

KEEP IT CONSTITUTIONAL



Episode 08 & 09

- **HEALTHCARE**
- **FOOD, WATER, AND
SOCIAL SECURITY**

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REPUBLIC OF SOUTH AFRICA



The Keep It Constitutional campaign is a 20-part series brought to you by the Foundation for Human Rights. The campaign aims to provide South Africans – particularly learners – with an introduction to the Constitution and its contents. The campaign consists of animated episodes, audio episodes, and lesson plans.

For more information visit www.keepitconstitutional.co.za.

The lesson plan is designed to assist educators and group leaders lead an introductory session on the Constitution. Educators can follow the lesson plan word-for-word, but may improvise as desired.



Episode 8 & 9:

Healthcare, Food, water and Social Security

Time required	45 minutes
Learning objectives	<ul style="list-style-type: none">• Socio-economic rights are not limited to citizens – people who are not citizens may be able to access some, if not all, of them• The courts help the government understand what each person in South Africa is entitled to• All of the socio-economic rights are interlinked, and to live dignified lives, we need all of them to be available to us
Resources	<ul style="list-style-type: none">• Keep It Constitutional animation series: Episode 8 OR Keep It Constitutional radio series: Episode 8• Keep It Constitutional animation series: Episode 9 OR Keep It Constitutional radio series: Episode 9• Constitutional Court case summaries, attached at the end of this lesson plan



Introduction

Time required 5 minutes

Educator:

We've spoken quite a bit about socio-economic rights over the past few lessons. What are socio-economic rights?

ADVICE TO EDUCATORS

Allow learners to respond.

Answers should cover that socio-economic rights are rights that address the basic social and economic conditions that are needed to live a dignified life.

Try to get the learners to name specific rights: housing, education, water, healthcare, food and social security.

Educator:

What are some of the important things that we've learnt about socio-economic rights so far?

ADVICE TO EDUCATORS

Allow learners to respond.

Answers could include:

- That everyone in South Africa has a series of socio-economic rights protected in the Constitution.
- That some elements of the socio-economic rights are realisable immediately, but other elements only have to be realised over time.
- The realisation of socio-economic rights requires a lot of resources and investment, and this might limit what the State can immediately realise.
- That socio-economic rights and other rights in the Constitution are linked together – for example, the right of access to housing helps protect a number of other rights, including the right to safety and security of the person, the right to life, the right to education and the right to dignity.



Educator:

The inclusion of socio-economic rights in the Constitution seems obvious to a lot of people, because they are so closely linked to dignity, equality and freedom, the founding values of our Constitution. But actually, South Africa was one of the first countries in the world to include socio-economic rights in a constitution, and this was a little bit controversial at the time.

One of the main reasons that some people didn't want socio-economic rights included in the Constitution was due to the idea of separation of powers. Remember, the legislature and the executive and the branches of government that are responsible for making and enforcing the law. Some people thought that if everyone could claim socio-economic rights, the Courts would be able to control government policy. In terms of the separation of powers, this isn't what courts are supposed to do. Can you think about what aspects of the way that the rights are framed might prevent this?

ADVICE TO EDUCATORS

Allow learners to respond.

Answers could include:

- Many of the rights are not immediately realisable, so as long as the government is helping more and more people obtain the right, the courts will accept the government programme.
- The courts recognise that there are many demands on government resources, and as long as the government programme is justified and will eventually realise the right, the courts will allow the government scope.

So, socio-economic rights are fully enforceable – some are immediately claimable, and others must be realised over time. Let's have a look at some other aspects of the socio-economic rights in the South African Constitution.





PLAY VIDEO/RADIO EPISODE 8

Time required 5 minutes



PLAY VIDEO/RADIO EPISODE 9

Time required 5 minutes



DISCUSSION

Time required	20
	minutes

Educator:

Let's think about who can claim socio-economic rights in South Africa.

There was a really important case, called *Khosa and Others v Minister of Social Development and Others*. This case looked at whether people who have the right to be in South Africa, but who aren't South African citizens, can claim certain socio-economic rights.

There are a few important things to notice. Almost every country distinguishes between people who are citizens and people who aren't – even if these people have the right to live in a country and intend to remain there. Can anyone name a right that is only available to citizens?

ADVICE TO EDUCATORS

Allow the learners to answer.

The most obvious example will be the right to vote. The law recognises that citizens may have a particularly strong reason to have a say in the way that a government functions. This doesn't mean that non-citizens who live in a country should be considered less important – and, if someone lives in South Africa long enough, they may be able to apply for citizenship.

Educator:

So, in the *Khosa* case, the Constitutional Court had to consider whether a law which limited some welfare grants to South African citizens, and which didn't allow permanent residents to claim benefits, was constitutional. The Constitutional Court found that the right to social security is a right that vests in 'everyone', and that excluding permanent residents from social security would be unfair discrimination and would violate the right to equality.

It is important to note that the Constitutional Court recognised that there may be limits – in this case they said that 'permanent residents', people who have the right



to stay in South Africa permanently, couldn't be prevented from obtaining benefits. But some other groups still could – like people in South Africa on work permits. It is important to note that in order to obtain social security, all sorts of valid documentation is required. Studies show that very few people who aren't entitled to social welfare grants are able to cheat the system and claim.

As you know, citizenship isn't the only limitation that might be placed on the ability of people to access their socio-economic rights.

In our groups, let's discuss some cases that have appeared before the courts.

ADVICE TO EDUCATORS

Divide the learners into groups and hand out the Constitutional Court case summaries – one per group. If the class is big, have two groups discuss the same case.

Each group should try to summarise the most important elements of the case – telling the class the facts of the case, why the Constitutional Court decided the case the way that it did, what were the most important considerations in the judges' minds, whether any of the judges disagreed.

Ask the learners to tell us what they think the case tells us about how socio-economic rights, and particularly the right to healthcare and social security.

Finally, have the learners share whether they find the judges reasoning to be convincing or whether they think the case should have been decided differently.

Allow the learners to discuss their case for 10 minutes and then have 8 minutes for all of the groups to share about their case. When sharing, have the learners report back on their case to the class, highlighting all of the above.



DEBATE

Time required 10 minutes

ADVICE TO EDUCATORS

Ask the learners to discuss in their groups which of the socio-economic rights they think is most important. After allowing 4 minutes for them to discuss, have a class discussion about the different socio-economic rights, and why each is important.

Ultimately, the aim is to get the learners to understand that all of the socio-economic rights are interlinked, and as important as each other.



CONCLUSION

Time required 1 minutes

Educator:

The socio-economic rights in our Constitution show how deeply committed South Africa is to changing the lives of the most vulnerable people. But this isn't easy. All of the arms of government need to work together to make sure that the rights are realised properly, and that more people each year are able to access their rights.



HANDOUTS FOR LEARNERS

Media summary provided by the Constitutional Court of South Africa (amended by KIC)



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Soobramoney v Minister of Health (Kwazulu-Natal)

Decided on 27 November 1997

Media Summary

The appellant is a diabetic who suffers from ischaemic heart disease and cerebro-vascular disease. His kidneys failed in 1996 and his condition has been diagnosed as irreversible. He asked to be admitted to the dialysis program of the Addington Hospital (a state hospital). He was informed that he did not qualify for admission. Addington Hospital, like many state hospitals, has a severe shortage of dialysis machines and trained nursing staff. Because of limited resources the hospital has adopted a policy of admitting only those patients who can be cured within a short period and those with chronic renal failure who are eligible for a kidney transplant. Mr Soobramoney cannot be cured in a short period and is not eligible for a transplant because of his heart condition.

Mr Soobramoney ... claim[ed] that he had a right to receive renal dialysis treatment from the hospital in terms of s 27(3) (which provides that no-one may be refused emergency medical treatment) and s 11 (the right to life) of the 1996 Constitution...

... the Constitutional Court held that the right not to be refused emergency medical treatment meant that a person who suffers a sudden catastrophe which calls for immediate medical attention should not be denied ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. Mr Soobramoney suffers from chronic renal failure and will require dialysis treatment two to three times a week to keep him alive. The Court decided that this was not an emergency which called for immediate remedial treatment.

The Court held that the right could not mean that the treatment of terminal illnesses had to be prioritised over other forms of medical care such as preventative health care. It also held that the right not to be refused emergency medical treatment was independent from the right to life and had to be interpreted in the context of the availability of health services generally.



The Court went on to consider whether Mr Soobramoney ought to receive dialysis treatment at a state hospital in accordance with the provisions of the Constitution which entitle everyone to have access to health care services provided by the state (s 27). The Court noted that the state has a constitutional obligation within its available resources to provide health care, as well as sufficient food and water and social security. The Court found, however, that the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of services being provided to the public. Last year it overspent its budget by R152 million and it is anticipated that overspending will increase to R700 million in the current year.

The renal unit of the Addington Hospital is already under-resourced and 70 percent of people who, like Mr Soobramoney, suffer from chronic renal failure have to be turned away. The 20 dialysis machines at its disposal should ideally serve only 60 patients, but already cater for 85 patients. The Court held that if treatment had to be provided to Mr Soobramoney it would also have to be provided to all others in a similar position and the resources available to Addington Hospital could not accommodate the demand. Furthermore, the cost of providing renal dialysis twice a week to a single patient is R60 000 per annum and to expand the programme to cover everyone who requires renal dialysis would make substantial inroads into the health budget and prejudice other obligations which the state has to meet.

The Court held that the responsibility for making the difficult decisions of fixing the health budget and deciding upon the priorities that needed to be met lay with political organs and the medical authorities and added that the Court would be slow to interfere with such decisions if they were rational and taken in good faith. The Court concluded that it had not been shown that the state's failure to provide renal dialysis facilities for all persons suffering from chronic renal failure constitutes a breach of its constitutional obligations.

The judgment of the Court was delivered by [Chief Justice] Chaskalson ... and was concurred in by the other members of the Court. [Judges] Madala ... and Sachs ... wrote separate [agreeing] judgments.



HANDOUTS FOR LEARNERS

Media summary provided by the Constitutional Court of South Africa (amended by KIC)



IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Mazibuko and Others v City of Johannesburg and Others

Decided on 8 October 2009

Media Summary

Today, the Constitutional Court delivered a judgment in a case concerning the right of access to water entrenched in section 27 of the Constitution, which provides that everyone has the right to “sufficient water”. The case considers the lawfulness of Operation Gcin’amanzi, a project the City of Johannesburg piloted in Phiri in early 2004 to address the severe problem of water losses and non-payment for water services in Soweto. This project involved re-laying water pipes to improve water supply and reduce water losses, and installing pre-paid meters to charge consumers for use of water in excess of the 6 kilolitre per household monthly free basic water allowance.

Mrs Mazibuko and four other residents of Phiri, Soweto (the applicants) challenged, firstly, the City of Johannesburg’s Free Basic Water policy in terms of which 6 kilolitres of water are provided monthly for free to all households in Johannesburg and, secondly, the lawfulness of the installation of pre-paid water meters in Phiri. The three respondents are the City of Johannesburg (the City); Johannesburg Water and the national Minister for Water Affairs and Forestry.

....

All the parties before this Court, including the applicants, accepted that the old system of water supply to Soweto was unsustainable and had to be changed. The applicants however asserted that the City’s policy and the manner in which it was implemented is unlawful, unreasonable, unfair and in breach of their constitutional right to sufficient water.

Once the City had opted for Operation Gcina’manzi, there was extensive consultation with communities about what the project would entail and how it would be implemented. The initial implementation in early 2004 caused unhappiness amongst residents. By the time the applicants brought their challenge in the High Court eighteen months later, the vast



majority of residents had accepted pre-paid water meters. According to a survey the City undertook, they were satisfied with the new system. Moreover, the amount of unaccounted for water in Soweto had been successfully curtailed.

The City provided a detailed account of Operation Gcin'amanzi and how it came to be adopted and implemented. It also made plain that its Free Basic Water policy has been under constant review since it was adopted. In particular, the City sought to ensure that those with the lowest incomes are provided not only with an additional free water allowance, but also with assistance regarding the charges levied for other services provided by the City, such as electricity, refuse removal and sanitation. The City accepts that it is under a continuing obligation to take measures progressively to achieve the right of access to sufficient water.

The Constitutional Court held that the obligation placed on government by section 27 is an obligation to take reasonable legislative and other measures to seek the progressive realisation of the right. In relation to the Free Basic Water policy, therefore, the question is whether it is a reasonable policy. The Court notes that it is implicit in the concept of progressive realisation that it will take time before everyone has access to sufficient water.

The Court concluded, in contrast to the High Court and the Supreme Court of Appeal, that it is not appropriate for a court to give a quantified content to what constitutes "sufficient water" because this is a matter best addressed in the first place by the government. The national government has adopted regulations which stipulate that a basic water supply constitutes 25 litres per person daily; or 6 kilolitres per household monthly (upon which the City's Free Basic Water policy is based).

The Court concluded that it cannot be said that it is unreasonable for the City not to have supplied more, particularly given that, even on the applicants' case, 80% of the households in the City will receive adequate water under the present policy. The Court noted that 100 000 households within Johannesburg still lack access to the most basic water supply, that is a tap within 200m of their household.

On pre-paid water meters, the Court held (contrary to the High Court and the Supreme Court of Appeal) that the national legislation and the City's own by-laws authorise the latter to introduce pre-paid water meters as part of Operation Gcin'amanzi. The Court concluded that the installation of the meters was neither unfair nor discriminatory.

The Court affirmed the democratic value of litigation on social and economic rights. It noted that the applicants' case required the City to account comprehensively for the policies it has adopted and establish that they are reasonable. During the litigation, and perhaps because of it, the City has repeatedly reviewed and revised its policies to ensure that they do promote the progressive achievement of the right of access to sufficient water.



The Court thus upheld the appeal by the City and Johannesburg Water and the Minister. The orders of the High Court and Supreme Court of Appeal were, therefore, set aside.



HANDOUTS FOR LEARNERS

Summary provided by the Global Health and Human Rights Database

(www.globalhealthrights.org), amended by KIC

Minister of Health and Others v Treatment Action Campaign and Others

Decided on 5th July 2002

Summary

The government of South Africa developed a national public health program to address mother-to-child transmission of HIV. The purpose of the program was to offer HIV-positive pregnant women nevirapine, a drug that prevents the transmission of HIV at birth, free of charge. The program was, however, limited in scope. It only offered nevirapine at certain pilot sites, none of which were public health institutions, and it did not set out a timeframe for national expansion of the program. The Treatment Action Campaign (TAC) filed a complaint in the High Court challenging the government's program alleging that the restrictions in scope violated sections 27 and 28 of the Constitution of South Africa. In relevant part, these sections guarantee the right of everyone to have access to public health care services and the right of children to be afforded special protection.

The Court first examined whether socio-economic rights were enforceable under the Constitution of South Africa. Based on previous cases, it quickly stated that they were. The Court determined that the issue in this case was whether the Government was meeting its obligations to provide access to health services for HIV-positive mothers and their new born babies.

The Court then considered what was required of the Government in relation to health rights. ... it held that sections 27(1) and (2) must be read together and all that may be expected of the state was that it take reasonable steps to progressively realize the rights...

...the Court examined ...whether it was reasonable for the Government to exclude access to free nevirapine from public hospitals and clinics where testing and counselling services were available and where the administration of the drug was medically indicated. Several issues were raised by the Minister of Health: whether the drugs worked; whether there were safety concerns; and whether there were administrative capacity concerns. The Court dismissed each concern as unwarranted or hypothetical.

Regarding the reasonableness of restricting the Government program to certain pilot sites, the Court indicated that it was reasonable for the Government to gather evidence regarding the scalability of the program and to examine resistance and efficacy concerns associated with nevirapine. It was, however, not reasonable for the Government to wait until the best possible program was developed before expanding it to the national level, denying



women and children access to the drug in the meantime. Moreover, the safety and efficacy of nevirapine had been established and the administration was relatively simple and well within the available resources of the Government. Under such circumstances, the Court stated that the provision of a single dose of nevirapine to mother and child where medically required was a simple, cheap and potentially lifesaving medical intervention. The Court thus held that the Government must remove the restrictions that prevented nevirapine from being made available at public hospitals and clinics pursuant to section 27(2), read with section 27(1)(a), of the Constitution.

The Court further held that the Government was obliged to ensure children were accorded the protection contemplated by section 28 that arises when parental or family care was lacking. These cases involve children born in public hospitals and clinics to indigent mothers unable to gain access to private medical treatment. The Court noted that these mothers and children were dependent upon the Government for health services.

The Court stated that it was implicit within its holding that a policy of waiting for a protracted period before taking a decision on whether the use of nevirapine beyond the dedicated research and training sites was also not reasonable within the meaning of section 27(2) of the Constitution. The Court therefore ordered the Government to take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector.

Finally, the Court further held that sections 27(1) and (2) of the Constitution required the government to devise and implement, within its available resources, a comprehensive and coordinated program to progressively realize the right of pregnant women and their new born children to access health services to combat mother-to-child transmission of HIV. Such a program must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and ensuring appropriate treatment was available to women for such purposes.

