

THE EXTENT, IF ANY, TO WHICH SOCIO ECONOMIC RIGHTS ARE ENFORCED IN SOUTH AFRICA: LESSONS FROM THE JUDGMENTS OF THE CONSTITUTIONAL COURT

Zungu Celumusa ^a

^a Black Lawyers Association, Pietermaritzburg Branch, South Africa.

^a Corresponding author: CZungu@justice.gov.za

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Abstract : Socio economic rights are enshrined in the constitution of the Republic of South Africa, the position that never existed prior to 1994 and it was even debatable if these rights were justiciable. The coming into operation of the constitution brought challenge to South African courts as the judiciary was tasked with enforcing social and economic rights whilst at the same time there is a question as to whether the courts, and not the government can be in a best position to decide on how best the resources of the state may be distributed.

This paper evaluates the extent to which the Constitutional Court in South Africa has, for the past 15 years enforced the constitutionally guaranteed socio economic rights. The challenges towards realization of the rights as well as the approach that has been followed by the Constitutional Court in dealing with the issue of realization of constitutionally guaranteed socio-economic rights will be highlighted. A special attention will be placed on a question regarding the extent, if any, to which the court's approach has been effective in the realization and enforcement of social and economic rights. An alternative view as well as some recommendations on how best can the courts protect and enforce socio economic rights will be highlighted.

Keywords: Constitutional Court, socio economic rights, democratic legitimacy and constitution

I. INTRODUCTION

In justifying the inclusion of socio economic rights in South Africa's bill of rights, there is a view that the state must be obliged to do whatever it can to secure for all members of society

basic set of goods- education, health care, food, water, shelter access to land and housing.¹ There is also an opinion that satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.² The preamble to the constitution of the republic of South Africa lists improvement of the quality of life for all citizens in the country as one of the objectives of the constitution³. Therefore inclusion of socio economic rights in the constitution appears to be in accordance with the current trends, not only in South Africa but also in other countries.⁴

However the constitutional court of the Republic of South Africa was, as early as the days of the first certification case, alive to the challenges brought about by the incorporation of the socio economic rights into South Africa's constitution as it conceded that these rights will indeed give rise to budgetary constraints. The court nevertheless added that such constraints "must not compromise their justiciability as socio economic rights are, to some extent justiciable".⁵

This paper therefore evaluates, through an analysis of some landmark judgments, the extent, if any, to which the court has enforced and protected the social and economic rights in the face of the challenges

¹ J DeWaal, I Currie, G Erasmus *The bill of rights handbook*, first edition 2000.

² African charter on human and people's rights adopted on 21 October 1986 OAU Ca/leg/67/3

³ The constitution of the Republic of South Africa, 1996

⁴ J Mabungazi *African Journal of Legal studies* (2006) 1-19

⁵ In re Certification of the constitution of the Republic of South Africa 1996(4)744(CC) para 77-78

including a view that the judiciary is usually an elite and undemocratically appointed branch of the state that lacks democratic legitimacy necessary to decide the essentially political question of how to divide social resources between factions, groups, and communities in society.⁶

Some lessons will be highlighted from South Africa's Constitutional Court cases and recommendations for a better and more efficient way of enforcing socio economic rights will be proposed.

From the onset, the paper will give an overview of the obligations imposed by the constitution on the courts in so far as they relate to the protection and enforcement of socio economic rights.

II. THE CONSTITUTION, SOCIO ECONOMIC RIGHTS AND THE POWERS OF THE COURT

By virtue of being embodied in the constitution which is the supreme law of the country, the obligations imposed by the socio economic rights must be fulfilled albeit subject to a constitutionally permissible limitation. All organs of the state must fulfill and respect the obligations imposed by the bill of rights. The courts are at the centre of the realization and enforcement of the rights as section 38 of the Constitution of the Republic of South Africa provides that "anyone listed under the section has a right to approach a competent court alleging that a right in the bill of rights has been infringed or threatened, and a court may grant appropriate relief including a declaration of rights". Section 172 also gives wide powers to the courts when dealing with the constitutionalised rights including the power to interdict a party found to have violated the rights in the constitution or it may make any order that is just and equitable.⁷ Courts of higher status than the magistrate's court also have inherent powers to protect and regulate their own process, and develop the common law, taking into account the interest of justice.

There is a question then on how have the courts utilized wide powers given to them by the constitution in enforcing the socio economic rights. A view on the Constitutional Court's judgments and orders may answer the question and also indicate the extent to which these rights have been enforced.

III. CONSTITUTIONAL COURT'S JUDGMENTS ON SOCIO ECONOMIC RIGHTS.

Consequent to the constitutionalization of socio economic rights, a number of cases dealing with the

realization of socio economics rights have come before the constitutional court in South Africa. The following are some of the cases that gave rise to some landmark judgments in the sphere of the rights. These judgments reveal the manner in which the court has tackled the issue of enforcement of constitutional rights, the challenges faced towards realization of the rights as well as the extent to which these rights may be realized.

3.1 *Soobramoney v Minister of Health (Kwazulu-Natal)*⁸

This was the first case to test the extent, if any, to which the socio economic rights may be realized in South Africa. The appellant, Mr. Soobromoney made a request for admission at a public hospital in order to receive dialysis treatment for his condition as he suffered from kidney failure. This request was turned down by the hospital on the following grounds ;

- that the hospital had a severe shortage of dialysis machines and trained nursing staff.

- that there was a criteria that the hospital in question followed in deciding the patients that had to be admitted for dialysis treatment. In terms of that criteria, only the patients that could be cured could be admitted and also those that are eligible for kidney transplant. Mr. Soobramoney could not be admitted because his condition was incurable and was not eligible for kidney transplant due to his heart problem.

He then approached the court for a remedy as he alleged that he had a right to receive renal dialysis treatment from the hospital as section 27(3) of the constitution provides that "everyone has the right to have access to health care service". Subsection 3 of section 27 guarantees that "no one may be refused emergency medical treatment". Mr Soobromany further alleged that by refusing to admit him at the state hospital for treatment, his right to life in terms section 11 of the Constitution was violated.

The Constitutional Court held that the right not to be refused emergency medical treatment as enshrined in the constitution mean that "a person who suffers a sudden catastrophe which calls for immediate medical attention should not be denied ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment"⁹

The court held that Mr Soobromony's condition did not fall within the ambit of what the right in question entailed.

⁶(see note 1) page 433

⁷ (see note 1)page 433

⁸ 1998(1)SA 765 (CC)

⁹ Soobromany versus Minister of Health CCT32/97 paragraph 20

The court further noted that even though the constitution entitled everyone the right of access to health care services provided by the state (s 27), the Department of Health in KwaZulu-Natal did not have sufficient funds to cover the cost of services being provided to everyone.

The court also considered the submission by the Department of Health in KwaZulu-Natal that the renal unit of Addington Hospital had by then already been under-resourced and 70 percent of people suffering from chronic renal failure had been turned away. There was also a shortage of dialysis machines at the hospital. The court further held that acceding to the request by the appellant would have budgetary constraints to the Department of Health because the government will, if treatment is given to the appellant, have to give it to all others in similar circumstances.

The court held that “the provincial administration which is responsible for health services has to make decisions about funding that should be made available for health care and how funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing health budget and at a functional leveling deciding the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities whose responsibility is to deal with such matters.”¹⁰ The court concluded that refusing to admit Mr Soobromany for dialysis treatment at the hospital was justified when considering the circumstances under which that decision had been taken, more especially the cost factor if everyone in Soobromany’s position has to be admitted for similar treatment.

3.2 *Government of the Republic of South Africa and Others v Grootboom and others 11*

Mrs. Grootboom, the respondent was one of a number of people living in informal settlement that proceeded to illegally occupy nearby land earmarked for low-cost housing. As they were forcibly evicted from that land, their shacks and possessions were, in the process destroyed. They then settled on a sports field as their original places of residence had already been occupied by other people. They then approached the Cape of Good Hope High Court, claiming that their right of access to adequate housing was being infringed as well as their children’s right to shelter. Their view was that the government must provide them with shelter.

¹⁰ Soobromany versus Minister of Health CCT32/97 paragraph 29

¹¹ 2000(11)BCLR 1169

Even though the court of the first instance had found in their favour and ordered the national and provincial governments as well as the Cape Metropolitan Council and the Oostenberg Municipality to provide them with tents, portable latrines and a regular supply of water, the Constitutional Court ruled in favour of the state, holding that even though the right to housing was constitutionally guaranteed, the right could be realized only to the extent of the availability of resources.

The Constitutional Court issued a declaratory order that the state had to devise and implement a programme that included measures to provide relief for desperate people who had no land, no shelter and hadn’t been catered for in the state programme that was applicable in the Cape area at the time. The court further maintained that if the housing programme of the government fails to consider and provide for those in intolerable conditions, such programme may not be held to be reasonable even if statistically it is successful.

This judgment was significant in South Africa and it was the first judgment to develop a reasonableness test to ascertain if the court can enforce the socio-economic right in question. The decision therefore showed that the government’s policies may be subject to scrutiny and if they are not reasonable the court will intervene in order to force the government to fulfill the obligation imposed by the right in question. It appears that the court chose the test for reasonableness in dealing with obligations of the state rather than placing a minimum core content of the right. The applied test offers government time and opportunity of prioritizing its plans towards the fulfillment of the duties imposed by these rights.

3.4 *Treatment Action Campaign v. Minister of Health.*¹²

Giving rise to this case was the announcement by the government that anti-retroviral drug, nevirapine, was only going to be available and used in certain pilot sites only. There had been indication that nevirapine drug was able to prevent mother to child HIV transmission.

The court was approached by the Treatment Action Campaign (TAC), on basis that the decision of the government restricting supply of nevirapine to certain sites only contravened section 27 of the constitution guaranteeing the right to have access to health care services, including reproductive health care. It was further stated that section 28(1)(c) providing every

¹² 2002(10)BCLR1033

child the right to basic nutrition, shelter, basic health care services and social services was also violated.

The applicants wanted South African government to provide anti-retroviral drugs to all HIV-positive pregnant women in order to prevent woman-to-foetus HIV transmission.

The High Court decided in favour of TAC, ordering that neviripine be made available to infected mothers giving birth in state institutions. Dismissing the appeal against the judgment of the High Court, the Constitutional Court held that the State's policy restricting nevirapine to research and training hospitals only was unreasonable and therefore fell short of meeting the constitutional obligations.

The court ordered the government to extend availability of neviripine throughout public health sector as well.

In reaching the decision on reasonableness of the government's policy relating to neviripine the court stated that "the policy of confining neviripine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother to child transmission and the need to provide access to health care services required by those who do not have access to these sites"¹³

The court further stated that the restriction of neviripine to the pilot sites will result in the suffering of the poor people who are unable to get the drug somewhere else. The court maintained that the state need to be alert and consider the position and plight of those that cannot afford to pay for neviripine somewhere else. This was due to the fact that those that can afford were able to get neviripine somewhere else whereas the poor could not. The court further commented that the government was receiving that drug in question free of charge and thus the cost factor was not an issue.

3.5 *Mazibuko v. City of Johannesburg*¹⁴

This was the country's first test case on the extent, if any to which the state may be compelled to provide water as section 27(b) of the constitution enshrines that "everyone has a right to sufficient food and water". The applicants were five residents of Phiri in Soweto who had been paying a flat rate of R68.40 to the municipality in respect of water supply by the municipality. The residents in that area paid the flat rate irrespective of the quantity of water supply.

Initiating this case was the City of Johannesburg's decision to deal away with a long standing policy of payment of a flat rate of R68.40 per month in respect of water supply to the applicants who resided at Phiri in Soweto. There was an introduction of pre paid meters which provided each household with only 6 kilolitres of free water per month. Should a certain household need more water, that household need to pay in advance.

The applicants(residents in the area) challenged the City's new plan stating that policy violated section 27(1) of the constitution which entitled everyone the right to have access to inter alia, sufficient food and water. They further stated that the installation of pre-paid water meters in Phiri was unlawful administratively unfair, unjustifiable discriminatory.

The Constitutional Court ruled against the residents holding that the City is only under duty take reasonable steps to have the right realized. It further stated that the City was not under obligation to provide a certain quantity of free water to the residents.

Furthermore it was maintained that the installation of pre-paid meters did not constitute unfair discrimination as installation was for a legitimate purpose. The court emphasized

that obligations imposed upon government by the social and economic rights will be enforced by the courts firstly where the government takes no step to realize the right. Secondly where the measures adopted by the government are unreasonable and also where the government fails to ensure that there are effective measures and policies in place aimed at and capable of progressive realization of the right.

IV. CONCLUSIONS

It appears from the cases discussed above it that the Constitutional Court in South Africa is alive to the idea that it has to carry a judicial function and that the political parties need to have a say in the distribution of the state's resources. The court is however aware of the obligations to enforce social and economic rights as well as budgetary constraints that are a huge challenge to the realization of rights. The court has been able to adopt the approach which appears to be a commendable one in the circumstances, the approach of enforcing the right if the government has not taken the steps to realize the right provided that resources are available for the realization. The court is also willing to force the government to realize the right if measures adopted towards realization are unreasonable or if there are no measures at place aimed at the realization of the right.

However the approach adopted by the court may be criticized on the basis that even in the situations

¹³ See note 12 above

¹⁴ 2009 ZACC 28 CASE NUMBER 39/09 decided on 8 October 2010.

where the government's policies have been said to be unreasonable, there has been no immediate remedy available to those that seek enforcement of socio economic rights. There was a victory for the members of the community in Grootboom case referred to above as the court stated that the government's measures to meet the constitutional obligations imposed by a right in question were unreasonable due to lack of any provision for those that were living intolerable conditions, having no shelter, water etc.

In that case the court ordered the state to make a programme which must include measures that will provide for those that have no water, shelter etc as section 26(2) of the constitution requires the state to devise and implement a programme aimed at progressively realizing the right of access to housing. Therefore Mrs Grootboom won the court battle as the government was ordered to deal with her plight. However she died in the year 2008 without having had a house irrespective of the order of the court.

Referring to Grootboom case Elizabeth Wickekeri maintains that "While the court's specific order required some ongoing supervision of the improvement of the community, the Oostenburg municipality has neglected to carry out aspect of the order. The result is the continuation of deplorable conditions."¹⁵

¹⁵ NYU School of Law. New York, Centre for human rights and global justice (number 02 of 2004).