

# Basic needs

## enforcing constitutional rights

**Geoff Budlender of the Legal Resources Centre speaks to Claire Horton about Constitutional Court rulings on socio-economic rights and the role social movements can play in enforcing these rights.**



Photo by Liezl Nel

**CH:** In terms of the Constitution, what are the obligations of the state to ensure that citizens are able to meet their basic needs?

**GB:** The Constitution states that everyone has the right to have access to adequate housing, health care services, sufficient food and water, and social security, including social assistance (for example an old-age pension) where this is necessary. However, it recognises that when our first democratic government was elected, millions of people could not achieve these basic needs. Resources were limited, and the state could not provide for all of these needs overnight. So the Constitution says that the state must take “reasonable legislative measures, within available resources”, to achieve the “progressive realisation” of these rights.

**CH:** What is a reasonable period of time within which to achieve “progressive realisation” of these constitutional rights?

**GB:** “Progressive realisation” means two things. First, it means that the state must move forward – it must not reduce the benefits which it has provided to enable people to achieve these rights. Second, the state must increase both the number of people who are able to realise these rights, and the quality of what people are able to achieve. If you apply this to housing, for example, the

the state to provide him with the use of a dialysis machine. The provincial hospital had only a limited number of these expensive machines. It had decided to provide them first to patients whose life would be extended through the use of the machines. Mr Soobramoney was so ill from a variety of causes that the unfortunate truth was that a dialysis machine would do only a limited amount to extend his life. The result was that he was low on the priority list of patients, and did not qualify for a dialysis machine.

**‘If resources are limited and government makes reasonable decisions to prioritise the allocation of those resources, this will not be in breach of the Constitution even if the result is that some people do not receive the benefits they need.’**

state must take measures to ensure that an increasing number of people have housing, and also that the quality of housing improves over time. So there is no fixed time target. There is a constantly moving target, which requires continual improvement in the amount and the quality of what is provided to those who can not provide for themselves.

**CH:** What are the implications of some of the Constitutional Court rulings on socio-economic rights?

**GB:** In the Soobramoney case, the appellant was extremely ill. His kidneys had failed and he needed

The Constitutional Court decided that it was not unreasonable to prioritise the use of this expensive and limited resource, and to provide it first to patients who could obtain long-term benefit from it. Mr Soobramoney’s rights were therefore not breached. The implication of the judgement is that if resources are limited and government makes reasonable decisions to prioritise the allocation of those resources, this will not be in breach of the Constitution even if the result is that some people do not receive the benefits they need.

The Grootboom case was about housing. The applicants had

literally nowhere to live, because they had been evicted from the land which they had occupied. When they asked the government for housing, the government's answer was that they should put their names on the waiting list for housing. The waiting list was more than ten years long.

The Court said that it was unreasonable to fail to make any emergency provision for people who are in a desperate situation. The people could not be left literally homeless for between ten and twenty years. The implication of the judgement is that to be reasonable, a programme must give some priority attention to people who are in a desperate situation. The programme must cater for short, medium and long term needs. It must not exclude a significant segment of society. And the programme must not only be reasonable in theory – it must also be reasonably implemented.

In the Treatment Action Campaign (TAC) case, the government had refused to allow doctors in public hospitals and clinics to provide their patients with a life-saving drug, which was available at a nominal price or for free, to prevent the transmission of HIV from mothers to their babies. The drug was registered by the Medicines Control Council, which meant that it was safe and effective.

The Court held that this refusal was unreasonable. Where people have a right to health care services, it cannot be reasonable to refuse to take an inexpensive step which will save lives. Even though the state said that it was still carrying out research on the best way to use the drug, it could not withhold this life-saving treatment from babies who needed it at the time of their birth.

A key implication of this judgement is that there must be a reasoned justification for policies which affect people's rights. The government cannot take the position that because it has made a policy the courts cannot interfere. The courts will test the policies against the requirements of the Constitution. The meaning of 'reasonable' as explained in the Grootboom case was underlined and applied to the right to health services.

### ‘A court case, and the judgement which follows, can be powerful tools for mobilisation to press a demand.’

#### **CH: How has the state responded to citizens trying to realise their constitutional rights?**

**GB:** There have been two sorts of response. In some cases, there has been a defensiveness. The government has appeared to resent citizens' use of the courts to assert their rights. It is as if citizens and the courts are 'getting in the way' and interfering with the prerogatives of the elected government.

The second response has been a recognition that the rights are in the Constitution to protect particularly the weak and the vulnerable who cannot achieve their rights through the electoral process which is too complex and infrequent. The rights and the courts are the way of holding the government to the best ideals of the nation and ensuring that poor people are treated as citizens and not as objects of administration.

#### **CH: What is the role of social movements in ensuring that the state gives effect to its Constitutional obligations?**

**GB:** Social and economic rights are most effectively enforced by social movements. The Grootboom and TAC cases demonstrate this. The Grootboom

judgement has been implemented slowly and inconsistently. It took a year before changes were made to provincial housing budgets to reflect the requirements of the judgement. The City of Cape Town, which was directly involved in the Grootboom case, has still not carried out its obligations under the judgement. The reason for this is that although the judgement is powerful and has large implications for housing programmes,

social movements have not used it to press the needs and demands of homeless people. This has deprived it of some of its power.

By contrast, the TAC is actively following up what is happening in the provinces to ensure that the TAC judgement is fully implemented. The TAC and its allies in the trade unions and churches have mobilised around the judgement and used it energetically to press for action. They have actually taken the judgement further. The judgement deals only with treatment to prevent mother-to-child transmission of HIV. But the TAC and its allies have used it to press for a general treatment plan, taking the effect of the judgement beyond its immediate implications. This demonstrates that a court case, and the judgement which follows, can be powerful tools for mobilisation to press a demand.

*[Geoff Budlender is an Attorney in the Constitutional Litigation unit of the Legal Resources Centre, Cape Town. Claire Horton is the Labour Standards Programme Co-ordinator at NALEDI]*