

Impact Litigation

“Giving content to our rights”



2015



Independent and within reach.

VISION

- A South Africa in which the rights and responsibilities enshrined in the Constitution are realised to ensure equality, justice and a better life for all.

MISSION

- To be the leader in the provision of accessible, sustainable, ethical, quality and independent legal services to the poor and vulnerable.

VALUES

- Passion for Justice/Protection of Human Rights
- Ubuntu
- Integrity
- Accountability
- Service Excellence
- People Centred



Independent and within reach.

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1. CHAIRPERSON'S FOREWORD

The Unit was established to assist in making the Constitution a living reality for the marginalised segments of our population. It provides the opportunity for Legal Aid SA to undertake and fund litigation or other legal work that can truly have a profound "Impact" on a group or segments of a group. The Unit undertakes litigation or fund cases:

- where the opportunity exists to establish a legal precedent, jurisprudence or clarify aspects of the law that will be followed in dealing with indigent persons in similar matters
- either by class action or by the litigation of a small number of matters calculated to bring about the settlement of a much larger group of disputes, the matters have the potential to resolve a large number of disputes or potential disputes, and obtain wider collective objectives
- by the strategic intervention and rendering of non-litigious legal services the potential exists to materially improve the lives of a group or a significant segment of a group
- Impact Legal Services are not restricted to matters in which the legal assistance to be rendered relates to litigation likely to establish a legal precedent

The policy governing the intake of impact litigation cases in the sphere of socio-economic rights has proven to be particularly effective and useful in the alleviation of poverty for marginalised groups such as women, children, the aged and the unemployed who live in makeshift dwellings and in informal settlements situated near urban centres. The Impact Litigation Unit has either directly litigated precedent setting cases or has funded litigation in the

interest of securing constitutionally entrenched rights on behalf of poor and vulnerable members of society. The manner in which the Constitutional Court has fleshed out the content of socio-economic rights without derogating from the limitation imposed by section 36 can be seen through reference to cases in which the Constitutional Court has protected negative infringements of socio-economic rights, in particular the manner in which the court has given the right to housing substantive content.

A cursory look at the various cases discussed in this publication reflect on how the Unit has used the rights enshrined in our Constitution to intervene in the lives of ordinary South Africans in a positive manner. These cases have advanced the rights of children in conflict with the law by ensuring that the names of those convicted of a sexual offence will not be recorded in the register for sexual offenders. Thus protecting them from stigmatisation for the rest of their lives.

While in the case of Khohliso, a traditional healer, the ILU intervened successfully to set aside her conviction under a Transkeian decree from the apartheid era, which violated her constitutional right to practice her culture and tradition. In keeping with its mandate to protect vulnerable members of our society, the Unit funded the legal representation of Mrs Botha, who was denied transfer and ownership of her property as a result of an unfair provision in the law, even though she had paid the full purchase price of the property. These are but a few of the interesting cases included in this publication.



Judge President Dunstan Mlambo
Chairperson – Legal Aid South Africa

On 12 January 2015, the government ratified the United Nations International Covenant on Economic Social and Cultural Rights (ICESCR). The decision of government to ratify the covenant must be commended because it shows that even under a stressful economic recession, the government is committed to alleviating poverty by half in line with the millennium goals-thus ensuring social justice for all. No doubt the Impact Litigation Unit will make use of the opportunity afforded by the final ratification of the covenant, to ensure that those provisions in the covenant which are not in our Constitution, become applicable in South Africa for the benefit of all.

Yours in ensuring access to justice.

Judge President Dunstan Mlambo
Chairperson: Legal Aid South Africa
February 2015

2. OVERVIEW BY THE CEO

Legal Aid South Africa is committed to ensuring that the Constitutional promise of justice for all becomes a reality in the lives of all who live in South Africa. Through its Impact Litigation Unit, Legal Aid South Africa has for the past decade continued to litigate and fund cases that impact on the lives of the vulnerable members of our society. Particular focus has been placed on ensuring that the voices of the often silenced and vulnerable members of our society are heard and deliberated on by our courts. Matters that have the ability to clarify an area of law and create a precedent are sought and litigated with the aim of contributing to Legal Aid SA's overarching goal of ensuring that the rights enshrined in the Bill of Rights of the South African Constitution become a lived reality.

Potential impact matters are thoroughly researched and assessed in order to ensure that they have the potential to contribute to enhancing the lives of the vulnerable and indigent members of our society. One such matter is Lorraine Sophie Botha and Another v Henry Robins Rich NO and Others CCT 89/13. In this matter Sophie Botha, an aged female managed to survive by operating a Laundromat that generated an income of approximately R5 000.00 per month. On 19 November 2003 Sophie entered into a contract with the JJW Hendricks Trust in respect of the sale of immovable property for the sum of R240 000.00. In terms of the contract Sophie had to pay the monthly sum of R4 000.00 in respect of the purchase price. On 17 March 2009 the Trust brought an application against Sophie to

cancel the contract and evict her from the property from which she ran her small-scale business. The trust alleged that Sophie was in arrears of R40 000.00, and thus the contract was breached prompting cancellation. The High Court handed down judgment in favour of the trust. The Supreme Court of Appeal was petitioned and leave to appeal was granted to the full bench. The full bench in turn dismissed the application. The matter was thus taken on appeal to the Constitutional Court. The Constitutional Court held that Sophie Botha was entitled to transfer of the property, as the remedy of specific performance is not excluded by section 27 of the Alienation of Land Act, (the Act) and furthermore that it would be unfair to deprive Sophie Botha of the transfer as she had already paid a large portion of the purchase price of the property. The Court however went further to state that in order to ensure fairness, Sophie Botha would have to pay the outstanding arrears. This matter thus assisted in testing the provisions of the Alienation of Land Act 68 of 1981 against the values of the Constitution, and furthermore ensured that Sophie was able to continue earning a living and not unfairly deprived of ownership of a property.

The Constitutional Court case of Khohliso v The State and Another CCT 12/14 has helped to clarify an uncertain area of law. Ms Khohliso, a traditional healer from Tsolo in the former Transkei was convicted in the Tsolo Magistrate's Court of possession of a pair of vulture feet, as this contravened sections 13(c) and



Vidhu Vedalankar
Chief Executive Officer – Legal Aid South Africa

84(13) of Decree 9. The conviction was successfully appealed in the Mthatha High Court, where it was held that the aforementioned provisions contravene the right to a fair trial and the right to equality, as contained in sections 35(3) and section 9 of the Constitution respectively. Ms Khohliso thus approached the Constitutional Court in order to confirm the ruling of the High Court in terms of section 167(5) of the Constitution. The matter was therefore taken on appeal for confirmation of invalidity to determine whether it was indeed necessary for the Constitutional Court to confirm the High Court's order of constitutional validity. The Constitutional Court ruled that Decree 9 was not a piece of provincial legislation, nor an Act of Parliament, nor conduct of the President. It was therefore not necessary to confirm the declaration

2. OVERVIEW BY THE CEO *continued*

of constitutional invalidity by the High Court. This important ruling has thus brought much needed clarity on when a matter should be brought to the Constitutional Court to confirm a declaration of invalidity by the High Court. It is thus an important precedent for future matters where there is uncertainty on whether confirmation is needed from the Constitutional Court.

These two case studies illustrate Legal Aid SA's steadfast commitment to ensuring that the Impact Litigation Unit is at the forefront of ensuring the realisation of the rights enshrined in the Bill of Rights. Legal Aid SA, through its Impact Litigation Unit, continues to strive to ensure that the voices of the most vulnerable members of our society are heard by our courts. In so doing Legal Aid SA continues to emphasise its firm commitment to ensuring that the slogan "Legal Aid South Africa your voice for justice" is not merely a catch phrase, but rather a firm commitment to striving towards the realisation of justice for all.

Legal Aid South Africa is currently involved in finalising its strategic plan for the next five years from 2015-2020. In this regard, the Impact Litigation Unit is carrying out an evaluation of its work over the last five years; the nature of the remedy obtained on behalf of clients and the impact it had on improving the quality of life of those who benefited from the litigation as well as the precedent value of the judgments for future cases. In addition, the unit has sent out a comprehensive questionnaire, to clients, stakeholders, civil society organisations and university clinics for their views on what needs to be done by the unit to remain relevant in promoting the values enshrined in our Constitution.

I would like to commend the Impact Litigation Unit for its hard work and dedication throughout the past year and for having reached the milestone of achieving ten years of excellent services in making the Constitution a reality in the lives of ordinary South Africans.

Vidhu Vedalankar

Chief Executive Officer:
Legal Aid South Africa
February 2015

3. MESSAGES OF SUPPORT

National Office

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 Tel: (011) 838 6601 • Fax: (011) 838 4876 • Email: info@lrc.org.za • www.lrc.org.za
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Mr Achmed Mayet
 Senior Litigation Attorney
 Impact Litigation Unit
 Legal Aid South Africa
 29 De Beer Street
 Braamfontein
 2017

10 October 2014

Dear Achmed

RE: IMPACT LITIGATION UNIT LETTER OF SUPPORT

Legal Aid South Africa (LASA) and the Legal Resources Centre (LRC) have enjoyed a long and effective working relationship. The LASA Impact Litigation Unit has been important partners of the LRC, particularly with regards to the implementation of our mission using the rule of law as an arm of justice for marginalized and vulnerable people in South Africa.

LASA was instrumental in providing support towards the LRC's representation of a group of homeowners in the Gauteng Province who were defrauded by the Brusson Finance Pty Ltd Scheme. The Brusson scheme unlawfully sold our clients' properties to a variety of investors as part of reverse mortgage scheme. Through the litigation, there have been a number of positive judgments in this case which have ensured that clients are not dispossessed of their homes. The support of the LASA Impact Litigation Unit, the LRC has been to secure the tenure of our clients and ensure that their properties are rightfully returned to them.

The Impact Litigation Unit has also continued its support of the LRC's work with regards to the Bongani Nkala & others v Anglo American South Africa Ltd case this year. The LRC, together with two other South African based law firms; Richard Spoor Attorneys and Abraham Kiewitz Inc, represent 56 representative plaintiffs who have all contracted silicosis, silico-tuberculosis or tuberculosis during their employment at the respondents' mines. Our clients contend that the common law duty of care owed to them by their employers to take reasonable measures to provide a safe and healthy work environment and/or to take reasonable care for the safety of persons entering the mines was not fulfilled. The Impact Litigation Unit's support in this matter is therefore crucial to ensuring employers adhere to their constitutional obligations arising from sections 10, 11, 12, 24 and 27 of the Constitution.

The Impact Litigation Unit has supported the LRC in its representation of three community clients in a claim brought by the Royal Bafokeng Nation's (RBN). The RBN seeks an order declaring that it is the owner of vast portions of mineral rich land in the North West province; and consequently it is entitled to have the land registered in its name. The land is presently registered in the name of the State. Our clients contend that they are the rightful owners and not the RBN. They contend further that the process to determine the ownership of the land should be open, inclusive and transparent and not confined to the parameters of a courtroom. LASA Impact Litigation Unit is therefore instrumental in ensuring the rights of our clients, who have lived on this land for decades, are protected under customary law.

LASA's focus on service and partnership within the sector has been invaluable enabling both organizations to combine their efforts to serve the interests of poor, vulnerable and marginalized communities.

The LRC looks forward to continued collaboration with LASA and the Impact Litigation Unit.

Yours sincerely



Janet Love
 National Director

National Office:
 Cape Town:
 Durban:
 Grahamstown:
 Johannesburg:
 Constitutional Litigation Unit:

Love (National Director), K Reinecke (Director: Finance), EJ Broster
 S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
 FB Mahomed (Acting Director), A Turpin
 S Sephton (Director), C McConnachie
 N Fakir (Director), T Mbhense, C van der Linde,
 J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, A Singh, M Wheeldon, W Wicombo

3. MESSAGES OF SUPPORT continued



Attention: Achmed Mayet

Legal Aid South Africa

Impact Litigation Unit

By e-mail: AchmedM@legal-aid.co.za

Dear Mr Mayet,

LETTER OF SUPPORT TO LEGAL AID SOUTH AFRICA

20 February 2015

1. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. Our work areas include research, advocacy and legal action to change the socio-economic conditions that undermine human dignity and development, prevent poor people from reaching their full potential and lead to the spread of diseases that have a disproportionate impact on vulnerable and marginalised people.
2. We write to express our support for the work of Legal Aid South Africa. Our organisations share a common objective of ensuring access to legal services and justice for all, including marginalised members of society. Throughout 2014 and the beginning of 2015, we have collaborated on several matters that demonstrate our mutual commitment to human rights. As a result, our established and positive working relationship continues to grow. A crucial collaboration is the newly established HIV & TB Legal clinic.

Implementation of the HIV and TB legal clinic

3. On 3 February 2015, Legal Aid and the South African National Aids Council (SANAC) signed a Memorandum of Understanding for the implementation of the HIV and TB legal clinic. The programme was the result of a partnership between SECTION27, Webber Wentzel; the International Labour Organisation and Legal Aid South Africa. The purpose of the clinic is to address the issue of HIV and TB discrimination in communities. The primary function of the clinic is to facilitate access to legal services for matters relating to HIV and TB discrimination for individuals who cannot afford legal representation and require assistance to indicate their right to access justice.

Conclusion

4. SECTION27 commends Legal Aid South Africa for undertaking important matters, especially in areas that impact on the right of access to health care services and other related rights.
5. We remain committed to supporting Legal Aid South Africa in future because we recognise the important contribution such a collaboration has on the development of our law in the public interest.
6. We look forward to a continued relationship with Legal Aid South Africa's Impact Litigation Unit.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Heywood', is written over a light blue background.

Mark Heywood
Executive Director
SECTION27

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Income Tax Exemption Reference Number: PBO 930022549. Nonprofit Organisation Registration Number: 055-382-NPO
SECTION27, a section 21 company (2006/021659/06) and a registered law clinic, is formally associated with the School of Law at the University of the Witwatersrand, Johannesburg.
Board of Directors: Ms V. Dubula (Chairperson), Justice J. Krieger (Deputy Chairperson), Mr N. Ndlovu (Treasurer), Prof. Q. Abdool-Karim, Dr B. Binek, Ms A.L. Brown,
Prof. S. Fonn (ex-officio), Mr M. Heywood (Executive Director), Prof M Pieterse (ex-officio), Ms T. Steel, Justice M.Z. Yacoob.

Natasha Wagiet / Achmed Mayet Impact Litigation Unit
Legal-Aid South Africa

11 November 2014

Dear Tasha and Achmed

RE: Thank you for support from LASA

1. The Centre for Applied Legal Studies (CALS) currently has three projects which are supported by Legal-Aid South Africa (LASA). All three are housed in CALS' Basic Services Programme.
 - 1.1. In the Kliptown Project, CALS represents approximately 5000 households residing in an informal settlement situated in Kliptown. This community has limited access to water and sanitation and has been devastated by heavy flooding in both March and October 2014. Our clients are in urgent need of relocation. We have commissioned a wetland study of the area and launched an urgent application in this regard in early November 2014. Judgment should be handed down within the next few weeks.
 - 1.2. In the Limpopo Water and Sanitation Project, CALS represents a community of 7000 in Limpopo, comprising of five villages, namely, Elandskraal, Mbuzini, Morarela, Dichweung and Tsansabela. This community has been without water since the beginning of the construction of a new water treatment plant in the area in 2009. They have been attempting to engage with the local authorities for years and have conducted a series of peaceful protests.
 - 1.3. In the Main Street project, CALS represents a community living in inner City Johannesburg who were evicted on Christmas Eve in 2012. Our application to have the eviction order rescinded was dismissed, however, the litigation resulted in several of our clients obtaining temporary alternative accommodation. The SCA has awarded us leave to appeal to the South Gauteng High Court.
2. The common themes running through these projects are communities seeking access to basic services like housing, water and sanitation in order to live a dignified life in line with the spirit of our democratic Constitution. In all cases they have been trying to engage with the local authorities for years and in many cases, have resorted to protest action to amplify their voices.
3. CALS is therefore providing support to these communities in a variety of ways including during negotiations with local and provincial government regarding the provision of services, assistance in relation to the holding of lawful and peaceful protest under the Regulation of Gatherings Act, and the institution of litigation where necessary.
4. Our objectives are broadly:
 - 4.1. To ensure that the value of precedent set in CALS' earlier housing litigation such as the Olivia Road and Blue Moonlight cases is not lost through an irreverent failure by lower court judges to consider Constitutional Court jurisprudence;
 - 4.2. To hold the government responsible in respect of its constitutional obligations to provide basic services to people living in South Africa;
 - 4.3. To ensure that the rights of vulnerable groups such as women and children in the community are protected;
 - 4.4. To establish precedent which other similarly-situated communities may find useful in their service delivery struggles;
 - 4.5. To contribute to the development discourse to ensure that the balance between the rights of property owners and those of poor communities is not subjugated to a classist approach to rights; and
 - 4.6. To positively assist in the further development of inner-city housing policies.
5. CALS, and our clients, are extremely grateful for the support we receive from LASA. We could not do this work without you as our partners.

Sincerely,



Lisa Chamberlain
Acting Director – Centre for Applied Legal Studies

4. IMPACT LITIGATION UNIT



Impact Litigation Unit

Patrick Hundermark: Chief Legal Executive, Natasha Wagiet: Professional Assistant, Achmed Mayet: Senior Impact Litigation Attorney, Xoli Nzimande: Legal Secretary

The Impact Litigation Unit (ILU) based in Braamfontein Johannesburg is committed to working towards giving content to our rights, as well as striving towards the progressive realisation of the rights enshrined in the Constitution. Since its establishment the ILU has continuously sought to achieve maximum benefits for a group of people or a segment of society that may be marginalised and thus vulnerable. The dedication of the ILU in fulfilling its commitment to give content to our rights is highlighted in the case studies and matters that follow in this publication.

5. INTERNS: STEPHANIE AMAKO

My Reflections on the International Conference on Access to Legal Aid in Criminal Justice Systems

Stephanie Amoako

As a third year law (juris doctorate) and master of international affairs student interning with the International Legal Foundation in New York, I was excited when I learned about the opportunity to travel to Johannesburg to help with the preparations for the first International Conference on Access to Legal Aid in Criminal Justice Systems. The conference, held from 24 June to 26 June, was co-hosted by Legal Aid South Africa, The Government of South Africa, the International Legal Foundation (ILF), the United Nations Development Programme (UNDP), and the United Nations Office on Drugs and Crime (UNODC). Participating in the conference planning and execution gave me great exposure to important issues concerning law, development, and legal aid.

One of the aims of this high-level conference was to discuss how to practically implement the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which was adopted in December 2012 by the United Nations General Assembly and is the first international instrument on legal aid. I was thrilled to be in the company of over 265 participants from 65 countries, including attorneys general and Supreme Court justices from several countries including the Maldives, India, and Liberia. Over three days, speakers, panelists, and participants discussed important topics in sessions such as Financing

Legal Systems: Cost-Effectiveness and Sustainability; Promoting Children's Access to Legal Representation; and Monitoring and Evaluation of Criminal Legal Aid Systems: Case Administration, Data Collection, and Assessing Impact.

I gained an immense appreciation of the need for legal aid from this conference. Speakers highlighted the millions of people around the world held in pre-trial detention without representation. They highlighted how everyday people are sentenced for committing crimes when there has been no thorough investigation of the facts. They highlighted how legal aid systems are often woefully underfunded. Lack of legal representation is truly a human rights issue. Similarly, I gained an understanding of the solutions for this crisis and was exposed to the innovative strategies different countries are using to ensure access to justice. Impact litigation is a useful strategy because it can address larger, systemic problems that affect several clients. Legal Aid South Africa is an organization that is admired around the world for its effective service delivery and several participants mentioned how they had come to learn about the South African model for legal aid.

Legal Aid South Africa hosted me for a month while I was working on conference preparations. I thoroughly enjoyed being in the company of dedicated and



Stephanie Amoako
Intern – International Legal Foundation

passionate advocates for justice. I accompanied Impact Litigation Unit lawyers Achmed Mayet and Natasha Wagiet to the Constitutional Court to hear the verdict in *Sali v. National Commissioner of the South African Police Service and Others*. Justice Edwin Cameron read the verdict and afterwards I was able to briefly meet with him. I am grateful for this experience and my overall time in South Africa and Legal Aid South Africa. Hopefully I can return to South Africa soon and work with the wonderful staff of Legal Aid South Africa again.

6. EQUALITY

Introduction

Equality is defined as the enjoyment of rights equally by all people in society and in this regard it is a basic necessity to every Constitutional democracy. The core tenant of a constitutional democracy, such as South Africa is thus, that every person deserves an equal claim to the rights enshrined in the Constitution. The right to equality is therefore deeply entrenched in the historical development of the South African legal system. As such, legal equality deals in some parts with the correction of past wrongs in order to attain a fair outcome and, in other instances it focuses on correcting current wrongs. Further components also deal with the correction of current behavioural trends that come to the fore when trying to attain the notion of equality.

The Constitution Act 108 of 1996 and the Promotion of Equality and Prevention of Unfair Discrimination Act

In terms of section 9 of the Constitution¹, all people are equal before the law. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (The Equality Act) has been enacted to give effect to the constitutional provision. Sections 6-12 of the Act provides that no person can be unfairly discriminated on the grounds of race gender or disability. These sections further provide definitions for hate speech and harassment, and in addition stipulate penalties for persons that commit these acts.

The Equality Courts

The Equality Courts were created after the enactment of The Equality Act. These courts sought to, along with the Equality Act, ensure that the right to equality, which is enshrined

in Section 9 of the Constitution is upheld. The Court generally oversees matters that relate directly to the infringement of the right to equality, and as such rectify unfair discrimination. The Equality Act defines all High Courts as Equality Courts and also gives power of adjudication of such matters to Magistrate's Courts.

Court proceedings in equality cases are very similar to those of civil proceedings and The Equality Act provides for the awarding of damages if it is found that a person has been discriminated against. The Court also has the discretion to award any other sentence which it deems suitable.²

It is against the above background that Legal Aid South Africa

developed a policy in terms of its Legal Aid Guide, under Chapter Four in paragraph 4.17 to make legal aid available in matters governed by the Equality Act. However, in terms of the Policy, damages claims that are excluded in the Legal Aid Guide may not be dealt with as part of an Equality Court action or claim.

Our commitment to making the Equality Act a reality in the lives of especially poor and previously disadvantaged members of society has resulted in the training of our civil legal practitioners on the provisions of the Act and how to access Equality Courts so that clients can be assured of receiving quality, professional legal services in dealing with any infringement of any one of the listed grounds in terms of the Act.



The training offered to Legal Aid South Africa's civil practitioners has taken into account the development of the concept of equality through a study of case law, as is illustrated below. Furthermore, much of the work which is carried out under the Impact Litigation Policy of Legal Aid South Africa involves legal representation of clients who have suffered discrimination based on race, gender, and age. This is particularly highlighted in housing matters where single mothers have been denied housing, as a result of Apartheid discriminatory practices that still prevail in townships where women could not receive transfer of ownership as they were considered to be perpetual minors in terms of Apartheid legislation. The litigation on behalf of women has gone a long way towards addressing the gender imbalances in ownership of housing.

In rural areas, Legal Aid South Africa has been particularly active in protecting the rights of women who are spouses in traditional customary marriages. Women in rural areas have often suffered upon the death of their spouse in a customary marriage because women were precluded from inheriting in terms of intestate inheritance laws. Legal Aid South Africa played a key role in the Shilubana³ matter, where the right of women to be appointed a chief in terms of customary law was recognised and upheld in the Constitutional Court, thus bringing an end to the Rule of Primogeniture which openly discriminated against females.

Legal Aid South Africa is under a constitutional obligation to ensure that no child is unrepresented in a court of law and in representing children to ensure that the best interests of the child are taken into

account. Legal Aid South Africa has been successful in extending foster care grants to grandparents who were previously discriminated against in the allocation of the foster care grants.⁴

Legal Aid South Africa continues to uphold the rights of the previously disadvantaged communities, women and children regardless of race, ethnicity, religious affiliation or sexual preference and in so doing promotes a culture of equality devoid of any discrimination.

The development of the concept of equality by case law

An issue that arises from the application of equality is that it changes depending on the matter. Due to the wide range of types of discrimination in existence, it follows that there is a wide range of solutions and applications that are available for these scenarios. The aforementioned illustrates that the concept of equality is a fluid one, and as such needs to be contextualized. The practical application of equality will at times need to be redefined in each instance in order to make sure that the spirit and purpose of section 9⁵ is promoted. According to the Pillay case⁶, the Equality Act has become the first go-to point for any matter that deals with unfair discrimination. This case further illustrates that for any discriminatory act to be justified and deemed lawful; the onus rests on the respondent to prove it in court.⁷ This means that there are now procedural and jurisprudence aspects of dealing with equality, which in turn makes the inquiry into equality of rights more stringent. The decision in this case thus affords anyone an opportunity to have their matters heard more effectively compared to a direct application of the Constitution.

Further developments in this concept can be illustrated by the case of *Afri-forum and Another v Malema and Others*.⁸ This case involved a matter of discriminatory and hateful speeches made by Julius Malema, which involved the defendant singing the song 'shoot the Boer'. The song in question was famous during the Anti-Apartheid struggle days as one that inspired moral courage among the oppressed. However, years after the struggle Malema was singing the song in question and as such the Court found this amounted to hate speech. In the judgement of Judge C.G Lamont, an order was given to prevent the defendant from singing the song again. The court reasoned that this amounted to hate speech because it spread fear among the subjects of the song, as well as caused feelings of hatred in society.

The judgement in the Malema Case illustrated that the concept of equality runs both ways. Those who were discriminated against in the past are not exempt from being scrutinised now. Actions that were perceived to be acceptable in the past are no longer seen as such. In striving towards a fair and equal society, all peoples must be protected equally. The concept of equality must be applied in such a way that all members of society are treated the same, and as far as it is possible everyone must be afforded the same rights.

When unpacking the right to equality, one can take cognisance of an extract in the judgment of Mlambo JP⁹ which deals with correcting economic inequity of the past, namely:

'The issue rather is whether there is a rational connection between the transformational goal of promoting the achievement of

6. EQUALITY continued

equality by ensuring equitable representation of designated groups in all occupational categories and levels in the appellant's workforce on the one hand and the means used to achieve that goal on the other hand.'

Although the case at hand dealt with a specific type of discrimination, the point made that equality needs to be contextualised is a vital one. This can be applied to any issue by contextualising the concept of equality and the goal that the action seeks to achieve. Further, thanks to the Equality Act, this can be done easily and effectively to arrive at an appropriate resolution.

The Constitution provides that everyone has a right to enjoy rights equally. The Equality Act seeks to give embodiment to these rights and has contextualised certain types of discrimination in order to further aid courts in assessing such matters. However, the courts have in turn used the Equality Act to develop jurisprudence on the matter further whenever the opportunity arises. This point was made in the Solidarity Case¹⁰ in which the learned Judge Rabkin-Naiker¹¹ noted:

'The jurisprudence of this Court makes plain, that the proper reach of the equality right must be determined by reference to our history and the underlying values of the Constitution.

As we have seen a major constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From there emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact...'

This case highlights the fact that when policy is enacted badly, the result could be unequal treatment of the people that the Act in question sought to protect. Equality in this case has been contextualised in both a historical and current way. This has meant that application of it has further evolved. This case also looked at the demographic inequities of the province in question and noted that historical disparities can be exasperated if equality was not implemented properly.¹²

We now have to weigh up the right to equality between two parties, both of whom who are from previously disadvantaged backgrounds.

Conclusion

Equality and the lack thereof has been a cornerstone concept in the development of a post Democratic South Africa. The atrocities of the past must be acknowledged in the seeking of equality for all South Africans. As such, the Constitution as well as the Equality Act has together sought to direct the law in a way that has this goal in mind. However, what is illustrated by case law is that equality is not a stagnant concept, it changes and shifts, as needs require. The past inequities are not always the reason for discrimination happening, and thus one must contextualise each instance in order to work towards realising the constitutionally entrenched right to quality.

As an employer of change, Legal Aid South Africa has actively embarked on promoting diversity in the workplace by fostering interactions between the various cultural and religious affiliations represented in the workplace to ensure a healthy respect for cultural diversity.

1 Constitution of the Republic of South Africa 108 of 1996.

2 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Section 21(2).

3 Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9.

4 Manana and Others v The Presiding Officer of the Children's Court, District of Krugersdorp and Others.

5 Op cit

6 MEC for Education, KwaZulu-Natal v Pillay 2008 (1) SA 474 (CC)

7 Ibid at para 12-14.

8 Afri-Forum and Another v Malema and Others (20968/2010) [2011] ZAEQC 2; 2011 (6) SA 240 (EqC); [2011] 4 All SA 293 (EqC); 2011 (12) BCLR 1289 (EqC) (12 September 2011)

9 South African Police Services v Solidarity obo Barnard (JA24/2010) [2012] ZALAC 31; [2013] 1 BLLR 1 (LAC); 2013 (3) BCLR 320 (LAC); (2013) 34 ILJ 590 (LAC) (2 November 2012) at para 44

10 Solidarity and Others v department of Correctional Services and Others; Solidarity and Others v Department of Correctional Services and Others (C 368/2012, C968/2012) [2013] ZALCCT 38 (18 October 2013)

11 Ibid para 26

12 Ibid para 42-48

7. CASE STUDIES: GIVING CONTENT TO OUR CONSTITUTION



LORRAINE SOPHIE BOTHA AND ANOTHER V HENRY ROBINS RICH NO AND OTHERS CCT 89/13

Leave to appeal to the Constitutional Court against a judgment of the Northern Cape High Court.

Section 27 of the Alienation of Land Act.

Section 39(2) of the Constitution: when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

The facts of the matter are briefly that an aged female (Sophie Botha) operates a small laundromat from which she generates an income of approximately R5,000.00 per month. On 19 November 2003 Sophie entered into a contract with the JJW Hendricks Trust in respect of the sale of immovable property for the sum of R240,000.00. In terms of the contract, Sophie had to pay the monthly sum of R4,000.00 in respect of the purchase price. On 17 March 2009 the Trust brought an application against Sophie to cancel the contract and evict her from the property from which she ran her small-scale business. The trust alleged that

“ All law, including the common law of contract, derives its force from the Constitution and is thus subject to constitutional control.”

[Paragraph 24 of the Constitutional Court Judgment]

Sophie was in arrears of R40,000.00, and thus the contract was breached prompting cancellation. The High Court handed down judgment in favour of the Trust. The Supreme Court of Appeal was petitioned and leave to appeal was granted to the full bench. The full bench in turn dismissed the application. The matter was thus taken on appeal to the Constitutional Court.

This matter was funded as an impact matter because it presented an opportunity to test the provisions of the Alienation of Land Act 68 of 1981 against the values of the Constitution.

The Constitutional Court held that Sophie Botha was entitled to transfer of the property, as the remedy of specific performance is not excluded

by section 27 of the Alienation of Land Act, (the Act), and furthermore that it would be unfair to deprive Sophie Botha of the transfer as she had already paid a large portion of the purchase price of the property. The Court however went further to state that in order to ensure fairness, Sophie Botha would have to pay the outstanding arrears. Hence, in accordance with the principles of reciprocity it was held that Sophie Botha was entitled to have the property transferred into her name, however she would be obliged to register a bond over the property in accordance with section 27 of the Act in order to pay all outstanding monies owing to the Trust.

The Court thus upheld the leave to appeal.

7. CASE STUDIES: GIVING CONTENT TO OUR CONSTITUTION continued



CONSTITUTIONAL CHALLENGE TO DETENTION REVIEW PROVISIONS OF THE IMMIGRATION ACT 13 OF 2002

Review Application

Constitutional Challenge to the detention review provisions of the Immigration Act 13 of 2002.

Section 35(2) of the Constitution of the Republic of South Africa: “the rights of arrested, detained and accused persons.”

The matter involves a constitutional challenge to the detention review provisions of the Immigration Act 13 of 2002. Legal Aid South Africa decided to fund this matter as an impact matter to put a end to the unlawful detention of especially migrant women and children who suffer untold hardship whilst in detention.

Lawyers for Human Rights (LHR) brought an application in its own name to challenge the current practice of the Department of Home Affairs and the Magistrate’s Courts to approve and extend detentions under the Immigration Act for the purposes of deportation without requiring the appearance of the detainee in person to challenge the lawfulness of that detention, as required by section 35(2) of

the Constitution of the Republic of South Africa. The matter will come be before the South Gauteng High Court and the Respondents are the Minister of Home Affairs, the Director-General of Home Affairs, the Minister of Police, the National Commissioner of the South African Police Service amongst others.

The Immigration Act empowers a police officer or immigration officer to approach anyone on reasonable grounds and ask them for their lawful status in the country in terms of section 41. Furthermore, if an individual does not satisfy the official as to his or her status then he or she may be detained for a period of up to 48 hours for investigation in terms of section 32. In addition, in terms of section 34(1)(b) of the Act if the person is found to be an

“illegal foreigner” in terms of the Act then they may be detained for a period of 30 days for the purposes of deportation.

While it appears that these provisions provide for the protection of individuals who have been detained under the Immigration Act, all too often these provisions are not complied with and people are illegally detained until deportation can be arranged. The fatal flaw in the provision is that the detained person is not brought in person before the Magistrates Court. In this regard, section 35(2)(d) of the Constitution makes specific provision for all detainees to challenge the lawfulness of detention in person before a court. Hence, the current practice of Home Affairs is arguably in violation of the Constitution.

J v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND ANOTHER CCT 114/13

Application for confirmation by the Constitutional Court.

Section 28(2) of the Constitution Act 108 of 1996: the best interests of children are of paramount importance.

Section 50(2)(a) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act: “provision dealing with the registration of convicted sex offenders on the National Register for Sex Offenders.”

This matter involves an application for confirmation of an order of the Western Cape High Court whereby section 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act was declared unconstitutional due to the Court ruling that the section, which mandated the inclusion of the names of convicted sex offenders onto a national register, unjustifiably infringed on the rights of offenders, both adults and children. This matter was taken on as an impact matter because Legal Aid South Africa takes seriously its constitutional obligation to always act in the best interests of the child.

The facts of this matter are briefly that the applicant (J) was convicted of sexual offences committed against children. At the time of committing the offences J was a minor himself. The trial court convicted J and sentenced him. The Court further made an order that J's name be included on the National Register for Sex Offenders,

which automatically limits the chances of offenders listed on the Register from finding employment. The wording of the relevant provision made it mandatory for the presiding officer to have the name of the convicted sex offender listed on the register without giving the offender the opportunity to say why he or she should not be listed on the register.

The matter was taken on review to the Western Cape High Court, which found 50(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act to be unconstitutional. The High Court suspended the declaration of invalidity for 15 months, and ordered that certain words be read into the provision in the interim. The matter was then sent to the Constitutional Court for confirmation of the constitutional invalidity of the said provision.

The Constitutional Court ruled that the section infringes on the rights of child offenders to have their best interest be of the utmost importance in terms of section 28(2) of the Constitution. The Court limited its declaration of invalidity to child offenders, and stated that the Register is an important tool to protect children and persons with mental disabilities from abuse.

The Court suspended the declaration of invalidity for 15 months so as to afford the Legislature sufficient time to correct the defect in the legislation. The Respondents were further ordered by the Court to provide details of the child offenders currently listed on the Register.

KHOHLISO v THE STATE AND ANOTHER CCT 12/14

Application for confirmation by the Constitutional Court.

Section 9 of the Constitution Act 108 of 1996: The right to equality.

Section 35(3) of the Constitution Act 108 of 1996: “Everyone has the right to a fair trial.”

On 21 August 2014, the Constitutional Court heard an application for confirmation of a Court Order of the Mthatha High Court in the Eastern Cape, wherein sections 13(c) and 84(13) of the Republic of the Transkei's Decree 9 of 1992 were declared unconstitutional.

The facts of this matter are briefly that Ms Khohliso, a traditional healer from Tsolo in the former Transkei was convicted in the Tsolo Magistrate's Court of possession of a pair of vulture feet, as this contravened sections 13(c) and 84(13) of Decree 9. The conviction was successfully appealed in the Mthatha High Court, where it was held that the aforementioned provisions contravene the right to a fair trial and the right to equality, as contained in sections 35(3) and section 9 of the Constitution respectively. Ms Khohliso thus approached the Constitutional Court in order to confirm the ruling of the High Court in terms of section 167(5) of the Constitution.

Ms Khohliso's argument is premised on two grounds. The first ground is that the abovementioned sections

7. CASE STUDIES: GIVING CONTENT TO OUR CONSTITUTION continued

“South Africa is an interesting country. Our people are diverse, culturally and otherwise; our history is brutal but fascinating; our wildlife is unique and precious. This Court sometimes hears cases which would rarely reach the highest courts of most other democracies. The facts and legal framework of this matter provide a kaleidoscopic illustration of how a mix of all the above can present a significant constitutional question.”

[paragraph 1 of the Constitutional Court Judgment].



violate the right to equality in that they unjustifiably distinguish between people residing in the former Transkei, and people residing in the rest of the Eastern Cape. The reasoning behind this assertion is that people residing in the former Transkei face harsher sanctions and possession of animal carcasses has tight restrictions compared to other areas in the Eastern Cape. The second ground is that section 84(13) creates a strict liability, which is in violation of the right to a fair trial as contained in section 35(3) of the Constitution. Ms Kholiso further argued that the Decree is a provincial act and thus the Constitutional Court has jurisdiction to hear the confirmation proceedings. Section 167(5) of the Constitution provides that “the Constitutional

Court makes the final decision, whether an Act of Parliament, a provincial act or conduct of the President is constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court or a court of similar status before the order has any force.”

Section 172(2)(a) of the Constitution provides that “the Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of any Act of Parliament, a provincial act, or any conduct of the President, but an order of constitutional validity has no force unless it is confirmed by the Constitutional Court.”

The matter was therefore taken on appeal for confirmation of invalidity, to determine whether it is necessary for the Constitutional Court to confirm the High Court’s order of constitutional validity. In other words is Decree 9 and Act of Parliament, a provincial Act or conduct of the President. The Court was therefore asked to give guidance on whether litigants are obliged to bring confirmation proceedings when legislation similar to Decree 9 is found to be unconstitutional by a High Court.

The Constitutional Court ruled that Decree 9 was not a piece of provincial legislation, nor an Act of Parliament, nor conduct of the President. It was therefore not necessary to confirm the declaration of constitutional invalidity by the High Court.

NGQABUTHU MBELE, STANLEY NDLOVU AND THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND THE DIRECTOR OF PUBLIC PROSECUTION NORTH WEST CASE NUMBER 1116/13

Review Application.

Access to anti-retroviral medication; Section 12(1)(e) of the Constitution Act 108 of 1996: "Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way."

This matter involves a review of the decision taken by the Minister of Justice and Constitutional Development, to allow for the extradition of two accused persons to stand trial for the crime of robbery, which they were alleged to have committed whilst in Botswana. The one accused is HIV positive while the other is suffering from tuberculosis. The matter was referred to the Impact Litigation Unit (ILU) by the Mahikeng Justice Centre and the ILU is working together with Advocate Nzame Skibi of the Justice Centre.

Should the accused persons be found guilty, they will face a sentence of up to twenty years direct imprisonment, as well as corporal punishment. Botswana does not provide antiretroviral treatment for incarcerated HIV positive persons who are not Botswana citizens. This is contrary to the stance taken in South Africa, where antiretroviral treatment

is provided to all persons regardless of whether they are South African citizens or foreign nationals. The rights of the accused to life will be compromised should they be denied access to life-supporting medical treatment, which is not available to non-citizens of Botswana.

In Botswana corporal punishment is a competent punishment for the crime of robbery. The accused persons therefore face a real threat of being inflicted with corporal punishment if they are deported to Botswana and subsequently convicted of the crime of robbery in a Botswana court of law. In South Africa corporal punishment is unconstitutional and unlawful and amounts to cruel, inhumane and degrading treatment or punishment, which is a violation of section 12(1)(e) of the Constitution of the Republic of South Africa Act 108 of 1996.

In *Sv Makwanyane*, the Constitutional Court abolished the death penalty. Furthermore, in *Mohamed v The President of the Republic of South Africa*, the Constitutional Court ruled that it was an incorrect decision to extradite a person to a country where, if they were found guilty, they could face the death penalty, and lastly the matter of *Minister of Justice v Tsebe and Others*, where the Constitutional Court ruled that a person cannot be extradited to stand trial in a country in which the death penalty is not abolished, unless there is a written undertaking that, if convicted, that person will not be sentenced to death.

In light of the above jurisprudence, it is contended that should the accused be convicted of the crime of robbery and receive the sentence of twenty years without guaranteed access to antiretroviral treatment, it will be tantamount to the accused being sentenced to death. In addition, one cannot extradite the accused persons to a country where corporal punishment is still practiced in light of it being rendered unconstitutional and unlawful in South Africa, as it is a violation of the Constitution and of Article 4 the SADC Protocol on Extradition.

The matter was argued in the North West High Court on 14 March 2014 and the court ruled in favour of the Minister. Subsequent to this decision, an application for leave to appeal was filed. The application for leave to appeal which was set down for argument on 14 November 2014 was postponed by the court. The reason for the postponement was due to the court wanting clarity on the outcome of an appeal lodged by the government of Botswana against the decision of the Botswana High Court, that anti-retroviral medication should be provided to all prisoners regardless of nationality. The appeal will be heard sometime this year. The North West High Court has therefore postponed the matter to 23 May 2015, and has awarded costs against the Respondents' for late filing of their heads of argument.

7. CASE STUDIES: GIVING CONTENT TO OUR CONSTITUTION continued



CORMSA v PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS

Application for leave to appeal.

The granting of refugee status.

This matter involves the challenge mounted by the Consortium for Refugees and Migrants (CORMSA) to review the judicial decision to grant Mr Faustin Kayumba Nyanwasa – a Rwandan General, suspected of war crimes – refugee status in South Africa. The matter was argued on 17 and 20 May 2013 in the South Gauteng High Court because the judge seized with this matter was transferred from the North Gauteng High Court to Johannesburg.

CORMSA premised their legal challenge on South Africa being a party to the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, as well as the United Nations Refugee Convention. South Africa has incorporated these international obligations into South African law by way of the Refugee Act 120 of 1998. In light of this, CORMSA has argued that the Refugee Act, which contains the clause: “a person does not qualify for

refugee status for the purposes of this Act if there is reason to believe that he or she has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with such crimes.” It thus follows that CORMSA argues that Mr Nyanwasa should not be afforded refugee status in South Africa due to their being a “reason to believe” that he committed war crimes.

In rebuttal we argued that the evidence adduced does not amount to a “reason to believe” that Mr Nyanwasa committed a war crime. The interdict against Mr Nyanwasa was set aside for lack of evidence. Furthermore, there have been attempts to kill Mr Nyanwasa. In addition, all the parties agreed that

should Mr Nyanwasa be sent back to Rwanda there is a real threat that he will be killed, as is evidenced by the threats made to his life. Lastly, Mr Nyanwasa’s wife has been granted refugee status in South Africa, and thus should Mr Nyanwasa be sent back to Rwanda it will result in the breakup of his family.

Furthermore, the parties were in agreement that South Africa is bound by the principle of non-refoulement, as set out in article 32 of 1951 UN Convention Relating to the Status of Refugees. In terms of the principle of non-refoulement the General would have to be extradited to Rwanda.

The High Court therefore dismissed the application brought by CORMSA. CORMSA has indicated that after studying the judgment it may consider lodging an appeal.



SAHRC v PASTOR BOUGARDT EC13/2013

Equality Court Proceedings and
Mediation Proceedings.

Section 9(4) of the Constitution Act 108 of 1996: “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including sexual orientation.”

Section 9(4) of the Constitution Act 108 of 1996: “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).”

This matter was funded as an impact matter because it raised the issue of unfair discrimination against a community that was previously marginalised and persecuted under Apartheid laws for their lifestyle choices. It also illustrated how the Equality Courts could be used to challenge unfair discrimination quickly and within limited resources.

The Human Rights Commission instituted proceedings against Reverend Bougardt for the verbal and written utterances he made against the Lesbian and Gay community in the Western Cape.

The Western Cape Provincial Office of the Human Rights Commission subsequently approached Legal Aid South Africa to provide funding for a junior counsel.

The South African Human Rights Commission investigated the matter and found that the utterances and articles published by Pastor Bougardt were of such a nature that they amounted to hate speech even though he tried to justify his reprehensible conduct with quotations from the Scriptures.

The Commission proposed to litigate the matter in the Equality Court. The matter was however settled after a mediation process was entered into between the SAHRC and Pastor Bougardt. The mediation process was facilitated by Justice Bozalek of the Western Cape High Court. The matter has been settled and the settlement agreement prohibits Pastor Bougardt from, amongst other things, publishing further statements that are discriminatory or incite hatred or harm on the grounds of sexual orientation.

7. CASE STUDIES: GIVING CONTENT TO OUR CONSTITUTION continued

BONILE GALELA V THE STATE AND HENDRICK VAN WYK V THE STATE SCA [2014] ZASCA 152

Whether an accused person has the right to a second appeal.

Sections 309B and C of the Criminal Procedure Act No 51 of 1977.

This matter involves an appeal to the Supreme Court of Appeal (SCA) and focusses on whether an accused has a right to a second appeal, as well as under which circumstances such an appeal will be granted by the Court. The matter was argued by Advocate Mornay Calitz from the Western Cape Region of Legal Aid SA.

The facts of the matter are briefly that the Applicant was convicted of a single count of rape and sentenced to 17 years direct imprisonment by the regional court. An application for leave to appeal was filed and refused by the trial court. Subsequently a petition in terms of section 309C(2) of the Criminal Procedure Act (CPA) was filed with the High Court. The High Court refused the petition and therefore the matter was petitioned to the SCA.

In terms of section 309 of the CPA in order for an appeal to be granted there is a prerequisite that one has to appeal from the lower courts to the High Court. The Applicant is able to satisfy this requirement in two ways. Firstly seeking leave from the trial court in terms of section 309B of the CPA, and secondly if the trial court

refuses by way of a petition in terms of section 309C of the CPA.

The CPA is however silent on this issue in two instances. Firstly, where the trial court grants leave to appeal and the High Court constituting a court of appeal dismisses the appeal, and secondly where the petition is refused in terms of section 309C of the CPA. Prior to 23 August 2013 the SCA bridged the gap by relying on sections 20(1), 20(4) and 21(1) of the Supreme Court Act 59 of 1959.

On 23 August 2013 the Superior Court Act 10 of 2013 came into force, thus repealing the previous Act. In terms of section 1 of the new act a reference to an appeal excludes an appeal regulated by the CPA as well as any other criminal procedural law.

Against the backdrop of section 1 of the new act it appeared that Applicant did not have any further remedy once the High Court refused his petition. However, in light of section 168(3) of the Constitution, the SCA is clothed with the power to hear appeals from the High Court, issues connected with appeal and other matter referred to it, where national legislation makes provision for such referral. Section 315 of the CPA further determines

that the SCA is the court of appeal for appeals from the High Court.

Furthermore, the distinction previously drawn between what is regulated by the CPA and the subsequent process in terms of the Supreme Court Act 59 of 1959 can lead to the argument being made that the latter process falls outside the ambit of the CPA, and is therefore not excluded from the Superior Court Act 10 of 2013. Section 16(1)(b) of the Superior Court Act 10 of 2013 makes provision for an appeal to the SCA against a decision of the High Court. However it is subject to the qualification that as a prerequisite leave to appeal must be obtained from the SCA and if granted only the SCA may hear the appeal.

This matter was taken on to create certainty, as one court had ruled that an appeal was not possible while in another decision the opposite stance was adopted by the Court.

This matter has settled the law and paved the way for a distinctive appeal regime wherein it will no longer be necessary to approach the High Court for leave, nor will the SCA grant leave to appeal and be in a position to refer the matter to a Full Bench of the High Court.



LEGAL REPRESENTATION OF THREE COMMUNITIES IN THE NORTH WEST PROVINCE

Challenge to application declaring land to belong solely to the Royal Bafokeng Nation.

The Impact Litigation Unit provided funding to the Legal Resources Centre (LRC) for litigation proceedings in a matter where the LRC is representing three communities who are challenging the Royal Bafokeng Nation's legal application, in which they are seeking an order declaring that the Royal Bafokeng Nation is the owner of approximately 60 farms, with numerous farms located on mineral rich land.

The aim of the litigation is to protect and promote land security of the clients who fall under the authority of the Bafokeng administration, as well as to achieve a precedent setting judgment that will result in the adoption of constitutionally sound, fair, consultative and participatory procedures for addressing disputes over land rights. The LRC represents the Setuke family, the Thekwane Community, and the Bafokeng Land Buyers Association.

It is claimed by some of the clients that their predecessors were the true purchasers of the land. However, the "trust" purchase was allowed only if the beneficiaries were a recognised tribe. They were therefore forced to have their land held in trust for the Bafokeng, whereas in truth the Bafokeng were not the buyers. Other clients contend that they have rights under customary law to the land. There are overlapping rights to the land. If it is registered in the ownership of the Royal Bafokeng Nation, then their rights will not be properly recognised. Both the Constitution and the various land reform measures adopted by the State contemplate that contested land claims be resolved via fair and appropriately designed processes and with enquiry into the complex and often contested land rights held by communities on affected land.

It is contended that the Royal Bafokeng Nation has undermined the ability of communities to use the constitutionally prescribed methods to resolve land disputes by proceeding with an application in the

High Court. A complaint common to all three client communities is that the Royal Bafokeng Nation should not be permitted to utilise the procedure that they have adopted to assert their own claim to the land, as the land reform measures specifically designed for this purpose need to be followed. High Court litigation is an inappropriate means of dealing with the dispute particularly where, as in this case, the Royal Bafokeng Nation is using resources that belong to the entire community to litigate against elements of the community that do not have resources of their own.

Three interlocutory applications have been instituted in the North West High Court. The Royal Bafokeng Nation has instituted a Rule 6(5)(g) application, which is being opposed. The three communities have in turn, on the advice of counsel, launched two interlocutory applications. The first one is an application to stay the main application. The second one is a challenge to the Rule 7 Application in terms of which the LRC's clients dispute the Applicant's attorneys' authority to bring the main application in terms of Rule 7 of the High Court Rules.

7. CASE STUDIES: GIVING CONTENT TO OUR CONSTITUTION continued

Two of the three interlocutory applications were heard together on 31 October and 1 November 2013.

Furthermore, two days before the hearing of the three interlocutory applications, the State served a notice of intention to oppose the main application and withdrew their notice to abide the courts' decision. The parties agreed that the stay application would be postponed sine die with no order as to costs. It thus follows that only the Rule 7 and the Rule 6(5)(g) application proceeded.

The Court handed down judgment on 12 December 2013, and found in the favour of the three communities with regard to the Rule 7 Claim.

At present the three communities and their legal representatives are preparing for Rule 7 trial.

THOKOZANI MTSHALI AND OTHERS V T MASAWI AND OTHERS [2013] ZAGPJHC 92

Right to housing.

Section 26(1) of the Constitution of the Republic of South Africa: "Every-one has the right to have access to adequate housing."

In this matter, approximately 230 people who lived in a three-story building in Jeppestown, Johannesburg were evicted at 3am on 21 December 2012. Those evicted included unemployed persons or employed low earners. The residents had paid rental on a monthly basis to an individual who claimed to be the landlord of the property. In the days following the eviction, the majority of the residents left the building without their possessions, which had been locked in the building. Approximately 40 of the evicted residents lived

under a nearby bridge, and one resident was forced to give birth under the bridge.

The 40 residents were represented by the Centre for Applied Legal Studies (CALs) in a High Court action, which took the form of the restoration of the undisturbed possession of their homes. The applicants also sought an interdict preventing the owners from taking any steps to evict them, pending a rescission of the eviction order obtained by the owners. The Court heard the matter and ruled that the application to rescind the eviction order was to be dismissed. It was further ruled that the Applicants who were rendered homeless were to be accommodated in a private shelter sourced by the City of Johannesburg called Ekhaya House Shelter. The Applicants who were employed were required to pay R10.00 per day for accommodation and in addition the

Court granted a costs order against the Applicants.

The finding of the Court a quo on rescission, as well as the Order of the Judge was appealed by the Applicants and subsequently dismissed by the Court. In addition, the Court also gave a negative costs order against CALs despite the Constitutional Court prohibiting the granting of a negative costs order against an NGO in the Biowatch matter.

The Applicants have subsequently appealed to the Supreme Court of Appeal. On 15 January 2014, the Supreme Court of Appeal granted an order for leave to appeal to the full bench of the South Gauteng High Court. The Applicants drafted their Notice to Appeal in February 2014 and the First and Second Respondents have filed a Notice of Intention to Oppose.



DE VOS NO AND OTHERS V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS CCT150/14

Application for confirmation brought to the Constitutional Court.

Challenge to the constitutionality of sections 77(6)(a)(i) and (ii) of the Criminal Procedure Act 51 of 1977.

The two matters that have led to the challenge being mounted around the constitutionality of these two provisions are *Anna-Marie de Vos NO (4502/2010)* and *Sarah Snyders (5825/2014) v Minister of Justice & Constitutional Development and Others*. These two cases have subsequently been joined. Down Syndrome SA and Cape Mental Health were admitted as *amicus curiae* in the Western Cape High Court proceedings, while Cape Mental Health was admitted as *amicus curiae* in the Constitutional Court proceedings.

Advocate Ana-Marie De Vos was appointed as curatrix ad-litem to a mentally impaired 14 year old boy who fatally stabbed a 14- year old female resulting in him being subsequently arrested and charged with murder in the Oudtshoorn Magistrate's Court. The accused was assessed by three doctors, who were in agreement that he was mentally disabled. It was further agreed upon that the accused was not able to understand court proceedings nor appreciate the wrongfulness of his conduct. An application was brought to stay the proceedings in the criminal matter so

that a constitutional challenge could be launched to have section 76(a)(i) of the Criminal Procedure Act set aside as invalid.

During the initial hearing of the matter in the Western Cape High Court, the Court ordered that the Minister of Health be joined in as an interested party. This was subsequently done.

Prior to the matter being heard in the Western Cape High Court with the Minister of Health cited as a Respondent, the Stellenbosch Justice Centre applied for the matter of Pieter Snyders to be heard together with that of Stuurman. The second matter is in relation to an application brought forward by the Stellenbosch Justice Centre with regards to a 35 year old Down's Syndrome male who was detained at a mental institution on charges of rape. Although no evidence was given linking the accused to the crime, he still had to be detained as a state patient or as an involuntary patient due to his mental disability.

Both matters contend that sections 77(6)(a)(i) and section 77(6)(a)(ii) of the Criminal Procedure Act 51 of 1977 are inconsistent with the following rights enshrined in the Bill of Rights, namely:

- The right to equality before the law including the right to equal benefit of the law

- The right to equality;
- unfair discrimination on the ground of disability
- The right to human dignity
- The right to freedom and security of person including the right not to be detained without trial

The matters are of significance, as they involve a challenge to the constitutionality of section 77(6)(a) of the Criminal Procedure Act 51 of 1977 wherein a presiding officer is obliged to order the detention of an accused person in a mental institution or a prison if it is found, on a balance of probabilities that:

- The accused person is not capable of understanding the proceedings so as to make a proper defence
- The accused person has committed the crime of murder or rape

The Western Cape High Court ruled that sections 77(6)(a)(i) and (ii) of the Criminal Procedure Act 51 of 1977 are unconstitutional and furthermore gave Parliament a time frame within which to address issues of legislation that deal with the fate of mentally disabled people who have been accused of crimes.

7. CASE STUDIES: GIVING CONTENT TO OUR CONSTITUTION continued

SALI V NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE AND OTHERS CCT 164/13

Appeal to the Constitutional Court.

Discrimination based on age.

Section 9(3) of the Constitution Act 108 of 1996: "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds including age."

This matter involves an unemployed 43 year old police reservist who applied for a permanent position as a police officer. He was successful in all tests and the interview, but was not appointed because of his age. The matter was taken to the Labour Court where the following issues had to be decided upon, namely whether or not the Applicant met the South African Police Services (SAPS) requirements for appointment as a permanent member of SAPS; whether or not the Respondents had discriminated against the Applicant on the basis of his age; and if so, whether such discrimination was fair; and whether or not the Applicant was entitled to relief.

The Labour Court ruled that for his age, the Applicant met the requirements for the appointment. The judge found that the SAPS were bound by the provisions of a Regulation determining that recruits must be between the ages of 18-30 years, unless the National Commissioner determined otherwise. The Commissioner

“It cannot be gainsaid that this matter raises a constitutional issue. The applicant’s claim is for the enforcement of a right contained in section 9(3) of the Constitution and given effect to by section 6 of the Equity Act. The applicant contended that his right not to be discriminated against on a ground listed in these provisions was violated. This is a constitutional issue of importance.”

[paragraph 38 of the Constitutional Court Judgment].

in consultation with reservists’ representatives determined the age of recruitments to be between 18-40 years for a special group of reservists. The Court thus found that it would be illegal to appoint the Applicant because of his age. The Court also found that the Applicant through his reservists’ representatives was part of a bargaining process, which resulted in the determination of the upper limit of a recruitment age of 40 years instead of 30 years.

This matter was previously dealt with by an attorney in private practice. When the client approached the Port Elizabeth Justice Centre for assistance, it was felt that the Labour Court misdirected itself, as it did not take into account section 9 of the Constitution in terms of which unfair discrimination on the basis of age is deemed to be unconstitutional. The matter was therefore appealed to the Labour Appeal Court where leave to appeal was subsequently denied. Advocate Crouse therefore decided

to appeal the matter directly to the Constitutional Court to challenge the unfair discrimination.

In the Constitutional Court, Mr Sali argued that the interpretation given by the labour Court to ‘employment policy of practice’ was too narrow, and that further SAPS’s age limit was unfairly discriminatory. Mr Sali thus sought an order that the relevant provisions in the Regulations be declared invalid. The SAPS in turn raised the issue that because the constitutionality of the provisions was only raised on appeal it should not be entertained, and further that the age limit imposed was not discriminatory.

The Court denied Mr Sali leave to appeal, as it agreed with SAPS that Mr Sali had in fact not raised his constitutional challenge to the regulations in the Labour Court, and thus he was barred from raising it on appeal to the Constitutional Court. But for this fatal omission Mr Sali would have been successful in declaring the said regulations unconstitutional.

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