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CHALLENGING INNER CITY EVICTIONS BEFORE THE CONSTITUTIONAL COURT OF SOUTH AFRICA: THE OCCUPIERS OF 51 OLIVIA ROAD CASE

By Kate Tissington¹

Introduction

On 19 February 2008, a Constitutional Court victory was won for the desperately poor residents of two 'bad buildings' in the inner city of Johannesburg, who had been facing eviction. The Court ordered the City of Johannesburg to provide the occupiers with affordable alternative accommodation within the inner city. The judgment has significant implications for any future evictions undertaken against poor and vulnerable people in Johannesburg, with the Court stressing the need for prior 'meaningful engagement' to have taken place between local authorities and affected residents before an eviction order can be granted.² This article briefly outlines the background to the case, provides an analysis of the Constitutional Court's judgment and explains the situation at present with regard to the residents of the two buildings. More broadly, it considers the ongoing problem of inner city evictions in Johannesburg.

Background

During the height of apartheid, from 1948 to 1983, the inner city of Johannesburg was zoned for white residential and commercial activity. The winding down of apartheid from the 1980s onwards saw the rapid flight of white middle-class residents and businesses from the inner city of Johannesburg to the northern suburbs.³ During this period, the government lost control of migration into the urban areas

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- 1 Kate Tissington works for COHRE's Global Forced Evictions Programme and is a researcher at the Centre for Applied Legal Studies (CALs) in Johannesburg. Thanks to Sandy Liebenberg and Stuart Wilson for their comments and insights.
- 2 It is estimated that there are approximately 67 000 people of a similar class to that of the occupiers, who face possible eviction from so-called 'bad buildings' in the inner city of Johannesburg.
- 3 Jo Beall, Owen Crankshaw & Susan Parnell, *Uniting a Divided City: Governance and Social Exclusion in Johannesburg* (London: Earthscan, 2002), p. 111.

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EDITORIAL: ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON TRACK TO BEING ON AN EQUAL FOOTING WITH OTHER INTERNATIONAL HUMAN RIGHTS

In June, the United Nations Human Rights Council approved by consensus an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). This momentous decision of the Human Rights Council brings the possibility of an international complaints mechanism and remedy for violations of the ICESCR one step closer.

The Optional Protocol is the result of several decades of work by governments, civil society, experts and the UN human rights bodies aimed at remedying a long-term gap in human rights protection under the international system. With the Convention on the Rights of the Child, the ICESCR is one of only 2 major human rights treaties to lack a petition mechanism. An inter-governmental Working Group has deliberated on the scope and content of the draft Optional Protocol since 2004.

The Optional Protocol adopted by the Council includes a number of provisions, including the following:

-States Parties to the Covenant joining the Protocol recognise the competence of the UN Committee on Economic, Social and Cultural Rights to receive and consider communications alleging violations of the economic, social and cultural rights set forth in the Covenant (Optional Protocol, Article 1). Communications may be submitted by or on behalf of individuals or groups of individuals alleging that they have suffered violations of the Covenant's provisions, provided that they have exhausted domestic remedies in the country at issue (Article 2).

-The Protocol provides for the possibility of so-called 'interim measures' by providing that the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures to avoid possible irreparable damage to the victims of the alleged violations (Article 5).

-The Protocol also creates an inquiry procedure (Article 11). It states that, if the Committee receives reliable information indicating grave or systematic

violations of the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned. The inquiry may include a visit to the territory of the State Party concerned.

-The Protocol requires that States take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the Protocol (Article 13).

The adoption of the Protocol by the UN Human Rights Council brings the possibility of international justice one step closer for millions of excluded people, groups, communities and peoples worldwide. When the Protocol ultimately enters into force, it will allow for the creation of an economic, social and cultural rights jurisprudence that will constitute a persuasive authority to be used by advocates around the world to forward the movement for the justiciability of such rights at the domestic, regional and international levels.

For further information on the Optional Protocol see: <http://www.opicescr-coalition.org/>

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For additional information on the justiciability of ESC rights, see www.cohre.org/litigation and the Case Law Database at www.escr-net.org.

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and deregulation prevailed. More and more people entered the city to find work, with many choosing to live in the buildings left vacant and neglected by absentee landlords over the years. These buildings have been occupied, sometimes for as long as 14 years, by very poor people who were unable to find adequate housing within a reasonable distance of economic opportunities in the inner city. Unfortunately, desegregation in the inner city of Johannesburg has become synonymous with slum living, poverty, crime and urban decay.

In recent years, most notably since the implementation of the City's Inner City Regeneration Strategy (ICRS) in 2003, there has been a concerted effort to entice middle-class residents and businesses back into the inner city in order to halt urban decay and facilitate urban regeneration. This strategy has had a profound effect on the poor occupiers of so-called 'bad buildings,' which are deemed unsafe and uninhabitable by the City under the *National Building Regulations and Building Standards Act 103 of 1977* ('the NBRA'). In 2005, the Centre on Housing Rights and Evictions (COHRE) and the Centre for Applied Legal Studies (CALS) published a report entitled *Any Room for the Poor? Forced Evictions in Johannesburg, South Africa*, which examined the spate of forced evictions in the inner city and the City's lack of a housing

plan or suitable accommodation for low-income residents.⁴ This report also served as the basis of a court case which was launched in the High Court (Witwatersrand Division) in 2005.

Success in the High Court

The *Rand Properties*⁵ case revolved around the City's efforts to evict over 400 desperately poor residents from two 'bad buildings' in the inner city (referred to as San Jose and Zinns) using the NBRA and the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* ('the PIE Act').⁶ While it was generally accepted by both parties that the buildings were in appalling condition and posed health and safety risks (a fact verified by Judge Mohamed Jajbhay during his site inspection of the buildings), the Court found that they were not as "extreme" as the City had claimed. People had been living in the buildings for many years up until the City's call for an eviction. To deem the buildings uninhabitable and unsafe overnight, forcing the residents onto the street, would clearly be a counterproductive and perverse administrative blunder.

In terms of its application, the City sought to justify the evictions by invoking Section 12(4)(b) of the NBRA, which provides that a local authority can order any person occupying any building to vacate that building if the authority deems it

necessary for their safety.⁷ The City also relied on the *Health Act 63 of 1977* and the *Fire By-Laws*. In their opposition to the City's application and in their own counter-application, the residents made a number of arguments asserting violations of both the positive and negative obligations imposed by Section 26 of the Constitution of the Republic of South Africa. This provision sets out the right of everyone to have access to adequate housing and to protection from arbitrary eviction.⁸ In particular, the counter-application asserted that Section 12(4)(b) read together with Sections 12(5) and 12(6) of the NBRA⁹, which provide for evictions without a court order, were unconstitutional and constituted a violation of the right set out in Section 26(3) not to be arbitrarily evicted from one's home.

In addition, the occupiers claimed that the City had failed to fulfil its positive obligations towards the occupiers to achieve the progressive realisation of the right to have access to adequate housing. This was due to the lack of a comprehensive housing plan and the City's failure to provide alternative accommodation in the inner city. The residents argued that this failure precluded the City from obtaining the relief that it sought.

The occupiers sought an order declaring that the failure of the City's housing programme to address their plight amounted,

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4 See http://www.cohre.org/view_page.php?page_id=261#article722 for the COHRE report, relevant judgements and other information related to the case.

5 *City of Johannesburg v. Rand Properties, Residents of ERF 381, Berea Township & Ors* (Referred to as the *Rand Properties* case)

6 The PIE Act reinforces the right to housing contained in Section 26(3) of the Constitution stipulating that, as with other occupiers of property, unlawful occupiers may not be evicted without a court order made after considering all the relevant facts. "Unlawful occupation" describes a mode of housing in which people without either formal title or contractual rental agreements have occupied properties following the abandonment of the properties by the registered owners.

7 Section 12(4)(b) of the NBRA states that "if the local authority in question deems it necessary for the safety of any person, it may in writing, served by post or delivered, order any person occupying or working or being for any other purpose in any building, to vacate such building immediately or within a period specified in such notice."

8 Section 26 of the Constitution provides that:

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

9 Section 12(6) of the NBRA states that any person who continues to occupy a property following a notice of eviction is liable, on conviction, to a maximum fine of R100 for each day of unlawful occupation.

» amongst other things, to a violation of Section 26(1) and/or Section 26(2) of the Constitution. They also requested the Court to interdict (that is, prohibit) the City from seeking to evict the occupiers until suitable alternative accommodation was provided. Finally, the Court was asked to grant a structural interdict to procure compliance by the City with its positive obligations in relation to the occupiers under Sections 26(1) and 26(2).

In his judgment, Judge Jajbhay held that Section 12(4)(b) of the NBRA must be read subject to Section 26(3) of the Constitution.¹⁰ He found that the City had made no efforts to engage or consult with the occupiers in regard to their imminent eviction. He ordered the City to “*devise and implement ... a comprehensive and coordinated programme to progressively realise the right to adequate housing to people in the inner city of Johannesburg who are in a crisis situation or otherwise in desperate need of accommodation.*”¹¹ He ruled that, pending the implementation of this programme, or until such time as suitable accommodation was provided, the City was interdicted from evicting the occupiers of the buildings. In their arguments, the applicants drew to the attention of the court relevant international human rights law, particularly regarding the linkage of adequate housing and livelihood opportunities, and the obligation of the State to provide alternative

accommodation. Judge Jajbhay made reference to the contentious topic of minimum core obligations under international human rights law although he did not pursue this further.¹²

In the Supreme Court of Appeal (SCA)

In the wake of a potentially huge public relations and financial nightmare for the City’s urban regeneration strategy, the City appealed the High Court decision and the case was heard by the Supreme Court of Appeal (SCA) in early 2007.¹³ COHRE and the Community Law Centre (CLC) intervened as *amici curiae*, arguing that any evictions that lead to homelessness violate the Constitution. The *amici* also made proposals as to how the court should design an order that would balance the roles of the courts and the government in the implementation of the right to have access to adequate housing.¹⁴ The residents of the two buildings cross-appealed. This was not upheld, however, and the judge found in favour of the City. The SCA held that provisions of the NBRA were consistent with the Constitution, and that the decisions to seek the eviction of the occupiers concerned were procedurally fair. The SCA ordered the residents of the two buildings to vacate them. The SCA ruled that, while the residents did *not* have a constitutional right to alternative housing in the inner city, the City was to provide those who needed it with alternative shelter.

The judgment was a partial victory for the inner city poor in that the SCA found that the residents could not be evicted without the provision of at least a minimum level of shelter, the location of which was to be determined in consultation with the residents.¹⁵ The City was ordered to provide temporary accommodation for the respondents which was “*to consist of at least the following elements: a place where they may live secure against eviction; a structure that is waterproof and secure against the elements; and with access to basic sanitation, water and refuse services.*”¹⁶ Moreover the court ordered that “*the City shall after consultation (if requested by any respondent) determine the location of the alternative accommodation.*”¹⁷ This was undoubtedly a concession from the SCA regarding the importance of location to the provision of housing.

However, the judgment effectively condoned the City’s ad hoc and inadequate approach to ‘consulting’ those facing eviction. Also, in practise, the judgment denied the existence of the right of inner city residents to live near their place of work and refused to take proximity into account as an important factor in the provision of alternative accommodation. Indeed, the judgment did not speak to the issue of the social exclusion of the poor from the inner city as a result of the City’s Inner City Regeneration Strategy. Nor did it refer to the destructive impact that reloca-

10 See ‘Case to Watch’ 2006 3(2) *Housing and ESC Rights Law Quarterly*: <http://www.cohre.org/store/attachments/COHRE%20Housing%20ESC%20Rights%20Quarterly%20Vol3-No2.pdf>

11 Jajbhay J in the *Rand Properties* judgment, para 67.

12 In *Government of the RSA & Others v. Grootboom* 2000 (11) BCLR 1169 (CC) and *Minister of Health v. Treatment Action Campaign (No.2)* 2002 (5) SA 721 (CC), the Constitutional Court stated that it lacked sufficient information to determine what would comprise the minimum core obligation with regard to the constitutional rights to have access to adequate housing and health care services, respectively.

13 *City of Johannesburg v. Rand Properties (Pty) Ltd* 2007 SCA 25 (RSA).

14 Available at http://www.cohre.org/store/attachments/Constitutional_Court_COHRE%26CLC_AMICI.pdf

15 COHRE/CALS Joint Media Release, ‘Alternative accommodation ordered for residents of “bad” buildings in the Johannesburg inner city’ (26 March 2007).

16 Judgment in *City of Johannesburg v. Rand Properties (Pty) Ltd* 2007 SCA 25 (RSA), p. 32.

17 *Ibid.*

» tion to the already overcrowded peripheries of Johannesburg would have on the fragile survival strategies of families.

In the Constitutional Court

On 28 August 2007, the matter of *Occupiers of 51 Olivia Road and Others v. City of Johannesburg and Others* eventually came before the Constitutional Court.¹⁸ After the hearing, judgment was reserved and an interim order was handed down requiring the parties to “engage meaningfully” with each other regarding the issues subject to dispute in light of the rights and values enshrined in the Constitution. Three months later, negotiations were concluded and a signed agreement was reached between the parties and made an order of court. The settlement agreement stipulated that the occupiers of both properties be provided with affordable accommodation, consisting of at least “security against eviction; access to sanitation; access to potable water; access to electricity for heating, lighting and cooking,” located in two buildings identified by the City or “in another building...located within the Urban Development Zone (UDZ) for the inner city of Johannesburg.”¹⁹

The agreement also stipulated that the City must provide certain interim measures at the San Jose and Zinns buildings at its own expense, until transitional accommodation was made available for the residents at two newly renovated buildings in the inner city.²⁰ The parties undertook a comprehensive socio-economic survey of the residents and a process of engagement and consultation was entered into between the

City and the residents as to the nature of the accommodation to be provided. This process continued in lieu of a final ruling by the Constitutional Court, which was expected to address certain unresolved issues between the parties. These outstanding issues included: the issue of permanent accommodation and the relief sought by the occupiers in respect of the City’s failure to formulate and implement a comprehensive housing plan for the class of persons on behalf of whom the litigation was initiated; the practice to be adopted by the City in dealing with persons occupying so-called ‘bad buildings’ in future; the constitutionality of Section 12(4)(b) of the NBRA; the applicability of the PIE Act; and the reach and applicability of Section 26 of the Constitution.

This much-anticipated judgment was handed down in February 2008. Although much of the fate of the occupiers of the two buildings in question had already been negotiated as per the settlement agreement made court order between the City and residents, broader issues relating to inner city evictions by local authorities were covered in the judgment. The judgment overturned the SCA’s order granting an eviction and emphasised the relationship between Section 12(4)(b) of the NBRA and Section 26 of the Constitution. This relationship means that “the City must take into account the possibility of homelessness of any resident consequent upon a Section 12(4)(b) eviction in the process of making the decision as to whether or not to proceed with the eviction.”²¹ It also

found Section 12(6) of the NBRA to be inconsistent with the Constitution, and read words into the NBRA to render it constitutional. As a result, the criminal sanction provided for in the Section is only operative once an order of court has been granted.

Perhaps the most important aspect to emerge out of the Constitutional Court’s judgment was the stress it placed on the need for “meaningful engagement” between local authorities and occupiers in the event of a possible eviction. The Court stated that

in light of [...] constitutional provisions a municipality that ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit and purpose of [its] constitutional obligations.”²²

The judgment criticised the City’s failure to facilitate “structured, consistent and careful engagement” during the implementation of its Inner City Regeneration Strategy in 2003, when it “must have been apparent that eviction of a large number of people was inevitable.”²³ The Court stated that that some of the objectives of a two-way process of meaningful engagement would be to take into account: the potential consequences of an eviction on occupants; any measures the city could take to alleviate these “dire consequences”; whether it was possible to render the buildings concerned relatively safe and conducive to health for an interim period; whether the city had any obligations to the occupiers in the prevailing circumstances; and »

18 *Occupiers 51 Olivia Road v City of Johannesburg* 2008 (5) BCLR 475 (CC)

19 Settlement agreement reached in *Occupiers 51 Olivia Road v. City of Johannesburg* CCT 24/04 [29 October 2007], pp. 7-8.

20 These interim measures included cleaning and removing sewerage from the properties and providing standpipes with water, chemical toilets, skips and fire extinguishers.

21 Yacoob, J. Judgment in *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others* Case No: CCT 24/07 [2008] (CC), p. 27.

22 *Ibid.*, p. 11.

23 *Ibid.*, p. 13.

» when and how the city could or would fulfill these obligations. The Court stated that a municipality must make all reasonable efforts to engage appropriately with poor and vulnerable people, ensuring sensitivity and promoting human dignity in the process.²⁴

In terms of the City's housing plan to accommodate its inner city poor, the Court articulated that it was not its place to consider the question of "permanent housing solutions" for inner city poor and accepted the City's willingness to engage with the residents as evidence of its good faith to further develop this plan in the future. In essence, the Court took the pre-judgment negotiations and engagement between the two sides in this particular matter (as per the initial settlement order) as testament to the future success of engagement in achieving a reasonable result on a broader level.²⁵ Unfortunately, the Court made no mention of the proximity issue, which could have

acknowledged the importance of accommodating desperately poor people near their places of work and livelihood opportunities, and the potential for gentrification of Johannesburg's inner city as a result of one-sided urban regeneration strategies and 2010 World Cup-related developments.

The Situation at Present

Four months after the Constitutional Court judgment plans are still underway for the occupiers of San Jose and Zinns to move into the newly renovated buildings provided by the City. Both buildings are located within the inner city and have provision for privacy for families and for single people, access to water, electricity and sanitation, showers, cooking and heating facilities. Both are to be secured and maintained by a management committee that has yet to be constituted. Residents will not be made to pay more than 25% of their household monthly income in rent and will be guaranteed security against eviction.

The process of negotiation and consultation between the two sides has not always been easy. However, there is the sense, reinforced by the Constitutional Court judgment, that this is an important 'pilot project' in the inner city and that much rests on getting the process right.

The question remains as to how this intensive process can be replicated on a large-scale basis in the inner city, as well as elsewhere in South Africa. This is a particular issue in light of the fact that the reason that this case has come so far is because of the existence of a dedicated and capacitated pro bono legal team and a progressive judgment from the Constitutional Court. In the future, local authorities will have to facilitate, and prove that they have entered into, sensitive and meaningful engagement with occupiers of buildings. This will be an important precondition to the granting of an eviction order in similar circumstances.

24 Ibid, pp. 10-11.

25 Ibid, p. 20.

A LANDMARK JUDGMENT OF THE SOUTH AFRICAN HIGH COURT IN THE PRE-PAID WATER METERS CASE: *LINDIWE MAZIBUKO & ORS v. THE CITY OF JOHANNESBURG & ORS*

By Sonkita Conteh,²⁶ Ashfaq Kalfan²⁷ and Bret Thiele²⁸

In the landmark case of *Lindiwe Mazibuko & Ors v. The City of Johannesburg & Ors*,²⁹ the High Court of South Africa ruled that

the City of Johannesburg's pre-payment water meters scheme in Phiri, a township in Soweto, is unconstitutional. This judge-

ment reaffirms the principle of the progressive realisation of economic and social rights and increases the minimal amount of »

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28 Coordinator, ESC Rights Litigation Programme, COHRE.

29 Case no: 06/13865, 30 April 2008.

» safe drinking water that the City of Johannesburg is obligated to provide to those who do not have the resources to pay for the water they need for their day-to-day requirements.

Issues before the Court

The application by five residents of Phiri, supported by the Centre for Applied Legal Studies and the Coalition Against Water Privatisation, challenged the legality and constitutionality of the City's policy of imposing prepayment water meters. The applicants also challenged Regulation 3(b) of the *Regulations relating to Compulsory National Standards and Measures to Conserve Water* ('the National Standard Regulations') This regulation defines basic water supply as 25 litres per person per day or 6000 litres per household per month, upon which the City's policy was based.

The applicants asked the City to provide them and other similarly situated persons with 50 litres of free water per person per day, as well as the option of water credit which is afforded to the wealthier and largely white residents of Johannesburg who get water on credit, rather than having to use pre-payment meters. The case centred on Section 27(1) of the South African Constitution, which sets out the right of everyone to have access to sufficient water. According to Section 27(2), the state is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. The *amicus curiae* intervention by the Centre on Housing Rights and Evictions (COHRE), with assistance from the New

York University School of Law's International Human Rights Clinic and the Legal Resource Centre of South Africa, argued that the City's policy violated international human rights obligations as well as the Constitution of South Africa as informed by international law.³⁰ COHRE also provided comparative examples of jurisprudence on the right to water from jurisdictions including Argentina, Brazil and France.

Key aspects of the Court's decision

The Court noted that the prepayment meters result in an automatic shut-off in situations in which the free basic water allocation is exceeded and a household has insufficient funds to purchase water. In the case of the applicants, this meant that they often went without water for the last 15 days of each month.³¹ Such situations contravene national standards which require that no consumer is to be without water for more than seven full days in a year. The Court held that the implementation of prepayment meters with an automatic shut-off mechanism was unlawful, unreasonable and violated Section 33 of the Constitution on just administrative action read with the provisions of the *Promotion of Administrative Justice Act 2000* (which guarantee the right to lawful, reasonable and procedurally fair administrative action).³² This was due to the fact that the mechanism did not give reasonable notice to enable persons to challenge the shut-off of access to water prior to it actually occurring.

The Court also addressed the prepaid metre scheme in broad terms, holding that the forcible

imposition of prepayment meters contravenes the right to equality. It noted that, as a result of the provisions of By-Law 9 of the *City of Johannesburg Municipal Water Services By-Laws*, residents in wealthy, historically white areas get water on credit from the City, are entitled to notice before any cut-off of water supply and have the option to make arrangements to settle arrears, including an opportunity to make representations to the City, so as to be able to maintain an unlimited supply of water. Conversely, residents of poor and predominantly black areas such as Soweto do not enjoy access to these procedures. This situation, in the view of the Court, was not only unreasonable, unfair and inequitable; it was also discriminatory on the basis of colour.³³ It thus constituted a violation of the equality provision of the Constitution (Section 9).

The Court also addressed the issue of gender discrimination. Many domestic chores require access to water and are disproportionately performed by women, with many households in poor black communities headed by women. The Court favoured the argument made by COHRE and others that prepayment meters within this context discriminate against women on the grounds of sex.³⁴

The Court rejected the City's argument that prepayment systems had been widely accepted by residents. The Court examined the process by which these systems had been introduced, and concluded that it had been procedurally unfair. For instance, consultation, adequate notice, advice on legal

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30 The *amicus* brief and the court's judgment are available at www.cohre.org/watersa. The submissions of the applicants and respondents are available at: <http://www.law.wits.ac.za/cals/phiri/index.htm>

31 Para 92.

32 Para 92.

33 Para 94.

34 Para 159.

» rights, and information provided to the users on available remedies had been lacking.³⁵ The Court also rejected the City's argument that prepayment meters were beneficial for users in Phiri who could not afford water on credit, since, in actuality, such users faced cutoff of their water supply. The Court termed such an attitude as deeply patronising and discriminatory, noting that those who may not pay as required cannot be described in terms of colour or geographical areas, as the City's policy implied.³⁶

Two hundred litres per household per day insufficient

The Court rejected the applicants' request to declare unconstitutional the National Standard Regulations, which provide for a minimum quantity of potable water of 25 litres per person per day or 6000 litres per household per month. The Court took into account international guidelines, including WHO standards, which state that 25 litres of water per person per day provides for minimum consumption needs to maintain life over the short term (but does not include the amount water necessary for hygiene purposes). The Court stated that the minimum standard was understandable given South Africa's resource challenges.³⁷ However, the Court took the view that this standard was indeed a minimum and that the principle of progressive realisation applied.³⁸ Consequently, depending on its resources and the needs of its residents, Water Services Authorities are obliged to progressively realise

the right, and may increase the minimum as exemplified by the local authority of Volksrust in Kwazulu-Natal, which went above the national minimum amount and defined free basic water, taking into account water-borne sanitation, as 9000 litres per household per month, and Mogale City which provided 10,000 litres per household per month.³⁹

In the case of Phiri, the Court noted that the applicants need more water than the 25 litres per person per day. The Court noted that it takes 10-12 litres to flush a toilet in areas of water-borne sanitation and that many residents suffer from HIV/AIDS, therefore requiring extra water.⁴⁰ It stated that, in this context, water-borne sanitation is a matter of life and death.⁴¹ The court accepted expert evidence that 50 litres was required for residents of Phiri, in view of their circumstances. The judgment further noted that the average household in Phiri contains a minimum of 16 persons and that many connections are shared by residents.⁴² Thus, the 6000 litre allocation per month meant that many persons would receive far less (or none) of the 25 litres per day.⁴³

The Court noted that the City had established an Indigency Policy, whereby applicants could be granted an increased allocation of water, up to 10,000 litres per month. However, it determined that this system was insufficient, as the benefits were provided per account holder, which excluded the common situations in which

multiple households share a water standpipe, as in Phiri.⁴⁴ In addition, social stigma made people reluctant to register.⁴⁵ The scheme did not permit representations for further allocations of free water.⁴⁶ Finally, this scheme required applicants to agree to the installation of prepayment meters as a condition for an increased allocation.

The Court noted that it had not been contested that the City had the financial resources to increase the amount of water required by the applicants, including by channeling the water supplied for free to households that can afford to pay for it and by using the funding provided to the City by the national government for the purposes of water supply.⁴⁷ Given that that the applicants needed more than 25 litres per person per day, and that the City had the available financial and water resources, the court held that it was unreasonable in terms of Section 27(2) to limit supply to 25 litres per person per day.⁴⁸

The Court therefore ordered the City to provide the applicants and other similarly situated residents of Phiri with a free basic water supply of 50 litres per person per day. The Court rejected the argument of the Ministry of Water Affairs and Forestry (which was also a respondent in the case) that it was not legally obliged to provide free basic water. The Court noted that, on the basis of the Constitution, taking into account international law, the State is obliged to ensure free basic water to the poor.

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35 See, e.g., paras 106-112 and para 119.

36 Paras 153-4.

37 See, paras 45-48.

38 Para 49.

39 Paras 50-51.

40 Para 179.

41 Ibid.

42 Para 168.

43 Ibid.

44 Para 146.

45 Ibid.

46 Ibid.

47 Para 181.

48 Ibid.

» **Implications for Policy on Prepayment Water Meters in South Africa and Abroad**

The judgment incorporates a heightened awareness of the social and economic context of poor communities in South Africa and the best of South African constitutional jurisprudence on economic and social rights. The Court relied extensively on international law and comparative jurisprudence to aid its interpretation of domestic law.⁴⁹ The decision lends credence to the view that national courts can indeed rely on human rights standards and principles in their interpretation of domestic rights provisions. As such, it is an example worthy of emulation by courts elsewhere. Significantly, the judgment dispels the erroneous notion that existing Constitutional Court jurisprudence in South Africa completely rejects the concept of minimum core obligations. Referring to two landmark decisions, *Grootboom*⁵⁰ and *Treatment Action Campaign*,⁵¹ the judge maintained that it is possible to determine the minimum core content of a right if sufficient information is placed before a Court and that the concept of the minimum core is useful in determine the standard of reasonableness.⁵² In addition, by carefully assessing the City's Indigency Policy, the Court showed that aiming to target the poor through individual means-testing has its limits. The Court's remedy therefore applied to all residents of Phiri, not just those who the City considered as indigent.⁵³ This was a significant decision, given that examples from other countries show that

geographically based subsidies can help remedy the under-inclusion that is prevalent in individual means testing. This is particularly true in situations where poverty is concentrated, as in townships and informal settlements⁵⁴

The Court's decision that free basic water for the poor is a constitutional requirement is significant despite the fact that the national government has a free basic water policy. This is because, even going by government figures, a significant proportion of low-income South Africans do not yet have access to free basic water. This decision will put pressure on municipalities to extend access to free basic water. In addition, the decision will help protect poor users against disconnection from water in situations in which they cannot afford to pay.

Finally, by anchoring the quantity of basic water to the principle of need and resources, and, in this case, raising the threshold of free basic water from 25 to 50 litres in appropriate situations, the Court showed that the obligation to progressively realise social and economic rights encompasses real and unequivocal duties, which government bodies can be held accountable for failing to satisfy.

Conclusion

As mentioned above, the judgment not only demonstrates a heightened awareness of the social and economic context of poor communities in South Africa, it also incorporates the best of South African jurisprudence, in-

ternational law and comparative jurisprudence. For the first time, a South African court has affirmed the right of everyone to sufficient water for their basic daily requirements. This decision will be an immense boost to poor communities in South Africa and it creates a useful precedent for litigation globally.

Even though an appeal has been launched, the decision confirms - at least for the time being - that the introduction of prepayment meters can inhibit the right of access to water as such meters do not take into account inability to pay or the specific needs of users. This is particularly true where prepayment meters are imposed on poor communities. This decision is a warning shot across the bows of attempts to forcibly impose prepayment water systems on the poor in South Africa, elsewhere in Africa, and globally, given their procedurally unfair and arbitrary impact on the enjoyment of the right to water. The decision will no doubt embolden opponents of this system to take their activism to the courts. It will hopefully provide residents in townships such as Soweto, as well as broader civil society, a mobilising tool to ensure that the desired real changes on the ground are realised.

For more information, including the judgment, see: <http://www.cohre.org/watersa>

49 See, e.g., paras 35-40 ; paras 86-92..

50 *Grootboom v Oostenberg Municipality and Ors* 2000 (3) BCLR 277 (C).

51 *Minister of Health v Treatment Action Campaign (No.2)* 2002 (5) SA 721 (CC).

52 Pars 127-134.

53 See the Court's order at para 183(5).

54 See Section 10.6 of COHRE, AAAS, SDC, UN-HABITAT, *Manual on the Right to Water and Sanitation* (2007), www.cohre.org/manualrtws.

ADDRESSING RIGHT TO HEALTH-RELATED ISSUES UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS

*Dybeku v. Albania*⁵⁵

European Court of Human Rights

Right to health – prisoners' rights

Facts

Mr. Dybeku suffered from chronic paranoid schizophrenia from 1996 onwards, and was treated at a number of psychiatric hospitals. An explosion in his sister's family's flat killed two children and injured other people. Criminal proceedings were brought against Mr. Dybeku. His disorder was found to be in remission at the time of the explosion, and so he was permitted to stand trial. Found guilty and sentenced to life imprisonment, an initial appeal claiming a biased medical expert's report was unsuccessful. Living in three separate prisons and treated at the prison hospital as an inpatient, Mr Dybeku's counsel requested a transfer to a medical facility in response to his deteriorating condition. After the Court's decision was upheld at three separate domestic judicial levels, the case was brought to the European Court of Human Rights ('the Court'). The applicant argued before the Court that his detention conditions and the medical treatment provided by the Albanian prison system were inadequate considering his state of mental health. The Court found that, despite the fact that the applicant did not explicitly rely on Article 3 of the European Convention of Human Rights (the prohibition on torture and inhuman or degrading treatment or punishment), his claims could be examined under that Article.

Decision

The key focus of the Court's decision was Article 3 of the Convention.⁵⁶ The Court declared unanimously that Mr. Dybeku's complaint concerning inappropriate conditions of detention and the

provision of medical treatment revealed a violation of Article 3. The Court ordered that Mr. Dybeku be paid EUR 5,000 in non-pecuniary damages within three months.

Relevant domestic law concerning the conditions for life imprisonment and the conditions for prisoner release were presented to the Court. The European Prison rules, including the sections concerning mentally ill prisoners, as well as a series of reports on Albanian prisons by the European Committee for the Prevention of Torture, Inhuman and Degrading Treatment (CPT) were presented as relevant international material.

The Government argued that non-exhaustion of domestic remedies rendered the case inadmissible. However, the Court recognised that the applicant's counsel had repeatedly argued for release of Mr. Dybeku or his transfer to a specialised medical facility and so he could not be reproached for not exhausting domestic remedies. Furthermore, as the Government had failed to show proof that remedies already in place would have been effective, the Government's objection was dismissed and the case declared admissible.

Since the Court considered that the applicant's complaints about inadequate detention facilities and sub-par medical treatment both concerned Convention issues, they were dealt with jointly. Referring to its previous case-law, the Court held that violations of Article 3 must reach a base standard of severity, and that 'treatment' (accord-

ing to the text of Article 3) qualifies as 'inhuman' if it was premeditated, applied for extended periods of time and caused physical and mental suffering. The Court reiterated that it had previously deemed treatment to be 'degrading' where such treatment aroused feelings of fear, anguish and inferiority capable of debasing or humiliating a person.

The Court found that the State must ensure that a person is detained in conditions in line with respect for human dignity and that the detained person's health is secured. The Court recognised that it had been called on in the past to examine whether detention was deemed unsuitable given a person's mental or physical state. Given that Article 3 imposes upon the State Party an obligation to protect the physical well-being of those imprisoned, the Court reiterated that a lack of appropriate medical care could amount to a violation of Article 3.

The Court highlighted that there are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner; (b) the adequacy of the medical assistance and care provided in detention; and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant.

The Court agreed that the applicant was treated with similar drugs to those that would have been prescribed by his local physician and was given good treatment in lieu of a specialised treatment facility. »

55 Application no. 41153/06, 18 Dec. 2007. Full text of decision available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=dybeku&sessionid=10625602&skin=hudoc-en>

56 The Court rejected the applicants' complaint concerning his request for release under Article 6§1 of the Convention (right to a fair trial).

» However it found the applicant had been prescribed the same treatment repeatedly with little attention paid to the outcome of each regimen. Furthermore, the Court held that the feelings of “*inferiority and powerlessness*” of those suffering from mental illnesses merited increased attention to ensure Article 3 compliance. The Court accepted that Mr Dybeku’s psychological condition made him more vulnerable than the average detainee and that his detention may have exacerbated to a certain extent his feelings of distress, anguish and fear. The Court considered that the fact that he was treated in the same

way as other, healthy inmates, notwithstanding his particular state of health, demonstrated a failure of the Government’s commitment to improve the conditions of detention in compliance with recommendations of the Council of Europe.

The Court also highlighted that that the Government had not submitted information about prison conditions or showed that the applicant’s conditions were appropriate for a mentally ill person. Stating that regular visits to a local hospital were not a solution, the Court held that a lack of financial resources did not justify such poor conditions or treatment.

Taking into account the cumulative effects of Mr. Dybeku’s imprisonment, “*which clearly had a detrimental effect on his health and well-being*”,⁵⁷ the CPT’s findings in its latest reports concerning the conditions of detention in Albanian prisons and the Court’s own case-law in this area, the Court considered that the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on his health were sufficient to qualify as inhuman and degrading treatment. Therefore, the Court found a violation of Article 3.

Casenote by Evan Boggs

57 Ibid at para 51.

ROUND-UP OF RECENT DECISIONS IN ESC RIGHTS CASES

Housing rights – property rights

In *Khamidov v. Russia*,⁵⁸ the applicant complained that the occupation by federal police units of his estate between October 1999 and June 2002 had infringed his right to respect for his home and his private and family life (Article 8 of the European Convention of Human Rights). He also alleged that the occupation constituted a temporary *de facto* expropriation of his possessions in breach of his right to the peaceful enjoyment of his possessions (Article 1 of Protocol No. 1 to the Convention). Under the latter argument, the applicant also complained about the State’s failure to enforce a domestic judgment ordering the eviction of the police units in a timely manner, as well as the refusal of the domestic courts to award him compensation for the damage caused to his property by the federal forces. The estate included a plot of land, a house owned by the applicant, his brother’s house and industrial

buildings and equipment assigned to a limited company registered by the applicant and his brother. The Court concluded that there had been a violation of Article 8 and Article 1 of Protocol No. 1 as a result of the temporary occupation of the applicant’s estate by the consolidated police units and the damage inflicted on the estate.

The most significant element of the decision was the approach adopted by the Court to the definition of ‘home’ for the purposes of Article 8. In considering the Article 8 complaint, the Court noted that the applicant owned only one of the houses on the estate. However, having regard to the applicant’s submissions that the houses were built very close together and that the applicant, his brother and their next of kin (comprising six persons) always lived as one family, the Court considered that the house of the applicant’s brother,

and not only his own house, might be regarded as the applicant’s ‘home’ within the meaning of Article 8 of the Convention. The Court was not, however, convinced that the land and the industrial buildings, “*which appear to have been used entirely for industrial purposes*”,⁵⁹ could constitute the applicant’s home, although it reiterated its previous finding that the notion of ‘home’ can be interpreted widely and can apply to business premises in some circumstances. Nor could the land, which had been assigned for business activity rather than for merely residential purposes, be regarded as the applicant’s ‘home’. The Court concluded, however, that the applicant could claim to be a ‘victim’ of the alleged violations of Article 1 of Protocol No. 1 as regards the impugned measures taken in respect of the plot of land and industrial premises transferred to the company. »

58 Application no. 72118/01, 2 June 2008. Judgment available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Khamidov&sessionid=10512949&skin=hudoc-en>

59 Ibid at para 131.

» **Housing rights – Travellers - evictions**

In *Feantsa v France*,⁶⁰ the European Committee of Social Rights found France to be in violation of its obligations under Article 31 (the right to housing) in conjunction with the prohibition on discrimination (Article E) of the revised European Social Charter. The complainants had alleged that the manner in which legislation related to housing was implemented in France resulted in a situation of non conformity with Article 31. The Court found this to be the case due to: (a) the unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide rehousing solutions for evicted families; (b) the insufficiency of the measures in place to reduce the number of homeless, both in quantitative and qualitative terms; (c) the insufficient supply of social housing accessible to low-income groups; (d) the malfunctioning of the social housing allocation system, and the related remedies; and (e) the deficient implementation of legislation on stopping places for Travellers.

A full analysis of this decision will be included in the next edition of the Quarterly.

60 Complaint No. 39/2006, 5 Dec. 2007. Full text of decision at: http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/CC39Merits_en.pdf

CASE TO WATCH

On 28 March, INTERIGHTS registered a complaint against Greece with the European Committee of Social Rights. The complaint follows on from the European Committee of Social Rights' 2005 decision in *European Roma Rights Centre v Greece*,⁶¹ in which the Committee found Greece to have violated Article 16 of the European Social Charter on the right of the family to social, legal and economic protection, due to violations of the housing rights of Roma.⁶² INTERIGHTS' complaint focuses on Greece's failure to comply with the Committee's decision on the earlier collective complaint, as well as the commitments on implementation given by Greece to the Committee of Ministers who adopted a resolution in relation to the original complaint.⁶³ The complaint alleges that the Greek Government continues to forcibly evict Roma without providing suitable alternative accommodation. It also claims that the Roma in Greece continue to suffer discrimination in access to housing in violation of Article 16 alone or in conjunction with the non-discrimination clause in the Preamble of the Charter. This is the first complaint brought in relation to the failure of a State to remedy rights violations identified by the Committee in a previous complaint. The approach adopted by the Committee (as well as that of Committee of Ministers) is likely to be crucial in addressing the occasionally limited impact that successful collective complaints have in terms of ensuring that states remedy Charter violations identified by the Committee.

61 Collective Complaint No. 15/2003. Full text of decision at: http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/CC15Merits_en.pdf.

62 For more details, see 'A Recent European Housing Rights Case' (2005) 2(3) *Housing & ESC Rights Law Quarterly* 7.

63 Full text of Resolution at: <https://wcd.coe.int/ViewDoc.jsp?id=867037&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

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