

THE HIGHEST COURTS AND SOCIOECONOMIC RIGHTS



The high-level research project that assesses the impact of the two highest courts – the constitutional court (CC) and the supreme court of appeal (SCA) – on the lived experiences of all South Africans is now halfway, reports project co-leader, *Narnia Bohler-Muller*.

The Department of Justice and Correctional Services commissioned the HSRC's Democracy, Governance and Service Delivery research programme, together with its partner, the Nelson R Mandela School of Law of the University of Fort Hare (UFH) led by Prof. Obeng Mireku, to assess the impact of the two highest courts, the constitutional court (CC) and the supreme court of appeal (SCA), on the lived experiences of South Africans, especially the poor, vulnerable and marginalised.

The focus is on the adjudication and subsequent implementation (or not) of socioeconomic rights within the context of a capable and developmental state, as stated in the 2030 vision of the National Development Plan (NDP).

The desk-top reviews for the project have been completed, and it is now in its second phase, which comprises conducting 130 interviews with key informants who have been involved in court cases dealing with socioeconomic rights since 1994. In these cases, the courts had to adjudicate on the protection, promotion and fulfilment of socioeconomic rights by the government. The cases dealt with a wide range of topics including the provision of housing, water and electricity, health care, social security and education.

CC part of SA's social transformation

As part of the interview process, we interviewed two esteemed former constitutional court justices who presided over a number of these cases. They believed the court had a role to play in achieving social transformation, but also felt it was not the role of the judiciary to interfere in the executive's policy-making processes.

It was agreed the *Grootboom* case, which led to a change in the government's emergency housing policy, and the *Treatment Action Campaign* case, which led to the provision of antiretroviral therapy to HIV-positive pregnant mothers throughout South Africa, were landmark cases that demonstrated the CC's commitment to its constitutional mandate.

The learned justices also agreed the test the court had applied to adjudicate socioeconomic rights was the best approach to take. This test requires the government to take 'reasonable' steps to ensure the 'progressive realisation' of socioeconomic rights.

The judges expressed concern about the failure of government departments to adequately implement court orders, stating it was necessary to ensure the rule of law was upheld and that the judiciary should be respected.

The CC has been instrumental in holding the government to task when the latter has not shown proof of the progressive realisation of rights. It has also developed a new remedy that requires the government to *meaningfully engage* with litigants so as to find solutions that take into account the needs of people and communities.

A constitutional dialogue is necessary to ensure the promises embedded in the constitution do not fall by the wayside.



Each arm of government – executive, legislative and judicial – has a role to play in the transformation of South African society to ensure a better life for all. It is becoming more apparent that a constitutional dialogue is necessary to ensure the promises embedded in the constitution do not fall by the wayside and in so doing, threaten social cohesion and nation-building efforts. ■

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