

5.1 Socio-economic rights

Outcomes

After completion of this section learners will be able to:

1. Explain the importance of socio-economic rights.

Assessment criteria

1. The meaning of socio-economic rights and their relationship to the Constitution is explained.
2. A distinction between socio-economic rights and civil and political rights is made.
3. A decision is taken on whether socio-economic rights should be enforceable in the courts.
4. A set of facts is examined and a decision made on the duties of the state towards certain people regarding socio-economic rights.
5. Agencies are identified where people whose socio-economic rights have been violated can seek help.
6. A set of facts is examined and a decision made on whether the government is entitled to close a school.

5.1.1 Introduction

socio-economic rights are those rights that give people access to certain basic things

civil and political rights are those rights that give people freedom to participate in the political and social life

all human rights are interdependent, indivisible and mutually reinforcing

The 1996 South African Constitution contains a number of economic and social rights (or “socio-economic rights”) together with civil and political rights. Socio-economic rights are those rights that give people access to certain basic things (resources, opportunities and services) needed to lead a dignified life such as food, shelter, health care, social welfare etc. Civil and political rights are those rights that give people freedom to participate in political and social life such as freedom to think, to act, to know, to choose what to do, to join a political party, to vote etc. South Africa’s legacy of apartheid called for active steps to create a new society based on democratic values and social justice. The strong protection given to socio-economic rights in the Bill of Rights shows that South Africa is committed to redressing past wrongs and improving the quality of life of its people. By protecting both sets of rights, it also confirms that all human rights are interdependent, indivisible and mutually reinforcing.

Human rights depend on each other to be effectively protected, e.g.:

1. Without the right to an education, it is difficult to effectively exercise your civil and political rights, such as to express an opinion and to present a petition;
2. Without the right to food and health care, your right to life as a poor person is threatened; and
3. If you have a right to information and to participate in political decision-making, you have much better chance of ensuring that the government gives effect to your socio-economic rights.

[Source: The Socio-Economic Rights in South Africa: A Resource Book (2000), p15]

5.1.2 Which socio-economic rights are included in the Constitution?

The Constitution protects the following socio-economic rights:

1. Right to a healthy environment;

2. Rights of access to land and to security of tenure;
3. Right to adequate housing and protection against evictions and demolitions;
4. Rights of access to health care services, sufficient food and water, social security, including social assistance, as well as the right not to be refused emergency medical treatment;
5. Children's rights to basic nutrition, shelter, basic health care services and social services;
6. Right to education; and
7. Prisoners' rights to adequate accommodation, nutrition, reading materials and medical treatment.

Problem 1 Some questions on socio-economic rights

Questions

1. Do you think that socio-economic rights should be made enforceable in courts just like civil and political rights? Why or why not?
2. List some practical examples which show the interdependence of all human rights (civil and political as well as social and economic rights).

Problem 2 Should there be a right to clothing?

Questions

1. Given the great poverty levels and that many people cannot afford to protect and cover their bodies, do you think that the Constitution should have included the right to clothing which is recognised at the international level? Why or why not?

5.1.3 What are the government's duties in respect of socio-economic rights?

According to the Constitution, the government has a duty to respect, protect, promote and fulfil all the rights in the Bill of Rights.

"duty to respect"

First, the "duty to respect" means that the government should not take away socio-economic rights or make it difficult for people to exercise to these rights. The government does not respect socio-economic rights if, for example:

1. It demolishes homes or property without a good reason and without a proper order of court.
2. It stops paying a social grant to a person who is eligible for such a grant.

"duty to protect"

Second, the "duty to protect" means that the government must pass laws that prevent powerful people or organisations from interfering with people's socio-economic rights. The government is not protecting socio-economic rights if, for example:

1. It does not take action to stop a big oil company from polluting the community's water.
2. It does not make police and welfare authorities respond to cases of child abuse and neglect.

“duty to promote”

Third, the “duty to promote” means that the government must take active measures aimed at increasing public awareness and respect for socio-economic rights. It can do so by implementing educational programmes, use of the media, and encouraging and supporting the work of civil society organisations.

“duty to fulfil”

Fourth, the “duty to fulfil” means that the government must take positive steps to assist poor people to exercise their socio-economic rights. Largely because of apartheid, not everyone has equal access to resources and opportunities. Many people lack such basic amenities as shelter, sufficient food, clean water, access to good health care services and education.

take reasonable legislative and other measures

According to the Constitution, in order for the government to fulfil these rights, it must “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”.

“Reasonable measures” means that the government must pass laws, and adopt and implement policies and programmes that will give effect to people’s gain access to socio-economic rights.

“progressive realisation”

“Progressive realisation” means that the government must move forward and ensure that the rights are realised over time. It may do so through adopting a comprehensive and co-ordinated programme with time-frames, goals and targets, and must be able to monitor its own progress. For example, the government will not move forward if it takes away, without good reason, land which people use to produce food, and does not provide alternative means for people to obtain food by themselves.

within available resources

The government must use the resources that it has to ensure that poor people gain access to socio-economic services. The government may try to defend itself against the accusation that it has made little progress on the basis that it does not have sufficient resources. However, it cannot use this argument to divest itself of the duty to assist poor people. The Constitutional Court in the *Government of the Republic of South Africa v Grootboom* said that the government must adopt measures that would provide for “the urgent needs of people in desperate circumstances” e.g. without a roof over their head, a daily meal, access to health care services, etc. This means that it must prioritise the provision of services to these people.

Problem 3: Testimony of Emily Mphanya at the Poverty Hearings in the North West Province

“Since my husband died I am suffering. I have four girls and one boy. All the girls are married. I was working as a domestic worker. Then I went to work in the field. Now I stay at home. My son was ill. I moved in with him. He passed away. I am left with a handicapped grandson. There is no money at home. My house has no plaster and no windows. The water is closed. I am dying of hunger and thirst. I ask the government to help me. I have no family. I have no reference book and so no pension. I applied for an identity book, went to fetch it, but it was not there. I went again. They said again that it was not available. I have no more money to go back again. I will ask for money from the neighbours. Now they give me porridge. At present I go out and pick morogo. I eat that.”

[Source: National ‘Speak Out on Poverty’ Hearings, March – June 1998, *The People’s Voices*, 75]

Questions

1. What socio-economic rights are involved in this case study?
2. Describe the duty of the government towards Emily.

socio-economic rights are enforceable in courts

courts interpret rights, laws and policies

5.1.4 How to enforce socio-economic rights

Socio-economic rights can be enforced in South African courts. This is not common in the legal systems of many other countries. What is common is that socio-economic rights would be regarded as mere guidelines for the government programmes and not enforceable in courts.

The Constitutional Court is the highest court in South Africa that deals with cases about the Constitution. It interprets and decides whether a law or policy violates the Constitution. Anyone claiming a violation of socio-economic rights may bring the matter to the High Court first and, if need be, later to the Constitutional Court.

The Constitutional Court has heard three major cases involving socio-economic rights.

1. *Soobramoney v Minister of Health, KwaZulu Natal* 1997 (the right not to be refused emergency medical services)
2. *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (right of access to adequate housing)
3. *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (right of access to health care services)

5.1.5 Where can people go for legal assistance if their socio-economic rights are threatened or violated?

SAHRC promotes respect for human rights

the SAHRC was one of the parties that intervened as *amicus* in the *Grootboom* case, but withdrew as a party in the *TAC* case

free legal assistance

Anyone or any group of people who believes that their socio-economic rights are threatened or have been violated may consult the nearest office of the South African Human Rights Commission (SAHRC) and lodge a complaint. The SAHRC will then investigate the matter and may decide to act on the complainant's behalf by negotiating with the infringing party. It may also take the matter to Court on the complainant's behalf if the matter is not settled. It deals with the complaint at no cost to the complainant. As private lawyers are often expensive, it is advisable that people with complaints relating to human rights, including socio-economic rights, should consult the SAHRC.

People can also approach their nearest Legal Resource Centre or Legal Aid Clinic for free legal assistance. They can also seek advice from paralegal advice offices in their area. However the latter cannot take the case as far as the Court whereas the former can.

People can also contact non-government organisations (NGOs) and community based organisations (CBOs) in the area who may assist in investigating the matter and in getting legal assistance for the community or person.

limitation must be "reasonable and justifiable"

5.1.6 Can socio-economic rights be limited?

Socio-economic rights can be limited just like any other rights in the Bill of Rights. The Constitution says that a right can be limited on two grounds:

1. The limitation must be made under a law of general application. It is not a valid limitation if the law applies only to identifiable groups of people or individuals (e.g. it applies to all Zulus in the country).
2. The limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

The Court will look at the following factors to determine if the limitation is reasonable and justifiable:

1. The reason why the right is being limited.
2. The degree to which the right is limited (e.g. how much of the right is limited).
3. If there are any other ways to achieve the purpose of limitation other than actually limiting the right.

Problem 4 Socio-economic rights and limited resources

The Bill of Rights states that people may not be discriminated against on the grounds of nationality.

Questions

1. Would the government succeed in an argument that it does not provide social assistance grants to non-nationals on the grounds of resource constraints? Roleplay a discussion between groups (a) representing non-nationals and (b) the Department of Social Development.
2. The South African government decided to prioritise the strengthening of the defence system and bought expensive arms in 2001. This decision led to an increase in 2001 – 2002 of the budget of the Department of Defence and the cutting of social spending in the areas of education, amongst others. As a result of this cut, a number of public schools were forced to close. In Blikkiesdorp, the closure of the only public school providing primary education in the area has serious consequences for pupils. Their only option is to board at the school in the closest town, 50kms from Blikkiesdorp. No subsidised transport is provided. Most parents in Blikkiesdorp are poor and cannot afford the costs of transport and boarding their children at this school. The parents believe that this situation violates their children’s rights under the Constitution and want to challenge the government in court.

In Court, the government raises the defence of resource constraints and that it has prioritised the need for strengthening the defence system over other needs.

1. Divide into small groups to prepare arguments for and against the government’s decision to close Blikkiesdorp school.
2. As judges, decide whether you would find in favour of the parents in Blikkiesdorp or the government.

5.2 Education rights

Outcomes

After completion of this section learners will be able to:

1. Explain the meaning of education rights and the duties of the state in respect of them.

Assessment criteria

1. Different elements of education rights are identified.
2. A set of facts is given and a decision taken on whether certain learners may be turned away from school.
3. The procedure for applying for exemption from paying school fees is explained.
4. A set of facts is examined and a decision made on whether learners may be taught in the language of their choice.

5.2.1 What are education rights?

The Constitution sets out education rights as follows:

components of
education rights

1. Everyone has the right to a basic education.
2. Everyone has the right to further education which the state must realize progressively, taking into account available resources.
3. Everyone has the right to receive an education in the official language or language of their choice in public education institutions where, this is reasonably practicable.
4. Everyone has the right to establish and maintain, at their own expense, independent educational institutions.

Problem 1

Case study: Phumelela High School

It is Wednesday afternoon in Greytown, KwaZulu-Natal Province. Inside a filthy classroom, also used as a staffroom, a teacher is typing a document on an old typewriter.

Goats roam around the schoolyard while learners watch a passing cart through the broken windows of an overcrowded classroom. This is Phumelela High School in Umsinga village, near Greytown. Like most schools in the nearby villages, at first glance, Phumelela suggests chaos: shattered windows, a roof falling apart, reeking toilets and flattened school fences.

In 2001, not one of the 50 learners at Phumelela who wrote the matric examinations passed. In 2000, the school achieved a 16% pass rate. They are not expected to improve this percentage greatly in 2003.

poor performance
due to lack of
facilities

Phumelela officials attribute the poor performance to a lack of facilities, which affects most schools in the province. Phumelela has no electricity, telephones, water or proper sanitation. Learners are forced to travel more than 5kms to the nearest water source.

The school's situation is further aggravated by a severe shortage of textbooks, with a ratio of one textbook to five pupils. There are only two buildings with six classrooms for 301 pupils.

a severe shortage of textbooks and desks aggravates the school situation

There are 3 teachers for these learners. Each class has about 50 pupils. Of the six classrooms in the school, one is used as a mathematics classroom, staff-room, library and storeroom. Inside, textbooks and old equipment lie on broken shelves. The only teaching equipment is an artificial skeleton hanging from a broken shelf. Most of the school's blackboards are broken and there are not enough desks for the pupils. One of the buildings has no windows. This makes it very hard for the learners when there is rain or wind, especially during the winter months.

A teacher at Phumelela says that the problem at the school is a lack of teaching material and facilities: "Even if you bring any teacher from a school that got has a 100% pass rate, he will fail here because there are no facilities."

[Source: Evidence Wa Ka Ngobeni, "Rural Schools in Shambles" The Mail and Guardian 26 October 1999, in The Socio-Economic Rights: A Resource Book, (2002)]

Questions

1. Does your school experience one or more of the problems that Phumelela High School is facing?
2. Who has a duty to fix the problems experienced in schools like Phumelela?
3. Does South Africa need more schools and better facilities for schools?
4. Does your school have enough resources and facilities to enable you to learn?
5. What is the impact on the right to education if government does not deliver the textbook and facilities on time at the start of the year?
6. Does your community protect your school against vandalism and theft?

5.2.2 What does it mean to have a right to education?

5.2.2.1 The right to basic education, including adult basic education

education develops people's potential

Education becomes more important as time goes by. It is important because it develops people's potential, lays a good foundation for people to be responsible citizens, and gives people skills to be able to compete in the workplace. Society benefits from educating people. For example, society needs doctors, scientists, teachers, engineers, lawyers, judges, politicians, academics, social workers, and so on. These people are assets that enable society to function properly. Without education, people are less able to take part in social and political activities.

children should not be turned away

In South Africa, the right to basic education means that every child between 7 and 15 years or in grades 1 to 9 must receive compulsory education in public schools. Basic education only covers grades 1 to 9 while other grades are regarded as further education. The right to basic education means that children of 7 to 15 years or in grades 1 to 9 cannot be turned away from school on grounds that may be considered unfair. It also means that parents have a duty to send their children to school. If they cannot afford to pay school fees, for example, their children should not be turned away.

apartheid ensured that black people had low standard of education

The right to adult basic education is aimed at giving opportunities to adults who wish to be educated and skilled. The legacy of apartheid has made this right very important. Apartheid laws ensured that the majority of the black population had little education or a low standard of education.

government must ensure that people are educated.

The result is that there is a high rate of illiteracy among the black adult population. The right to adult education is therefore intended to give disadvantaged people the opportunity to be educated or improve their education. These adults cannot be turned away because they cannot afford to pay for their education.

The right to a basic education, including adult education, means that the government must build schools, set up facilities, and provide the necessary materials and equipment for people to have a good education.

Problem 2 Can the learners be turned away from school?

Questions

Can the persons in the following circumstances be turned away from school? Why or why not? What is the government's duty if these people cannot attend schools?

1. A learner living with HIV/AIDS.
2. A pregnant learner and her boyfriend (the father of the child).
3. A learner whose parent cannot afford to pay school fees.
4. A learner who does not have a school uniform.
5. An African learner in a private white school.
6. A learner who is gay.
7. A learner who does not have compulsory school textbooks.
8. A learner who regularly arrives late at school because of the distance between the school and his home.
9. A learner who cannot attend the school because it is too far from her home (more than 30km) and the parent cannot afford the transport costs everyday.
10. A learner who is doing badly in school because she comes to school hungry most of the time and her family is too poor to provide her with lunch.

5.2.2.2 School fees

Certain categories of people can be exempted from paying school fees if they cannot afford them. If parents cannot afford to pay and they fall within the category of people who should be exempted, they should make use of the exemption system so that their children are not turned away from school. Children whose parents have been given an exemption should not be discriminated against.

exemption from paying school fees

5.2.2.2.1 Guidelines on school fees

Category	Criteria	Example
Full exemption	If school fees for a learner are higher than 10% of the annual gross household income.	The household earns R3 000 a year, and the school fees are more than R300.
Partial exemption	If school fees for a learner are between 3,3 – 10% of the annual gross household income.	The household income is R3 000 a month, and the school fees are between R33 and R300.
Conditional exemption	Circumstances affecting a parent's ability to pay.	The parent has many children to pay for, or has lost his/her job.

5.2.2.2.2 Applying for exemptions

applying for exemptions

1. A parent wishing to apply to be exempted from paying school fees for her/his child, must send their application to the school governing body (SGB).
2. The SGB must consider the application using the above criteria and other rules of the school. It may either approve or reject the application.
3. The SGB may change its decision on whether or not a person should qualify for school fees if the person's financial position improves.
4. If the SGB turns down the application, the unsuccessful applicant has the right to appeal against the decision to the Head of Department of Education in the province.

Problem 3

Appealing against a decision not to grant an exemption from school fees

Questions

Draft a letter to the Head of Department in your province in which you appeal against the decision of the SGB not to grant you exemption from school fees for your three children that attend the same school.

higher education depends on the learner's ability to cope with it

5.2.2.3 The right to further education

The right to further education refers to education from grades 10 to 12 and vocational (education for a particular skill or training) and tertiary education (universities and technikons). Higher education is often based on the learner's ability to cope with studying at universities or technikons or any other similar institutions. The state cannot force learners to go and study at these higher learning institutions. However, it has the duty to make it possible for learners, who wish, to access further education over time. For example, it must pass laws that will ensure that learners are able to attend a further education institution without discrimination. It can provide subsidies to universities and technikons. It can also provide bursaries and loans to learners from poor families so that they can further their studies.

affirmative action programmes

Certain tertiary institutions make it possible for learners from disadvantaged backgrounds to receive education. For example in 2000, the University of the Western Cape adopted a policy that allowed learners to enrol without matriculation exemptions. Other universities have affirmative action programmes to encourage entry by less qualified learners who have the potential.

Case study: The case of the clever learner who was refused admission to the medical school

Questions

In *Motala and another v University of Natal* 1995, the parents of a learner applying to university took the University of Natal to court to challenge her non-admission to the University's medical school.

The University had an admission policy that gave preference to previously disadvantaged groups. Even though Motala had very good matriculation results, she was refused admission into the medical school, because preference was given to African learners. Motala was an Indian learner. She argued that that the medical school's policy of favouring African learners over Indian learners was unfair discrimination, because Indians were disadvantaged under apartheid.

Motala did not succeed. The Court said:

1. Although the Indian group was disadvantaged by the apartheid system, African pupils and learners were at a far greater disadvantage under the four-tier system of education.
2. As Africans were more disadvantaged than Indians under apartheid, the medical school was allowed to have an admission programme that gave preference to African learners over Indian learners.

5.2.2.4 The right to education in a language of your choice

"reasonably practicable"

Learners have a right to receive education in the official language or language of their choice at a public school to an extent that this is "reasonably practicable". To determine what is reasonably practicable in terms of personal choices, the state must consider the following factors:

1. Is it practically possible to implement?
2. Is it equitable? (Is it possible to do it fairly?)
3. What would be the purpose of implementing this (i.e. Is it meant to redress the results of past racially discriminatory laws and practices)?

No learner has the right to receive education in the language of their choice in a private school.

The National Education Act says:

1. The language of instruction should be an official language.
2. Learners should be taught in one language during the first two years of school.
3. From the third year of school, learners must learn two languages – one of these must be the language of instruction.

4. Education language policy should aim at promoting multilingualism (being able to speak several languages).

Problem 4 **Was the learner entitled to be taught in the language of her choice?**

Questions

1. Lebo, a Sotho-speaking girl, attends a public school which is dominated by Afrikaans-speaking learners. The school uses Afrikaans as a medium of instruction and most subjects are taught in Afrikaans. She and other Sotho-speaking learners argue that they also want to be taught in Sotho or English because they cannot understand Afrikaans very well. This results, they say, in them performing badly in their classes.

Roleplay a discussion between Sotho-speaking learners, Afrikaans-speaking learners and the school governing body on this matter.

2. Tumi, a Tswana-speaking girl, attends a public school in KwaMakhutha near Durban, in KwaZulu-Natal. The school conducts most of the classes in Zulu because the majority of the learners speak it. She can understand Zulu a bit but struggles to fully understand what is being taught in class. When she complained to the school teachers about this and asked for teachers to teach in English, she was told to go and find another school because the majority of the learners in the school are Zulu-speaking. Tumi has missed classes at times because she feels excluded. She does not feel like attending the school anymore, but does not have much of a choice because the other school is too far away, and her parents cannot afford to pay for transport costs.

Prepare a debate between the school principal and Tumi's. In the debate, both sides should consider if it is reasonably practicable for the state to implement an English medium option in the school so that Tumi can be accommodated. Can Tumi be turned away?

5.3 Social welfare rights

Outcomes

After completion of this section learners will be able to:

1. Explain the law concerning social security and assistance.

Assessment criteria

1. The law and regulations that govern social assistance are identified.
2. The requirements for applying and qualifying for different social grants are identified.
3. A set of facts is examined and a decision made on whether certain people qualify for social grants.
4. A set of facts is examined and a decision made on how certain people can access their social grants.
5. A set of facts is examined and a decision made on how to solve certain problems concerning social grants.

social security, social assistance and social services

5.3.1 Introduction

The Constitution says that everyone has the right of access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. It says that the government must “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”. It also says that every child has “the right to social services”. These rights are considered to be social welfare rights.

Examples of social services

The government must take steps to:

1. Protect children from physical or mental violence, injury or abuse, neglect or negligent treatment.
2. Protect and assist children temporarily or permanently separated from their families.
3. Assist children with mental or physical disabilities.
4. Protect children against economic exploitation.
5. Protect children from drug abuse.
6. Protect children from all forms of sexual exploitation and abuse.
7. Promote the recovery and social acceptance of children suffering from any form of abuse.
8. Promote a variety of alternatives to institutional care of children accused or convicted of crimes.

four types of social security

5.3.2 What is social security?

Social security refers to a number of public and private schemes that give money or in-kind benefits or both, in the event of a person's earning power temporarily or permanently ceasing. There are four types of social security in South Africa.

1. Private savings which refers to the voluntarily saving of money by a person for unexpected events such as disability, retirement and chronic diseases.
2. Social insurance which refers to the contribution of both employers and employees to pension or provident funds, or social insurance covering other unexpected events. government may also contribute to social insurance funds. The most common form of insurance falling within this category is the Unemployment Insurance Fund (UIF) which is paid by the employer and the employee.
3. Social assistance which refers to non-contributory and means-tested benefits provided by the government to groups such as people living with disabilities, elderly people and unsupported parents and children, who are unable to provide their own minimum needs. In South Africa, social assistance is also called "social grants".
4. Social relief which refers to short-term steps to help people in crisis, for example, those affected by such natural disasters as droughts or floods. This is also non-contributory and means tested.

This section focuses on social assistance and social relief of distress.

5.3.3 What types of social grants are available?

different types of grants

The Social Assistance Act is the main law which governs social grants. It is also supported by the welfare regulations that set out details of who qualifies for the different grants. The following different types of grants are available:

1. A grant for the aged.
2. A war veteran's grant.
3. A grant for the disabled.
4. A child support grant.
5. A foster child grant.
6. A care dependency grant.
7. A grant in aid.
8. A social relief of distress grant.

5.3.4 Where do people go to apply for a grant?

All applications must be made to the applicant's nearest Social Welfare Office. Applicants must provide all the necessary documents for applying for a particular grant. If the applicant is too sick to go and apply, it is possible for a family member or friend to go and apply on their behalf. The application must be completed in the presence of a Social Welfare Officer. It does not cost money to apply for a grant. It is important to keep proof of the application.

After a person has applied, s/he should not wait for longer than three months before getting paid. If it takes longer, a person can contact the Social Welfare Office or Provincial Department of Social Development to find out the reason for the delay in payment and approach a Legal Resources Centre or legal aid clinic.

payment from the date of application

An applicant is entitled to payment from the date of application. The methods of payment differ according to the applicant's arrangement with the Social Welfare Officer. The grant can be paid:

1. In cash at the grantee's local pay station.
2. Into a grantee's bank account.
3. Through a procurator (a person that receives the grant on behalf of another person).
4. Through a post office.

5.3.5 What do people need to apply and qualify for grants?

a "means test"

Most social grants require the person applying for them to pass a "means test". According to the means test, applications for particular social grants will only be approved if the applicant's income and assets are below a certain level. Therefore, a person applying for social grants that are means-tested will have to provide certain information for evaluation. Assets refer to valuable belongings such as a house, land, money that is saved somewhere, or a pension from retirement or previous employment. A person's financial state is reviewed regularly to check if it is still the same. If a person's financial situation improves, his or her grant may be cancelled.

Note:

1. The "means test" is not applied to pensioners aged 100 years or more.
2. The grant will be reduced to 25% of the maximum amount if the person is admitted to a state institution which takes care of such person.

Pensions are paid to elderly and disabled people who qualify in terms of a "means test"



5.4 Health rights

Outcomes

After completion of this section learners will be able to:

1. Explain the law concerning the right of access to health care.

Assessment criteria

1. An explanation of what people are entitled to in terms of health rights is given.
2. A set of facts is examined and a decision made on whether certain people are entitled to emergency medical treatment.
3. The law governing medical aid schemes is explained.
4. Some questions regarding medical aid schemes are raised and answered.
5. An explanation is given on how to complain against health workers.
6. A set of facts is examined and a decision made whether certain people qualify for free medical treatment.

5.4.1 What health rights are protected in the Constitution?

The Constitution protects a number of health rights:

1. Everyone has the right of access to health care services.
2. Everyone has the right to emergency medical treatment.
3. Every child has the right to basic health care services.
4. Every prisoner has a right to adequate medical treatment.
5. Everyone has the right to bodily and psychological integrity.

components of health rights

Health rights are also linked to a number of other constitutional rights, namely: the right to equality, life, privacy, human dignity, education, as well as the rights of access to adequate housing, a pollution free environment, and to sufficient food and water.

The right of access to health care services imposes a duty on the government to take reasonable legislative and other measures to realise the right progressively. (For the meaning of this duty, see above para 5.1.3.)

5.4.2 What do health rights mean?

poor people can access health care services for free

Health care services are provided by both private and government hospitals and clinics. Most of our discussion, however, will be about government hospitals and clinics as the majority of people cannot afford to attend private ones. People (particularly pregnant and lactating women, and children) who are very poor and unable to afford health care services of their own, are entitled to get them free from a public hospital or clinic.

People requiring financial assistance for medical equipment like crutches, artificial limbs (e.g. arms or legs), wheel chairs, leg irons or hearing aids may be able to get them from the hospital, if they cannot afford them. This will apply where the equipment is needed to improve the working of a damaged arm or leg, or where the patient's limbs are damaged. Poor people who need equipment must go to the health clinic or a doctor and get a letter before approaching the hospital.

Patients at government hospitals may or may not have to pay the full medical fees depending on their income



5.4.2.1 The rights to health care services, to emergency medical treatment, and children’s rights to basic health care services

The Constitutional Court has given guidance on the meaning of the right of access to health care services in the Soobromoney and Treatment Action Campaign cases.

Case study 1: The case of the kidney patient who is refused dialysis

Soobramoney v Minister of Health, KwaZulu-Natal (1997)

Mr Soobramoney needs kidney dialysis

Mr Soobramoney suffers from a serious kidney disease which requires regular kidney dialysis treatment for his survival. If he is not given treatment he will die. Mr Soobramoney cannot afford treatment from private clinics and approaches a state hospital for dialysis treatment. The hospital refuses to treat him because dialysis treatment is very expensive and it has limited resources to provide such treatment. The hospital says that he does not meet its criteria for treatment.

only good candidates for kidney transplants are given dialysis

The hospital only has a limited number of kidney dialysis machines. The hospital’s policy states that patients suffering from irreversible chronic kidney disease will only qualify for dialysis if the patient is a good candidate for a kidney transplant. However, in order to be eligible for a transplant the patient must not have other significant diseases. Unfortunately Mr Soobramoney suffers from other significant diseases.

Mr Soobramoney brings an urgent High Court application

Mr Soobramoney brings an urgent application in the High Court for an order directing the hospital to provide dialysis treatment for him.

He bases his application on two provisions of the Bill of Rights in the Constitution:

(a): Everyone has the right to health care services, within the available resources of the state.

(b): No one may be refused emergency medical treatment.

The hospital opposes Mr Soobramoney's application on the grounds of the above two provisions of the Bill of Rights in the limitation clause:

The hospital also argues that Mr Soobramoney's condition does not qualify as "emergency" medical treatment.

Questions

1. If you were the lawyers for Mr Soobramoney what arguments would you make?
2. If you were the lawyers for the hospital what arguments would you make?
3. If you were the Judge what would your decision be?

Problem 1 Do the patients require "emergency medical treatment"?

Questions

Would the following scenarios be considered to be emergency situations within the meaning of the right to "emergency medical treatment" as set out in the Soobramoney case?

1. Siphso is involved in a car accident and is bleeding heavily. He is rushed to a public hospital by a friend, Sabelo who was an eye-witness to the accident. On arrival at the hospital, the nurses tell Sabelo that there are no doctors to attend to Siphso and that they will only come the next day. As ordinary nurses, they cannot treat him in the state in which he was. Siphso later died as a result of heavy loss of blood. If he had been attended to immediately and the bleeding had been stopped in time, he could have survived.
2. Bonga is a patient suffering from an AIDS-related illness. He has full-blown AIDS and is at the critical stage of the disease. He argues that he is entitled to be provided with anti-retroviral drugs at state expense to save his life.

Case study 2: Anti-retroviral drugs to prevent mother-to-child transmission of HIV/AIDS

Nevirapine prevents mother-to-child transmission of HIV/AIDS

government policy challenged by the TAC

Minister of Health v Treatment Action Campaign (2002)

In 2000, the Government adopted and implemented a policy in which it sought to pilot the anti-retroviral drug Nevirapine which is widely recommended in reducing mother-to-child transmission of HIV/AIDS. Access to Nevirapine was only given to HIV-infected pregnant women in 18 research and training pilot sites. In terms of the policy, doctors in public hospitals could not prescribe Nevirapine to pregnant mothers outside of the pilot sites. In 2001, the Treatment Action Campaign, an organization that advocates for the treatment of people living with HIV/AIDS, challenged the government's policy in the High Court arguing that:

1. It violated the rights of access to health care services of the pregnant women with HIV/AIDS, including reproductive health care services.
2. It failed to adopt a comprehensive response to the prevention of MTCT of HIV.
3. It violated the right of children to basic health care services.

Both the Pretoria High Court and the Constitutional Court decided in the favour of the TAC's arguments. The Constitutional Court ordered the government to allow Nevirapine to be given in hospitals other than those involved in the pilot sites.

HIV-positive women and their new babies are entitled to access to Nevirapine at hospitals



5.4.3 The right to make decisions on reproduction

See above para 4.3.4 in Part 4.

5.4.4 The right of prisoners to adequate medical treatment

prisoners have the same health rights as other patients in hospitals

The meaning of the right of prisoners to adequate medical treatment was tested by the Cape High Court in *B v Minister of Correctional Services*, 1997. The applicants, a group of four convicted prisoners who were living with HIV, applied for anti-retroviral medication at state expense under the right to adequate medical treatment. The Department of Correctional Services refused to give them treatment arguing that prisoners did not have greater rights than other patients at state hospitals who were generally not receiving this treatment, and that the drug for HIV was too expensive.

The Court decided that:

1. The Constitution did not give prisoners a right to the best medical treatment, but that the treatment must be adequate.

2. The meaning of the right to adequate treatment has to be linked to what the state can afford.
3. The state had not proved that, due to budgetary constraints, it could not afford to provide the prisoners with the treatment they claimed.
4. Two of the prisoners living with HIV had a right to get the anti-retroviral treatment at state expense because their infection had developed to a stage where internationally accepted medical standards considered the therapy to be necessary, and this treatment had been prescribed for these prisoners on medical grounds.

5.4.5 Privacy and confidentiality

As a general rule, a health care professional may not disclose to any other person information about a patient's health status, treatment or stay in a public or private hospital without the patient's consent.

Case study 3: Confidentiality and HIV status

Jansen van Vuuren and Another v Kruger (1993)

The decision of the Appellate Division of the Supreme Court (now the Supreme Court of Appeal) in Jansen van Vuuren and Another v Kruger (1993) (the McGeary case) remains an important one on the doctor's duty to respect confidentiality about his/her patient's health status.

Mr McGeary wanted to apply for a life insurance policy. The insurance company required an HIV test first. Mr McGeary was tested and was later informed by his doctor (Dr Kruger) that he was HIV positive. The following day, Dr Kruger played golf with another doctor and dentist. During the game, Dr Kruger disclosed to his colleagues that Mr McGeary had tested positive. Within days, the news spread all over the community. Mr McGeary brought an action against Dr Kruger for breach of confidentiality or privacy.

The Appellate Division said that:

1. Dr Kruger had not respected Mr McGeary's right to privacy or confidentiality, especially the doctor-patient relationship.
2. Dr Kruger had no duty to give the information to his colleagues, who also had no right to receive such information.
3. Dr Kruger was ordered to pay a compensation of R5 000 to Mr McGeary's estate. (Note: Mr McGeary died during the time of the trial of HIV-related illnesses.)

right to privacy and confidentiality upheld

5.4.5.1 Ethical guidelines on HIV/AIDS

According to the Ethical Guidelines on HIV/AIDS (1995), the doctor is only allowed to disclose HIV-related information when:

circumstances where it is permissible to disclose

1. The patient consents.
2. A court order or any law says there must be disclosure.
3. If the spouse or partner of the person with HIV is at risk and where, even after repeated counselling, the person with HIV refuses to tell the partner. In such circumstances, the doctor is only disclosing the information to protect the partner.

4. The doctor may only tell the partner who is an identifiable sexual partner and only once he has told the patient that she/he will do so after the patient has refused to do so.

5.4.6 Full knowledge and consent (informed consent)

No person may be tested, treated or have any other medical procedure done on them without their consent. The consent must be given freely and voluntarily after a detailed explanation on the health status and procedure is given (the range of options, the benefits, risks, costs and consequences of each option). Likewise, if a person participates in a research and training study, he or she must be fully informed of their rights and the risks as well as the benefits involved in participating in such a study. This is called an “informed consent”.

exceptions to the rule of informed consent

There are exceptions to the rule of informed consent. For example, a health care worker does not have to get an informed consent to do an HIV test:

1. In emergency situations where the medical treatment is extremely important to save the patient’s life. For example, where the patient is unaware of the treatment required because she is unconscious.
2. For testing done on blood donations.
3. If a patient is mentally ill and there is no other legally entitled person to give consent.
4. If the test is done anonymously for research purposes to find out how HIV is spreading.
5. If a patient is tested after a needlestick injury (this should be done with consent; otherwise existing blood samples should be used).

5.4.6.1 The Patients’ Rights Charter

A proposed Patient’s Rights Charter includes the following rights:

1. The right to a healthy and safe environment.
2. The right to participate in decision-making on health policies and issues affecting one’s health.
3. The right of access to health care services, including receiving timely emergency care (regardless of one’s ability to pay), treatment and rehabilitation, provision for the special health needs of vulnerable groups, counselling without discrimination, a positive attitude by health care workers and the necessary health information in a language understood by the patient.
4. Adequate information about one’s health insurance and/or medical aid scheme.
5. The right to choose a particular health facility for treatment.
6. The right to be treated by a named health care provider.
7. The right to privacy and confidentiality.
8. Informed consent – the right to be given full and accurate information so that you can make a decision on testing or treatment.

9. The right to refuse treatment as long as this refusal does not endanger the health of others.
10. The right to be referred for a second opinion.
11. The right not to be abandoned by a health care worker.
12. The right to complain about health care and have these complaints investigated, and to receive a full report of the investigation.

A patient's responsibilities include:

1. To take care of one's own health.
2. To care for and protect the environment.
3. To respect the rights of other patients, health care workers and health care providers.
4. To use the health care system fully and not to abuse it.
5. To know local health services and what they offer.
6. To provide health workers with relevant and accurate information for diagnostic, treatment rehabilitation or counselling purposes.
7. To advise the health providers of the patient's wishes before he or she dies.
8. To follow the prescribed treatment and or rehabilitation procedures.
9. To enquire about related costs of treatment and or rehabilitation, and to arrange to make payment for these.
10. To take care of health records in a patient's possession.

[Source: Socio-Economic Rights: A Resource Book (2000), p242]

5.4.7 Sterilisation

sterilisation is a medical operation to make a person incapable of having children

Sterilisation is a medical operation to make a person incapable of having children. Everyone has the right to decide whether they want to have children or not. If a person chooses to be sterilised, the hospital must respect their decision.

A married person does not need to discuss their decision with their partner or get their consent.

5.4.7.1 General principles

In order for a woman to have a sterilisation, the following conditions apply:

a person must be 18 or older

1. A person must be 18 or older to consent to sterilisation on their own.
2. As sterilisation is a medical operation, a person under 18 must have the consent of their parents or legal guardian before a hospital will agree to sterilise them.
3. The law also allows for the sterilisation of a person with severe mental disability provided their parents, spouse, guardian or close relatives and the hospital also agree.

prohibition of smoking in public places

5.4.8 Protecting against harmful effects of tobacco on health

The Tobacco Products Control Amendment Act was passed to deal with the harmful effect of tobacco on the health of people. The law prohibits people from smoking in certain places. It also prohibits tobacco companies from:

1. Advertising and promoting tobacco.
2. Distributing tobacco for free.

5.4.9 Medical schemes

Medical Schemes Act

Medical schemes are governed by the Medical Schemes Act. The Act protects the interests of members of medical schemes by setting out guidelines on the terms and conditions for membership of schemes. The Act prohibits:

1. Unfair discrimination on a number of grounds.
2. Risk rating – that is, making people pay more because they are seen as being at higher risk group (e.g. people living with HIV or AIDS).

What is fair and unfair discrimination?

The Constitution declares that certain acts of discrimination may be considered fair and others not. It is fair discrimination if the government implements a policy which provides access to certain opportunities first, or is aimed to redress the racial discrimination of the past, to the previously disadvantaged groups (African, Coloureds and Indians).

The Act also says that what people have to pay (premiums) must:

1. Be based on the income and the number of dependants of the medical scheme applicant or holder.
2. Not be based on any other grounds such as sex, past or present state of health of the applicant or her dependants.

“late joiners”

The Act imposes penalties on “late joiners” of a scheme. A “late joiner” refers to an applicant or dependant of the applicant who, at the date of applying for membership, is 40 years or older and has not been a member of another medical scheme during the period of two years before applying for membership. Penalties are set out in the Regulations to the Act. Penalties may include payment of higher premiums.

5.4.9.1 How do medical aid schemes work?

Different medical aid schemes work in different ways. For example, some medical aid schemes cover a member for 80% - 100% of the doctor’s fees for any treatment. In cases where the scheme does not pay the full amount, the patient will have to pay the rest.

medical aid schemes cover a number of health-related visits to the doctor

Medical aid schemes cover a number of health-related visits to the doctor, including those related to eyes and teeth check-ups, pregnancy etc. They also cover hospital fees such as accommodation and medical treatment. However, most medical schemes will pay the hospital fees up to a certain amount.

all private hospitals costs may not be covered

If a person chooses to go to a private hospital, which is more expensive, the medical aid scheme may not cover all hospital fees. It may only pay the amount that the patient would have paid had he or she gone to a public hospital.

Medical aid schemes cover people who are ill and injured. They do not normally include "cosmetic surgery" to improve one's looks (e.g. treatment for lifting a person's buttocks, or an operation to lift a person's face or stomach).

Find out whether the doctor is "contracted out" before choosing your doctor



5.4.9.2 How do you claim under a medical aid scheme?

procedures for claiming under medical aid

There are different procedures for claiming under different medical aid schemes. Depending on the rules:

"contracted out"

"prescribed minimum benefits"

1. A patient may be able to claim directly by sending the doctor's medical accounts to the medical aid society, (or it may be done by the doctor for the patient) if the fees have been charged at the normal rates.
2. A patient may send a claim form with the account which the medical aid scheme will then pay the hospital or doctor what the patient is owes.
3. A patient may pay the medical doctor or hospital and then claim from the medical aid scheme. This often happens in the case of doctors who are "contracted out".
4. A patient must send his or her claim as soon as the account is received.
5. A medical aid scheme may refuse to pay, or reduce the amount that it will pay. For example, many schemes limit the amount that can be claimed for teeth or spectacles in a year, or the time that may be spent in hospitals. Medical schemes may refuse to pay for certain treatment such as anti-retroviral drugs because these drugs are not yet included in the "prescribed minimum benefits".
6. Some medical schemes set the amount that can be claimed for different types of treatment during the first year of the scheme.

Problem 4 Some questions on medical aid schemes

Questions

1. Does your family belong to a medical aid scheme? If so, how much of the family's medical and hospital expenses does it cover?
2. Do you think that all employers should provide their workers with medical aid? Why or why not?
3. What happens if medical aid patients choose to consult doctors who have "contracted out"? How much will the medical aid scheme pay? What might happen if a patient wishes to stay in a private hospital? How much will the medical aid scheme usually pay?
4. What are some of the ways a person may claim from a medical aid scheme?
5. What kinds of limits may be placed on claims against medical aid schemes?
6. Should the state provide free medical aid for everyone or only for the poor? Why or why not?

5.4.10 How to complain against health professionals?

complaints to HPCSA and SANC

Complaints can be made to the following professional health councils:

1. The Health Professionals Council of South Africa (HPCSA) for the medical practitioners, doctors, psychologists, etc.
2. The South African Nursing Council (SANC) which oversees the training and conduct of nurses.

complaints to Public Protector and Department of Health

In the case of general health workers, complaints can also be made to the nearest offices of the Public Protector or the Department of Health (especially in the case of a health authority's refusal to treat a patient).

5.4.10.1 General guidelines on making complaints

The complaints should be in writing and must give the following details:

1. The name of the complainant.
2. The nature of the complaint.
3. The date and place of the incident.
4. How the incident happened.

5.4.10.2 People who cannot afford to pay for medical treatment

affordable and free health care services

No one may be denied access to medical treatment at a public hospital or health clinic simply because they cannot afford to pay for it. The right of access to health care services also means that such services must not only be within the reach of the people, but they must also be affordable. Therefore, everyone who is sick and cannot afford medical treatment may approach a public hospital or health clinic for medical attention at state expense.

Most community health care clinics, and public hospitals provide free health care services to pregnant and lactating women and children, as well as the elderly who cannot afford to pay for their medical treatment.

Problem 5 Do they qualify for free medical treatment?

Questions

1. An old-age pensioner who is 80 years old.
2. Shaida who is expecting a baby and requires medical treatment. She cannot afford a doctor.
3. Tembu who lives in a rural area and whose leg is crushed in an accident in a remote forest. He needs to be transported to a hospital 100 kilometres away but does not have the money for a bus or taxi.
4. Petrus who worked in the coal mines for 15 years and suffers from a lung disease. He cannot afford a doctor. What should he do?

5.5 Food rights

Outcomes

After completion of this section learners will be able to:

1. Explain the law concerning the right to food.

Assessment criteria

1. The meaning of the right of access to sufficient food is given.
2. Barriers to access to food are identified.
3. Different departments that are responsible for realising the right to food are identified.
4. A set of facts is examined and decision made on whether a certain groups of people and their families qualify for free food from the state.

5.5.1 Why is it important to understand food rights?

food needed for survival and healthy development

Everyone needs food to survive, perform physical activities (e.g. work), to interact with others, to participate in social and political activities, to prevent infectious diseases and to live a decent life. People without food often find themselves begging for food in the street. This undermines their right to human dignity. They need to be able to get food through their own efforts such as working.

households unable to afford basic subsistence food

Many people in South Africa are poor and cannot afford basic household needs. Some families go hungry every day (sleep without food) and some do not have enough food to prevent starvation. Children, women, people with disabilities and the elderly are the groups most vulnerable to hunger and malnutrition.

The Constitution protects the right to food in three ways. It protects (a) the right of everyone to have access to sufficient food; (b) the right of children to basic nutrition and the right of prisoners to adequate nutrition. The state has to take reasonable legislative measures to ensure access to food for all South Africans.

access means ability to produce food

The right to food means that people are entitled to produce or obtain food for themselves through work or other income-generating activities, access to productive land, social welfare benefits etc. It also means that food should be provided to people who have no means producing or getting food for themselves.

assistance to households with hungry children

The right of “access” to food means that the state does not have to give everyone food, but must make it possible for people to access food for themselves. The state must ensure that people have access to food over a period of time, subject to available resources. The right to food for children and prisoners is given special protection under the Constitution because they are not in a position to provide food for themselves. The main duty to provide food for children lies with their parents and families.

The state has a duty to provide food to children whose parents cannot afford to do so and to children who do not have, or have been abandoned by their parents and families. For example, the state has a duty to assist orphans or child-headed households who need food or have other basic needs. It also has a duty to provide food to prisoners.

Problem 1 “I am nothing - I am just a person of God”

Joyce lives in a small rural community in Limpopo. She takes care of both her son and her daughter’s children. She has no job and receives no income from relatives living in urban areas. Instead, she derives a very small income from building other people’s houses. Her granddaughters also earn money by collecting wood, which they sell for R10 a bundle. The girls are usually out from 06h00 to midday, as the wood is heavy and they cannot carry much at a time. Fetching for their own use and for selling means that they usually go three or four times a week. The wood collecting has already paid for one son’s school fees.

Unlike some others, Joyce has no land to plough and no livestock. “I am nothing – I am just a person of God. My biggest problem is to have enough food for my children.” Joyce has been told that she does not qualify for free mealie meal and soap from Operation Hunger, as the food is only available to orphans.

[Source: NGO Matter, (March 1998) in Socio-Economic Rights. A Resource Book (2000), p259]

Questions

1. Should the government help Joyce and her family? If not, what kind of assistance should Joyce get from the government or who should help?
2. Does the fact that Joyce has children mean that she is entitled to assistance from the state immediately? If not, does it mean that Joyce should wait for is a government programme that provides food in her community?
3. Why do you think people do not have access to food?
4. What rights are linked to the right to food?
5. What do you think the government should do to address hunger and malnutrition amongst children?

5.5.2 What does the right of access to sufficient food mean?

basic amount of food to prevent hunger

The Constitution speaks of “sufficient food”, “basic nutrition” and “adequate nutrition”. These words are said to refer to one and the same standard of food, that is: the quantity of food. Everyone must have access to the basic amount of food necessary to prevent hunger.

quality of food to live a healthy and dignified life

Not only should people have a basic amount of food and not go hungry, they must also have access to quality food to prevent vulnerability from diseases. The food people eat should have an adequate a mixture of nutrients. It should also be fresh and without harmful substances to enable a person to live a healthy and dignified life.

food must be acceptable to different groups

Further, different groups of people eat difference types of food. To be “adequate”, food must not only be sufficient, safe and nutritious, but also be acceptable to those who eat it. For example, the popular meal among African people is mealie meal. Hindu people are not allowed to eat meat. Food must also be culturally and traditionally acceptable to meet the needs of different peoples. It should also be acceptable to meet the special food needs of other people such as children, pregnant women, and breastfeeding mothers and people who are ill and elderly.

5.6 Housing rights

Outcomes

After completion of this section learners will be able to:

1. Explain the law regarding access to adequate housing.

Assessment criteria

1. The meaning of the right of access to adequate housing is explained.
2. A set of facts is examined and a decision made on whether or not the people concerned are entitled to be provided with housing by the state.
3. The laws governing evictions are identified and explained.
4. A set of facts is examined and a decision made on whether the landlord may evict the occupiers.
5. The law governing the renting of houses is explained.
6. A decision is made on what people should look for when renting houses.
7. An explanation on how to lodge a complaint concerning rental agreements is given.
8. A set of facts is given and a decision made on the rights and duties of landlords and tenants.
9. A set of facts is given and a decision made on whether to rent or buy a house.
10. An explanation is given on how to access housing subsidies and housing loans.
11. A set of facts is given and a decision made on which persons qualify for a housing subsidy.
12. A set of facts is given and a decision made on whether the persons concerned qualify for a housing loan.
13. Dishonest ways of buying and selling houses are identified.
14. An explanation of the nature, context and effect of a deed of sale is given.
15. An explanation is given on what a mortgage bond is and how to apply for one.

5.6.1 What are housing rights?

all families need housing

Everyone and all families need housing. The Constitution says that everyone has a right of access to adequate housing, and not to be evicted from their homes or have their homes demolished unless it is ordered by a court. It also says that every child has the right to shelter and every prisoner “has a right to adequate accommodation at state expense”. The government must take reasonable steps to ensure that everyone has access to housing.

apartheid is primarily responsible for homelessness

The problem of homelessness or lack of adequate housing is still a major challenge in South Africa. The previous apartheid laws and policies are responsible for this problem. For example, the Group Areas Act was responsible for evicting many people from their homes without any compensation. Often these people were relocated to remote areas designated for black South Africans. They could not choose which neighbourhood they were going to live in. This resulted in inadequate housing for many of people. The legacy of the apartheid system puts pressure on the current government to address the problem of inadequate housing and homelessness.

homelessness a major problem

The constitutional right of access to adequate housing is a useful tool for people and families who are homeless or live in houses that are inadequate for a decent standard of living.

Many laws have been passed that seek to achieve the objectives of this constitutional right.

This section will discuss what the law says about people's entitlements to housing. It will also deal with some of the practical issues for people without homes, with inadequate housing and those who rent or cannot own flats or houses.

5.6.2 What does the right of "access to adequate housing" mean?

Case study 1: Meaning of the right of access to adequate housing and children's rights to shelter

Government of South Africa v Grootboom 2000

In the Government of South Africa v Grootboom 2000, the Constitutional Court had to interpret the meaning of the constitutional right of access to adequate housing and children's rights to shelter as well as the state's duty in respect of these rights. The case involved about 900 adults and children from Wallacedene who were evicted from the private land they were unlawfully occupying. Following the eviction they camped on a sports field. They applied to the Cape High Court claiming that the state had a duty to provide them with adequate temporary shelter or housing. The High Court ruled in their favour on the basis that the state had a duty to provide shelter (including tents, portable latrines and a regular supply of water) to the children and their parents. The state appealed against the judgment to the Constitutional Court.

Problem 1: The case of the sport's field squatters

Questions

1. In small groups, half for the Grootboom community and the other half for the state, prepare arguments which you think could have been presented before the Constitutional Court during the appeal hearing.
2. What was the Constitutional Court's decision in the case?
3. Assuming the state provided you and your family with a house, what would you expect to get in order to consider it "an adequate house"?
 - (a) What type of house?
 - (b) How much should it cost?
 - (c) What size should the house be?
 - (d) What quality of building materials should be used?
 - (e) Where should it be?
 - (f) What other factors should be considered when deciding what is the standard of an adequate house?

5.6.3 What does the right to protection against arbitrary eviction mean?

The Constitution says that no one can be evicted from their homes or have

their property demolished without an order of court made after all relevant circumstances have been considered. The laws governing evictions are the Extension of Security of Tenure Act 1997 (ESTA) and the Prevention of Illegal Eviction from and the Unlawful Occupation of Land Act 1998 (PIE).

5.6.3.1 Extension of Tenure Act (ESTA)

security of tenure

ESTA prohibits unfair evictions, provides security of tenure, and protects against arbitrary eviction for people in rural and peri-urban areas. It is aimed at protecting “occupiers”.

protection against arbitrary eviction

definition of “occupier” under ESTA

An “occupier” is a person living on land belonging to another person and who has on or since 4 February 1997 been allowed by the owner to continue living on it. The definition does not include the following:

1. A labour tenant under the Labour Tenants Act.
2. A person using or intending to use the land for industrial or commercial purposes.
3. A person who has an income of more than R5 000 per month.

ESTA also provides two different procedures for evictions:

1. A procedure for people who occupied land before or on 4 February 1997.
2. A procedure for people who occupied land after 4 February 1997.

5.6.3.1.1 Procedure for evictions of people who were occupiers on or before 4 February 1997

A court may order an eviction of the above persons if the following conditions are satisfied:

suitable alternative accommodation

1. The reason for granting the eviction order is that the occupier has done something wrong.
2. A court may still grant an order of eviction if it is satisfied that suitable alternative accommodation is available for the occupier.
3. Such suitable alternative accommodation must be available to the occupier within a period of 9 months after date of termination of their residence and must be found before the person is evicted.
4. The owner or person in charge provided the house where the occupier lives.
5. Other than the above conditions, a court may still make an eviction order if it is convinced that it will be just and equitable to evict, taking into account:
 - (a) The efforts of the owner or person in charge to find suitable alternative accommodation.
 - (b) The interests of both sides (e.g. it would cause more hardship for the owner if the court were not to grant the eviction).

just and equitable

5.6.3.1.2 Procedure for evictions of people who became occupiers after 4 February 1997

A court may order an eviction of the above if the following conditions are satisfied:

1. There was an express and fair agreement between the occupier and the owner or person in charge on the period of occupation, and the court is of the view that it is just and equitable to grant an eviction order.
2. The court believes, after considering all the circumstances, that it is just and equitable to grant an eviction.

To determine what is just and equitable, the court will consider:

- (a) How long the occupier has lived on the land.
- (b) Whether the agreement between the parties was fair.
- (c) Whether the occupier can get suitable alternative accommodation.
- (d) The reason for eviction.
- (e) The interests of the owner or person in charge, the occupier and the remaining occupier on the land.

In deciding on the date of the eviction, the court will also consider what is just and equitable from each side.

“lawful occupiers”

5.6.3.2 The Prevention of Illegal Eviction from and the Unlawful Occupation of Land (PIE)

Unlike ESTA which focuses on “lawful occupiers”, PIE prohibits unlawful evictions of “illegal occupiers”. It provides procedures for evictions of people by an owner or a person in charge, or by an organ of the state.

5.6.3.2.1 Procedure for evictions of unlawful occupiers by an owner or person in charge

If an occupier has unlawfully occupied the land for less than six months at the time of the start of eviction proceedings, the court may grant an eviction order if it considers it just and equitable to do so, after taking into account all relevant circumstances including the rights and needs of such vulnerable groups as the elderly, children, people living with disabilities and women-headed households.

circumstances for evictions

If an occupier has unlawfully occupied the land for more than six months at the time of the start of eviction proceedings, the court may grant an eviction order if it thinks that is just and equitable, after considering the following circumstances:

1. Whether land has been made available, or can reasonably be made available, by a landowner for the relocation of the unlawful occupier; and
2. The rights of the elderly, children, people living with disabilities and women-headed households.

5.6.3.2.2 Procedure for evictions of unlawful occupiers by an organ of the state

A court may grant an eviction order if:

1. It is of the view that this is just and equitable after considering all the relevant circumstances;

alternative
accommodation or
land

2. The unlawful occupier is occupying land without the consent of an organ of state where this consent is needed; and
3. It is in the public interest to grant the eviction order.

In deciding what is just and equitable, a court will consider:

1. The circumstances in which the unlawful occupier occupied the land and erected the building or structure;
2. The period that the unlawful occupiers and their families have lived on the land; and
3. The availability of suitable alternative accommodation or land.

Problem 3 **The landlord threatens to evict the occupiers**

Questions

A landlord threatens to evict the occupiers from his land. The occupiers have been living on this land with the consent of the landlord since 4 February 1998. He says that he will apply to court for an order of eviction soon.

Divide the participants into three groups representing (a) the landlord; (b) the lawyers for the occupiers; and (c) judges in the court. Subdivide the large groups into small groups in order to prepare their roles. Lawyers should prepare their arguments and judges their judgments.

1. Present arguments as lawyers for the landlord.
2. Present arguments as lawyers for the occupiers.
3. Give judgments as the Court.

5.6.4 Promoting and protecting access to adequate housing

5.6.4.1 What does the law say about the rental and leasing of houses?

rental
accommodation and
leases

The Rental Housing Act of 1999 governs all rental accommodation and leases in South Africa. It seeks to create mechanisms to ensure the proper functioning of the rental housing market. It also aims at regulating the relationship between landlords and tenants, protecting them against unfair practices and exploitation. It also provides the mechanisms for conflict resolution between tenants and landlords. The main section of the Act came into effect on 1 August 2000, and the other sections in 2003.

people protected by
the Act

The Act protects people who are staying in dwellings and houses, hostel rooms, huts, shacks, flats, apartments, rooms, outbuildings, garages or similar structures, parking spaces, which form part of the lease.

what is a lease?

5.6.4.1.1 What is a lease?

A tenant who rents a dwelling pays the landlord (the person who hires it out) a certain amount of rent. In return the landlord gives the tenant the right to live in the dwelling for a certain period of time. The landlord is the person who owns the dwelling leased or the person who is in charge of the property. The landlord and tenant enter into a contract called a "lease". The lease sets out the amount of rent that must be paid and the length of time the house or flat may be rented. It also mentions the rights and duties of the landlord and tenant.

5.6.4.1.2 What to look for when leasing a property

A checklist of what to do and what to look for before agreeing on the lease:

1. What is the condition of the house, flat or room?
2. If it is a flat or room, are the passages, entrances, and shared areas clean?
3. Who will be responsible for repairs to the property?
4. Are the taps, toilets, and drains in good working order?
5. Do the lights, plugs and electrical equipment work properly?
6. If they are to be rented are the kitchen stove and fridge clean and in good working order?
7. Is there evidence of leaks (e.g. water stains, peeling paint or damp patches)?
8. Are there burglar guards?
9. Is the accommodation furnished or unfurnished? If furnished, is the furniture clean and in good condition?
10. Do the windows and doors open and close easily?
11. Are there any broken window panes, window latches or door locks?
12. Are there any rules about animals or children?
13. Are there keys for all the doors?
14. In the case of a flat, is it serviced?
15. In the case of a house, who looks after the garden?
16. Is the house, flat or room big enough?
17. What is the condition of the paintwork?
18. Is the “key deposit” refundable?

NB: If things are wrong with the place to be rented, make a list of all the faults and ask the landlord to have them repaired.

Tenants should inspect the flat or house before signing a lease



Note: Orders made by the Rental Housing Tribunal may be appealed against in the High Court.

Tenants and landlords can get advice on their rights and duties from the Rental Housing Information Office at their local authority.

Problem 7 The Phalas are evicted

Questions

Mrs Lizzie Phala lives in a house in Kliptown with her husband, Mr Ernest Phala. The house is privately owned by Mr Landu. Mr Phala earns R2 500 a month. The rent for the house is R400 a month. Mr Phala is retrenched from his job and can no longer afford to pay the rent. Mr Landu physically evicts the Phalas from the house without a court order. He removes all their furniture and places it on the pavement. He also locks the doors of the house so that the Phalas cannot get in. Mrs Phala wants to break the lock in order to get back into the house. What should she do?

Mr Landu physically removes the Phalas and throws their possessions onto the pavement



5.6.4.2 Deciding whether to rent or buy

There are advantages and disadvantages to both buying and renting homes.

5.6.4.2.1 Buying

The advantages of buying are:

1. Monthly mortgage repayments are like savings and can be used as savings if the house is sold.
2. Buying a house is a good way of fighting the increasing cost of living over the years because properties usually increase in value much quicker than other things.

The disadvantages of buying are:

1. People who buy houses and cannot afford cash usually have to pay a large deposit and transfer fees that may cost thousands of rands.
2. People who take out “mortgage bonds” to pay off their loans usually have to pay off the loans for 20, 25 or 30 years. This means that they pay much more for the houses than they would have to pay if they paid in cash because they pay interest for many years.
3. People who fail to keep up their monthly mortgage bond repayments may have their house taken away and sold by the bank or building society that made the loan.
4. People who buy houses not only have to pay for electricity and water, but also for maintenance, repairs, insurance, and home improvements.
5. Mortgage repayments may have to be increased if the cost of money increases.

5.6.4.2.2 Renting

The advantages of renting are:

1. People who rent houses (tenants) have fewer responsibilities than people who buy houses.
2. Tenants may ask their landlords (the people who rent out the property) to make repairs and do not have to worry about insuring the building.
3. Renting allows people to move out of the building at short notice. [People who own a home usually have to sell it before they can move out.]
4. If tenants earn less money they only have to pay the rent for as long as the lease lasts. [If they own houses, they have to keep up mortgage repayments until the bond is paid off or the house is sold.]

The disadvantages of renting are:

1. In the long run a tenant has nothing to show except receipts for rent payments. [A person who buys a home will own the property and the mortgage repayments will help to pay it off.]
2. Monthly rents may increase if there is a shortage of property for renting.
3. Tenants have to agree to more rules and have less privacy than people who own their own homes. [This is because landlords are usually allowed to visit the property at reasonable times to make sure that it is being looked after.]

Depending on the agreements with their landlords, tenants may have to pay electricity and water costs in addition to rent. These costs should be taken into account when tenants work out how much they can afford to pay each month. Before renting or buying flats or houses, tenants or buyers should find out the average monthly cost of electricity and water. This can be done by asking for copies of accounts from previous tenants or owners of the building. People renting sometimes have to pay a “key deposit” to cover any damage to the property.

If you do not pay your electricity or water account, the services may be cut off



Problem 8 Should Dawie and Koekie buy or rent the house?

Dawie and Koekie, both 23 years old, decide to get married. They each have jobs paying R30 000 a year. Each brings home R2 400 a month (R4 800 total). Between them they have R15 000 in savings. They are trying to decide if they should rent or buy a house. They visit an estate agent who takes them to see a small two bedroomed house. The agent says the owner is willing to rent the house or to sell it to them. If they rent the house the owner wants R1 500 a month rent, plus R200 a month for water and electricity. The owner will give them a one-year lease and make the necessary repairs. If they wish to buy the house the price is R150 000, including a deposit of R15 000. They will then have to obtain a mortgage bond for R135 000 from a bank or building society. The monthly repayments on the mortgage bond will be R2 400. They will have to spend an extra R2 000 a year on rates and taxes, R800 a year on insurance, and R300 a month for electricity and water.

Questions

1. List all the reasons why Dawie and Koekie should buy the house.
2. List all the reasons why Dawie and Koekie should not buy the house.
3. Roleplay a conversation between Dawie and Koekie in which they discuss whether to rent or buy the house.
4. Where might Dawie and Koekie get help to buy the house?

Landlords renting a house will usually want to know the following about their tenants:

1. Do the tenants have a steady income that is likely to continue?
2. Are the incomes of the tenants high enough and their expenses low enough to allow them to pay the rent?
3. Do the tenants have a good record for paying off previous debts or loans?
4. Will the tenants take good care of the property?

5.6.4.2.3 Problems in renting a house or flat

Type of problem	What can be done about it
i) Rent and service charges increase (e.g. sewerage, rubbish removal, water, community facilities, maintenance and administration).	i) Often nothing can be done to prevent increases in rent and service charges. The Rental Housing Act says the rent can be increased by 10% every year. But eviction of tenants because they cannot pay may be challenged in court or a Tribunal.
ii) The tenant's possessions are taken by the landlord without a court order because the tenant has not paid the rent.	ii) The landlord may lock the possessions in the premises for a short time, but must apply to court to attach the tenant's possessions. If the landlord does not, the tenant may take legal action against the landlord. The landlord may not use force to prevent the tenant from recovering the possessions. The tenant should consult a Rental Housing Information Office, a lawyer or legal aid clinic in this situation.
iii) Movable property that is still being paid for under a credit agreement or "hire purchase" is attached by the landlord or sheriff.	iii) This property does not belong to the tenant and may not be attached. The owner of the goods being paid for under a credit agreement must tell the landlord that he or she is the owner of the goods. The tenant may lodge a complaint with the Tribunal, or contact the Rental Housing Information Office or should immediately consult a lawyer or legal aid clinic or paralegal advice office.
iv) The landlord fails to keep the leased property in the condition promised.	iv) It is the duty of the landlord to do general maintenance of the property. However, it is also a duty of the tenant not to cause damage to the property. The tenant should consult the Rental Housing Information Office or a lawyer or legal aid clinic or paralegal advice office for help.
v) The landlord evicts a tenant who has not paid the rent, without obtaining a court order	v) The tenant may obtain a "spoliation order" from the court to be put back in the house or flat. The landlord will then have to go to court to obtain an eviction order. If the property belongs to a local authority the landlord need not go to court but must give the tenant seven days' written notice.
vi) The landlord decides to do an inspection in the property without giving the tenant reasonable notice.	vi) The Rental Housing Act prohibits the landlord from violating the tenant's right to privacy and says that inspection must be done at a reasonable time and upon reasonable notice being given. The tenant may lodge a complaint to the Tribunal, consult a lawyer or legal aid clinic.

5.6.5 How is the right of access to adequate housing being implemented?

types of housing subsidies

5.6.5.1 The housing subsidy scheme

The South African government introduced the housing subsidy scheme in 1995 to address the problem of lack of access to adequate housing. This scheme provides the following types of subsidies:

1. Individual ownership subsidies which allow people to purchase a site and build their own house.
2. Project-linked subsidies which allow individuals to own houses in projects that are approved by the Provincial Housing Board.
3. Consolidation subsidies that provide people who have already received State housing assistance with financial assistance to improve the standard and quality of their houses.
4. Institutional subsidies which are available to institutions and agents that build affordable houses for individuals.

Housing subsidies vary in amounts. The housing subsidy scheme provides beneficiaries with an amount of R16 000 or 15% more in areas where people experience natural difficult conditions, such as the Western Cape where beneficiaries get R18 250 because of the water table problem.

[Source: Socio-Economic Rights Resource Book (2000), p205]

conditions for qualifying for the scheme

5.6.5.2 Who qualifies for a housing subsidy scheme?

To qualify for the scheme, a person must:

1. Be a South African citizen.
2. Be 21 years or older.
3. Have a total household monthly income of:
 - (a) Less than R1 500 to qualify for a project subsidy of R16 000.
 - (b) Between R1 501 – R2 500 to qualify for a project subsidy of R10 500.
 - (c) Between R2 501 – R3 500 to qualify for project subsidy of R5 000.
 - (d) Less than R3 500 to qualify for institutional subsidy of R16 000.
 - (e) Less than R1 500 to qualify for a consolidation subsidy of R8 000.
4. Be part of a married couple, or a single person living together with another as a couple, or a single person with one or more dependants.
5. Not have received a housing subsidy previously.
6. Not own or have owned property in South Africa.

People wishing to apply for the housing subsidy scheme must fill in the forms which are available at the nearest office of the Department of Housing. All applications are checked, approved or rejected by the Provincial Housing Development Board.

Problem 10 Do the people qualify for a housing subsidy scheme?

Questions

Consider the following cases and decide whether the person(s) involved can qualify for a housing subsidy scheme. Why or why not?

1. Gerald Smith has been paying for his home for the past 7 years. He is now insolvent and cannot afford to continue with the payments. He has also been in arrears for more than three months. He is about to be thrown out of the house. Does he qualify for a subsidy?
2. The Motene family have recently been involved in a tragic accident which resulted in their 25-year-old daughter, Rose, being permanently disabled. They own a small home? With their poor background, they cannot afford to upgrade the house to suit Rose's disability needs. Do they qualify for a housing subsidy? Why or why not?

5.6.5.3 Obtaining a loan or accessing credits

cheaper ways of paying off the loan

The cheapest way to buy a home is to pay for it in cash. If you pay cash for a home you do not have to pay interest or finance charges. Most people however do not have large sums of money and usually have to borrow money in order to pay for a home. When a person has obtained a loan for a home, it is cheaper to pay off as much as possible with a high deposit and high monthly instalments as possible because the buyer will save a lot on interest. The monthly instalments should not, however, take up more than 25% of the buyer's monthly income.

calculating expenses

When calculating the amount to be paid for the home, the buyer should take into account extra expenses like transfer duty, insurance costs, inspection fees, stamp duty, rates and taxes as well as conveyancing fees. These should be worked out when deciding what deposit and monthly instalments the buyers can afford.

Costs involved in buying a home:

1. Transfer duty is a tax which has to be paid to the state when property is transferred from one person to another.
2. Insurance premiums are usually added to the monthly mortgage bond repayments. Building societies or banks require buyers to insure the property to cover its value in case it is damaged or destroyed.
3. Inspection fees are charged by building societies when they inspect the property to decide whether or not to make a mortgage bond loan. The inspection, however, does not guarantee that the house is free from defects. Usually if there are defects in the property building societies will require them to be repaired before the bond is granted.
4. Stamp duty is a tax that must be paid to the Receiver of Revenue when a mortgage bond is registered over a property.
5. Rates and taxes must be paid to the relevant municipality for the period up to the date when the property is sold.
6. Conveyancing fees are fees payable to the attorney who transfers the property into the name of the buyer and registers the mortgage bond. These fees are governed by regulations. [Before a person buys a house, he or she should work out the cost of all the above expenses.]

Problem 11 Edward wants to buy a house

Questions

1. Edward wants to buy a house for R280 000. He sees a house advertised at that price. What other costs should Edward work out before he will know whether he can afford it?

5.6.5.4 Who qualifies for home loans?

risks involved in loaning monies

Anyone who is capable of repaying a loan qualifies for a home loan. However, different financial institutions have different criteria and procedures for determining to whom they may lend money. High-income earners do not often have a problem borrowing from these institutions, unless they have been blacklisted by a credit bureau. However, financial institutions are sceptical of lending money to low and medium-income earners because they often experience problems with repayments of their home loan from this group of people. The law attempts to strike a balance between the potential risks of lending money to poor communities for the institutions and the need for everyone to access loans for the purposes of buying a house.

The government has different ways of making it possible for people to gain access to adequate housing. It has created mechanisms for people to get credit (borrow money) to buy houses through a number of laws and by developing various programmes.

5.6.5.5 Laws dealing with home loans

banks and financial institutions encouraged to provide loans to marginalised groups

The Home Loan and Mortgage Disclosure Act promotes fair lending practices among financial institutions that provide home loans. It encourages banks and other financial institutions that provide home loans to focus on marginalised groups of the population in giving such loans. This Act helps the government to determine the progress of each institution in providing access to credit for the purposes of housing. However, it does not interfere with the institution's business of providing home loans. Thus, the institution can approve or decline a person's application on whatever basis the business practice demands.

The Community Reinvestment Housing Bill, when passed into law, will force financial institutions to make finance available to the lower end of the home loan market. These institutions must set aside a portion of their loan to cater for the credit needs of the low and medium income earners so that they can access home loans. The Bill proposes that the financial institution must:

"redlining"

1. Not refuse home loan finance on the basis of the poor socio-economic conditions of the neighbourhood in which a person's home is located ("geographic redlining").
2. Not practice "redlining" (refusing people access home loan because of their socio-economic status) unless it is demanded by safe and sound business practices.
3. Inform applicants of the outcome of the applications and, if unsuccessful, provide information on why the application was not successful.
4. Help unsuccessful applicants get home loans through other home loan lenders or schemes.

Problem 12 Should a housing loan be granted?

Questions

1. Joyce and her four children live in an informal settlement in Cato Manor in Durban. She applies for a home loan with Boland Company which gives credit to people for the purposes of housing. She has been told that her application was unsuccessful because Boland considers the place where Joyce and her family live to be “a high risk area”. Roleplay an interview between the manager of Boland and Joyce.
2. Kobus is domestic worker who earns R500 per month. The combined household income of Kobus’s family comes to R6 000 per month. They have been living in a one-room shack in Khayelitsha. He applies for a home loan with Siyathuthuka Bank. His application is refused because he earns too little and the bank is of the view that he cannot afford to repay the loan. Roleplay an interview between the manager of Siyathuthuka and Kobus.

5.6.5.6 Where can people go to borrow money to buy houses?

5.6.5.6.1 Loans from building societies, banks and financial institutions

building societies and banks give home loans

One of the best ways of getting a loan to buy a home is through a building society or bank. Building societies and banks will lend home buyers money in exchange for a mortgage bond.

The advantages of obtaining a loan from a building society are:

advantages with a building society

1. The loans are usually for a fixed period of time (e.g. 20, 25 or 30 years).
2. The rates of interest charged are usually very similar because building societies compete with each other to give the most economical rates.
3. People can own homes bought through building society loans even though they have not paid the full purchase price.

advantages with banks

Loans from banks have the same advantages as those from building societies. An extra advantage of bank loans is that sometimes the interest rates are guaranteed for a year at a time. This is different from building society interest rates which change if the financial position of the country changes.

other financial institutions normally charge higher rates

Loans from private people and other financial organizations are usually more expensive than those from building societies or banks because they charge higher interest rates. Higher rates are charged because the loans are often for shorter periods of time. There is also the danger that a private mortgage bond holder may call up the loan after a shorter period of time.

be careful about special agreements with private people and other organisations

Building societies or banks usually try to assist buyers who are in trouble with their payments by increasing the period of the loan and reducing the amount that has to be paid each month. Private people and other financial organizations may be prepared to make special arrangements to assist people in trouble. Buyers, however, should be careful about signing “special” agreements.

The bank or building society will want to know that the buyer has a good financial record



getting subsidies from employers

5.6.5.6.2 Loans from employers

Some employers give loans to their workers. Others help their workers to get building society loans, or give them a “subsidy” so that they pay less interest on their loans. This usually applies to workers employed by the state. Whether or not an employer will give a loan to a worker may depend upon: (a) what the worker earns; (b) how long the worker has been with the employer; and (c) whether the worker pays into a pension fund. Employers might also help workers to pay the deposit for a housing loan from a building society or bank. In addition, employers may assist workers by giving them a monthly housing allowance (e.g. a certain amount each month towards the cost of paying off the house). They may also pay part of the interest charged by the bank or building society. For example, if a worker has to pay a building society 19% interest the employer might agree to pay 10% of the interest to bring the rate down to 9%.

People employed by the state can also obtain help in buying homes. This is usually done by guaranteeing workers a housing loan and giving them a monthly subsidy towards the cost of paying off the price of the home. In order to qualify for this help workers usually have to have been employed full-time by the state and to have paid into a public service pension fund for at least one year.

Problem 13 How can employers help workers to buy homes?

Questions

1. Mr Thami is employed by Good Hope Enterprises. Thami approaches his employer Mr Hope and asks him for a loan to buy a house. Roleplay a conversation between Mr Thami and Mr Hope

5.6.5.6.3 Loans from the Government

obtaining loans from the State

There are a number of ways in which the state helps people to buy houses. The state has passed laws that encourage financial institutions providing home loans to cater for the needs of everyone (see above para 5.6.5.5). It has also created state agencies that provide home loans and housing subsidy schemes directly to certain groups of people (especially low and medium-income earners (see above para 5.6.5.1). It has also created an agency that will assist people who are at the risk of losing their homes because they are struggling or cannot repay the loan instalments regularly (in arrears) (see below para 5.6.5.9.4).

5.6.5.7 What does a person need to apply for a home loan?

The following information is important when applying for a loan:

1. The person's identity document.
2. The person's proof of income.
3. The value of the person's assets.
4. Previous records of payment by the person (the person will have to disclose other credits held).
5. The person's record with a credit bureau (if any).
6. The details of the person's guarantor or surety (e.g. ID, proof of income, value of assets).

5.6.5.8 What happens if an application for a home loan is unsuccessful?

applicants are entitled to reasons for being unsuccessful

Any financial institution that gives credit to people has the right to approve or refuse the applications. It has to protect its business by not lending money to applicants who, after considering their financial position, may not be able to repay their home loans. An applicant is entitled to be given the reasons for the decision of the institution not to approve their application.

After a person receives a letter or a phone call informing him/her that their application was declined, the person should:

1. Ask for the reasons for such a decision.
2. Ask if there are other alternatives within or outside of the institution that may allow them to get the home loan.

5.6.5.9 Other housing initiatives to consider when buying a house

a go-between for buyers and lenders

5.6.5.9.1 The National Housing Finance Corporation

The NHFC provides assistance to people who are looking to buy a house in the price range between R15 000 to R50 000. It acts as a go-between for buyers and lenders who are prepared to offer loans.

guarantees to banks

5.6.5.9.2 The National Urban Reconstruction and Housing Agency

The NURHA provides temporary housing finance to households earning less than R1 500 per month. It also provides guarantees to banks that are prepared to make housing loans to low-income borrowers.

5.6.5.9.3 The People's Housing Process

assist people to build

The People's Housing Process aims to assist people to build and organise building their own housing by accessing housing subsidies and technical, financial logistical and administrative support. This process is driven by the People's Housing Partnership Trust.

5.6.5.9.4 Servcon housing solutions

assist low-income earners with financial difficulties

Servcon is an agency set up to assist low-income earners who are facing financial difficulties with their homes. It assists households that have defaulted on their loans so that they can resume payment. It has a special programme for pensioners and the unemployed. It provides the following options to lenders:

instalment sales

1. Instalment sales for households whose houses have been repossessed but who can afford the property. Clients can buy back the property in terms of a subsidised installment programme.

rescheduled payments

2. Rescheduled payments for households whose properties have not been repossessed but who are in default and who can afford the property. Servcon arranges for the balance of the loan to be relocated and for the client's loan repayments to be rescheduled.

rightsizing programmes

3. Rightsizing programmes for households whose properties have been repossessed or who are in default and cannot afford the property. Servcon assists households to find alternative affordable long-term accommodation while the family remains in the property at an affordable rental. These households are eligible for relocation assistance (i.e. a subsidy) from the housing subsidy scheme (see above para 5.6.5.1)

5.6.5.10 Dishonest ways of buying and selling homes

dishonesty in the buying and the selling of homes

The shortage of African housing has meant that many dishonest ways of buying and selling homes are used in the townships. These involve dishonest agents, builders, developers and estate agents as well as unfair written agreements that have special clauses that are not drawn to the attention of consumers.

5.6.5.10.1 Dishonest agents

no deposit until agreement is signed

Dishonest agents who say they are acting for builders approach people who wish to buy homes. They claim that people can immediately buy a house just by giving them a deposit. People who are not careful give these agents large deposits. The agents sometimes give them receipts for the money paid. The people hear nothing more from the agents, and then find out that they are dishonest people who have disappeared with the deposit.

People should always check to make sure that an agent is acting for a builder by contacting the builder. A buyer should never pay money "as a deposit" until a proper agreement has been signed, and the buyer is sure that the builder or seller is genuine.

Problem 14 Mr Nyathi is asked to pay a deposit

Mr Nyathi is approached by Mrs Kani who tells him that she is acting for Fast Homes, a building and development company. Mrs Kani says that if Mr Nyathi pays her a R5 000 deposit she will guarantee that Fast Homes will build him a house within three months.

Questions

1. What should Mr Nyathi do? Roleplay a conversation between Mr Nyathi and Mrs Kani.

5.6.5.10.2 Dishonest builders and developers

beware of dishonest builders and developers

Builders and developers sometimes contact people who wish to buy homes and offer to build houses for them if they pay large deposits. The builders and developers then fail to build the houses, and may not even have bought sites to build on. This is either because they never intended to build the houses, or because they have gone insolvent after not paying their debts.

get information regarding the developer or builder

People should always make sure that the builder or developer has a good reputation. A useful way of checking this is to ask the builder or developer to point out houses that they have built and to make sure that they are telling the truth. A better way is to ask the bank or building society that is helping with a loan to check whether the builder has a good reputation.

Problem 15 Speedy builders offer to build Mrs Sotho a house

Questions

Mrs Sotho is approached by Mr Kwiko of Speedy Builders who says that he is a housing developer and will build her a house in six months if she pays him a deposit of R8 000. What should Mrs Sotho do? Roleplay a conversation between Mrs Sotho and Mr Kwiko.

Be cautious before paying large deposits to builders or agents



beware of "easy loans"

dangers of "easy loans"

5.6.5.10.3 "Easy loans"

Builders and developers tell people who wish to buy homes but do not earn enough money to qualify for bank or building society loans, that they will persuade the bank or building society to make a loan. The builders or developers then falsely fill in bond application forms in which they say that the people who wish to buy the homes have more money than they have. Once the house is built, and the owner starts repaying the loan and he or she cannot keep up with the payments the house is taken away by the bank or building society (see above para 5.6.4.2.1).

People should always make sure that they fill in bond forms properly and do not promise to pay more than 25% of their earnings to the bank or building society each month (see below para 5.6.5.11). If they have to pay back more than 25% of their monthly earnings they are likely to fall behind in their payments and lose their homes.

5.6.5.10.4 Reading agreements before signing them

"fly-by-night" builders

"Fly-by-night" builders approach people with offers to build them houses if they pay deposits. Consumers sign agreements which they do not read properly. The agreements often have clauses in them which say that if the buyer does not make the necessary arrangements for a loan, or to obtain a plan passed by the local authority, no building will be done, and the deposit will be kept by the builder. Consumers are not told about these clauses, nor how to apply for a loan or have the plan approved by the local authority. The builder keeps the money when the consumer does not carry out the conditions in the clauses.

no signature without reading

People should never sign agreements without reading them. If people do not know how to read or do not understand what an agreement says, they should ask somebody to read it and to explain what it means. The person who reads or explains the agreement should not be the person who is trying to persuade the person to sign it. People should never sign an agreement without first having it explained to them.

Problem 16

Mrs Mphahlele is asked to sign an agreement

Questions

Mrs Mphahlele, who cannot read, is approached by Mr Fingo, a builder, who offers to build her a house for R30 000 if she pays a R3 000 deposit and signs an agreement. What should Mrs Mphahlele do? Roleplay a conversation between Mrs Mphahlele and Mr Fingo.

builders do not always disclose everything

5.6.5.10.5 Offers to make alterations or additions to homes

Builders sometimes approach people who own council houses and persuade them to make alterations by adding extra bedrooms or a garage for a "spaza" shop. Finance can be obtained by having a mortgage bond registered over the whole property which is worth much more than the alterations. The builders do not tell the owners that if they are unable to repay their bonds they will not only have to pay for the alterations or garages, but may lose the whole property if it is sold by the bank or building society.

For example, a house may be worth R30 000 and the alterations may cost another R10 000. If a bond for R8 000 is taken out and repayments are not made, the home worth R30 000 may be sold by the building society.

The owner will lose the house, but will be paid any money not needed to pay off the rest of the bond. Therefore if R5 000 is still owing on the bond and house is sold for R30 000, the owner will receive R25,000 (R30,000 less R5 000). It may be difficult to buy the same kind of house for R25 000, especially if there are other costs involved.

do not be talked into making alterations

People should not be persuaded to make alterations or additions to their homes unless they are able to pay for them. The total repayments for a loan, including the original loan for the house, and the extra money needed to make the alterations or additions, should not cost more than 25% of the home owner's monthly wages.

5.6.5.10.6 Dishonest estate agents

many people have lost to dishonest estate agents

Estate agents sometimes contact home-owners who are struggling to meet their bond repayments. They offer to buy their homes at a low price (e.g. half the market value), and to allow the owners to stay on in the houses after they have been sold. The owners will no longer own the houses but can rent them from the agents. The owners sell their houses to the estate agents who allow them and their family to stay on for a few months. The estate agents then find people who are desperate to buy houses and prepared to pay high prices because of the housing shortage. The estate agents sell the houses to the new owners for two or three times the prices paid to the previous owners. The previous owners are then evicted from the houses and the estate agents make a large profit. Many people have lost their houses in this way.

People should be very careful about selling their property to people who promise to let them stay on in their homes. The chances are that eventually the new owners will want to evict the previous owners. If people are struggling to make payments on their bonds they should approach their banks or building societies to see if they will increase the period of the bond so that they can pay a smaller amount each month.

There are many ways in which dishonest estate agents can cause people to lose money or even their homes



Problem 17 Mrs Luthuli is approached by Ms Batha, an estate agent

Mrs Luthuli who is struggling to pay off the bond on her house is approached by Ms Batha, an estate agent, who offers to buy it. Ms Batha says that she will buy Mrs Luthuli's house for R14 000 even though it is probably worth R25 000. In exchange she will allow Mrs Luthuli to stay on in the house and pay rent.

Questions

What should Mrs Luthuli do? Roleplay a conversation between Mrs Luthuli and Ms Batha.

beware of people who offer to help buyers repay their home loans

5.6.5.10.7 Offers to help with repaying loans

Some builders and developers advertise that they will help home buyers repay their bonds if they buy houses from them. The builders and developers then sell the houses at prices much higher than they are worth. They do this so that when the home buyers apply for loans they are given larger loans than they need. The contractors or developers then put part of the money received from the buyers into banking accounts and use it to help pay off the bonds for two or three years.

While the builders or contractors are helping to pay off the bonds, the home owners pay less than people who are not being assisted. When the builders or developers stop helping with the bond repayments the buyers have to pay the full amount each month. If this is too much for them and they fall behind in their payments they will lose their homes. These schemes look as if they help people who cannot afford to buy houses. Usually, however, people who buy under these schemes lose both their homes and the money paid by them.

People should be very careful about signing agreements in which other people promise to help them pay off loans or mortgage bonds. If such an offer is made they should make sure that the price at which the house is being sold is the proper price, and not higher than it should be. They can do this by asking the bank or building society to tell them how much the house is worth. They can also compare the prices of similar houses in the same neighbourhood. This can be done by reading newspaper advertisements or asking sellers. They should never enter into bond agreements unless the amount that they have to repay does not add up to more than 25% of their monthly income.

Problem 18 Mr Marivati is offered help in paying off his bond

Mr Marivati is approached by Miss Suni who offers to help him pay off his bond if he buys a house from her. Mr Marivatis earns R2 000 a month and the repayments on the bond will be R800 a month. Miss Suni offers to help Mr Marivati by paying off R300 of the R800 each month.

Questions

What should Mr Marivati do? Roleplay a conversation between Mr Marivati and Miss Suni.