A legal voice for the poor and powerless

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Those entrusted with drafting a new democratic Constitution for South African were confronted with many difficulties. One which loomed large was how to deal with apartheid's legacy of vast inequality and the grinding poverty of millions of South Africans.

From a constitutional perspective, the answer was not self-evident. With a democratically elected government committed to meeting the needs of the people, there was arguably no need for the Constitution to address itself to this question at all. The provision of housing, healthcare, food, water and the like would be obvious priorities for the new regime which could be expected and trusted to deal with these issues. If it did not do so, it would risk incurring the electoral wrath of those who put it in power. There was no need, therefore, to create enforceable rights of this kind.

Even if the Constitution were to address itself to socio-economic rights, how would this be done? In the debates preceding the adoption of the Interim Constitution some argued that there were insuperable legal obstacles to the inclusion of these rights in the Constitution. The core arguments were neatly captured by Nicholas Haysom (who supported their inclusion) in the following way:

“Socio-economic rights require the state to undertake positive action. This means that the efficacy of these rights is contingent upon available resources. Unlike the well-defined or absolute political/civil rights, they give rise to no enforceable

obligations. The courts themselves cannot enforce them. As Judge Ismail Mahomed has observed, 'How does one insist on a right to a meal, if the granaries of the nation are empty?'." (Nicholas Haysom '*Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 SAJHR 451 at 454)*

But there was a different view as well. The arguments for the inclusion of socio-economic rights in the Constitution were summarised, at the time, by Dennis Davis as follows:

"… [t]he arguments for the inclusion of social and economic rights such as the right to housing, medical care, education, a job and nutrition in a Bill of Rights rests on the premise that to deny these rights, while according first-generation rights of speech, association and freedom of religion is to engrave into society a distorted notion of democracy. In other words, economic and social inequality is a form of political inequality in that the former disables citizens from participating fully in the political process. A vote without food, association without a house, freedom to pray without any access to medical care makes a mockery of a Bill of Rights which claims to promote democracy and detracts from a claim that government works in the interests of the impoverished, particularly in a country such as South Africa with its legacy of apartheid, maldistribution of wealth and lack of opportunity for the vast majority of the population. For this reason the desire to constitutionalise a range of social and economic demands of millions of South Africans is understandable. It represents a particularly important symbol because it exhibits a commitment to meet understandable demands to redress the apartheid legacy." (D N Davis '*The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*' (1992) 8 SAJHR 475 at 475)

This view was ultimately to triumph but the architects of the Constitution were anxious to ensure that they met the arguments of the critics and that the inclusion of socio-economic rights was not simply a meaningless gesture. They adopted a formula which attempted to create an enforceable right while at the same time acknowledging the problem of limited resources. By way of example, the right to housing in Section 26 of the Constitution is formulated thus:

"Housing

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(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.”

A similar formulation was adopted in relation to the right of access to healthcare, food, water and social security in Section 27 of the Constitution and minor variations were used in relation to environmental rights in Section 24, certain property rights in Section 25 and the right to further education in Section 29.

With the inclusion of these rights in the Constitution, the debate now shifted to the interpretation and enforcement of socio-economic rights, a task entrusted to the Constitutional Court. The inclusion of these rights presented poor and marginalised communities with a potentially powerful weapon against the state. Courts can offer a unique forum for the voices of the politically weak, the poor and the marginalised sections of society to be heard in ways which would otherwise not be possible or as effective. The court setting has a number of special attributes. First, it is a forum in which debate is structured. Irrespective of how poor or politically weak a particular litigant may be, a judge is obliged to give both sides a fair hearing and to do so in a manner that does not permit one side to silence the other. So the very process of a legal hearing is a form of empowerment. Second, litigants are represented by lawyers who have special duties to their clients. They are ethically obliged fearlessly to uphold the interests of their clients by the free and unfettered statement of every fact and the use of every argument and observation that can legitimately, according to the principles and practices of law, conduce to this end. Third, save in exceptional circumstances, courts are required

to operate in the open. Members of the public, and more importantly, the media have access to court proceedings. Hence litigation presents the possibility of wide dissemination of views and arguments which might otherwise enjoy only limited circulation. These peculiar features of litigation therefore present opportunities to ventilate issues, frequently with significant moral overtones, in a public forum and simultaneously to draw attention to the plight of those affected and to mobilise support, both domestically and internationally.

Given this possibility, it is surprising that in the 15 years of our constitutional democracy, there have been very few cases on socio-economic rights decided by the Constitutional Court. This may be thought especially surprising given the ongoing discontent, sometimes expressing itself in violent protest, with service delivery, inadequate health and education and all the problems associated with poverty. The possible reasons for the paucity of cases is a matter to which I will return after dealing with some of the more important
socio-economic rights cases.

The first case to heard by the Constitutional Court was a tragic one (*Soobramony v Minister of Health, Kwa-Zulu Natal 1998 (1) SA 765 (CC)*). Mr Soobramony was suffering from a number of irreversible medical problems. He was in the final stages of chronic kidney failure. His life could only be prolonged by means of regular renal dialysis. When he sought such treatment from the provincial hospital, he was told that the hospital could only provide dialysis to a limited number of patients. The hospital simply did not have sufficient resources to provide dialysis to all patients who required it. He took his case to the Constitutional Court claiming

that his right to emergency medical treatment had been violated. He failed. The court reviewed the hospital's policy and its manner of implementation. The hospital had in place a policy to assist in making the “agonising choices” as to who should receive treatment and who not. The court held that these guidelines were reasonable and fairly applied to Mr Soobramony (who died shortly after judgment was delivered).

Then came the *Grootboom* case (*Government of the Republic of South Africa and others v Grootboom and others 2001 (1) SA 46 (CC)*) which was to lay the foundations of the Constitutional Court's socio-economic rights jurisprudence. The case concerned a problem all too familiar in South Africa – the right of access to adequate housing. The essential issue was described by Justice Zac Yacoob in the following way:

“The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing.” (para 3)

Mrs Grootboom and the community she represented had previously lived in an informal squatter settlement called Wallacedene. In the words of Justice Yacoob:

“The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all and more than two thirds earned less than R500 per month. About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare. Mrs Grootboom lived with her family and her sister's family in a shack about 20 metres square.

Many had applied for subsidised low-cost housing from the Municipality and had been on the waiting list for as long as seven years. Despite numerous enquires from the Municipality no definitive answer was given … Faced with the prospect

of remaining in intolerable conditions indefinitely [they] began to move out of Wallacedene … They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing." (at paras 7-8)

Having been rendered homeless by reason of their eviction, they applied to court for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. In the high court they got what they asked for on the basis that the majority of those affected were children who had an unqualified right to shelter in terms of the Constitution. On the day the matter was argued in the Constitutional Court, counsel for the national and provincial government advised the court that the community had been offered alternative accommodation "not in fulfilment of any accepted constitutional obligation but in the interests of humanity and pragmatism" (at para 91). The community accepted the offer. It was probably for this reason that the Constitutional Court did not find it necessary to order the state to provide alternative accommodation. It nevertheless declared that the state's housing programme fell short of the requirements of the Constitution because it failed to make reasonable provision within its available resources for people with no access to land, no roof over their heads and who were living in intolerable conditions or crisis situations.

The significance of the judgment lies in its articulation of the positive duties resting on the state. While the case concerned access to adequate housing, the principles laid down by the Court are of broader application. These principles include, the following:

- The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. (para 24)

- The state is required to "devise a comprehensive and workable plan to meet its obligations". That obligation is not unqualified and is defined by the state's obligation to take reasonable measures to achieve the progressive realisation of the right within available resources. (para 38)

- A reasonable programme must "clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available". (para 39)

- The measures in question must establish a coherent programme directed towards the progressive realisation of the right. "The programme must be capable of facilitating the realisation of the right. The precise contours and contents of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable". (para 41)

- The policies and programmes adopted must be reasonable "both in their conception and their implementation". (para 42)

- Reasonable measures "cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril,

> must not be ignored by the measures aimed at achieving realisation of the right". (para 44)

The next case of significance was the litigation between the Treatment Action Campaign and the government, then led by President Thabo Mbeki (*Minister of Health and others v Treatment Action Campaign and others (2) 2002 (5) SA 721 (CC)*). The long and bitter struggle waged by the Treatment Action Campaign to enable pregnant mothers to obtain the medication which held out the real possibility of preventing the transmission of HIV to their children ought never to have occurred. The moral and ethical issues were stark, indeed incontestable. It was the kind of case that a sensible and sensitive state should never have opposed. But oppose they did, with an aggression and hostility reminiscent of the way in which the apartheid state fought political cases in by-gone years.

The case had its genesis in the most devastating health crises South Africa has ever faced. The HIV/Aids epidemic had reached catastrophic proportions in South Africa. According to the department of health's own estimates, by the end of 2000 it was believed that there would be 4,7-million South Africans infected with HIV. Without antiretroviral therapy, the majority of people with HIV/Aids die prematurely of illnesses that destroy their immune systems, quality of life and dignity. Early diagnosis, clinical management, medical treatment of opportunistic infections and the appropriate use of antiretroviral therapy prolongs and improves the quality of life of people with HIV/Aids. One of the most common methods of transmission of HIV is from mother to child at or around birth. This results in approximately 70 000 babies being infected each year. Amid this gloom there emerged real hope.

Mother to child transmission could effectively and substantially be reduced by a single does to the mother and child of a drug known as Nevirapine. Nevirapine was a registered drug. It had been offered to the South African government free of charge by the manufacturer for five years for use in the public health sector. The government had not accepted this offer at the time. The cost of Nevirapine was, in any event, negligible. The cost per dosage was R10. Because Nevirapine had been registered by the Medicines Control Council, it was considered to be safe and effective. Nevertheless, the department of health adopted a policy drastically limiting the availability of Nevirapine. It designated two sites per province where pregnant HIV positive mothers could obtain the drug. Outside of the designated sites, Nevirapine could not be prescribed even where in the opinion of the treating doctor this was medically desirable and even where the facilities for its provision were available. The policy of precluding doctors at the non-designated sites from prescribing the Nevirapine was arbitrary and unreasonable. Major urban hospitals, like the Johannesburg Hospital, were excluded from the original designation. Doctors, however eminently qualified, who happen to work in non-designated sites were precluded by the state's policy from dispensing Nevirapine when this was medically indicated and irrespective of the availability of backup resources required for the implementation of the drug regimen. The real possibility of life for thousands of children born to mothers living with HIV was thus made dependant upon two factors: first, the extent to which they were able to afford treatment in the private healthcare system. Second, the designation of a limited number of sites per province in the public healthcare system at which it was permissible for doctors to dispense the drug.

Confronted with such an intransigent and unreasonable attitude, the Treatment Action Campaign was left with no choice but to go to court. It was armed with a potent weapon in the form of the constitutional right of access to healthcare services. The Constitutional Court made shorts shrift of the state's case. It stated:

"Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of Nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the State without any known harm to mother or child."

The Constitutional Court thus declared that the government was required

"… to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to heath services to combat mother-to-child transmission of HIV."

The court further declared that the government's existing policy fell short of its constitutional obligations and the government was ordered "without delay" to:

"(a) Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.

(b) Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical Superintendent of the facility concerned this is medically indicated."

Mention should also be made of a decision by the Constitutional Court to extend social assistance grants to permanent residents (*Khosa and others v Minister of Social Development and others 2004 (6) SA 505 (CC)*). The court had to decide whether the Constitution restricts the right of access to social security to South

African citizens only. The Constitution is silent on this issue conferring the right on "everyone". The court had little difficulty in concluding that permanent residents – in this case a group of destitute Mozambicans – fell within the ambit of the right. This result is perhaps unsurprising. What is significant about the decision, is that the court was prepared to make such an order notwithstanding the fact that the cost of including permanent residents was somewhere between R243-million and R672-million.

Last year the court handed down a number of decisions on socio-economic rights. The one which has attracted most attention was the *Mazibuko* case (*Mazibuko and others v City of Johannesburg and others 2009 ZACC 29*). It concerned the right of access to free water. The applicants were five residents of Phiri, a suburb in Soweto. They were all poor and had only limited resources to pay for water. In 2001, the City of Johannesburg and Johannesburg Water adopted a policy of proving 6kl of water free of charge to every household. For a household of eight persons this translated into 25l per person per day. The water was provided by means of pre-payment metres which delivered the first 6kl free but thereafter required the purchase of any additional water. The city's policy on free water evolved during the course of the litigation. It had to find a way of dealing with the problem of large households and population shifts which made individual targeting impossible. It decided to increase the allocation of free basic water to 10kl for every registered indigent household (together with a 4kl emergency supply) and in addition created a representation mechanism for individuals to obtain additional water based on need. The applicants were dissatisfied with this policy. The demanded 50l per person per day free of charge. They failed in their claim. In

order to understand why this occurred, it is necessary to appreciate the circumstances in which the policy of free basic water was introduced.

Soweto, like many other cities in South Africa, used to receive water at a flat rate, irrespective of how much water was actually consumed. By reason of a crumbling water infrastructure and the services boycotts of the 1980s, it was estimated that 75% of all water pumped into Soweto was unaccounted for. While between one quarter and on third of all water purchased by Johannesburg Water was distributed to Soweto, only 1% of revenue was generated from Soweto. It was this parlous situation which the city faced when it decided to introduce the system of pre-payment and free basic water. Before the pre-payment system was introduced, the city and Johannesburg Water canvassed widely and as an incentive offered to write-off the arrears of those who went onto the pre-payment system. In addition, the city had to contend with a wide range of needs besides water, such as electricity, sanitation, refuse removal, health, transport, crime. The list is endless. But it had in place a policy to do so. Of particular significance, in my view, was the fact that the residents of Phiri, despite their poverty, did not fall within the class of those whose needs were greatest. Within the Johannesburg area, there were an estimated 750 000 people living in informal settlements without access to basic water services at all. Moreover, the demand for 50l per person per day free of charge is unprecedented anywhere in the world, let alone in a developing and water scarce country like South Africa.

The failure by the applicants is thus explicable, when considered in its proper context. The Constitutional Court reaffirmed its approach in *Grootboom* and clearly

indicated when the positive obligations imposed upon government by the socio-economic rights in the Constitution would be enforced. It stated:

"If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom*, it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions … the court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised." (para 67)

Finally, mention should be made of the *Nokotyana* case, also decided last year (*Nokotyana and others v Ekurhuleni Metropolitan Municipality and others [2009] ZACC 33*). The case was brought by the residents of an informal settlement. Following *Grootboom*, the government had put in place a detailed and comprehensive policy dealing with emergency housing and the upgrading of informal settlements. The residents of the informal settlement in question had applied for the upgrading of their settlement into a formal township. Fed up with waiting, they applied to court demanding immediately specific forms of sanitation and high mast lighting, pending the decision on the upgrade of the settlement. The application failed for a number of reasons. The real problem lay in the unconscionable delay in processing the application for the upgrade. The problem did not lie in the policy regarding emergency housing and upgrading of settlements, which the applicants had elected not to challenge. The court stated:

"The delay by the province is the most immediate reason for the dilemma and desperate plight of the residents. As long as the status of the settlement is in limbo, little can be done to improve their situation regarding sanitation, sufficient lighting to enhance community safety and access by emergency vehicles, as well as a range of other services." (para 57)

Nevertheless, the court placed the province on terms to reach a decision on the application for upgrading within a stipulated time period.

I return to the debate foreshadowed at the beginning of this lecture and pose the question whether poor and marginalised communities are better off with the entrenchment of socio-economic rights in the Constitution. I suggest that the answer is in the affirmative for two principal reasons. First, there have been some very significant victories in the courts which may have been unattainable or at least considerably more difficult without the force of the socio-economic rights which underpinned the arguments. The Nevirapine case is perhaps the best example. The decision made it virtually impossible for the Mbeki administration to persist with its flirtation with Aids denialism. Second, it is clear that the principles laid down by the Constitutional Court in *Grootboom* are taken seriously by the state, albeit in a somewhat inconsistent manner. The Mazibuko case on access to sufficient water illustrates this vividly. The City of Johannesburg had self-consciously sought to model its water policy on the requirements of the Constitution as articulated by the Constitutional Court and had achieved significant success in its endeavour. In this sense, the *Mazibuko* case can be seen as a triumph for socio-economic rights, even though the applicants lost their case. In the words of the Constitutional Court, the evidence made plain that the city "has approached … the challenges it faces with an impressive seriousness of purpose and commitment to improving the lives of the residents … in a sustainable fashion" (para 164).

In my view, the relative paucity of socio-economic rights cases to have reached the Constitutional Court, therefore, does not speak to their irrelevance. The small number of cases is not the appropriate yardstick to measure the efficacy of socio-economic rights. One must accept that law has its limits and that recourse to the courts is not axiomatically the panacea for social problems. Moreover, socio-economic rights cases are complex and their success or failure is dependent upon a wide variety of factors.

In a constitutional democracy, the demarcation between the executive and the courts is always a delicate exercise. In my view, the Constitutional Court has struck an appropriate balance. Were the courts to act as surrogate legislators in this sphere, there is a serious risk of engendering a very undesirable conflict between the judiciary and the executive. The Nevirapine case raised the spectre of outright defiance by the State. After the high court had found in favour of the Treatment Action Campaign, the then minister of health, in a televised interview, indicated that she would not obey the court's decision. She was immediately repudiated by the then minister of justice. This incident (and there have been others) indicates the unease with which some politicians view the oversight role of the courts. In so stating, I do not suggest that the courts should be or have been cowed into submission when dealing with socio-economic rights cases. I mean no more than to emphasise the inherent delicacy of the need to strike the appropriate balance in order to safeguard our constitutional enterprise.

Gilbert Marcus SC is a member of the South African Bar. He delivered this address at the University of Cape Town Summer School on Tuesday January 19 as part of

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