Legal opinion:

State support of community and home based health care provision for people living with HIV/AIDS

Executive summary

In order to provide palliative and other forms of ongoing care to people living with HIV/AIDS, the state relies to a large degree on the services of voluntary community and home based care-givers (chbc's) operating under the auspices of non-governmental and community-based organisations (ngo's and cbo's). The state supports the work of chbc's only indirectly, by providing funding to ngo's and cbo's for infrastructural and other support and stipends; and by providing health care training in health care provision.

Despite the official recognition of their role and the state support that they enjoy, chbc's face a number of problems that significantly dilute the impact of their work:

- State funding is inadequate so that only a relatively small percentage of chbc's receive stipends for their work and infrastructural support is limited.
- State funding is allocated to responsible ngo's and cbo's on an annual basis only, so that long term planning is not possible and ngo's and cbo's continually operate under the threat of losing funding.
- Training is inadequate and takes place on a small scale only, so that only a relatively small percentage of volunteers who work as chbc's receive training; training is also not accredited.
- No form of state registration or accreditation of chbc's exists.
- The state does not regulate or prescribe standards to the chbc-sector.

In this opinion I explore possible legal responses to the inadequacies in the state's support for the chbc-sector.

I focus on one possible form of response: a constitutional challenge on the basis of constitutional health care rights. Such a challenge would take the form of an allegation that the failures in the state's support for the chbc-sector breaches the state's constitutional duty to promote and fulfil health care rights. In particular, drawing on similar litigation that has taken place in the social development field, I propose an argument that the state, having adopted a plan of sorts as part of its general strategy to combat HIV/Aids to provide health care services through and support chbc's is under a duty to make reasonable progress in implementing that plan and is in particular under a legal duty to provide a reasonable level of funding for that plan.

In this respect I come to the conclusion that the state would currently probably not be able to show that its implementation of and funding for the chbc-sector meets

the constitutional requirement of reasonableness, such that a legal challenge along these lines is potentially viable and could be pursued.

However, again drawing on the experience in similar litigation in the social development field, I conclude that the real difficulty with any such potential challenge would not be to win the case, but to obtain from the court a practical and enforceable remedy. I then propose a variety of possible ways in which this problem can be mitigated – in particular I point out that the establishment of a legal duty to improve state support for the chbc-sector in itself would create a tool that can be used as part of political strategies to improve progressively state support for community and home base care.

Brief:

1. I was briefed to explore possible legal responses to perceived failures in the support from by the state, notably through the departments of health, social development and public works, to community and home based care givers providing different forms of treatment to people living with HIV/AIDS, as part of its general strategy to combat HIV/Aids.

Facts:

2. The national Department of Health (DoH) recognises that an important aspect of the health care required with respect to people living with HIV/AIDS is palliative and other forms of ongoing basic supportive care provided outside of formal health care facilities at patients' home or places of shelter.[1]

3. Despite officially recognising the need for such care, the DoH and, consequently, provincials departments of health do not provide this kind of health care to people living with HIV/AIDS itself. Rather, it largely depends on the work of volunteer community and home based care-givers (chbc's) who provide such basic health care services through ngo's and cbo's operating in the civil society health care and social assistance sectors.[2]

4. The DoH supports the work of these chbc's indirectly, by providing, through conditional grants and subsidies, funding to the ngo's and cbo's they work for, from which basic infrastructural and management support can be provided, and from which, importantly, stipends are paid to chbc's to cover their costs and as a basic form of remuneration.[3]

5. The support provided in this way by the state is only partly seen as a health care initiative. Formally, the payment of stipends and provision of other forms of support to chbc's is part of the government's Extended Public Works Programme, a poverty alleviation programme aimed at creating basic employment opportunities for indigent people so that they can earn a subsistence income. This means that the support

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1 See, for example, government's National Departments of Social Development, Health and Education 'National Integrated Plan for Children and Youth Infected and Affected by HIV/AIDS (NIP)' (2006).

2 Gender Links 'Fact Sheet 9: Care work' (2005) 1.

3 As above.

provided to chbc's is run jointly by the DoH, the Department of Social Development (DSD) and the Department of Public Works (DPW).

6. At last count, it was estimated that there are at least 40 000 hcbc's providing basic health care in communities nationally, working through 1500 different ngo's or cbo's. Of these volunteers only 22% receive stipends, ranging from R1000 per month in some provinces, to R1700 in others.[4]

7. State funding for chbc's has steadily increased over the last several years culminating in an announcement in 2005 that from then until 2010, R500 million per year would be allocated for use with respect to chbc's, with the aim to increase the numbers of chbc's to 150 000.[5]

8. Despite the DoH, DSD and DPW's formal acknowledgement of the important role played by chbc's in basic health care provision to people living with HIV/Aids, despite their formal involvement in that sector, and despite the seemingly high levels of funding injected since 2005, chbc's and the organisations supporting them face a variety of problems that seriously jeopardise their efforts to provide quality basic health care to people living with HIV/AIDS:

- State funding remains inadequate, whether because it is not enough, or because in many cases provinces annually fail to spend their allocations for support to chbc's. This means that the number of chbc's receiving stipends remains low (only 22% - see para 6 above) and that many organisations providing support to chbc's continue operating without basic necessary resources such home-care kits, wheelchairs and transport for chbc's. Clearly the level and scope of care that chbc's can provide suffers from this.[6]
- State funding to ngo's and cbo's supporting chbc's is allocated on an annual basis, making longer term planning and budgeting difficult.
- Only a small percentage of chbc's who in fact provide care have been trained in the 59 day training programme provided by the state.[7] This means that, potentially, questions can be asked over the quality of care provided by many

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4 As above.

5 As above

6 As above. See also Adams and Claassens 'The role of Poverty Relief and Home-based Care within the National Integrated Plan for HIV/AIDS' (2001) Budget brief no. 78 Idasa Budget Information Service, available at http://www.idasa.org.za/bis (accessed 27 November 2007).

7 Gender Links (n 2 above) 1.

chbc's. The 59 day training course has itself also drawn criticism related to its quality and scope – the course is not accredited with the relevant accreditation authorities.[8]

- The state does not regulate the chbc-sector in any over-arching way. So, for example, no general standards for the provision of care exists, and no system for registration of chbc's. [9] This leads to problems with the consistency and quality of care provided from province to province and community to community.

Issues

9. The basic concern behind me writing this opinion is with the health care rights of people living with HIV/AIDS. In this respect my focus is on the adequacy, in constitutional terms, of the state's programme to support chbc's as an element of their broader approach to combating and treating HIV/AIDS. I do not, therefore, address other legal issues that may arise, such as the employment related rights of chbc's.

10. From the facts related above, two important points arise:

- First, although the state does not itself provide the kind of care that chbc's engage in, it is clear that it regards that care as part of its general response to HIV/AIDS. As such the state's programme in support of chbc's can be evaluated as part of the state's attempt to fulfil its constitutional duties with respect to health care rights in the context of HIV/AIDS care – to use the language of section 27(2) of the constitution, it 'legislative and other measures' progressively to realise health care rights. That is, the fact that the state provides this kind of care indirectly through private volunteers and institutions does not mean that it escapes legal responsibility with respect to it – it remains constitutionally responsible for the quality and scope of care provided by chbc's.
- There are important problems in the provision of state support to the chbc-sector, problems that inevitably limit the extent to which chbc's can provide comprehensive and quality care to people living with HIV/AIDS and that inevitably, therefore impact on the constitutional health care rights of people living with HIV/AIDS.

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8 As above.

9 As above. The DoH has issued the 'National guideline on home-based care and community-based care' available at http://www.capegateway.gov.za/eng/publications/guidelines_manuals_and_instructions/N/3654 (accessed 28 November 2007).

11. In this light the following legal issue arises, which I proceed to address in the remainder of this opinion: does the state's current programme of support for home-care to people living with HIV/AIDS provided by volunteer chbc's working within ngo's or cbo's amount to a failure in the state's constitutional duty to promote and fulfil constitutional health care rights of people living with HIV/AIDS?

Analysis:

Applicable law

12. The duty to promote and fulfil health care rights requires the state to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures'[10] so that access to basic resources is extended and enhanced - in sum, it must act affirmatively to realise the rights. The state breaches the duty to fulfil not when it invades the existing exercise of health care rights, but when it does not do enough, or does not do the appropriate things fully to realise those rights.

13. To determine whether such breaches have occurred, the Constitutional Court has used a traditional model of judicial review,[11] but has given it new content. As with any breach of any other right, when it is alleged that the duty to promote and fulfil health care rights has been breached, where *prima facie* such a breach is established, the Court considers whether or not it can be justified. The Court has developed a special test or standard against which to evaluate the justifiability of state measures to fulfil health care rights. Such breach can be justified only in terms of a special standard of scrutiny - the Court's 'reasonableness' standard - developed on the basis of the internal limitation clause attached to health care rights.

14. The Constitutional Court has described its 'reasonableness' standard of scrutiny in four cases. In *Soobramoney v Minister of Health, KwaZulu-Natal*,[12] it denied an application for an order that a state hospital provide dialysis treatment to the applicant, finding that the guidelines according to which the hospital decided whether to provide the treatment were not unreasonable[13] and were applied rationally and in

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10 Committee on ESCR General Comment No 14 (*The right to the highest attainable standard of health (art 12 of the Covenant)* UN Doc E/C 12/2000/4) para 33.

11 As suggested by Mureinik in an early article; E Mureinik 'Beyond a charter of luxuries: Economic rights in the Constitution' (1992) 8 *South African Journal on Human Rights* 464.

12 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) (Soobramoney).

13 Soobramoney (n 12 above) paras 24-28.

good faith to the applicant.[14] As such, the Court held that the denial of treatment did not breach the section 27(1) right of everyone to have access to health care services. In *Government of the Republic of South Africa v Grootboom*,[15] the Court heard a claim that the state was obliged to provide homeless people with shelter. It declared the state's housing programme inconsistent with section 26(1) of the Constitution.[16] In *Minister of Health v Treatment Action Campaign*,[17] the Court held that the state's policy not to provide Nevirapine at all public health facilities to prevent the mother-to-child transmission (MTCT) of HIV at birth, as well as the general failure by the state to adopt an adequate plan to combat MTCT of HIV breached section 27(1) of the Constitution The Court held that the state's measures to prevent MTCT of HIV breached its duties in terms of section 27(1) of the Constitution,[18] and declared as much and directed the state to remedy its programme.[19] In *Khosa v Minister of Social Development*,[20] the Court held sections of the Social Assistance Act[21] excluding permanent residents from access to social assistance grants inconsistent with section 9(3) (the prohibition on unfair discrimination)[22] and section 27(1)(c) (the right to have access to social assistance)[23] of the Constitution. The Court read words into the Act to remedy the constitutional defect.[24]

15. Although the Court has as yet not been explicit about this, it is clear from these cases that the reasonableness standard is a shifting standard of scrutiny. In *Soobramoney*, the Court applied a basic rationality and good faith test to the decision of the state not to provide renal dialysis treatment to the claimant.[25] In *Grootboom*[26]

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14 *Soobramoney* (n 12 above) para 29.

15 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*).

16 *Grootboom* (n 15 above) para 95.

17 *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) (*Treament Action Campaign*).

18 *Treatment Action Campaign* (n 17 above) para 95.

19 *Treatment Action Campaign* (n 17 above) para 135.

20 *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) (*Khosa*).

21 As above.

22 *Khosa* (n 20 above) para 77.

23 *Khosa* (n 20 above) para 85.

24 *Khosa* (n 20 above) paras 89 & 98.

25 With respect to its evaluation of the guidelines according to which the state made this decision, the Court applied a stricter reasonableness test; *Soobramoney* (n 12 above) paras 23-28.

and *Treatment Action Campaign*,[27] the Court applied a more stringent means-end effectiveness test.[28] In *Khosa*,[29] in turn, the Court applied a yet stricter proportionality test. The Court has not been explicit about which factors determine the strictness of its scrutiny, but the cases indicate that the position of the claimants in society;[30] the degree of deprivation they complain of and the extent to which the breach of right in question affects their dignity;[31] the extent to which the breach in question involves undetermined, complex policy questions;[32] and whether or not the breach also amounts to a breach of other rights,[33] all play a role. Most importantly with respect to the issues raised in this opinion, it seems that our courts regard the constraint under which they operate in applying their reasonableness standard to be significantly diluted where the state has adopted a measure to give effect to health care rights and it is not the adequacy of that measure itself that is scrutinised by the court, but the adequacy of its implementation and resourcing.[34]

16. The Court derives its reasonableness standard from the state's duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of socio-economic rights. In describing this duty, the Court has described the standards against which to evaluate the state's measures. The Court

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26 n 15 above.

27 n 17 above.

28 It is also clear that in *Treatment Action Campaign*, although the standard of scrutiny applied by the court was in formal terms the same as in *Grootboom*, the Court in fact scrutinised the state policy at issue there more rigorously than it did in *Grootboom*.

29 n 20 above.

30 Whether they are a marginalised or especially vulnerable group; P de Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal on Human Rights* 258 266.

31 *Khosa* (n 20 above) para 80.

32 In *Grootboom* (n 15 above), the issues were much less clearly delineated than in either *Treatment Action Campaign* (n 17 above) or *Khosa* (n 20 above). Also, in *Treatment Action Campaign*, many of the complex issues the Court had to consider (ie the safety/efficacy of Nevirapine and the availability of the necessary infrastructure to provide it properly) had either been determined by specialised bodies empowered to decide such issues (ie the Medicines Control Council), or the Court had dispositive evidence at its disposal with which to decide. In both the latter cases a stricter scrutiny was applied than in *Grootboom*.

33 In *Khosa*, the impugned provisions also breached sec 9(3). In applying this section, the Court uses a standard of scrutiny rising to the level of proportionality. It would make little sense to apply sec 27(2) to the same breach using a more lenient standard.

34 See D Brand 'Socio-economic rights and the courts in South Africa: Justiciability on a sliding scale' in F Coomans (ed) (2006) *Justiciability of economic and social rights: Experiences from domestic systems* 207 233-234 and the authorities cited there.

has presented its reasonabeleness test as a means-end effectiveness test: In Grootboom, the Court indicated that the state's measures are evaluated to determine whether they are 'capable of facilitating the realisation of the right'.[35]

17. The Court's reasonableness standard requires first that the state indeed act to give effect to socio-economic rights, that the state must devise and implement measures to realise health care rights - it cannot do nothing.[36] Although these measures need realise the rights only *progressively* - the need for full realisation is deferred[37] - the state must have measures in place to realise these rights and must implement them. In addition, the state must show progress in implementing these measures and must be able to explain lack of progress or retrogression. Particularly any deliberate retrogression would be a *prima facie* breach, requiring convincing justification.[38]

18. Second, the reasonableness standard requires that those measures that the state does adopt must be reasonably capable of achieving the realisation of the right in question.[39] To be judged as reasonable in this sense, the state's measures must meet at least the following basic standards:

18. *The measures must be comprehensive and co-ordinated*.[40] This means in the first place that the state's programme with respect to a right must address 'critical issues and measures in regard to *all* aspects' of the realisation of that right.[41] Using the right to food as an example, the Committee on ESCR has said that this requires the state to adopt measures with respect to the 'production, processing, distribution, marketing and consumption of safe food, as well as parallel measures in the fields of health, education, employment and social security', whilst at the same time taking care 'to ensure the most sustainable management and use of natural and other resources for food at the national, regional, local and household levels'.[42] *Grootboom*, although

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35 *Grootboom* (n 15 above) para 41.

36 Secs 26(2) & 27(2) are clearly mandatory provisions with respect to this basic point - 'the state *must* take … measures … to achieve the … realisation of these rights' (my emphasis).

37 *Grootboom* (n 15 above) para 45.

38 As above. Deliberate retrogression breaches the negative duty to respect rights. As such it is subject for its justification to sec 36(1) rather than to the reasonableness scrutiny that applies uniquely to the positive duties imposed by qualified rights.

39 *Grootboom* (n 15 above) para 41.

40 *Grootboom* (n 15 above) para 39.

41 Committee on ESCR General Comment 12 (*The right to adequate food (art 11 of the Covenant)* UN Doc E/2000/22) para 25.

42 As above.

decided on another basis, offers an example of a case where the state's measures to give effect to the right to housing were not sufficiently comprehensive to be reasonable. The state's mistake in *Grootboom* was that, despite having a programme to provide access to housing that the Constitutional Court described as 'a major achievement',[43] it had done nothing with respect to a critical aspect of the right to housing - it had no measures in place with which to provide shelter to people with no roof over their heads. As such, its housing programme was not comprehensive. The requirement of co-ordination simply holds that a programme must as a whole be coherent, such that responsibilities are clearly allocated to different spheres and institutions within government.

19. *Financial and human resources to implement measures must be made available*. In *Grootboom* the Court stated that, for a programme to be reasonable, 'appropriate financial and human resources [must be] available'.[44] The Court has as yet not elaborated on this tantalising phrase. It is clear that the Court is loath to prescribe to the state how and on what it must spend its money - to tell it that it must expend resources so as to do something it did not plan on doing and does not want to do.[45] However, this phrase does seem to indicate that the Court will not allow the state to adopt mere token measures: *Where the state has itself decided and so undertaken to do something*, it is under a legal duty, which the Court would be able to enforce, to allocate the resources reasonably necessary to execute its plans. In *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*,[46] the plaintiffs had applied for the Social Relief of Distress Grant, but despite clearly qualifying for it, did not receive it. Their complaint was that although, in terms of the Social Assistance Act[47] and its regulations, provincial governments were required to provide the grant to qualifying individuals upon successful application, the North West Province had not dedicated the necessary human, institutional and financial resources to do so. The grant was consequently available on paper only, and not in practice. The case resulted in a settlement order

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43 *Grootboom* (n 15 above) para 53.

44 *Grootboom* (n 15 above) para 39.

45 See below for a discussion of the court's approach to scrutinising the state's budgetary choices.

46 *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province* Case 671/2003 23 October 2003 (B). My thanks to Nick de Villiers, of the Legal Resources Centre in Pretoria, for providing me with a copy of the order.

47 Act 59 of 1992.

that in essence required the province to dedicate the necessary human, institutional and financial resources to provide the grant. Specifically, it requires the province to acknowledge its legal responsibility to provide Social Relief of Distress effectively to those eligible for it and then to devise a programme to ensure its effective provision. This programme must enable it to process applications for Social Relief of Distress on the same day that they are received, must enable its officials appropriately to assess and evaluate such applications and must enable the eventual payment of the grant. Importantly, the province was ordered to put in place the necessary infrastructure for the administration and payment of the grant, *inter alia* by training officials in the welfare administration in the province.[48]

20. *The state's measures must be both reasonably conceived and reasonably implemented*.[49] This element of the Court's reasonableness test is closely related to the requirement of 'reasonable resourcing' outlined above. Of course (also in terms of the understanding of 'progressive realisation' outlined above) it is not sufficient for the state merely to adopt measures on paper. These measures must also in fact be implemented effectively. The *Kutumela* case, described above in the context of adequate resourcing, also illustrates this element of the Court's reasonableness standard. In effect, the Court in *Kutumela* ordered the provincial government to implement a measure that existed in concept but not in practice.

21. *The state's measures must be 'balanced and flexible', capable of responding to intermittent crises and to short-, medium- and long-term needs,*[50] *may not exclude 'a significant segment of society',*[51] *may not 'leave out of account the degree and extent of the denial' of the right in question and must respond to the extreme levels of*

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48 See in this respect also *People's Union for Civil Liberties v Union of India* Writ Petition [Civil] 196 of 2001, available at http://www.righttofoodindia. org/mdm/mdm_scorders.html (accessed 31 October 2004), an Indian case dealing with an application in part directed at obtaining orders that the Indian government's existing measures at national and state level to address food insecurity and famine be effectively implemented. The complaint alleged, amongst other things that, although adequate food reserves existed in India, and although the state had adopted various measures to address food insecurity and famine, these measures were not implemented in part because state governments routinely diverted funds from national government, intended to implement them, to other needs. In response, the Indian Supreme Court has issued a number of interim orders requiring, among other things, that funds allocated from national level to state governments for use in public distribution of food and famine measures in fact be used for those purposes.

49 *Grootboom* (n 15 above) para 42.

50 *Grootboom* (n 15 above) para 43.

51 As above.

deprivation of people in desperate situations.[52] These related requirements of flexibility and 'reasonable inclusion'[53] formed the basis for the Constitutional Court's decisions in both *Grootboom* and *Treatment Action Campaign*. In *Grootboom*, the Court found that the state's housing programme was inconsistent with sections 26(1) and (2) because it 'failed to recognise that the state must provide relief for those in desperate need'.[54] In *Treatment Action Campaign*, the Court held the state's measures to prevent MTCT of HIV to be inconsistent with the Constitution because they 'failed to address the needs of mothers and their newborn children who do not have access'[55] to the pilot sites where Nevirapine was provided, and because the programme as a whole was 'inflexible'.[56] In one sense, these different requirements all relate to the idea that the state's programmes must be *comprehensive*. Any state programme designed to fulfil a socio-economic right, will be incomplete (and as such unreasonable) unless it includes measures through which short term crises in access to the right can be addressed and measures that 'provide relief for those in desperate need'.[57] However, the intriguing question raised by these requirements related to flexibility and reasonable inclusion, and particularly the Constitutional Court's phrase in *Grootboom*, that a programme must take account of the degree and the extent of deprivation with respect to a right,[58] is whether the Court's reasonableness test in this respect requires state measures to prioritise its efforts, both with respect to temporal order and resource allocation, according to different degrees of need. Does the test require the state to engage in 'sensible priority-setting, with particular attention to the plight of those in greatest need'?[59] Roux has made a strong argument that it does not. He points out that the Court's finding in *Grootboom* requires 'merely *inclusion*' and that 'a government programme that is subject to socio-economic rights will [in terms of this finding] be unreasonable if it fails to *cater* to a significant segment of

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52 *Grootboom* (n 15 above) para 44.

53 See T Roux 'Understanding *Grootboom* – A response to Cass R Sunstein' (2002) 12:2 *Constitutional Forum* 41 49.

54 *Grootboom* (n 15 above) para 66.

55 *Treatment Action Campaign* (n 17 above) para 67.

56 *Treatment Action Campaign* (n 17 above) para 80.

57 *Grootboom* (n 15 above) para 66.

58 *Grootboom* (n 15 above) para 44.

59 CR Sunstein 'Social and economic rights? Lessons from South Africa' (2001) 11:4 *Constitutional Forum* 123 127.

society.'[60] With respect to the finding in *Grootboom*, Roux's reading is correct: The Court there clearly simply required the state to *take account of* the needs of those most desperate, without at the same time suggesting that the needs of such people should in any concrete way take precedence over other needs.[61] However, it has been suggested that the Court's reasonableness test can take account of a prioritisation according to need, by varying the standard of scrutiny that it applies to particular alleged breaches of socio-economic rights *according to the degree of deprivation suffered by those affected by the breach.*[62] According to this view, a court would scrutinise state measures more rigorously where those complaining of their impact are desperately deprived. This idea has recently been given credence in *Khosa*.[63] As pointed out above, the Court in *Khosa*, possibly for a variety of reasons, applied a substantially stricter standard of scrutiny to the state's exclusion of permanent residents than it applied to the state's HIV prevention policy in *Treatment Action Campaign,*[64] or the state's housing programme in *Grootboom.*[65] The Court in *Khosa* applied a proportionality test, weighing the impact that the exclusion had on the dignity and practical circumstances of indigent permanent residents against the purposes for which the state had introduced the exclusion. The Court did not only find that the basic survival interests of the excluded permanent residents should take precedence over the legitimate purposes for their exclusion.[66] It also, particularly by rejecting the state's arguments that to include permanent residents in the social assistance scheme would place an undue financial burden on the state, potentially requiring the diversion of resources from other social assistance needs,[67] by implication held that the basic survival needs of the permanent residents should take

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60 Roux (n 53 above) 49.

61 D Brand 'The proceduralisation of South African socio-economic rights jurisprudence, or "What are socio-economic rights for?" ' in H Botha, AJ van der Walt & JWG van der Walt *Rights and democracy in a transformative constitution* (2004) 33 50.

62 See D Brand 'The minimum core content of the right to food in context: A response to Rolf Künneman' in D Brand & S Russel (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 99 108 and D Bilchitz 'Toward a reasonable approach to the minimum core. Laying the foundations for future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 11 15-17.

63 n 20 above.

64 n 17 above.

65 n 15 above.

66 *Khosa* (n 20 above) para 82.

67 n 20 above, paras 60-62.

precedence over further expansion of the social assistance system as it applies to South African citizens. The most important factor determining the Court's robust scrutiny in this respect was 'the severe impact [that the exclusion of permanent residents from the scheme was likely to have] on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants'.[68]

22. *The state's measures must be transparent in the sense that they must be made known both during their conception and once conceived to all affected.*[69] This final element of the Court's reasonableness test was added in *Treatment Action Campaign* where the Court held that, in order for it to be reasonable, a programme's 'contents must be made known appropriately'.[70] As *Treatment Action Campaign* itself illustrated, litigants in socio-economic rights cases face great difficulties if it is not possible to ascertain with certainty what the state's measures entail. In a very basic sense, in order to be able to challenge the state's position, one has to be able to pinpoint what exactly it is.

23. Should a court find that the state's measures with respect to health care rights in any aspect fails the reasonableness standard set out above, the next step for the court would be to fashion a remedy to make good the resulting breach of constitutional health care rights. In constitutional matters, including matters dealing with socio-economic rights, courts have wide remedial powers. Section 38 determines that courts must in such matters provide 'appropriate relief, including a declaration of rights', whilst section 167 empowers courts to declare invalid law or conduct inconsistent with the Constitution, and in addition to provide any order that is 'just and equitable'.[71] The Constitutional Court has been clear that these powers allow it to fashion new remedies where necessary to 'protect and enforce the Constitution'.[72] An

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68 n 20 above, para 80.

69 *Treatment Action Campaign* (n 17 above) para 123.

70 n 17 above, para 123.

71 Such 'just and equitable' orders could include but are not limited to orders limiting the retrospective effect of an order of invalidity or suspending the operation of an order of invalidity; sec 172(1)(b)(i) & (ii).

72 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.

important consideration for the Court in this respect is that the remedies it provides, whether new or existing, must be effective.[73]

24. In most socio-economic rights cases, providing 'appropriate relief' is unproblematic, requiring courts to do little else than they are used to do in cases decided on the basis of other rights or indeed cases decided on the basis of the common law or ordinary legislation. However, when courts are required to provide relief in cases where the state has been found to breach the duty to fulfil socio-economic rights, or where the state has been found to have interfered in the existing exercise of a socio-economic right and is under a duty to mitigate the impact of that interference, their position is often more difficult. In these cases, the Court's finding requires the state to act affirmatively in order to remedy its breach of the right; to amend its policy or adopt a new policy, or to provide a service that it is not currently providing or extend a service to people who do not currently qualify for it. Such cases necessarily involve 'amorphous, sprawling party structures, allegations broadly implicating the operations of large public institutions such as schools systems … mental health authorities … and public housing authorities, and remedies requiring long term restructuring and monitoring of these institutions', policies and programmes.[74] Courts are consequently faced with having to decide to what extent to prescribe directly to the state what it must do, and to what extent and in what manner to retain control of the implementation of their orders, to see that indeed they will be effective.

25. An obvious way for courts to retain control of the implementation of their orders is through so-called structural or supervisory interdicts.[75] These orders would usually require the state to draft a plan for its implementation of the order, which could then be submitted to the court and the other party for approval, and then periodically to report back to the court and the other party with respect to its implementation of that plan. The court could manage the supervision on its own, through the other party to the litigation or through a court-appointed supervisor.[76] In the two cases where such a

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73 *Fose* (n 72 above) para 69.

74 CF Sabel & WH Simon 'Destabilisation rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1016 1017.

75 See, in this respect, W Trengove 'Judicial remedies for violations of socio-economic rights' (1999) 1:4 *ESR Review* 8-11 9-10 and, in general, Sabel & Simon (n 74 above).

76 The Constitutional Court made use of such a structural interdict in *August v Electoral Commission* 1999 3 SA 1 (CC), to ensure that the state take the necessary steps to make it possible for

supervisory interdict could perhaps have played a role, the Constitutional Court has elected not to make use of it. In *Grootboom*, the Court issued a simple declaratory order, leaving the remedy of the constitutional defect in its housing programme entirely to the state.[77] In *Treatment Action Campaign*, the Court similarly issued a declarator, coupled with a mandatory order requiring the state to remedy the constitutional defect in its programme for prevention of MTCT of HIV.[78] However, despite confirming that it did indeed have the power to do so, the Court again declined issuing a supervisory interdict, holding that there was no indication that the state would not implement its order properly.[79]

26. Although the Court's failure in particularly *Grootboom* to make use of a supervisory interdict certainly trenched on the effectiveness of its order,[80] it is understandable that the Court is circumspect in its use of these remedies. Structural interdicts have to be very carefully crafted indeed to be effective.[81] More importantly, structural interdicts have the potential to erode the legitimacy of the Court, both because they directly and on an ongoing basis place the Court in confrontation with the executive, and can involve the Court in the day to day management of public institutions, something at which it is almost bound to fail.[82] Whether or not a structural interdict would be appropriate in a given case would depend on the nature of the breach in question and particularly on the nature of that which is required for the remedy of that breach.[83]

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prisoners to vote in general elections. The various High Courts have made quite regular use of such interdicts in socio-economic rights cases. See eg *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C).

77 *Grootboom* (n 15 above) para 99.

78 *Treatment Action Campaign* (n 17 above) para 135.

79 n 17 above, para 129.

80 In a number of recent cases, courts have pointed out that the state has for all intents and purposes simply ignored the order in *Grootboom* and has put in place no discernible measures to take account of the plight of those in housing crises. See eg *Modderfontein Squatters v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 22 and *City of Cape Town v Rudolph* 2004 5 SA 39 (C) paras 77B-84H. See also K Pillay 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights' (2002) 6 *Law, Democracy and Development* 255.

81 Sabel & Simon (n 74 above) 1017.

82 n 74 above, 1017-1018.

83 It remains an open question, for example whether or not a structural interdict would indeed have led to the findings in *Grootboom* being implemented effectively by the state, or whether, instead, the policy issue in *Grootboom* was so wide and amorphous and required such wide-ranging and complex adjustment on the side of the state, that the Court would simply have become bogged down in debilitating detail had it retained jurisdiction.

Application

27. How does the state's programme to support the health care work of chbc's fare when evaluated against its constitutional duty to promote and fulfil health care rights as described in the paragraphs above?

28. At the outset it is clear that the state meets the first requirement of that duty – that is, the requirement that it must indeed be able to show at the very least that it has a measure, a plan in place with which to provide this specific aspect of health care to people living with HIV/AIDS. The state does have an explicitly proclaimed programme of support with respect to chbc's, described in some detail in a variety of policy and other documents, and funded on an annual level.

29. Having satisfied the first leg of the inquiry, will the state be able to show that the programme it has in place with respect to chbc is reasonable, as that standard has been described above? It is here where, to my mind, the state will run into difficulties. I would submit that the state at the very least fails to meet two of the requirements of the reasonableness test: the requirements of 'reasonable resourcing' and 'reasonable implementation'. In addition, I would suggest that the state's current programme is currently possibly also not comprehensive, as it is required to be by the reasonableness test, in that it fails to address a number of matters that are crucial to its success in providing quality health care at home to people living with HIV/AIDS.

Reasonable resourcing and implementation

30. There where the state has in place a programme to cater for a specific aspect of the realisation of health care rights, the reasonableness test applied by our courts in socio-economic rights cases requires, as outlined above, that the plan be reasonable not only in conception, but also in implementation, which includes that resources must be allocated for its implementation that are adequate to ensure its proper implementation.

31. As illustrated by the *Kutumela*-case discussed above, this line of attack on a state measure is potentially very strong. Because, in application of this mode of evaluation, courts are not required to evaluate the content and structure of the programme itself – that the state has adopted itself, in a sense taking on itself a responsibility to do that which the programme/policy undertakes will be done – courts have shown themselves, in particular in *Kutumela* to be much more intrusive and prescriptive in

their application of these elements of the reasonableness test than with respect to others.

32. As indicated in the description of the facts in para 8 above, there are a variety of failures in the implementation of the state's support programme for chbc's. These failures are mostly related with problems in the funding of the programme: either because not enough funds are allocated from national government, or because the funds that are allocated to provinces are not properly spent, it does seem that a lack of funding has a direct adverse impact on the quality of care that chbc's are able to provide and the sustainability of that care. In addition there seem to be various simple failure in implementation, such as the seeming inability to extend the training programme for chbc's beyond its current limited scope in numbers of chbc's reached. In this light I would submit that a court, when presented with an argument along the *Kutumela* lines, is likely to find that the state is failing to implement its programme reasonably and does not reasonably resource that programme.

33. In addition to this possible line of argument I would suggest that another approach is perhaps available. As indicated in the discussion of the reasonableness test above, a programme, in order to be reasonable for purposes of the constitution, must be comprehensive. The reasonableness test in broad terms simply requires that a programme must be reasonably capable of achieving its purpose of realising health care rights in a particular way – this must logically include that the programme must address all those issues that must be addressed in order for it effectively to attain its goals.

34. If applied to the state's support programme for chbc's this means that this programme must do all those things that are necessary to make it possible for chbc's consistently and regularly to provide high quality care of the kind for which they are utilised by the state. I would suggest that the state's current chbc support programme does not address all of the issues it needs to in order to be comprehensive as required by the reasonableness test. In particular, it does seem that the absence of over-arching regulation and standard-setting, coupled with the lack of a national registry for chbc's is a fatal gap n the programme that makes control of quality of care impossible.

35. On this basis I would conclude that a constitutional challenge to the state's current chbc support programme is viable and could be pursued.

36. However, I must conclude with a note of caution. Success in arguing a socio-economic rights case (legal success) does not necessarily translate into practical

advances. The *Kutumela* matter is a case in point: despite the comprehensive and intrusive order secured against the province in that case, access to Social Relief of Distress has not improved appreciably. The problems of lack of capacity, administrative laxness etc that initially created the problem have not magically been solved by the court's order. In sum, the extent to which an implementable remedy can be secured in a socio-economic rights case, coupled of course with the extent to which there is organisational capacity to ensure that an order is implemented, determines whether or not legal success in such cases can be translated into practical advances.

37. I would submit that a case argued along the lines proposed above with respect to state support for chbc's is precisely the kind of case in which it will be difficult to fashion an effective an implementable remedy. In short: the issues involved in the case are diverse and are intimately caught up in failures in administrative and management capacity within provincial government structures that cannot simply be solved with more money, or with the simple handing down of a court order. A case such as this would require a detailed and intrusive supervisory interdict, with instructions about monitoring of its implementation and enforcement. As indicated in the discussion of remedies above our courts have so far shown themselves to be loathe to hand down such orders. Even were a court to be persuaded to hand down such a detailed and intrusive order, it remains an open question whether its implementation, faced with the institutional practicalities that have bedevilled the implementation of the state's support programme for chbc's so far, will be possible.