ESR REVIEW

Economic and Social Rights in South Africa

vol 7 no 4 December 2006

Editorial

This is the fourth and last issue of the *ESR Review* for 2006.

This issue contains interesting articles on social assistance, housing rights and investment and human rights.

In the world of increasing economic globalisation, the relationship between investment and human rights is of particular concern to many people. Danwood Chirwa highlights the dangers of investments that are made without regard to human rights. He points out that investment is sought principally to achieve certain economic objectives and that the realisation of human rights is seen as implicit in those objectives. He argues that this approach is dangerous for human welfare because it often fails to see the relevance of human rights. He contends that an appropriate balance ought to be struck between the achievement of economic objectives and the protection of human rights when implementing these projects. He therefore proposes that a human rights impact assessment be undertaken before embarking on investment projects.

Heated debate is expected to emerge on the issue of the differential age-eligibility for accessing a social grant for older men and women in South Africa. At the centre of the debate will be the Pretoria High Court case of *Christian Roberts and Others v The Minister of Social Development and Others*, which will determine whether or not the age differentiation is constitutional. Bryge Wachipa kick starts the debate by providing some background information on the subject. In engaging with the arguments of the state, he asks some challenging and pertinent questions on the rationale and relevance of age differentiation today.

Lilian Chenwi examines the need for a comprehensive and coherent national policy framework on special needs housing in South Africa. She argues that the absence of such a policy framework constitutes a *prima facie* violation of the right of access to adequate housing. She critiques the current housing policies, with the aim of highlighting their limitations in accommodating the special needs of vulnerable groups. She also discusses the proposed national policy on special needs housing.

Following the exposure of the abuse, neglect and ill-treatment of

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Economic and Social Rights in South Africa

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older persons in residential homes by the media in 2000, South Africa decided to take measures to address this by passing the Older Persons Act in 2006. Mary Turok provides background information on the Act's passage and an overview of the Act itself. She calls on civil society and government to work together on its implemention.

In 2006, controversy emerged around the right of access to antiretroviral treatment by prisoners in the Durban Westville Prison (*EN and Others v The Government of the Republic of South Africa and Others*). This case attracted international and national attention. Adila Hassim and Jonathan Berger provide an update on the case following the article on it in the second issue of the *ESR Review* for 2006.

Mercy Brown-Luthango reports on the World Habitat Day seminar which focused on women's access to adequate housing.

Still on housing, we alert you to our recent publication, *Accessing housing in the Western Cape: A guide for women vulnerable to gender-based violence and HIV/Aids, and for organisations providing services to them* (August 2006), written by Lilian Chenwi. This booklet provides an overview of housing allocation policies in the Western Cape as an informative tool for women in need of housing. It is also designed for organisations that provide services to these women.

We hope that you will find these articles insightful and invigorating in the quest for social justice for the poor. We thank our guest authors for their generous contributions in this issue.

Sibonile Khoza, Editor-in-Chief

Investment with a human face

The need for human rights impact assessments

Danwood Chirwa

Investment has become a hallmark of the new global economic order. In particular, developing countries have been clamouring for foreign direct investment, seeing it as a solution to underdevelopment and a key to economic growth and prosperity. Investment is sought principally to achieve certain economic objectives. The realisation of human rights is seen as a mere by-product of those objectives.

However, in many cases, the search for investment opportunities is undertaken at the expense of human rights. The approach that fails to see the relevance of human rights to investment is exceedingly dangerous for human welfare. An appropriate balance ought to be struck between the protection of human rights and the achievement of economic objectives when implementing investment projects to ensure that such de-

velopment ultimately benefits human beings.

This article highlights the dangers of investments that are pursued without regard to human rights and proposes that human rights impact assessments are one of the key means of avoiding these.

Investment and human rights

Supporters of economic globalisation glorify investment because of its potential, among other things, to increase job opportunities and to enhance economic growth. These are plausible objectives, which states must pursue as they can lead to an enhanced enjoyment of human rights, especially socio-economic rights. They must, however, not be regarded as exclusive objectives of investment.

A human rights-based approach to development places human welfare at the fore of development initiatives. This requires that investment ventures and other development opportunities must not only be governed by human rights standards, but also that their ultimate objective must be the realisation of human rights.

Cases of human rights violations resulting from investment projects

Investment projects structured outside the human rights framework have had diverse negative impacts on human rights internationally. For example, in Bhopal, India, more than 7 000 people died in 1984–1987 due to toxic gas leaks from a pesticide plant owned by a transnational corporation (TNC) from the United States, Union Carbide Corporation, and its subsidiary Union Carbide India Limited. The number of deaths has risen to more than 15 000 over the years. The victims of these violations have been unsuccessful in obtaining relief from the Indian government and the corporations implicated.

Many are also very familiar with the case of *Doe v Unocal* [963 F Supp 880 (CD Cal, 1997)]. It revealed how a project on gas exploitation in Myanmar was undertaken in blatant disregard for human rights. The case alleged that Unocol, a private corporation, hired military personnel of the government of Myanmar to provide security for its project, which was undertaken jointly with the government. The military forced villagers to work on the project, committing acts of violence in the process. Entire villages were also forced to relocate for the project's benefit. While these allegations remain unproven in the US courts, many non-governmental organisations' reports have corroborated them.

Furthermore, the case of *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication 155/96, 2001 AHRLR 60) (discussed in *ESR Review*, 3(2) September 2002) also underscores the downside of investment. It was alleged that the state-owned Nigerian Petroleum Company (NNPC) and Shell Petroleum Development Corporation (Shell), in which the NNPC held majority shares, had committed a range of human rights violations for which Nigeria was responsible. It was also alleged that the companies had exploited oil reserves in Ogoniland in Nigeria without regard for the health or environment of the local communities as no facilities were put in place to prevent the wastes from spilling into neighbouring villages. As a result, water, soil and air were polluted, causing serious short-term and long-term health complications among the local population.

It was further alleged that the Nigerian government condoned these violations by failing to monitor the activities of the oil companies or enforcing domestic environmental standards. The government also facilitated the abuses by allowing oil companies to use the government's security forces to carry out several military operations against the Ogoni people who protested against the oil companies' activities. Among other things, the security forces burned and destroyed several villages and homes, crops and farm animals and even killed some of the people.

A human rights-based approach to development places human welfare at the fore of development initiatives.

In 2001, the African Commission on Human and Peoples' Rights found Nigeria to be in violation of a range of rights including the right not to be discriminated against, the right to life, the right to property, the right to health, the right to family protection, the right of peoples to freely dispose of their wealth and natural resources, and the right to a generally satisfactory environment.

As is clear from these cases, the range of rights that may be adversely affected by investment projects are not limited to civil and political rights but to all three sets of rights – civil and political; economic, social and cul-

tural; and the so-called third generation rights.

Most of the human rights concerns raised by investment projects have largely focused on the extractive industry. It is important, however, to underline that many other sectors raise similar concerns. For example, privatisation initiatives have raised important concerns about the lack of accountability structures for private service providers, the lack of public participation in the privatisation process and the increasing inaccessibility of the privatised services for poor people.

Responses to concerns about investment

The human rights problems raised by investment require wide-ranging responses from all sectors of society.

Firstly, states bear the primary responsibility for all rights. Investment projects are also negotiated among or with states. International human rights law imposes specific obligations on states to refrain from violating human rights, prevent violations of human rights, protect the people within their jurisdictions from violations of human rights by third parties, and to fulfil human rights. The fulfilment of positive duties requires the state to take legislative and other measures. It is therefore important for states to bear in mind their international human rights obligations when concluding investment contracts to ensure that the realisation of human rights is reflected as the overriding goal of investment and that the implementation of investment projects accords with both procedural and substantive human right principles.

While the state on whose territory the project is undertaken bears a more onerous obligation in this regard, the state providing the funding or participating in the project also has an obligation to ensure that international human rights standards are not undermined by the project.

Most investment projects involve TNCs. States in which these projects take place ought to ensure that they enact appropriate legislation to regulate and monitor the activities of these corporations. Crucially, state officials ought to refrain from being unduly influenced or co-opted by these corporations.

Furthermore, failure to obtain recourse against corporations that benefit financially from human rights violations amounts to a failure of justice for the victims of these violations.

In practice, states – especially those from the developing world – have increasingly found it difficult to regulate TNCs. Sometimes they simply lack the political will to do so due to the symbiotic relationship that often develops between governments and corporations. States are also reluctant to impose strict regulatory mechanisms for fear of losing a competitive edge against other states in terms of attracting investment.

Furthermore, failure to obtain recourse against corporations that benefit financially from human rights violations amounts to a failure of justice for the victims of these violations.

These reasons, among others, have heightened the need for extending the application of human rights to non-state actors. This call has been presented on two fronts – the strengthening of international voluntary codes of conduct for TNCs and other business enterprises, and the development of binding human rights obligations for these actors. The adoption of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Norms) in August 2003 by the UN Sub-Commission for the Protection and Promotion of Human Rights was a bold step towards the recognition of human rights obligations of non-sate actors in international law. Although progress on these standards has slackened, the pressure for their adoption, especially from NGOs, has not abated.

Civil society also has a considerable role to play to ensure that investment projects do not undermine human rights. As watchdogs of human rights, NGOs play an important role in monitoring the realisation of human rights, documenting violations and bringing them to public light, and helping victims of violations to obtain relief. Many violations of human rights in the context of investments are hidden from the public in order to protect those investments. Victims of the violations often do not know where to turn to for assistance and legal recourse.

NGOs need to devise strategies aimed at digging out information on compliance by investment projects with human rights. Collaborative efforts with other NGOs within the domestic sphere and international arena would facilitate information sharing and ensure that both domes-

tic and international mechanisms of redress are exhausted. International collaboration is particularly significant to popularise human rights concerns in the state that sponsors the investment.

The need for human rights impact assessment

Most of the responses to human rights concerns raised by investment discussed above are reactionary. While their significance cannot be gainsaid, the adage that 'prevention is better than cure' offers a useful insight that ought to inform the appropriate responses to these concerns. Investments are in and of themselves not bad for human rights. Each project must be examined on its merits. Some may lead to a greater enjoyment of human rights while others may diminish the protection of human rights. It is therefore important that an assessment of an investment project's potential human rights impacts must be made before it is begun.

The idea of impact assessments is a novel one in international human rights law but it is well established in environmental law. Many human rights activists are now arguing for the recognition of the duty of states to assess the human rights impacts of investment projects before their implementation. This duty is considered as a sub-set of the state's duty to protect human rights, which requires it to exercise due diligence to prevent human rights violations. Where the violations have nevertheless occurred, the duty to protect enjoins the state to provide remedies to victims and punish the perpetrators.

Many commentators consider a human rights impact assessment as an important device for preventing human rights violations. Its advantage lies in the fact that the state would have a chance of forecasting the range and nature of the likely human rights violations that an investment may cause. With the benefit of such knowledge, a state may be in a position to decide whether it is worthwhile to proceed with the project or not. The more serious or significant the violations, the less reluctant states must be to proceed. Where a state finds that the project may still be beneficial to the nation and to the advancement of human rights, a human rights impact assessment would enable it to take measures to limit the extent of the violations anticipated and provide redress to victims.

The idea of impact assessments is a novel one in international human rights law but it is well established in environmental law.

In the case of a water privatisation project, for example, a human rights impact assessment may reveal that the project could lead to price increases and lack of accessibility of water services for the poor. The state would therefore have to put in place policies, such as free water policies and subsidisation policies, to ensure that the poor's right to water is not denied.

Many questions remain unresolved about human rights impact assessments. For example, some have argued that human rights impact assessments would be appropriated by corporations and some states to legitimise their activities. This problem has been heightened by recent efforts by international financial institutions to develop a methodology for human rights impact assessments for corporations that will be based on the voluntary will of corporations to apply it or not. Thus if a corporation opts to carry out an impact assessment, it will not be obligatory for it to adopt measures to address any of the human rights concerns raised..

It is therefore critical to develop flexible, simple and workable methodologies for assessing the human rights impacts of investment projects that can be used by a wide range of actors including the communities affected by the projects.

Rights and Democracy, a non-partisan organisation created by the parliament of Canada to "encourage and support the universal values of human rights and the promotion of democratic institutions and practices around the world", has commendably been spearheading a project aimed at developing such a methodology for communities. The draft methodology is currently being tested on five investment projects in various sectors around the world, namely a water privatisation project in Buenos Aires, three mining projects in Mantaro River Plain in Peru, Katanga in the Democratic Republic of Congo and Mindanao in Philippines, and an information technology project on the Ghormo-Larsa railroad in Tibet.

The ideal methodology for human rights impact assessments must also be capable of being used both before and during the implementation stage of the project and after its conclusion. This

may help to identify human rights violations which were not foreseen at the beginning.

Conclusion

Investment and human rights are often pitted against each other as irreconcilable subjects. This is obviously wrong. Investments may advance human rights while the latter may help to make investments successful. Both can gain from each other in ways that can bring benefits to human welfare.

One of the critical ways of marrying investment and human rights is through the recognition of human rights impact assessments. This important device can be used to prevent irreversible or serious violations of human rights resulting from investments projects.

It is therefore critical that more effort is devoted to the development of methodologies for assessing the human rights impacts of investment and other development projects. Of course, human rights impacts are one of the many means of dealing with the relationship between investment and human rights.

States must do more than undertaking human rights impact assessments to uphold and fulfil human rights. Civil society must also step up their efforts to raise public attention to the human rights concerns arising from investment.

Dr. Danwood Chirwa is a senior lecturer in law at the University of Cape Town

Resources

UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003)

For further information on the Rights and Democracy's project on human rights impact assessments see http://www.dd-rd.ca/site/home/index.php?lang=en.

For further information on the tragedy in Bhopal see the International Campaign for Justice in Bhopal (ICJB) at http://www.icjb.org/articles/.

Older persons' right of access to social assistance

Is age differentiation still relevant in South Africa?

Bryge Wachipa

The increase in the population of older persons in the world represents one of the major successes of the human sciences. According to South African Medical Research Council (2005), South Africa has one of the highest populations of older persons in sub-Saharan Africa.

There is ample evidence of the high esteem in which older people are held in this country. They have played and continue to play a positive role in the family unit. Upon reaching the age of retirement, older persons are often absorbed within the households of their children where they play a supportive role in providing care as well as financial assistance, using their pension funds. Sadly, some older persons have taken up this role without access to any form of social assistance.

Social security in developed countries has primarily consisted of a financial guarantee after retirement from formal employment. However, in South Africa, a majority of the population never enjoyed access to employment in the formal sector due to past discriminatory practices. Thus, most older persons will not have secured retirement benefits. These need assistance from the state in order to cope with their increased vulnerability and to live independent lives in the community.

In South Africa, a non-contributory old age grant is paid to assist vulnerable older persons who have little or no income. The old age pension is in some cases the only source of family income. The distribution of the grant has been transformed over

the years. Currently about 2 131 820 older persons receive a monthly old age grant of R820. While it is barely sufficient for the older persons themselves, its significance is diminished by family dependence on the grant due to poverty at the household level. Thus, instead of the grant benefiting the elderly, it is often used for many other purposes such as caring for the sick and orphans.

The old age pension, like many other social grants in South Africa, was introduced before the 1996 Constitution of South Africa (the Constitution) was adopted. However, it is now recognised as forming part of the constitutional right of access to social assistance.

The importance of social grants was highlighted by the Constitutional Court in *Khosa v The Minister of Social Development and Others; Mahlaule and others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) where it held that:

> Equality in respect of access to socio-economic rights is implicit in the reference to "everyone" being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance (para 42).

In South Africa, men who are 65 years and older and women who are 60 years and older qualify for the old age pension.

History of the old age pension

The old age pension was introduced in South Africa in 1928. The then government enacted the Old Age Pensions Act 22 of 1928 to implement the provision of the old age pension for whites and coloureds only, which was in line with the racist policies of the time (Devereux, 2002).

However, at the time, the pension was meant to motivate people to care for the elderly as opposed to securing the economic independence of the elderly. It was believed that income support schemes should not undermine the family's responsibilities towards the elderly (Sagner, 2000).

The old age pension was subsequently extended to all South Africans in 1944 upon the passage of the Pensions Laws Amendment Bill. The amount payable to the elderly qualifying for this pension remained differentiated on racial grounds in favour of whites (Sagner, 1998). Blacks received the baseline rate. By 1958, the percentage of older persons receiving the grant had risen to 60%, yet black people received only 19% of the whole pension budget (Van der Berg, 1998). In 1992, the Social Assistance Act attempted to de-racialise access to the pension. As a result, older persons of all races qualifying for the old age grant have received the same amount since 1993.

Since 1994 the democratically elected government has continued to provide the old age pension as a constitutional obligation rather than a policy choice.

As noted earlier, since 1994 the democratically elected government has continued to provide the old age pension as a constitutional obligation rather than a policy choice.

Differential age-eligibility

Despite all the efforts to provide equal access to the old age grant, eligibility for it remains gender-based and age-differentiated. Men who are 65 and older and women who are 60 and older who meet the means test, qualify for the old age grant. This age differentiation also applies with regard to access by older persons to community-based care or admission to old age institutions. Save for the fact that the differential age-eligibility was introduced in the Aged Persons Act 81 of 1967, the reason for the distinction is still unclear.

This differentiation is currently being challenged in the High Court in the case of *Christian Roberts and Others v The Minister of Social Development and Others [High Court] Transvaal Provincial Division Case no. 32838/05*. In this case, four male applicants aged between 60 and 64 are arguing that the provisions discriminate against them unfairly on the grounds of age and gender contrary to the equality clause in the Constitution.

The legislation and regulations under challenge include regulation 2(2) of the Regulations to the Social Assistance Act 59 of 1992 (the 1992 Act); and the Social Assistance Act 13 of 2004 (the 2004 Act), which became operational on 1 April 2006, after these proceedings were launched. Although the 2004 Act repealed the 1992 Act, the 1998 Regulations were kept alive by operation of section 33(2) of the 2004 Act.

Other provisions of legislation challenged are section 10 of the 2004 Act and regulation 2(1) of the Regulations promulgated under GN R162 of 22 February 2005 pursuant to section 32 of the 2004 Act (the 2005 Regulations).

According to the affidavit deposed to by the Department of Social Development (DoSD), the age differentiation:

- is justifiable based on the concept of substantive equality as provided in section 9(2) of the Constitution to redress the inequalities between men and women;
- is justified because women have been historically disadvantaged and earned less pensionable income (if any) in their lifetime;
- is based on the fact that women's pensions are affected due to work histories being interrupted by their caring responsibilities, such as unpaid household duties;
- is fair because women live longer than men;
- is reasonable because women often put the grant to better use than men, in that the grant reaches or benefits more people when given to women than it would when given to men; and
- is not a product of recent social change and thus the threshold should not be changed.

The Department also argues that reducing the age requirement for men would increase eligibility to the grant by 325 060 men, which would significantly raise the costs of administering each pension.

While some of these concerns are valid, various questions may be posed against the rationale for this age differentiation.

- Is there evidence that destitute men will be at an unfair advantage over women should they receive grant at the age of 60 years?
- What is the difference between destitute men and destitute women in light of the current challenges of poverty?
- Is there enough evidence to conclude that women put the grant to better use than men do? Even if they did, who is the grant meant to benefit? Or how does use affect access to the grant?
- Has the Department considered the low life expectancy of men in South Africa, which is estimated to be 47, in reducing the burden on the budget?
- Has consideration been given to current power dynamics within the household when a woman receives a grant at 60 and a man receives it at 65 and whether that dynamic is in favour of a woman?

The Department argues that reducing the age requirement for men would increase eligibility to the grant by 325 060 men, which would significantly raise the costs of administering each pension.

Amicus intervention

The Community Law Centre (CLC) and the Centre for Applied Legal Studies (CALS) will participate in the above-mentioned case as *amici curiae*, if their application to act as such is granted. They will bring various human rights perspectives to the case, by making submissions on the following issues:

1. **The duty of the State to respect, protect, promote and fulfil the constitutional right of every person to social security in terms of section 27 as read with section 7 of the Constitution.** Furthermore, these sections impose an obligation on the State to take reasonable measures to progressively realise the right of access to social assistance. Such measures, CALS and CLC will argue, include designing and implementing a programme for all persons between the ages of 60 and 64 to have access to social grants if they are unable to support themselves and their dependants. This programme should include measures to provide relief to those in desperate need within available resources. CALS and CLC wish to present expert evidence regarding the affordability of extending social assistance to men in this category and to address the court on the appropriate weight of such evidence.
2. **The proper approach a court should take in cases in which it is claimed by the State that a legislative measure is designed to advance persons or categories of persons disadvantaged by unfair discrimination as contemplated in section 9(2) of the Constitution.** CALS and CLC will make submissions regarding

the level of scrutiny a court must apply to such a claim if the legislative measure in question violates the rights to equality, dignity and social security of other disadvantaged and vulnerable people (in this case, vulnerable and disadvantaged men in the age group 60 to 64).

3. **The right to non-discrimination in section 9(3) of the Constitution.** CALS and CLC would like to present evidence and make submissions regarding the constitutional implications of the intersectional grounds of discrimination which impact on the men in the 60-64 age group, who are unable to support themselves or their dependants. These grounds include race, sex, age, social origin and the analogous ground of poverty.

The *amici curiae* will make submissions regarding the effect on the rights of women if the court's remedy makes 65 the pensionable age for all.

4. **The proper remedy to be awarded by the court if the applicants' claim of discrimination is upheld.** CALS and CLC would like to make submissions regarding the effect on the rights of women between 60 and 64 currently receiving social assistance if the court were to impose a remedy, which determines the pensionable age as being 65 years for all persons. They will submit that the court should retain 60 years as the qualifying age for social assistance for women.

Conclusion

Clearly, a number of important questions raised in this article need answers. It is hoped that the High Court will give clarity to some of these social security questions. In *Khosa*, the Constitutional Court held:

> It is also important to realise that even where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits ... must be consistent with the Bill of Rights as a whole.

Therefore, the gender-based age differentiation in accessing the old age grant must be justified under the Constitution.

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The author would like to thank Beth Goldblatt (Senior Researcher at CALS) and Karen Kallmann (Consulting researcher at CLC) for their useful comments on this paper.

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Giving effect to the right to adequate housing

The need for a coherent (national) policy on special needs housing

Lilian Chenwi

According to the Centre for Housing Rights and Evictions (2006), the right to housing is one of the most widely violated human rights. Over a billion people worldwide have inadequate housing.

In South Africa, many people depend on the government for the realisation of their right of access to adequate housing. This right is guaranteed to "everyone" in section 26 of the 1996 Constitution of South Africa, which obliges the government to take "reasonable legislative and other measures, within its available resources, to achieve the realisation of this right" (section 26(2)).

The government has put in place a number of legislative and other measures aimed at fulfilling this right. They include the provision of rental housing, allocation of land for purchase and subsidising the building of houses. However, about 2.5 million households in South Africa do not have access to adequate housing (South African Human Rights Commission, 2006). In addition, thousands of people have no access to housing or shelter of any kind. About 2.4 million households live in informal housing structures (Minister Lindiwe Sisulu, 2005). The rate of delivery of housing is below the rate of low-income household formation.

More disturbing is that housing delivery takes place in a legal and social framework that results in inequalities. For example, vulnerable groups such as women (especially abused women), people living with HIV/Aids, the aged, children, people with disabilities and the poor still face difficulties in accessing housing. Worse still, although HIV/Aids and special needs groups are high on the development agenda of South Africa and the National Department of Housing (NDoH) has, in principle, agreed to assist the departments of health and social development in providing shelter, there is no coherent policy at the national level on special needs housing (SNH). In addition, SNH is not explicitly enshrined in the National Housing Code and some provinces do not have a policy on it.

The aim of this article is to examine the need for such a comprehensive and coherent policy at the national level as well as in those provinces where it does not exist. The meaning of SNH is considered first. The article then looks at current housing policies with the aim of highlighting their limitations in accommodating the special needs of vulnerable groups, and hence establishing the need for a coherent and specific policy on SNH. This is followed by a brief analysis of the proposed national policy on SNH and the SNH policy framework prepared by eThekwini Municipality and Project Preparation Trust of KwaZulu-Natal (KZN), which was submitted to the NDoH.

Defining special needs housing

According to Astrid Wicht:

> Special Needs Housing can be defined, on the one hand, as a facility provided for a temporary period for vulnerable groups in our society that have been rendered homeless through a range of circumstances, during which, as residents, they can be provided with secure accommodation and programmes by which they can 'rectify their vulnerability'; on the other hand it is housing for people who cannot live in a typical house without some form of physical adaptation or some level of assistance to cope with the tasks of daily living (Astrid Wicht, 2006).

Although Wicht uses the word 'temporary' in her definition, SNH could be transitional (temporary) or permanent, depending on the circumstances under which it is provided. Transitional housing is temporary accommodation for people who are in transition between homelessness and permanent accommodation. For example, victims of abuse or violence may need a place to stay while looking for permanent accommodation. Transitional housing is subsidized through government housing subsidies and normally managed by an institution. This type of housing requires short-term tenure and empowerment training. Permanent housing, on the other hand, implies home ownership plus, in some instances, the provision of support services.

Simply put, SNH is housing that is aimed at meeting the specific needs of certain vulnerable households. SNH would therefore benefit people who are affected by poverty and are further disadvantaged because

they live with disabilities, or are old and infirm, homeless, infected or affected by HIV/Aids, victims of domestic abuse and violence, critically ill or because they are orphans.

SNH can take the form of emergency shelters (short-term accommodation), shelters (medium-term accommodation), second stage housing (short-term rental accommodation), community foster care homes, home based care and individual housing (ownership).

The basis for a (national) policy on SNH

With the widening inequalities between the rich and poor, the provision of special needs housing is a growing necessity in South Africa. A national policy on special needs housing can be justified on the following basis:

First, the White Paper on Housing (1994) states that housing policies and subsidy programmes must reflect a constant awareness of, and make provision for, the special needs of the youth, disabled people and the elderly. In addition, section 2(1)(a) of the Housing Act No 107 of 1997 requires the government – national, provincial and local spheres – "to give priority to the needs of the poor in respect of housing development". They are further required to promote "the meeting of special housing needs of the disabled", "marginalized women and other groups disadvantaged by unfair discrimination" (section 2(1)(e)(viii & x)). Thus, housing development must provide the widest possible choice of housing and tenure options. Yet, there is no comprehensive and coherent national policy specifically on SNH.

Second, the Court in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) [*Grootboom*] specifically held that the State has the obligation to develop and implement a coherent and comprehensive programme to realise the right of access to adequate housing. In addition, it held that any measure instituted by the government must take into account the housing needs of those in desperate circumstances or crisis situations, and those whose ability to enjoy all rights are therefore most in peril (para 44). A measure that fails to reflect these obligations would be considered unreasonable. In *Grootboom*, although the government had a plan for the progressive realisation of the right of access to adequate housing and major achievements had been made in this regard, there was a major flaw in its programme in that it did not make reasonable provision for those in desperate circumstances. The Constitutional Court held that the government was not meeting its obligations in terms of section 26(2) of the Constitution (para 69). This case, therefore, provides a legal basis for the development of a SNH policy.

With the widening inequalities between the rich and poor, the provision of special needs housing is a growing necessity in South Africa.

Third, the failure to include provisions on SNH in the National Housing Code and guidelines of the NDoH on SNH has brought about confusion on how to deal with the issue of SNH. Again, as stated in *Grootboom*, the NDoH has the responsibility of ensuring that laws, policies, programmes and strategies are adequate to meet the government's section 26 obligations (para 40). The lack of a coherent national policy on SNH would therefore imply that the NDoH is not meeting its obligations in realising the right of access to adequate housing.

Fourth, provinces with no SNH policy are reluctant to support special needs housing without a national policy framework. This reluctance could be attributed to the limited understanding of the structuring of such policy frameworks given the provinces' limited project experience (eThekwini Municipality and Project Preparation Trust of KZN, 2005). A national framework would provide some guidance in developing a SNH policy at the provincial or local government levels.

Fifth, the prevalence of HIV/Aids in South Africa is increasing, coupled with high levels of gender-based violence (GBV), and resulting in vast numbers of orphans and increased homelessness. As a result, some provinces such as KZN and Gauteng have made provision to meet the housing requirements of people with special needs. Likewise, a SNH policy is currently being developed in the Western Cape by both the City of Cape Town and the Provincial Department of Local Government and Housing. Assistance with shelter requirements is undoubtedly an important part of health and social development strategies to address the HIV/Aids and GBV crisis.

Lastly, SNH does not squarely fit into existing housing policies. As will be shown below, current housing

policies were not specifically designed for SNH purposes and can therefore not be adapted to meet SNH in all instances.

The limitations of current housing policies

There are a number of national policies which come close to dealing with SNH. These are critiqued in the following paragraphs.

Institutional subsidy

The institutional subsidy is the closest mechanism to SNH as it deals with the acquisition and development of housing for occupation and, in some cases, acquisition by the beneficiaries. The institutional subsidy is given to qualifying housing institutions so that they can buy residential property and manage it. An institution that receives the subsidy must provide subsidised housing for families earning below R3 500 per month on a rental or rent-to-buy option. A beneficiary rents the property for at least four years. During this time, ownership of the property is vested in the institution. After the four years, the house may be sold or transferred to the beneficiary.

A subtype of institutional subsidy – transitional subsidy – has been used by Gauteng and KZN to provide SNH. For example, the KZN Department of Housing's Policy to Cope with the Effect of AIDS on Housing (July 1999) makes provision for giving subsidies to appropriate institutions in terms of transitional accommodation or for home based care.

In terms of this subsidy variation, subsidies are made available to qualifying institutions – one subsidy per bed. Thus, the beneficiaries need not be designated.

However, due to the fact that the institutional subsidy mechanism was not initially designed for SNH projects it cannot be sufficiently adapted for SNH, especially non-institutional forms of SNH, resulting in the need for additional policy or guidelines on SNH. For instance, as evidenced in KZN, a subtype of the institutional subsidy mechanism was employed instead.

Limitations of the institutional subsidy mechanism include the fact that the minimum age requirement for applying for a housing subsidy is 21 years, so the subsidy would not meet the housing needs of orphans and child-headed households. Furthermore, the institutional subsidy does not meet the needs of abused women who have no dependents, as they would fail to meet the requirement that they must be married or live with a partner or be single or divorced with one or more dependants.

Housing subsidy for the disabled

People with disabilities normally have special housing needs. Disabled housing subsidy beneficiaries may qualify for extra funds to enable them to acquire, where applicable, such facilities as handrails, visual doorbell indicators, kick plates to doors, slip-resistant flooring or vinyl folding doors. These extra funds are available for those who, for instance, have lost their vision, who have hearing problems, are in wheelchairs, or who have little or no use of their arms.

Clearly, this subsidy is limited to a specific vulnerable group – people with disabilities. Hence, there is need for the formulation of an additional subsidy mechanism or a coherent policy that will also carter for other vulnerable groups with special housing needs.

HIV/Aids framework document

The HIV/Aids framework was prepared by the NDoH in 2003. It highlights the critical role of housing in fostering improved access to health – through the provision of healthy living conditions including access to clean water and sanitation – and promoting prevention as well as enhancing the quality of life of persons living with HIV/Aids.

The framework proposes a number of interventions in response to the impacts of HIV/Aids. These include the need for the NDoH to:

- collaborate with other government departments in facilitating HIV/Aids prevention programmes in the housing sector;
- address the housing needs of institutions, households and communities that care for people living with HIV/Aids;
- assist the Department of Social Development with shelter requirements and solutions;
- develop, together with the provincial housing departments, appropriate guidelines to implement the transitional subsidy mechanism, which is already in place in Gauteng and KZN; and
- investigate an additional subsidy for the building of additional rooms and services for households currently under strain of providing care due to inadequate space and facilities

The HIV/Aids framework document emphasises the need to review housing delivery models and address the housing needs of people living with HIV/Aids.

Social housing

This is a new housing option provided by housing institutions for persons with low or medium income, which excludes immediate ownership.

Social housing institutions help with the preparation of development plans and business plans and find suitable land for housing developments. They also deal with the administration of the properties and consider the applications of those seeking housing.

The potential target groups for the social housing option include "persons with special housing needs but who are able to live independently, such as those with disabilities living with HIV/AIDS, including orphans and children" (*A Social Housing Policy for South Africa: Towards an Enabling Environment for Social Housing Development*, July 2003 draft).

The policy clearly states that co-operation would be required with the Departments of Health and Social Development in order to accommodate this group of persons.

Social housing is a fairly new concept and is still being developed. It must be pointed out, however, that it is not a policy that targets the poor. There has therefore been a call for the integration and allocation of a percentage of SNH into all social housing projects to meet non-institutional forms of SNH (Wicht, 2006).

Breaking new ground

To accelerate the delivery of houses, the government introduced the Comprehensive Plan on Sustainable Human Settlements in 2004 – generally referred to as Breaking New Ground in Housing Delivery (*Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements*, August 2004). The adoption of this plan is in line with South Africa's commitment to achieving the Millennium Development Goals.

It represents a holistic approach to housing development and requires the government to redirect and enhance existing mechanisms to move towards more responsive and effective housing delivery. The government has committed itself, under this plan, to ensuring the availability of adequate housing to all.

Although the policy makes no explicit mention of SNH, it emphasises the need for the delivery of alternative housing and tenure options and forms. The inclusion of SNH mechanisms for groups with special needs could thus find its basis here.

Proposed SNH policy framework

In a submission to the NDoH, a framework for SNH has been proposed based, *inter alia*, on the KZN Department of Housing Guidelines (eThekwini Municipality and Project Preparation Trust of KZN, 2005).

The framework highlights the need for a partnership between the Departments of Housing, Health and Social Development, and an appropriate welfare or health organisation working at the grassroots level in developing and implementing SNH projects. This is in line with section 41(1)(h) of the Constitution, which requires all spheres of government and all organs of state within each sphere to co-operate with one another. Preference is also given to SNH delivery models focussing on community or family-based care.

The proposed SNH delivery models include the institutional model, the community care home model and the home care/extension model.

The institutional model consists of the provision of care at a single locality to a group of beneficiaries either in one structure or by means of several structures on one site. Project types include children's homes, places of safety and shelters, hospices and homes for the elderly.

The community care home model, a non-institutional model, consists of a care giver with four to six beneficiaries in his/her care. The housing subsidy is used to either acquire existing housing stock or develop new housing stock within affected communities. The house is owned by an approved organisation or institution, which is responsible for its operation and maintenance. However, operational costs are shared between the organisation and the care giver in the case of foster care grants. Project types include community foster care homes, places of safety for children and palliative care.

The home care/extension model provides home improvements or home extensions to *de facto* care givers, who provide care to those in special need but who do not have adequate shelter – that is, insufficient living space within the household. The HIV/Aids framework document also highlights the need for this model. It should be noted that this model is different from the community care home model in that, among other things, ownership of the home remains with the existing home owner and care giver. Project types under this model include the provision of home extensions or improvements to shelter and accommodation for orphans and vulnerable children (including those in the care of extended family or other community networks) and the care for those who are sick and receiving palliative care by these support networks.

eThekwini Municipality and Project Preparation Trust of KZN also state that the above models can be linked to existing housing projects as a way of adding value to them and making them more integrated and better able to accommodate those in special need. In this case, SNH is treated as a range of sub-projects with separate subsidy applications being lodged for them but with provision in the planning and management of the greater housing project.

Conclusion

Current housing policies do not adequately carter for the housing needs of vulnerable groups such as the people living with HIV/Aids, orphans, abused women and the disabled. The absence of a compressive and coherent national policy framework for SNH constitutes a *prima facie* violation of the right of access to adequate housing. Therefore, the national government and, where applicable, provincial governments, need to develop and implement appropriate, comprehensive and coherent policies on SNH.

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The Older Persons Act

A step in the right direction?

Mary Turok

Legislation governing older persons in South Africa dates back to the Aged Persons Act 81 of 1967 and its subsequent amendments. The Act provided for the protection and welfare of certain aged and debilitated persons, the care of their interests, the establishment and registration of institutions for such persons, and their accommodation and care. Homes for the aged subsequently mushroomed, financed by generous government loans and subsidies.

However, there was discrimination in spending on the care of the elderly. There were also backlogs in facilities for older people. The post-apartheid government acknowledged the backlogs in most communities and the over-supply in others and promised to address the problem as evidenced in the Housing White Paper of 1995 and Welfare White Paper of 1997. However, nothing was done to solve the problem.

In addition, it was found that half of the budget for welfare services was spent on subsidies for homes with white older persons to the detriment of black older persons. Also, the Aged Persons Amendment Act in

1998 made it possible to restrict subsidies to frail residents, resulting in a sharp drop in the budget for older persons. The South African Council for the Aged, now known as Age in Action, lobbied for community services and protection of older persons from abuse. However, the hope for re-direction of budgetary resources to poorer communities did not materialize, probably because their voice was tiny compared with the demands of other sectors.

The wake-up call

In 2000 the exposure of the abuse of frail residents in a residential home in Amanzimtoti on Carte Blanche, a television programme, led to a public outcry. The Minister of Social Development received over 2 000 letters protesting at the ill-treatment of elderly residents at the retirement home. The letters recounted similar stories and appealed to the Minister to do something about the situation in frail care centres and asked why facilities were not being inspected. They also called for abusive homes to be closed and those responsible to be prosecuted.

The Minister of Social Development established a Ministerial Committee to investigate "the abuse, neglect and ill-treatment of older persons". The Ministerial Committee held public hearings throughout the country and visited homes and pension pay-points.

The Committee found, among other things, that there was no coherent policy on older people, let alone a strategy to address their abuse.

The Older Persons Bill

The first draft of the Older Persons Bill was produced by the Department of Social Development (the Department) in early 2001. It was a lengthy Bill, which covered voluntary retirement, geriatric services, preferential transport, an ombudsperson, curatorship, assisted living facilities and a national consultative forum.

Consultations took place between the Department and service providers in the voluntary sector over the next two years and the Bill was redrafted several times.

In 2003, the Older Persons Bill (B68B-2003) was approved by Cabinet. The Bill was strongly guided in its formulation by the Political Declaration and Madrid International Plan of Action on Ageing. South Africa signed it in 2002, committing it to extending the right to development to older people, halving old-age poverty by 2025, and ending age-based discrimination. In addition, section 9 of the South African Constitution of 1996 prohibits unfair discrimination on, among others, grounds of age and requires the State to adopt national legislation to prevent unfair discrimination.

The South African Council for the Aged, now known as Age in Action, lobbied for community services and protection of older persons from abuse.

One of the key weaknesses of the Bill was that it contained no provision for an ombudsperson or a national consultative forum and its emphasis remained on residential care, with little attention given to the rights of older persons.

Workshops on the Bill were held in all provinces by the South African Human Rights Commission, which resulted in the compilation of a detailed critique of the Bill presented during the public hearings of the Parliamentary Portfolio Committee in August 2005. Many of the proposals made in the critique and from other submissions were taken on board and the outcome was the much improved Older Persons Bill (B68F-2003). This Bill was signed by President Mbeki on 28 October 2006 and gazetted on 2 November (*Government Gazette* No. 29346). It has therefore now acquired the status of law as the Older Persons Act No 13 of 2006 (the Act).

An overview of the Older Persons Act

The Act echoes many of the phrases found in the Madrid Declaration. A closer examination shows that it seeks to address many of the challenges faced by older people in South Africa. It does not, however, address the issue of social grants, as this is dealt with in the Social Assistance Act and the South African Social Security Agency Act of 2004. Like both these Acts, the Older Persons Act defines an older man as a man over the age of 65 years and an older woman as a woman over the age of 60 years.

General principles

The objects, implementation and general principles of the Act are dealt with in chapter one. The objects are:

- to maintain and promote the status, well-being, safety and security of older persons;
- to maintain and protect the rights of older persons;
- to shift the emphasis from institutional care to community-based care in order to ensure that an

older person remains in his or her home within the community for as long as possible;

- to regulate the registration, establishment and management of services and the establishment and management of residential facilities for older persons; and
- to combat the abuse of older persons.

The Act, though spearheaded by the Department of Social Development, "must be implemented by all organs of state rendering services to older persons in the national, provincial and local spheres of government in an integrated, coordinated and uniform manner" (section 3(1)). Such organs of state must "take reasonable measures to the maximum extent of their available resources to achieve the realization of the objects of the Act" (section 3(2)).

According to the Act, all proceedings, actions or decisions concerning older persons by any organ of state must respect the older person, be in his or her best interests, promote his or her rights and protect him or her from unfair discrimination including on grounds of health status or disability. In such matters, the approach must be conducive to conciliation not confrontation and delays must be avoided as far as possible (section 5).

Creating an enabling and supportive environment

The creation of an enabling and supportive environment (as per the Madrid Declaration) is the subject of chapter two. It provides for the prescription of national norms and standards for services. Such services may not unfairly deny older persons the right to participate in community life, to establish associations, to participate in income-generating activities or to live in an environment catering for their changing capacities (section 7).

Financial awards to service providers are provided for in section 8. The Minister may prioritize needs and services and must prescribe conditions for receiving financial awards. Such services must:

- recognize the contribution of older persons;
- promote their participation in decision making;
- promote inter-sectoral collaboration;
- ensure access to information, education and training;
- ensure priority to older persons in the provision of basic services; and
- ensure accessibility, rehabilitation and the provision of assisting devices.

Community-based care and support services

Community-based care and support services are dealt with in chapter three. They are divided into two categories: preventative and promotional programmes to support those living independently, and home-based care programmes for the frail. The first type of programmes includes education, recreation, income generation, medical services and multi-purpose centres. Home-based care programmes include physical care, professional and lay support, respite care and free health care.

Home-based care programmes include physical care, professional and lay support, respite care and free health care.

All these services will have to be registered (section 13). Failure to register is an offence. Conditions for registration will be laid down in the regulations to the Act. In addition, persons providing home-based care must ensure that care givers receive prescribed training and the Minister of Social Development must prescribe a code of conduct for care givers and keep a care givers' register (section 14).

Residential facilities

Residential facilities are dealt with in chapter four. Section 16 deals with the rights of residents while section 17 deals with services that may be provided in these facilities. The actual registration provisions (section 18) are largely based on the 1967 Aged Persons Act.

Residents Committees are covered in section 20. The composition of these committees must reflect "the profile of residents", must include representatives of the residents and members of staff and may also include outsiders. The main responsibility of the committees is to oversee the manager and monitor the facility.

Section 21 on admission to homes is an elaboration of a similar provision in the Aged Persons Amendment Act. While ruling out unfair discrimination in admissions, the requirement that, in determining eligibility, consideration should be given to the need for a home "to reflect broadly the race composition of South Africa" has been removed. Unlike previous Acts, this section spells out safeguards against admissions

without the consent of the older person.

Monitoring provisions are contained in section 22. This section is similar to section 4 of the Aged Persons Act on inspection. If instructed by the Director General, a social worker must now visit and monitor a registered residential facility in order to ensure compliance with the Act. Social workers are supplemented by "a designated person". The actual implementation of section 22 in the light of the long history of non-inspection and the shortage of social workers is a cause for concern.

The Act is silent on the role of the Health Department despite the prevalence of frail people in homes (section 43 of the National Health Act requires that minimum standards for health services must be met in non-health establishments).

Also missing from this chapter is a provision on new residential facilities in under-serviced areas, despite the growing need for such facilities.

Protection of older persons

The protection of older persons in both the community and in residential facilities is the subject of chapter five. This chapter contains an expanded definition of abuse in section 30. Also, the definition of older persons in need of care and protection (section 25) includes those who have suffered economic abuse, are in a state of neglect or are living and begging on the street. Social workers must investigate reports and if substantiated, must move such persons to a hospital or shelter, ask the police to act or ensure that their basic needs are met. Secondly, it specifically states that the Domestic Violence Act is not overridden.

Thirdly, it makes it mandatory for everyone to report suspected abuse to the Director General or a social worker or police official. Failure to do so is an offence. Fourthly, following the Children's Act, the abuser, instead of the victim, can be removed by the police (section 27). The Act also requires that a register of persons convicted of abuse, which prohibits them from operating or working in any facility or service for older persons, be kept by the Department of Social Development (section 31).

Two lengthy clauses from the 1967 Act on bringing an abuser before a magistrate and enquiries into abuse have been included almost unchanged as sections 28 and 29, although they were never implemented under the 1967 Act.

General and supplementary provisions

Under chapter six (section 32), the Minister of Social Development has the right to delegate powers to any officer of the Department. The chapter also provides for penalties for any person convicted of any offence under the Act.

Future steps: Awaiting regulations

The Act now awaits the development by the Department of Social Development of the regulations for its implementation. However, except where the Act specifically allocates roles and responsibilities, its implementation is the responsibility of all organs of state rendering services to older persons in the national, provincial and local governments and has to be done in an integrated, coordinated and uniform manner (section 3).

The draft regulations have to be published for public comment and then submitted, together with the comments, to Parliament before final publication (section 34 (5) and (6)).

Conclusion

This is an important piece of legislation. The challenge now is to increase awareness of the Act and lobby provincial and national governments for the resources required for its efficient implementation. It is critical for civil society and government to join forces, considering that the successful enactment of the Act was the result of a joint effort between civil society and government.

Mary Turok is the chairperson of the Steering Committee of the South African Older Persons Forum

Resources and references

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Case review

Prisoners' right of access to anti-retroviral treatment

Adila Hassim and Jonathan Berger

EN and Others v The Government of the Republic of South Africa and Others (Durban High Court, Case No. 4576/2006, unreported)

This case centres on the State's constitutional obligations in respect of access to anti-retroviral (ARV) treatment by prisoners at Westville Correctional Centre (WCC).

The applicants are individual prisoners living with HIV/Aids, along with the Treatment Action Campaign, assisted by the AIDS Law Project. The respondents are the Government of the Republic of South Africa, the Head of WCC, the Minister of Correctional Services, the Area Commissioner of Correctional Services (KwaZulu-Natal), the Minister of Health and the Member of Executive for Health (KwaZulu-Natal).

In June 2006, Durban High Court Judge Pillay ordered the State to immediately remove all restrictions to ARV treatment at WCC. The State was also ordered to file an affidavit with the Court by 7 July 2006 – two weeks after the judgment – on the steps it intended to take to make ARV treatment available to all prisoners at WCC who wanted and needed it.

Since the initial decision in this matter, the case has taken a number of interesting turns. Most importantly and notwithstanding the leave to appeal on the merits, the State was compelled to implement Pillay J's orders. Regrettably, it required two further court orders for the State to comply with the initial judgment.

In a strongly worded judgment handed down by Nicholson J on 28 August 2006, the respondents were ordered to implement the original orders "unless and until" set aside on appeal (para 46(d)). This included the obligation to file an affidavit "setting out the manner in which it will comply with...[the] order" by 8 September 2006 (para 46(e)). The State's affidavit was indeed filed on this date.

In reply, the applicants filed their commentary on the State's ARV treatment plan for WCC, followed by a supplementary affidavit that relied on expert medical evidence in support of the conclusions reached. In the commentary, the applicants "welcome[d] the fact that the Respondents...[had] begun, in a more systematic manner, to address the issue of HIV/AIDS – including access to antiretroviral (ARV) treatment – at WCC".

In addition, they noted "that more prisoners are accessing ARV treatment, sessional doctors have been employed to initiate ARV treatment within WCC and steps are being taken to accredit the WCC hospital as an ARV treatment site".

Deficiencies in the State's plan

Notwithstanding these positive developments, the applicants noted certain "serious shortcomings", concluding that "the plan, in its current form, is unreasonable and therefore fails to pass constitutional muster". They asserted that the plan "is nevertheless capable of rectification, provided it is amended to take into account the Applicants' commentary", which alleges that the plan is deficient in the manner in which it addresses (or fails to address) the following eight fundamental issues:

1. the identification of prisoners at WCC in need of ARV treatment;
2. HIV and CD4 count testing;
3. opportunistic infections;
4. nutrition, the timing of meals and the 'wellness programme';
5. HIV prevention interventions;
6. co-operation between respondents;
7. internal monitoring and evaluation; and
8. independent assessment of implementation of the plan.

In reply, the State provided important new information on various aspects of its HIV/Aids programme at WCC but also disputed many of the allegations. When read together with its affidavit of 8 September 2006, the reply does not adequately address all of the applicants' concerns. The stage was thus set for

ongoing legal proceedings. However, at the time of writing, the parties were poised to consider the possibility of resolving the outstanding issues through negotiations instead of unnecessary further litigation. According to the applicants, "there is sufficient common ground between the parties upon which a final settlement in this matter may be negotiated".

The majority of prisoners at WCC who know their HIV status and need ARV treatment are accessing it.

Ensuring compliance with the original court order

While the matter remains unresolved, significant progress has indeed been made since the applicants' attorneys first initiated legal proceedings against the State regarding access to ARV treatment at WCC about six months ago.

According to the evidence put forward by the State, the vast majority of prisoners at the Medium B section of WCC who know their HIV status and need ARV treatment are in fact now accessing such treatment. In addition, the prison hospital has been accredited by the Department of Health to provide ARV treatment on-site. It also appears that there is improved co-ordination between the Departments of Health and Correctional Services with regard to the delivery of HIV-related health care services to prisoners.

Without the litigation, it is likely that none of these developments would have taken place by now. Nevertheless, much more still needs to be done.

In an earlier article in the *ESR Review* (7(2), July 2006), Muntingh and Mbazira noted that the State had filed an appeal, and predicted "that the successful applicants ...[would] wait until the legal battle is over before knowing whether or not they are entitled to ARVs" (p 16). That might well have been the case had the applicants not initiated and successfully concluded interim implementation proceedings.

First implementation proceedings

Acting in terms of Rule 49(11) of the Uniform Rules of Court, the applicants applied to the Durban High Court for an order directing the respondents to implement Pillay J's original order pending any appeal against it. It was made to ensure that the main order was implemented without delay. In their Heads of Argument, the applicants argued as follows:

> The very purpose of the main application has always been to expedite the ARV treatment to which the inmates are entitled under the Constitution. Their case has always been that the respondents have 'delayed without good cause in circumstances where life and death mattered'. It was also why this court concluded that its intervention was necessary. It concluded that 'intervention by this court is called for to ensure that the respondents urgently comply with their constitutional and statutory obligations not only to the first fifteen applicants...but also to similarly situated prisoners'. That is the purpose of the main order. It is to avoid further delay and to ensure that the inmates get the urgent medical treatment to which they are entitled under the Constitution...The question in these circumstances is whether the implementation of this court's main order should again be suspended and delayed until after the appeals in this matter have been finalised. We submit that it would be outrageous to do so. It will not only perpetuate the ongoing violation of the inmates' constitutional rights but will unlawfully cause them suffering they are entitled to avoid, permanent damage to their health against which they are entitled to be protected and for some of them avoidable death against which they have a right to be protected (paras 9 and 10, footnotes omitted).

On 25 July 2006, just over a month after handing down his initial ruling in the case, Pillay J held that the "order of the Court of the 22nd of June 2006 (as amended) was to be implemented pending the outcomes of the appeal subject to the date in paragraph 3 of that order being amended to read the 14th of August 2006". In other words, the State was ordered to begin providing ARV treatment and to deliver the affidavit setting out its treatment plan for WCC by 14 August 2006. Pillay J also granted the respondents leave to appeal to a full bench of the Natal Provincial Division on the merits.

In his judgment, Pillay J considered the following factors:

> (a) The [potential] of irreparable harm being sustained by the Respondents if leave to execute were to be granted and to the Applicants if leave were to be refused.
>
> (b) The prospects of success on appeal.
>
> (c) Where there is potential of irreparable harm or prejudice to both Applicants and Respondents, the balance of hardship or inconvenience, as the case may be.

His decision to compel the State to implement the original order was based on the following reasoning:

> I take the view that the prejudice to the Respondents, if any, pales into insignificance when compared to the potential of prejudice to the Applicants and other similarly situated prisoners. For the Applicants it is a matter of life and death. For the Respondents it involves no more than the conduct of an exercise and thereafter setting out in affidavit form how it intends to carry out its obligation in terms of its Operational Plan and Guidelines, which the Respondents have consistently maintained they are already complying. With the resources at their disposal, it would be a matter of relative ease for them to comply with the order. Even if the Respondents were to eventually succeed on appeal, I am in agreement with the submission by counsel for the Applicants that complying with the order would constitute more of an inconvenience than real prejudice. The question of irreparable harm to the Respondents does not even, in my estimation, arise. On the Respondents' own version as pointed out in my judgment, an officer in the service of the Third Respondent describes the position at WESTVILLE CORRECTIONAL CENTRE as one of "seriousness" and "... a matter of life and/or death".

Second implementation proceedings

Disturbingly, 14 August 2006 came and went without any compliance by the State. Instead, it filed an application for leave to appeal against the interim implementation order the following day. Such a step was indeed surprising, given the adverse case law on the issue and the State's previous unsuccessful attempt to appeal against such an order in the Treatment Action Campaign's litigation in 2001/2002 regarding the Department of Health's prevention of mother-to-child transmission of HIV programme. As noted by Nicholson J in his judgment of 28 August 2006:

> The authorities do not view with particular favour appeals from implementation orders. These have taken place – I gather – on extremely rare occasions. It is somewhat ironic and sad that both occasions relate to the government seeking to avoid the effect of court orders for the provision of ARVs (para 15).

In response to the new application for leave to appeal, the app-licants filed an application on 18 August 2006 seeking a declaration that the application for leave to appeal against the interim implement-ation order did not suspend the operation of the earlier order, which was to "be carried out forthwith unless and until set aside on appeal".

In essence, the applicants launched a second interim implementation order. In reply, the respondents filed a notice in terms of Rule 30(2) of the Uniform Rules of Court "to the effect that the second implement-ation order was an irregular step", and called on the parties to remove the cause of complaint within ten days.

By the time the second interim implementation application was brought, the grim truth of the potential irreparable harm that was argued in the first such application was borne out.

On 6 August 2006, the seventh applicant, MM, died of an HIV/Aids-related illness. Despite being diagnosed with such an illness and therefore eligible for ARV treatment in November 2003, he only received this medical treatment on 12 July 2006. By then it was too late.

The second interim implement-ation case was argued on 23 August 2006. In his judgment handed down only five days later, Nicholson J found the respondents to be "in contempt of the order of Pillay J". He explained:

> The affidavit had to be filed by 14 August 2006 and it was not. It does not seem to me to be any answer to file an appeal against the 49(11) order. The notice of appeal would only have stayed the effect of the order if it was filed *before* the date by which the order had to be obeyed. That the period for an appeal had not expired is not the point. The res-pondents were aware of the difficulty in appealing against a 49(11) order from their earlier experience at the hands of the Con-stitutional Court. Even to date no affidavit has been filed (para 27).

Dealing with contempt of court

Nicholson J pointed out that "unless and until section 3 of the State Liability Act 20 of 1957 [was] declared unconstitutional, there [was] no legal mechanism such as incarceration to enforce the court's decrees". He continued: "[S]hould that situation continue then the effect of a court order would be what the law calls a *brutum fulmen*, in other words – a useless thunderbolt" (para 32).

It appears that Nicholson J did not consider the opening that the Supreme Court of Appeal has created with regard to incarceration for contempt against public officials. In *Member of the Executive Council: Welfare v Kate* [2006] SCA 46 (RSA), Nugent JA stated that "there ought to be no doubt that a public official who is ordered by a court to do or refrain from doing a particular act and fails to do so is liable to be committed for contempt in accordance with the ordinary principles and there is nothing in *Jayiya* that suggests the contrary" (para 30). In any event, the question of committal proceedings was not before Nicholson J.

Nicholson J then delivered what appears – in retrospect – to have set the State in motion to implement Pillay J's orders:

If the refusal to comply does not result from instructions from the first respondent, the Government of the Republic of South Africa, then the remaining respondents must be disciplined, either administratively or in an employment context, for their delinquency. If the Government of the Republic of South Africa has given such an instruction then we face a grave constitutional crisis involving a serious threat to the doctrine of the separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench (para 33).

Dates of key developments in the case

22 June 2006 – Pillay J's judgment (the initial orders)

25 July 2006 – first interim implementation judgment (of Pillay J)

28 August 2006 – second interim implementation judgment (of Nicholson J)

8 September 2006 – state affidavit filed setting out their plan

15 September 2006 – applicants' commentary on the plan

22 September 2006 – state's reply to the commentary; also on same day, applicants filed an affidavit supplementing the initial commentary

2 October 2006 – state replied to app-licant's affidavit of 22 September 2006

On 7 September 2006, Government Communications issued a Cabinet statement reaffirming the State's commitment to enforcing court orders. Particular mention was made of Nicholson J's judgment:

> Following comments by Judge Nicholson in the case concerning prisoner access to antiretroviral treatment (ART), Cabinet would like to re-iterate its unwavering commitment to the separation of powers and to the rule of law. The judiciary should not have any reason to doubt government's commitment in this regard. The Department of Justice and Constitutional Development and Government Communications (GCIS) were directed to study recent court judgments with a view to understanding instances that could have led to the perception that government was not complying with court decisions. Such a study will help government to educate its officials about the importance of complying with court decisions so that the matter could be put to rest, forever.

Concluding remarks

The last word on the WCC case has yet to be written. While its impact has been felt both within and beyond the walls of the prison, many of the concerns raised in the papers have yet to be resolved. Much now depends on the State's response to the applicants' call for a negotiated settlement. While the potential for a speedy resolution of the case clearly exists, the matter may not be concluded soon. However, given the remarkable change in the policy direction on HIV/Aids currently initiated by the Deputy President, we are cautiously optimistic that the parties will avoid protracted litigation and instead agree to a comprehensive settlement that will benefit all correctional facilities and the rights holders – the prisoners themselves.

Adila Hassim is the head of litigation and legal services and **Jonathan Berger** the head of policy and research at the AIDS Law Project. Both are part of the legal team representing the Westville prisoners and the Treatment Action Campaign in this case

Resources

The applicant's heads of argument in the first implementation proceedings are available online at http://dedi20a.your-server.co.za/alp/images/upload/FinalHeads.pdf.

Applicants' commentary on the state's ARV treatment plan for WCC is available online at http://dedi20a.your-server.co.za/alp/images/upload/AppComm15_09_06.pdf.

The judgments can be accessed on ALP website as follows:

- Judgment of 22 June 2006: http://dedi20a.your-server.co.za/alp/images/upload/WCCJudgment.pdf
- Judgment of 25 July 2006: http://dedi20a.your-server.co.za/alp/images/upload/Judgment.doc
- Judgment of 28 August 2006: http://dedi20a.your-server.co.za/alp/images/upload/Judgment.pdf

World Habitat Day seminar calls for improved women's access to housing rights

Mercy Brown-Luthango

The theme of this year's World Habitat Day, commemorated on 2 October, was Cities – Magnets of Hope. Cities have assumed great importance as centres of economic activity and growth in the era of globalisation. However, according to the State of the Cities Report of 2006, poverty, inequality and informality are highly concentrated in South African cities. Women are particularly vulnerable as they bear the brunt of these social ills. Within this context, the assertion of socio-economic rights contained in the South African Constitution becomes very significant.

The right of access to adequate housing is pivotal as it is linked to so many other rights, such as the rights to water, electricity, and sanitation. It is also linked to economic opportunities and economic growth. These links have been recognised by the World Urban Forum, which has argued that "adequate housing should be regarded as both a goal in itself and as a contributor to sustainable economic growth, social development and integration" (*Cities without slums*, 2002, p 5). The State therefore needs to view housing as more than just a delivery issue, but as part of a broader economic development issue.

To celebrate World Habitat Day this year, the Development Action Group (DAG) – a South African NGO working towards providing and facilitating the delivery of housing to marginalised communities in the Western Cape – organised a seminar on women and housing rights in South Africa, in partnership with the United Nations Habitat Programme in South Africa. The seminar was held at the South African National Museum in Cape Town.

Its aims and objectives were to:

- provide a platform for women fighting for improved access to adequate housing to voice and share their struggles and celebrate their success stories;
- to raise awareness about women's struggle for housing; and
- to come up with tangible proposals and strategies for ensuring that government policies reflect the urgent need for better access by women to adequate housing.

The right of access to adequate housing is linked to many other rights such as water, electricity and sanitation.

Key issues

A number of important issues were discussed at the seminar. However, three dominated the discussion throughout the day:

- the lack of effective implementation of laws and policies, especially those pertaining to women's rights of access to adequate housing;
- the fact that women still face discrimination and exclusion in exercising their housing rights. This calls for the inclusion of a gender perspective in housing and other policies; and
- the extent to which the Constitution has enabled South African citizens to enjoy their basic human rights.

Divergence between laws, policies and implementation

The seminar highlighted the fact that laws in themselves do not automatically guarantee people, especially women, access to adequate housing. Huge gaps still remain between the conception and adoption of laws and policies and their actual implementation.

It was argued that this gap is largely responsible for the continued vulnerability, marginalization and homelessness of the majority of South Africans. This was clearly illustrated by the testimonies of women, some of whom have been struggling for up to two decades to secure adequate housing for themselves and their children. The experiences of three communities in the Western Cape – Rainbow Housing Cooperative, Freedom Park and

Netreg – were shared through the testimonies of three community representatives and a photographic exhibition.

The Rainbow Housing Cooperative, a group consisting of domestic workers, care givers, cleaners, gardeners, caretakers, chauffeurs and restaurant/hotel workers working and living in the Atlantic Seaboard area, have been lobbying government since 1996 to provide them with low-cost, well-located land or buildings in the area for the establishment of housing units. After ten years and numerous engagements with different government departments and officials, they are no closer to realising their housing aspirations.

The Freedom Park community, a group of informal settlement dwellers, had to go without the most basic amenities such as water and sanitation for five years and still does not have electricity after living on their site for close to ten years.

In Netreg, after a struggle of two decades, construction of housing units has been completed and the community can finally move into their homes.

These three experiences show that even though the right to adequate housing is fully recognised in the Constitution, legislation and international treaties, a community's housing needs would not automatically be met. They also demonstrate that the realisation of housing rights is also a political process, which depends on the active engagement and mobilization of citizens.

The need for a 'gendered' approach to housing policy

Women – especially African women – still face many challenges in realising their housing rights. Historically, a woman's access to the urban environment and her right to housing and property were vested in a man.

While great strides have been made in recognising women's right to housing, remnants of past discriminatory laws and the failure of current housing policy to cater for women's specific housing needs make it difficult for women to access and enjoy their right to adequate housing.

These hardships are compounded by women's specific economic conditions and social factors such as the continued dominance of patriarchal practices, customary and religious laws, domestic violence and HIV/Aids.

Often women's child-care, domestic and care-giving responsibilities prevent them from securing employment. Patriarchal practices, such as men insisting that houses be registered in their names, leave women completely at the mercy of a male partner and often force them to remain in abusive relationships in order to retain their housing.

This calls for a gender perspective to housing and other policies and for specific measures to be put in place to ensure that women's right to adequate housing is respected and upheld.

The constitutional promise

This year marked the tenth anniversary of the Constitution. One of the key themes of the seminar focussed on determining the extent to which the Constitution has lived up to its promise of securing the human rights of all South African citizens.

Considering that poverty, inequality and exclusion remain the dominant features of the South African society, it is clear that the realisation of socio-economic rights remains an empty constitutional promise for the majority of South Africans.

The Constitution itself is not the problem but rather the manner in which the state has engaged with it and the failure of citizens to hold the state accountable.

As aptly stated by Sibongile Ndashe, an attorney with the Women's Legal Centre, the Constitution itself is not the problem. Rather, the problem lies in the manner in which the State has engaged with it and, more importantly, the failure of citizens to hold the State accountable for constitutional rights. There is thus a need for greater engagement by ordinary citizens with the Constitution and the rights enshrined in it.

It was argued that a progressive interpretation of section 26 of the Constitution should be employed to secure the housing needs of the vulnerable and marginalized. This section places both a negative and positive obligation on the state. The former requires the State to refrain from infringing on the housing rights of people while the latter obligates it to provide housing within its available resources. The State has the obligation to devise a comprehensive plan which caters for

the specific needs of the most vulnerable in our society, namely, women, children, disabled people, the elderly and people living with HIV/Aids.

Way forward

The seminar called for a realignment in the strategies adopted by the State and civil society in providing for and securing housing rights. In rethinking present strategies, Anthea Houston, Executive Director of DAG, called on the State to adopt a more developmental approach and to "intervene where markets have failed to provide for the needs of the poor and the most vulnerable". It was also pointed out that there was a need for a more integrated approach involving all spheres of government as well as for partnerships between different governmental departments.

More importantly, though, the voices of poor and marginalised groups need to become louder as they engage with the Constitution and hold government responsible for the rights contained in it. This will ensure that the provisions of the Constitution become more than mere rhetoric and a part of their daily reality.

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New publication

The publicaion called, *Accessing housing in the Western Cape: A guide for women vulnerable to gender-based violence and HIV/Aids, and for organisations providing services to them*, was produced as part of a joint project between the Community Law Centre (in particular, the Socio-Economic Rights Project and the Gender Project) and the Saartjie Baartman Centre for Women and Children on reducing women and girls' vulnerability to HIV/Aids by ensuring their property and inheritance rights. The project was supported by the International Centre for Research on Women, through financial support from UNAIDS. It aimed at contributing to efforts designed to improve women's access to adequate housing and reducing women's vulnerability to gender-based violence and HIV/Aids

The guide provides an overview of housing allocation policies in the Western Cape as an informative tool for women who need housing. It is also designed for organisations that provide services to these women.

The guide gives a summary of housing policies in a user-friendly way, defining the nature of each policy, the intended beneficiaries, application procedures and requirements, and sources of information on the policy.

The policies discussed include the housing subsidy scheme, the discount benefit scheme, social housing, government rental policies and private rentals.

Lilian Chenwi, *Accessing housing in the Western Cape: A guide for women vulnerable to gender-based violence and HIV/Aids, and for organisations providing services to them*, August 2006, Cape Town, Community Law Centre (University of the Western Cape)

An electronic version of the guide is available online at www.communitylawcentre.org.za/ser/publications.php.

For printed copies of the guide, contact the Socio-Economic Rights Project on +27 21 959 3708/2950 or serp@uwc.ac.za.

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http://www.communitylawcentre.org.za/ser/esr_review.php