

# Non-implementation of court orders in socio-economic rights litigation in South Africa

Is the cancer here to stay?

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Over 12 years have elapsed since the South African Constitution was adopted, and the jurisprudence on socio-economic rights has increased considerably. Yet a majority of the population remain entrapped in poverty.

The failure of socio-economic rights litigation to lead to rapid socio-economic transformation can be attributed in some measure to the failure of the government to implement fully the court orders made in a number of socio-economic rights cases (Andrews, 2006: 65).

The government's record in complying with court orders - especially those concerning socio-economic rights - has hardly been

satisfactory (AfriMap & Open Society Foundation of South Africa, 2005: 17).

Non-compliance with court orders could therefore be described as a major stumbling block in the way of the realisation of socio-economic rights. Successful litigants have been rendered hopeless and the judiciary helpless in the face of the government's recalcitrance. Not only does the government's failure to imple-

ment court orders undermine the rule of law and the legitimacy of the judiciary, it also impairs the dignity of the successful litigants and impedes access to justice [*Nyathi v MEC Department of Health, Gauteng, and Another*, Case CCT 19/07 (2008), para 43].

This paper assesses the extent to which the government has complied with court orders in socio-economic rights litigation and sets out to devise strategies for their effective implementation. Although it uses the case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) (*Grootboom* case) as the point of departure because of its centrality to socio-economic rights, there are a number of other cases whose orders have met with a similar response from the government.

### A legacy of non-implementation of court orders?

The recent death of Mrs Irene Grootboom while still waiting for formal housing proves that successful litigation does not necessarily result in tangible goods and services for the poor. Mrs Grootboom and others successfully petitioned the Constitutional Court to enforce the right of access to adequate housing for themselves and other members of their community. The fruits of their struggle were multifaceted. They were able to obtain a negotiated settlement resulting into an interlocutory order by which the government was ordered to improve the living conditions of the Wallacedene community. A recent survey by Marcus and Budlender provides evidence

that the government had still failed to comply with this order almost eight years after it was made (Marcus & Budlender, 2008: 61).

The other outcome of *Grootboom* was the general declaration that the government's housing programme was unreasonable because, among other things, it did not provide for the needs of the most vulnerable. This case is also important because of the principles it laid down for assessing the extent to which the government has discharged its constitutional obligations to realise socio-economic rights.

It is argued that had the government fully implemented the decision in *Grootboom*, it would have avoided subsequent litigation in the areas of housing, health and social security.

### Housing policy and actual access to housing

The report of the UN Special Rapporteur on adequate housing, Miloon Kothari, following his mission to South Africa details the deficiencies in the housing policy and access to adequate housing in the country (Kothari, 2008: paras 35-53). The report provides evidence of failure to respond to the housing needs of the poor, to coherently implement housing laws and policies, and to halt forced evictions. The bleak reality is that the government's progress on the provision of housing to poor South Africans has not improved much since the *Grootboom* decision (Wickeri, 2004: 6-7).

However, it must be acknowledged that there have been some positive changes in both housing policy and case

law. For example, the judgment provided the impetus and basis for communities to resist forced evictions and to demand better housing conditions. It forced the government to adjust its housing programme to accommodate the needs of those living in intolerable conditions and those threatened with eviction (Budlender, 2004: 18). New policies that have directly resulted from *Grootboom* include the National Housing Programme: Housing Assistance in Emergency Circumstances (Emergency Housing Programme), adopted in April 2004, and the Upgrading of Informal Settlement Programme (UISP), adopted in October 2004.

The main objective of the Emergency Housing Programme is to provide temporary assistance in the form of municipal grants to enable municipalities to provide secure access to land and/or other basic municipal services and shelter in emergency situations.

The UISP allows municipalities to apply for a community-based or area-based subsidy that is not linked to individual households but is based on the actual cost of improving an informal settlement. Municipalities are discouraged from relocating informal settlements from expensive or unsuitable land to new housing developments on the outskirts of cities and towns. Instead, they are encouraged and empowered to make already occupied land habitable even if it is deemed to be technically and economically unsuitable.

These programmes represent noble efforts to implement the *Grootboom* judgment. However, concerns abound as to the compre-

hensiveness of these programmes and the reasonableness of their implementation. Wickeri, for example, has argued that

[d]espite the order of the Court, ... which required the implementation of policy to deal with persons living in crisis, there has been no revolutionary change in either the availability or delivery of housing for South Africa's urban poor (Wickeri, 2004: 6).

Even at a policy level, one cannot say with confidence that the current policies on housing comprehensively cover all vulnerable people in need of housing. There is, for instance, no coherent and comprehensive policy at the national level on housing for people with special housing needs. Special needs groups include "women (especially abused women), people living with HIV/AIDS, the aged, children, people with disabilities and the poor" (Chenwi, 2007).

As to the impact of the case on access to housing, one need look no further than the following cases: *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), *Rudolph and Another v Commission for Inland Revenue and Others* 1996 (2) SA 886 (A) and *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 (5) BCLR 475 (CC) (*Olivia* case). The facts and issues in these cases are similar in many respects to those in the *Grootboom* case, and the question of the implementation of the principles in *Grootboom* was raised in these cases. It is clear from the cases that if the *Grootboom* judgment had been implemented fully, further litigation would have been averted.

It is important to note that though the implementation of

the agreement in the *Olivia* case has thus far been successful (see below), this is the exception rather than the rule.

### Right of access to health care services

The impact of the *Grootboom* case on the right of access to health care services can be assessed by first examining the case of *Minister of Health and Others v Treatment Action Campaign 2002 (5) SA 721 (CC)* (*TAC* case). This case was a challenge to the government's policy on the prevention of mother-to-child transmission of HIV/AIDS on the ground that it was inconsistent with the right of access to health care services. The Court found that the government's policy was unreasonable as it excluded the most vulnerable, "those who cannot afford to pay for medical services" (para 70).

Of concern in this case is the extent to which the judgment has been implemented and the extent to which it has influenced changes, as it should have, in the general response to the problem of HIV/AIDS. The Treatment Action Campaign (*TAC*) has consistently castigated the government for its failure to distribute antiretroviral (*ARV*) medication. Like *Grootboom*, the *TAC* case demonstrates a reluctance on the part of the government - in this case, to overhaul the health system to extend HIV/AIDS treatment to all deserving patients. Indeed, in some provinces the implementation of the mandatory interdict issued in the judgment came only after threats of contempt of court proceedings (Heywood, 2003: 7-10).

The most recent case illustrating the government's failure to observe the principles emerging in the *Grootboom* case is *EN and Others v Government of RSA and Others (Westville case)* [2007 (1) BCLR 84 (D)] (discussed in *ESR Review* 7(2), July 2006). This concerned access to *ARV* treatment for HIV-positive prisoners. The recalcitrance of the government in this case is reflected in its failure to comply with a consent agreement between the parties. It instead chose to engage in adversarial litigation. As a result, the judge issued a structural interdict requiring the government to file a plan within two weeks on how it intended to implement the court order (paras 32-3).

The most interesting aspect of the *Westville* case is that even after judgment was handed down condemning the government's programme as unreasonable, the government was not willing to abide by the directions of the Court. The attitude of the government in this case was proof of lack of respect for the rule of law. Rather than implement the court order, the government chose to appeal on the technical point that the judge had erred in refusing to step down because one of the counsel for the applicants was his daughter. The government also applied to stop the implementation of the orders of the High Court pending the appeal. At the conclusion of this application, Judge Nicholson found that irreparable harm would be suffered by the prisoners if the interim order was set aside. The harm that the prisoners would suffer, he argued, was not comparable to the inconvenience likely to be suffered by the government.

Although in the end the government did file a plan, a lot of damage had already been done. The reputation of the Department of Correctional Services and the Minister of Health had been damaged and the case almost led to a breakdown in the relationship between the executive and the judiciary.

In spite of some shortcomings implicit in the department's plan, it represents a more systematic effort to address the issue of HIV/AIDS, including access to ARV treatment (Berger, 2006). Recent reports also indicate that the department is taking the issue of providing ARVs to prisoners more seriously than it did before. Access to ARV treatment by prisoners has increased considerably. The projection is that access will have increased by 76% by the end of 2008 (Sapa, 2008).

### Social assistance cases *Despondency in the Eastern Cape*

The Eastern Cape provincial government is notorious for disobeying court orders in cases in which it was found to have violated the right to social security and assistance and the right to just administrative action [see, for example, *Eastern Cape Provincial Government and Another v Ngxusa and Others* (2001 (10) BCLR 1039 (SCA) (Ngxusa case)].

In *Bushula and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* [2000 (2) SA 849 (E);

2000 (7) BCLR 728 (E)] (*Bushula case*), the applicant, who had been receiving the disability grant for over five years, was verbally informed of its termination. The Court found that the termination violated the provisions of the Social Assistance Act and its accompanying regulations, which authorised the suspension of the grant after notification to the beneficiary but did

not recognise the power of cancellation of a grant.

One would have expected the provincial government to apply the *Bushula* case to all similarly situated persons. Unfortunately, this is not what happened. The government did not reinstate the grants that had been cancelled. This precipitated further litigation, the most immediate case being *Ngxusa*. This was followed by *Njongi v MEC, Department of Welfare, Eastern Cape* (Case CCT 37/07 [2008] ZACC 4). Ms Njongi had successfully applied for the reinstatement of her grant, but the application was determined 18 months after its submission. The issue was whether she was entitled to arrears. The Constitutional Court castigated the provincial government for not reinstating the cancelled grants immediately after the *Bushula* case was decided. The Court confirmed the holding in the *Bushula* case to the effect that the termination of the social grants was unlawful and unconstitutional, and ordered the retrospective reinstatement of the

applicant's grant and payment of all the arrears due with interest (para 92). It remains to be seen whether this decision will be respected.

These cases are just the tip of the iceberg. They illustrate the magnitude of the problem of political commitment to implementing socio-economic rights and underscore the urgency of the need to devise strategies to ensure compliance with court orders. The next section describes some of the strategies that could be adopted in this regard.

### Strategies for effective compliance

The reluctance of government officials to comply with court orders does not arise from mere obstinacy. There appears to be an entrenched belief among some government officials that the courts overstep their boundaries when adjudicating socio-economic rights. Evidence of this can be found in the attitude exhibited by the Minister of Health during the hearing of the *TAC* case; the reaction of the Department of Correctional Services to the judgment in the *Westville* case; and the recent outburst by the mayor of the City of Johannesburg, Amos Masondo, in response to the judgment in *Mazibuko and Others v City of Johannesburg and Others* [High Court of South Africa (Witwatersrand Local Division) Case No 06/13885]. The mayor is quoted as saying:

Judges are not above the law. We don't want judges to take the role of Parliament, the role of the national council of provinces, the role of the legislature and the role of this council. Judges must limit their role (Shoba, 2008).

While one may fault the *Mazibuko* judgment, to the extent that it prescribes 50 litres of water on the basis of the concept of the minimum core, the reaction of the mayor is unbecoming and a misconception of constitutional democracy (De Vos, 2008). It also clearly undermines the fundamental principle of the rule of law (Liebenberg, 2008). A public official with such an attitude would definitely ignore any order lawfully made by the court in cases of this type. This perception should be kept at the back of one's mind when assessing the extent to which court orders have been implemented.

The recent invalidation of section 3 of the State Liability Act by the Constitutional Court should be lauded (see *Nyathi v MEC, Department of Health, Gauteng CCT 19/07*). This judgment opens up space for enforcing court orders against the government in the same way that orders are enforced against private litigants. In spite of this, it is important to note that, ultimately, the successful implementation of court orders is largely dependent on the political will of the state. The government could still undermine the state by exempting a wide range of properties from execution, something sanctioned by the Constitutional Court (para 51).

What needs to be done is to inculcate and entrench a culture of constitutionalism and respect for the rule of law in public officials. It is important that state officials understand that judicial processes are not hostile to state functionaries but merely play a complementary role. As

Liebenberg points out (*Business Day* 20 May 2008):

Instead of viewing the courts' role in enforcing these [socio-economic] rights as an unwelcome intrusion, ... [the state] should understand that this is part of the "constitutional conversation" between courts, the government and civil society on how best to realise human rights. Rather than detracting from democratic politics, the judicial enforcement of human rights enriches constitutional democracy.

It is also important to cultivate inter-institutional trust between the courts, the executive and civil society. This can be achieved by promoting alternative dispute resolution and amicable settlement, not only as an alternative to litigation but also as part of the litigation process. This is a course that the Constitutional Court has already embarked on in the *Olivia* case. In the course of hearing the case, the CC ordered what could be described as an "interim structural interdict". The parties were ordered "to engage with each other meaningfully ... in an effort to resolve the differences and difficulties aired in this application".

The parties were also ordered to file reports, by way of affidavits, on the outcome of the engagement before the Court on or before 3 October 2007. The Court reasoned that this order would help to resolve the dispute amicably, and it did. The parties reached an agreement, which resulted in the relocation of over 450 people without an eviction.

Promoting institutional dialogue and amicable settlements, as was done in the *Olivia* case, also has the advantage of obtaining meaningful enforcement of court orders while minimising court involvement. Amicable dispute resolution "is far more effective than establishing an antagonistic relationship in which the government waits for specific court instruction and is unwilling to go beyond the bare minimum required by those specific orders" (Ray, 2008: 26).

### Role of social mobilisation

South Africa has a long history of grassroots struggles led by political organisations, trade unions, social movements, religious organisations and NGOs (see Ballard, 2005). While these organisations have relied on litigation to challenge certain socio-economic policies by reminding the government of its socio-economic rights obligations, some have appreciated the limitations of litigation and combined it with social mobilisation, protests,

demonstrations and public campaigns. They have also used the Constitution and the language of rights to legitimise their social mobilisation activities (Ballard, 2005: 88). In the process, they have not only influenced the development of the law, but also broken oppres-

sive laws by, for instance, advocating civil disobedience (Heywood, 2005: 181).

The South African experience has shown that litigation and social mobilisation are mutually

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reinforcing. Social mobilisation prior to litigation has been used not only to force the government into submission, thus rendering litigation unnecessary, but also to illustrate the problems and extent of the violations that necessitated recourse to litigation. This “means that a court deciding a conflict does so in the knowledge of the expectations and lives that depend on the outcome” (Heywood, 2005: 210).

There is thus a need to intensify social mobilisation after successful litigation to ensure the implementation of court orders. As a matter of fact, social mobilisation has the potential to promote the implementation of court orders in the same way that it has promoted substantive litigation on socio-economic rights.

## Conclusion

One of the challenges to realising socio-economic rights in South Africa lies in the reluctance by the

government to implement and respect court orders. This reluctance has partly arisen from the perception that courts are illegitimately overstepping their boundaries in social policy. South African courts have the power to adjudicate socio-economic rights and are therefore entitled to deal with questions concerning the reasonableness of social policies. However, to minimise concerns about the role of courts in social policy, courts should encourage the negotiated settlement of disputes in socio-economic rights cases. This will in turn improve the chances of the implementation of court orders arising from such settlements.

The *Olivia* case is a success story and has opened the horizon for this strategy. The decision in the *Nyathi* case, which invalidated section 3 of the State Liability Act, has also widened the opportunities for enforcing court orders involving liquidated damages. This case exposes the

state to the same consequences of litigation as those that private litigants face as far as money orders are concerned.

To cover the gaps that are still left, this paper has emphasised the need to inculcate a culture of respect for the rule of law in state officials and raise awareness of the role of the judiciary in the context of the separation of powers. Moreover, civil society and other stakeholders should combine litigation with other strategies of realising socio-economic rights. Based on the experiences of such organisations as the TAC, social mobilisation is a formidable tool for bringing about social change and holding the state accountable.

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