The Judiciary

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Chief Justice Mogoeng Mogoeng in Paris

Safe and voluntary motherhood is a matter of human rights

Gauteng Judges introduced to court e-Filing

CONTENTS

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From the Editor

Dear Colleagues,

We are pleased to present to you the 2018 Spring Issue of the South African Judiciary Newsletter. A number of our colleagues have been active in public platforms over the past quarter engaging on various matters of interest. We are happy to bring you some of their writing in this bumper edition.

We start off with the Honourable Chief Justice Mogoeng Mogoeng addressing the issue of the importance of courageous media in exposing and holding power to account. This was a Keynote address delivered at the 2018 Nat Nakasa Awards on 23 June 2018. The Judge President of the Supreme Court of Appeal, Justice Maya, also addressed the annual Helen Kanzira Memorial Lecture at the University of Venda on 18 September 2018 on safe and voluntary motherhood as a human right.

We also followed our colleague, Justice Mbuyiseli Madlanga of the Constitutional Court, to the University of Stellenbosch where he delivered the 2018 Annual Human Rights. Justice Madlanga is on long leave and will be using his time speaking on various platforms. He was also due to avail his services to Walter Sisulu University, his alma mater, and to Fort Hare University, an institution that has the proud history of having educated many an African luminary. We hope to bring you more on these activities in the next Issue.

We also hear from Judge President of the Mpumalanga Division of the High Court, Judge Francis Legodi, who has written a special article for this Newsletter on the slow pace of litigation.

It is a full edition and we trust that you will find it to be satisfying reading! A word of thanks goes to my honourable colleague, Judge President Leeuw, for working alongside me in the Judicial Communications Committee (JCOM). We wish also to thank Mr Mncube, the Spokesperson for the Judiciary, as well as the OCJ Communications team for their hard work in producing this latest Issue of the Judiciary Newsletter.

Until next time…

Judge President Dunstan Mlambo
Chairperson: Judicial Communications Committee

Chief Justice Mogoeng Mogoeng in Paris

France's Secretary of State to the Minister of Foreign Affairs, Jean-Baptiste Lemoyne, met on Friday, July 13 with Chief Justice of the Constitutional Court of South Africa and current President of the Conference of Jurisdictions African Constitutionals (CJCA), Mogoeng Mogoeng. This engagement raised several challenges common to Europe and Africa, in terms of managing migration flows, strengthening the independence of the Judiciary and the rule of law. In particular, the importance of good governance was emphasized to ensure inclusive development and to guarantee political stability over time. The current political climate in South Africa and the major ongoing reforms were also discussed.

Chief Justice Mogoeng Mogoeng with France's Secretary of State to the Minister of Foreign Affairs, Jean-Baptiste Lemoyne.

The Importance of Courageous Free Media in Exposing and Holding Power to Account

Keynote speech delivered at the 2018 Nat Nakasa Awards, 23 June 2018

[1] Acknowledgments and expression of gratitude.

[2] I have been asked to share some reflections on ***"the importance of courage and free media in exposing and holding power to account"***.

[3] I would be failing in my duty as a citizen of this country if I don't pause to record my gratitude to our media for the extraordinary display of courage and exercise of their right to freedom of expression entrenched in section 16 of our Constitution. Without any fear of contradiction I say, that in the exercise of its freedom of expression, which includes "freedom of the press and other media" and "freedom to receive or impart information or ideas", our media has courageously exposed wrongdoing by the government and its functionaries and held it accountable. You have truly done a sterling job. The importance and benefits of doing so are all around for all to see. For that you have been well and deservedly praised.

[4] The challenge is that much more needs to be done. With the same rigour, courage and creativity you need to identify other national destiny-defining powers that must be urgently exposed and held to account.

[5] To do justice to the topic I was given requires a particular understanding of the concepts and issues that flow from the terminology employed here.

[6] "The importance". Important to whom? And what are the real bases for asserting or concluding that certain people, interests or every well-meaning person would be a beneficiary of exposing or holding power to account? How exactly are they lightly to benefit from what we do? Much more than a superficial, run-of-the-mill reflection on this, and other issues is called for.

[7] "Courageous and free" also assumes the existence of formidable opposition or restrictions from those with the ability to oppose and limit the execution of one's legitimate mandate effectively or in a meaningful way. And the immediate question is who has what it takes to pose that threat.

[8] What struck me with the word "power" was what or who immediately comes to mind every time the word "power" is mentioned. Do we think or assume or take it as a reality that there is only one centre of power? Or do several repositories of real power immediately occupy our thoughts, when the word "power" is mentioned?

[9] From where I stand, there are far too many factors at play in determining who to expose and hold accountable, what real benefit, if any, that exercise is lightly to yield and to whom. The "power" to be exposed or held accountable seems to occupy centre-stage in the topic I have been asked to address. And that "power" is context or situation-specific.

[10] The context and setting in addressing this issue properly, differs from country to country and moment in history to moment in history.

[11] The superficiality now in vogue and its enabling narratives, that the past be ignored and focus should only be on the post-independence era is not only disingenuous and overly protectionist, but also a threat to finding enduring solutions to problems that plague South Africa, Africa and the rest of the developing world. No wonder we are still trying to grapple with matters in relation to which we should already have made a lot of progress.

[12] It is essential to trace powers historically and currently at play in entrenching the poverty, indignity, dispossession, disunity of the African people and the perpetuation of their

dependencies, and the corruption of some of those who govern.

[13] Which power needs to be exposed or held accountable in South Africa or the rest of Africa for indigenes to derive optimum benefit from that exercise? In other words, what are the crucial and urgent challenges that confront South Africans and Africans whose resolution could be paralysed by the lack of courage or freedom by the media, to expose or hold accountable any power that could but doesn't want to bring about the necessary change?

[14] It appears that there are powerful forces behind the major problems that have plagued and continue to plague South Africa, Africa and the rest of the developing world over the years. Poor governance, racial and gender discrimination, wealth disparities along racial lines, virtual landlessness and control of the economy and lack of meaningful participation by the previously disadvantaged are but some of those important challenges that require serious and urgent attention. The power behind them also needs a courageous and free media to expose and hold accountable.

[15] But, these problems will forever be synonymous to South Africa and Africa as long as we all resign ourselves to being superficial in grappling with them or c*hoose to know and confine ourselves to our place,* in dealing with these issues. To be truly effective in exposing and holding all real powers accountable, we must seek to know those powers, what sustains them and why they may never let go.

[16] I again begin, as I recently often do, with the loaded words of Lord Macaulay on 2nd February 1835 while he was addressing the British parliament. He said:

> **"I have travelled across the length and breadth of Africa and I have not seen one person who is a beggar, who is a thief such wealth I have seen in this country, such high moral values, people of such calibre, that I do not think we would ever conquer this country, unless we break the very backbone of this nation, which is her spiritual and cultural heritage and therefore, I propose that we replace her old and ancient education system, her culture, for if the Africans think that all that is foreign and English is good and greater than their own, they will lose their self-esteem, their native culture and they will become what we want them, a truly dominated nation."**

[17] So, the much talked-about poverty, unemployment and inequality did not just happen. The contentment, abundant supplies of the needs of the African people, their cultural and educational heritage was deliberately destroyed by a colonial power to entrench poverty, unemployment and inequality. Crime and corruption, according to Lord Macaulay, was virtually non-existent. There was no theft, he said. The high moral values upheld and the calibre of the people of Africa struck him as being so essential to the sufficiency or prosperity, morality, peace and virtual absence of crime, that it all had to be destroyed to reduce the people to the level of poverty, helplessness, criminality and absolute dependency that they have been brought down to, over the years. The very backbone of their being and success had to be broken. Otherwise, Africa would never have been as poor, run down and despised as it is.

[18] Lord Macaulay said Africans had to be made what colonial powers wanted them to be – people of low self-esteem, a truly defeated people who believe that everything about them was inferior and everything English or foreign was best and superior. African people had to be and were reduced to a defeated people – beggars for foreign aid or favour, from those who shamelessly took their wealth to enrich themselves.

[19] Well over a hundred years later, while addressing the Ghana National Assembly on 8th August 1960, President Kwame Nkrumah, often referred to as Osageyefo, said the following about the continuous struggle in the Congo:

> **"The evil balkanisation, disunity and secessions, is that the new**

balkan states of Africa will not have the independence to shake-off the economic shackles which result in Africa being a source of riches to the outside world, while grinding poverty continues at home. There is a real danger that colonial powers will grant a nominal type of political independence to individual small units so as to ensure that the same old colonial type of economic organisation continues long after independence has been achieved."

[20] President Nkrumah also said "my purpose for writing Neo-Colonialism was to expose the workings of international monopoly capitalism in Africa in order to show the meaninglessness of political freedom without economic independence, and to demonstrate the urgent need for the unification of Africa and the socialist transformation of society."

[21] And, after a breath-taking description of the African landscape, her waterfalls, rivers, as well as fauna and flora, Loren Cunningham goes on to share the following sobering and painful realities:

"Our great artist God has displayed these and other wonders in Africa ... He hid more gold here, more diamonds, plutonium, and copper than in any other place on earth. Africa has more hydroelectric potential than all the rest of the world put together, as well as an abundance of coal and oil.

Wisely used by and for Africans, the continent's resources could contribute significantly to new health and prosperity. Unfortunately, for too long Africa's people have been enslaved, raped, abused, dismissed by prejudice, hated, or just ignored. Their rich resources have often been collected and used by others – even stolen – with little if any benefit going to Africans. Instead, their value has attracted foreign exploitation, enriching dictators and warlords, bringing bloodshed, starvation, and even modern forms of black-on-black slavery."

This, he said in 2007.

[22] Is that not where African people are right now? Why when Africa is so well-endowed with the resources that are necessary to remove Africa from this state of squalor and dependency? I say so because there are incredibly powerful forces that have brought about this state of affairs and have never really been dislodged or held to account. They have a near-perfect plan to stay on and keep their position of dominance unshaken and intact. It will take more courage by our free media to expose and hold those powers accountable. For, their dislodgement seems to be an extremely risky, career or even life-threatening assignment to embrace. If they cannot capture you, then a well-oiled smear or character assassination machinery would be activated, failing which physical consequences might follow.

[23] It follows that the other forces to be confronted are those that maintain or keep alive the stubbornness of poverty, dependencies, poor governance, stagnancy, division and neo-colonialism in South Africa and the rest of Africa, because of the virtually immeasurable benefits they derive from the status quo. Why is it that black and white countries, including Canada, Australia and New Zealand were all colonies of Western powers at some stage. And yet, African people, unlike their white counterparts, are seemingly unable to or incapable of reconnecting with their crime-free, corruption-free, peaceful, stable, proud and prosperous past. What explains the disconnect between the good distant past and the present backward, poverty, crime-ridden present, enabled by maladministration or impunitised poor governance? How many African countries are really free, especially economically?

[24] It seems that there are powers with strategies designed to perpetuate neo-colonialism and the consequential impoverishment of Africa. And those are the powers that need a courageous and free media to expose and hold to account, for the sake of the suffering masses of the people of Africa. There should be no untouchables or holy cows here.

[25] An article, that appears to be of relevance to the whole of Africa, was forwarded to me about two days ago. It details an angry reaction by a white foreign business executive triggered by a well-to-do Ghanaian man who was begging for an exchange of seats on a plane. When a fellow passenger confronted him about his apparently discourteous tirade, the white brother, who had since cooled down, explained why he hated the very idea that African people continue to beg foreigners even for what is rightfully theirs. He said:

> "I have just finished a month long negotiations with your ministers and government officials over your God-given mineral rights, and what my gold mining company should pay. I come to your country, see all this poverty everywhere, with wealth right under your feet. Your own government gives only foreign companies the rights and privileges to rape and steal your country blind.
>
> For a few thousand dollars, your government officials allow these foreign companies to walk away with:
>
> a) perpetual tax holidays
> b) duty free imports
> c) bloated capital and operational investment costs
> d) under-declared mineral output
> e) minimum wages for local employees doing all the work, but FAT salaries and expense accounts for foreigners who do almost nothing
> f) exaggerated cost of shoddy school blocks and boreholes instead of meaningful royalty to local land owners and communities
> g) destruction of local farm lands with pitiful resettlement payments
> h) pollution of local drinking water
> i) destruction of local infrastructure, etc.
>
> My bosses had counseled me at a briefing before my departure. I was asked to read your Osageyefo's "Neo-Colonialism". Then I was told: "be prepared, and the first, to offer the negotiating team:
>
> a)a few thousand dollars each
> b)a center, or a 6-room school block, or a few boreholes for the community; and there will be no mention of the usual above 10% royalties, or an actual government oversight of our operations, or adequate resettlement compensations, etc."
>
> I did not believe my bosses since I, a mere high school graduate, was coming to deal with officials with masters and doctorate degrees. Imagine my shock and disappointment when these officials, instead of demanding what is INTERNATIONALLY ACCEPTABLE COMPENSATIONS AND ROYALTIES for their country and communities, only accepted the 3% royalties, and with ALL KINDS OF GIVEAWAYS, and then came to me later BEGGING me to deposit "something" in their foreign accounts (numbers written on pieces of paper)."

[26] The foreigner went on to explain how companies take the minerals of Ghana for next to nothing, deposit huge sums of money in their banks and turn around to loan the same to the Ghanaian government with ridiculously oppressive conditions. The business executive then went on to ask, which is of great relevance to the media:

> "Has your media asked why the MD's of the Ghana Chamber of mines keep defending the mining companies, or how a Ghanaian, working for a Ghanaian/British joint company in Ghana earned the "Order of the British Empire (Sir)"? ...
>
> Your media is just as bad. With buffet lunches or dinners and a few Cedis in their pockets, your print media become the propaganda machines of these mining companies. They tout the few boreholes and the 6-room schools, but leave out the callous treatment of local employees and residents, and the destruction of the environment. The airwaves are SILENT on all this. WACAM IS THE LONE VOICE FOR THE PEOPLE (WACAM is a community based human rights and environmental mining advocacy NGO in Ghana). Why don't your media SUPPORT WACAM by broadcasting and educating the masses, especially the officials that:
>
> (a)THE UNITED NATIONS DOES NOT APPROVE OF FOREIGN COMPANIES ROBBING THE INDEGENES FULL BENEFITS OF THEIR GOD GIVEN MINERAL AND OIL DEPOSITS. ...

I have listened to your new President talking about Ghana beyond aid and it seems he is the only Ghanaian who has read Osageyefo's book on "neo-colonialism". Let's hope he is your messiah."

[27] It is necessary that our media be courageous enough to expose and hold to account all the powers behind business or investment practices similar to those in Ghana and the rest of Africa. The rape and the stealing of Africa's wealth must now come to an end. The corruption and collusion in the corporate sector must be exposed and dealt with very firmly and with the same vigour and persistence as is the case with public sector corruption and its practitioners. The terms under which investors are allowed to do business must be published for public information and comment. Wages paid by mining companies to Africans must be compared, by the media, to those paid to similarly-situated employees in Western countries. The injustice, exploitation, overt or subtle racism, economic marginalisation that Sol Plaatjie set out to uproot, must be fought relentlessly by our courageous and free media.

[28] Africa is divided along religious, colonial and pigmentational lines. There is a self-serving indecent emphasis on so-called black and white Africa. Who are the masters of this evil game and to what end is a divided Africa being pursued? It is important that our media exposes and holds accountable all, not some, powers. The state wields a lot of power but so do the corporate sector, foreign interests and governments, governing and opposition parties and those who set up, own or sustain media houses. And it may not always be easy to undermine the agenda of those who pay you or the interests of those who oil the printing machines. But, try we must. All wrongdoers must be exposed. Let me make my point clearer.

[29] Not every media house was established with the sole objective of simply receiving and imparting any piece of information that objectively advances the interests of all.

[30] A newspaper by the name of the "National Gazette" was secretly established by the Secretary of State Thomas Jefferson and a highly regarded constitutional law expert and trusted party member James Madison in 1791. They begged and captured Philip Freneau. Thomas Jefferson paid a government salary from his department to Freneau to be the editor of the "National Gazette". The purpose of the "National Gazette" was to oppose the Secretary of the Treasury Alex Hamilton and the government of George Washington, in which Jefferson served. It was a covert operation by the media and government money was used to undermine government. Editor Freneau was not free from Madison and Jefferson. He displayed no courage against them. His courage and freedom applied only to others.

[31] President Abraham Lincoln and his Secretary of State William Henry Seward conspired to purchase a controlling share with government money in a number of failing Southern states' newspapers. These newspapers were to be used to "provide a forum for union men to sway the opinion of fellow southerners". No free media.

[32] Fox News channel was formed on 7th October 1996 by Rupert Murdoch and GOP strategist Roger Ailes. It was established to counter the apparently pro democratic sentiment by the likes of CNN International. The agenda was clear – push the Republican Party agenda.

[33] Sol Plaatjie's agenda for establishing his newspaper "Koranta ya Becoana" in 1901 and "Tsala ya Batho" in 1910 was very clear. His agenda was to highlight issues of great concern to Africans, such as racism, injustice, exploitation and ultimately land restitution.

[34] Much of what you can or cannot do might well depend on why the media house you are attached to was established, who really controls it and what agenda they would really want you to push or you are allowed to push.

[35] It is important that our media be free from all wrongdoing and corrupt powers. Even at the risk of losing your job, muster the courage to expose and hold all centres or repositories of power to account.

[36] When that is so, then corruption in both the public and private sector would be uprooted

and good corporate and public sector governance would be realisable. The wealth of South Africa and of Africa would at long last benefit her citizens. And Africa would be truly free from the neo-colonialism that has been enabled by double-standards and negative self-serving narratives in some reporting. Don't ignore, justify or forgive some quickly, while spending months or years on similar wrongs by others.

[37] Racism, corruption and crime in general, unconscionable economic exploitation of Africa, the exclusion of indigenes from meaningful participation in the mainstream economy, and the virtual landlessness of the indigenes. Who is writing about these things and waging a relentless campaign against them? Should we be seeking to define transformation as if it is too complex a concept or project to understand? Are we as angry about private sector corruption, fronting, tax evasion, the destruction of the African environment, dishonouring social responsibility contracts as we are about public sector corruption or wrongdoing? If not, why? We have been here for too long. Now is the time to act against all injustice, prejudice, self-serving agendas and disunity.

[38] It is important that the media be courageous and free to expose and hold all power to account. This way, South Africa and Africa will be genuinely free of the crushing dominance that yielded grinding inter-generational poverty engineered by Lord Macaulay and all those like-minded people and entities, still alive and determined, who took over from them.

-Ends-

Safe and voluntary *motherhood* is a matter of human rights

President of the Supreme Court of Appeal, Mandisa Maya, addressed the annual Helen
Kanzira Memorial Lecture at the University of Venda on 18 September 2018.

On Wednesday, 19 September 2018, the University of Venda (Univen) School of Law and the University of Pretoria's Centre for Human Rights hosted the annual Helen Kanzira Memorial Lecture. The Memorial Lecture was held under the theme 'Safe and voluntary motherhood a matter of human rights: We can do more', which addressed women's maternal and health rights as human rights. Helen Kanzira passed away in 2007 due to complications arising from giving birth. Below is an excerpt from her address:

I must begin by tendering my unreserved and most humble apology that this event takes place only today when it was originally arranged for a date during a more fitting period, August, which is Women's month. But life's exigencies have a way of intruding at the most inconvenient of times. But here we are and I am really happy to be among you this morning.

I must also express my deep pride for being associated with this institution. We have been watching with growing delight as the University of Venda took its rightful place among its peers; becoming an important player in the South African higher education landscape and contributing meaningfully to the development of the human resources and other needs of the country and region. This institution values and unabashedly celebrates its Africanness and it is no mean feat that it is the only centre of higher learning, as I am told, that offers the Bachelor of Indigenous Knowledge Systems programme in South Africa; this in an age when we are lamenting the degradation of our precious indigenous languages and cultures. This is true leadership by example and one hopes that our other institutions of learning will follow suit.

I am humbled by the invitation to give this year's public lecture in honour of an illustrious woman, an icon of women's universal struggles, after whom the lecture is named. And the opportunity is especially gratifying because the subject issue is one of such gravity that it should occupy the collective mind and will of all mankind until the problem is eradicated. This is so because women bear the burden of child bearing and keeping the human species alive. I cannot think of a more important human task. The subject is also very close to my heart. I too am a mother who has suffered from some of the life threatening afflictions associated with pregnancy and childbirth. When I fell pregnant with my first child as a young woman, I suffered from pre-eclampsia i.e. hypertension induced by pregnancy, which has persisted throughout my adult life. And five years later, I gave birth to my middle child and almost died from excessive bleeding and anaesthetic complications. But because I had a good job which earned me a good income, a good healthcare plan and easy access to good healthcare facilities, my life was saved.

Regrettably, Helen Kanzira was not as lucky. And like many other women in the developing countries who do not enjoy these advantages, she died needlessly, from childbirth complications, in the 21st century. Thankfully, her death has not been in vain as it has inspired this movement that provides a platform on which the gross violations to women's health, sexual, reproductive rights and just the basic right to determine their lives can be highlighted. And as we honour her legacy today we are particularly reminded to step up our efforts to define maternal mortality as a human rights issue, so that women and girls do not die from avoidable causes while performing the most natural, life giving act that benefits all of humankind.

Reproductive health and rights is a wide-ranging topic. For purposes of this presentation, I will cover the normative legal framework pertaining to the right

to health care in the international context, in broad strokes, and then bring the focus to South Africa and what has been done in the country since we attained democracy to address the challenges arising from maternal health issues and give effect to the right to reproductive health that is entrenched in our Constitution.

Primary causes of death

The main conditions that have been identified as contributing to maternal death are non-pregnancy-related-infections such as HIV-AIDS, tuberculosis, pneumonia, meningitis and malaria (with HIV-AIDS reportedly constituting 95% mortality in this group); obstetric haemorrhage i.e. excessive bleeding, hypertension, medical and surgical disorders attributable to poor access to care, lack of appropriately trained and experienced doctors and nurses; and an inadequately resourced health system. According to relevant experts, the majority of these deaths are entirely preventable.

Case studies conducted by the National Committee for Confidential Enquiry into Maternal Deaths in South Africa (NCCEMD), which has been operational since 1998, maternal deaths almost doubled between 1990 and 2008. And according to the statistics of the World Health Organisation in 2013 South Africa was ranked in the top forty worst maternal health countries in the world alongside smaller, poor countries such as Haiti, Niger, Ethiopia and Liberia.

It is universally recognised that maternal health is an indicator of the strength of a country's health system which provides early warnings of wider health system problems. But more importantly, maternal mortality severely impacts the development of a country. Healthy mothers enable a country to maximise its human capital, reduce poverty, hunger and child mortality and improve universal primary education. It is partly in recognition of these facts and to enhance these societal benefits that the international community has developed various policies and legal instruments to address maternal mortality.

International Law, Agreements and Treaty Monitoring Bodies

Women's sexual and reproductive health rights are founded in a number of rights guaranteed in various international human rights laws and treaties. These include the rights to life, to equality, to health, to privacy, to information and not to be subjected to discrimination, torture and ill-treatment.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, signed by 187 nations, is the foremost human rights treaty. It provides extensive measures for the elimination of discrimination against women in the field of health care, inter alia, access to health care which includes access to family planning (article 12(1)), appropriate services in relation to pregnancy, confinement and the postnatal period which must be provided free of charge where necessary (article 12(2)), a special recognition of the additional burdens faced by rural women in vindicating these rights (article 14), and the equal right of women to decide freely and responsibly the number and spacing of their children and have access to information, education and the means to exercise these rights (article 16(e)).

Similar protections are stipulated in other instruments including:

- the International Covenant on Economic, Social and Cultural Rights, 1966, which guarantees '[t]he right to the highest attainable standard of physical and mental health' (article 12);
- the International Covenant on Civil and Political Rights, 1966 which guarantees '[e] quality between men and women' (article 3) and requires the law to protect all against discrimination (article 26);
- the Programme of Action of the International Conference on Population and Development, Cairo, 1994 which sets out the internationally accepted, wide definitions of 'reproductive health' and 'reproductive rights', respectively, as the 'state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes', and '… the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health ... includ[ing] the right of all to make decisions concerning reproduction free of discrimination, coercion and violence';
- the African Union Campaign; and
- the SADEC Gender Policy and the ECOWAS Protocol, 2013.

In addition to these instruments, there are the political

agreements reached at the United Nations World Conferences which also support women's sexual and reproductive health rights. There are then the three Treaty Monitoring Bodies:

- the Committee on Economic Social and Cultural Rights, which spells out the comprehensive rights and freedoms contained in the right to health (para 8) and enjoins States to provide functioning, accessible, acceptable and quality health facilities, goods and services (General Comment No. 14 of 2000 titled 'The Rights to the Highest Attainable Standard of Health' (Article 12 ICESCR) paras 8 and 12. respectively);
- the Committee on CEDAW which decrees it discriminatory for a member State to refuse to legally provide for the performance of (certain) reproductive health services for women and makes it the duty of the member States to ensure women's rights to safe motherhood and emergency obstetric services (General Recommendation No. 24 of 1999 "Women and Health" (Article 12 The Right to Health, Non-Discrimination and Choice)); and
- the Human Rights Committee (General Comment No.28 of 2000 "Equality of Rights Between Men and Women" (Article 3 ICCPR)).

Quite apart from these measures, the United Nations (UN), following its Millennium Summit in 2000, established the Millennium Development Goals. These were in the form of eight international development goals which were intended to be achieved by 2015. The member States, which include South Africa, committed to eight key objectives – the eradication of extreme poverty and hunger; the achievement of universal primary education; the promotion of gender equality and empowerment women; the reduction of child mortality; the improvement of maternal health and combating HIV/AIDS and other diseases. When these goals were not achieved within the anticipated time frames, the UN launched the Sustainable Development Goals, which have the same objectives, to transform the world by 2030. The key goals which impact women's sexual and reproductive rights in the new compendium are ensuring healthy lives and promoting well-being for all, ensuring inclusive and quality education for all and achieving gender equality and empowering all women and girls.

But the women's lot has not improved much despite this plethora of measures which enjoin member States to provide their citizens with adequate health care that addresses the different needs, roles and responsibilities of women in relation to pregnancy and family planning and implement measures that will create gender quality so that women are empowered to access the services that are available.

Position in South Africa

The Constitution of the Republic of South Africa, Act 108 of 1996, entrenches the achievement of equality as a founding value and the full and equal enjoyment of all fundamental rights and freedoms by all (s 9). Thus, it embodies gender equality and its attainment as an essential part of the creation of a just society. In s 27(1) , the Constitution grants 'everyone … the right to have access to … health care services, including reproductive health care'. And in s 27(2) it enjoins the 'state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of … these rights'.

The courts, led by the Constitutional Court, have pertinently interpreted s 27(1) and (2). And although they have declined to recognise the minimum core of the rights in question that must be immediately provided for by government, they have held that the sections must be read in conjunction and mean that the State must take reasonable steps to progressively realize the rights they provide. Accordingly, in Minister of Health v Treatment Action Campaign (No 2) [2002] ZACC 15; 2002 (5) 721; 2002 (10) BCLR 1033 (CC), the Court dealt with the issue whether the government was meeting its obligation with respect to enforceable socioeconomic rights based on existing policies to provide access to health services for HIV-positive mothers and their new-born babies. It held that these provisions required the Government to devise and implement, within its available resources, a comprehensive and co-ordinated programme to progressively realize the right of pregnant women and their new-born children to access health services to combat mother-to-child transmission of HIV, such a program to include reasonable measures for counselling and testing of pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV and ensuring that appropriate treatment was available to women for such purposes (see also Lungisile Ntsele v MEC for Health, Gauteng Provincial Government SGHC Case No 2009/52394 delivered on 24 October 2012; Vuyisile Lushaba v The MEC for Health, Gauteng SGHC Case No 17077/2012 delivered on 16 October

2014; Khoza N obo minor child Z v MEC for Health & Social Development, Gauteng Provincial Government Case No 2012/20087 delivered on 6 February 2015).

Pursuant to these provisions, the Choice on Termination of Pregnancy Act, 1996, (the Abortion Act) which governs abortion, was promulgated. Significantly, this statute has since survived two legal challenges. In Christian Lawyers Association v Minister of Health, the plaintiff sought the striking down of the entire Act on the ground that it violated the constitutionally guaranteed right to life of the foetus. However, the Constitutional Court determined that the word 'everyone' in s 1 of the Constitution, which guarantees that '[e]veryone has the right to life', could not include an unborn child. In Christian Lawyers Association v National Minister of Health, the plaintiff applied for an order declaring unconstitutional the provisions that permitted a minor with the capacity to consent to terminate a pregnancy without parental consent or control. The court ruled that abortion rights (without parental involvement) could apply to adolescents with the capacity to give informed consent.

So, everyone is guaranteed the right to make decisions concerning their reproduction, and to security in and control over their bodies. The Constitution, domestic legislation, policies and protocols and the jurisprudence of the courts unambiguously oblige the government to support the protection of women's sexual and reproductive health as a fundamental human right.

In addition to the Abortion Act, the government introduced other important policies in the sphere of reproductive health. In 1994 it introduced free health care for pregnant women and children under 6 years. In 1998 maternal deaths were rendered notifiable by law and the NCCEMD which monitors the process of notification and conduct independent assessment of maternal deaths, predominantly in public health care facilities.

This committee reports that since 2011, following the implementation of the policy on the introduction of an improved HIV testing and the provision of ARV-treatment to all HIV-positive pregnant women from 2009, there has been a marked decline of maternal deaths in hospitals. And the Abortion Act has made safe abortions more accessible, thereby reducing incidences of unsafe abortions and maternal mortality and morbidity related to abortion significantly since its promulgation. There has also been a decline in deaths caused by obstetric haemorrhage although deaths owing to complications of hypertension remain high. South Africa now compares favourably among other sub-Saharan countries in terms of its key maternal health interventions.

But there is still a lot of work to be done. According to the NCCEMD mentioned above, a trifling percentage, a mere 4,6% of the Gross Domestic Products accounts for our health budget and there is need for intensified efforts focussed on improving the health system holistically to reduce the death owing to haemorrhage and hypertension – proper training of doctors, nurses and allied health workers and improvement of obstetric care and facilities, bringing properly resourced health care facilities to all, especially the many poor and rural black women in far flung rural areas who do not access the health system early enough or at all by reason of their location, ensuring efficient emergency transport between facilities so women do not die waiting for ambulances or being carted in wheelbarrows to far health centres by desperate relatives, keeping the focus on HIV-AIDS testing so that people know their status, destigmatising the syndrome, improving screening systems, prevention and treatment measures, ensuring safe caesarean section births as this has been found to cause a three times higher mortality rate than normal deliveries, careful monitoring and treatment of hypertensive patients, promotion of family planning services especially to the young and older mothers to prevent pregnancy in these particularly vulnerable groups, eradicating child marriages which place young girls at risk, health worker training and. There is still great need for more health workers to receive training in the termination of pregnancy. Safe abortion services are also limited by the low use of medical abortion in public facilities. The lack of adequate public facilities to provide safe abortion care services also translates into the poor implementation of the guidelines.

I cannot conclude the presentation without alluding to the other incidents of systemic gender discrimination and gross violations of their rights which women face daily which result in deaths and for those who survive, render it impossible for them to live and function in a dignified way. We see in court case statistics and media reports that women continue to be victims of extremely high levels of rape and domestic violence in South Africa. Society, sometimes including the very judicial officers adjudicating cases involving sexual violence against women, blames the women victims for their own sexual assault by questioning their

physical appearance, sense of dress and their presence at the places where they were attacked. Women continue to be treated as sexual objects who may never hold any valuable opinions or have a voice and who exist solely for the benefit of others, usually men. They are assumed to be intellectually inferior to men and less capable than them in any sphere of life. And on top of these disadvantages, women carry an unequal burden of home care and child rearing.

Poverty, which mostly affects women and girls, is another dire challenge. We live in a country where it is still an unaffordable luxury for many young girls to even access sanitary towels. And this of course has an extremely negative effect on their lives because when that time of the month arrives they must stay at home. So they lose valuable school time as they miss classes and some of them end up being so discouraged that they simply do not return to school. Poverty invariably translates to less chances of getting an education and more chances of suffering ill health, early marriage and / or pregnancy, abuse and exploitation. And these women are then sunk even deeper into the poverty trap.

The major cog of the solution lies in empowering all women and girls, mainly by investing in their education and development and creating and enhancing existing social safety nets that will ensure that they remain in school, and do not, in addition to missing out on valuable school hours because they are having their periods and cannot afford sanitary pads and end up not returning to school, have to stay at home to care for younger siblings because they were orphaned by HIV-Aids and have no one to raise them, or are abducted or handed over by their families and forced into early marriages with much older men for lobola because their families are poor and need the money, and all the other risks to which vulnerable women are susceptible. These are realities of many girls and young women in South Africa and elsewhere. A good education increases the chances of becoming informed and are aware of what is going on in the world around one, capable, articulate, self-sufficient and independent.

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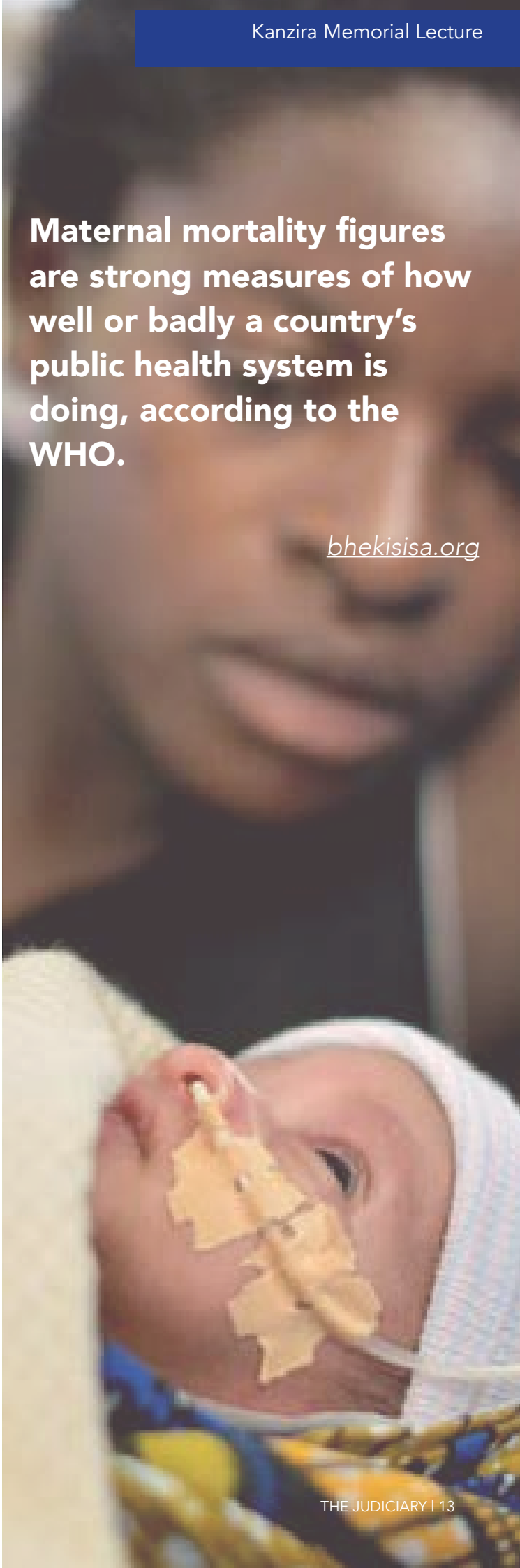

Stellenbosch Human Rights Lecture 2018

"The Human Rights Duties of Companies and other Private Actors in South Africa"

Justice Mbuyiseli Madlanga, Constitutional Court of South Africa

Introduction

Let me start by thanking Professor Sandra Liebenberg for the invitation and Professor Nicola Smit, the Dean of the Law Faculty, for being my wonderful host.

It is humbling and special to present the Annual Human Rights Lecture. It is humbling because I present it following a number of luminaries in the Human Rights discipline who have presented the lecture before. It is special because this year is the 100th anniversary of the birth of Mam'uAlbertina Sisulu and Tat'uNelson Rolihlahla Mandela who both made immeasurable personal sacrifices and were subjected to untold suffering so that you and I could enjoy human rights in a constitutional democracy. It is special because this year is also the 100th anniversary of the existence of the University of Stellenbosch; a university which – with other white universities – were part of the symbols of the domination of the black majority by the white minority. I say so because black people found themselves in these universities only on sufferance. The racist, segregationist policies of the successive colonial and apartheid governments played themselves out in these universities[1]. And apartheid's "logical" conclusion was the establishment of black universities from the late 1950s[2]. Many apartheid notables were educated here at Stellenbosch: Dr DF Malan was educated here when this institution was still called Victoria College; Dr Hendrik Verwoerd was educated here; Mr Balthazar Johannes or John, as he preferred to be called, Vorster was educated here[3]; and many a member of the Afrikaner Broederbond must have been educated here. Whatever else the Broederbond might have been a think-tank for, it was most certainly also a think-tank for crafting and propping up the heinous apartheid system[4] Dr Verwoerd was an academic here[5]. The equally notorious Dr Werner Eiselen was a professor of – guess what – "Bantology" here at Stellenbosch University[6]. Surely, there were many others like them. One can only imagine what they taught. So, this university played a significant role in the tutelage of people who later featured prominently in the apartheid machinery.

That said, in recent years Stellenbosch University has made some strides towards transforming itself. Were it not for those strides, we would not have had Professor Russel Botman, a black person, as a Vice Chancellor of this university. Were it not for efforts at chipping away at the foundations of the status quo, patriarchy and misogyny, apartheid's cognate evils[7], would have been barriers to the appointment of, for example, Professors Sonia Human and Nicola Smit, both women, as deans of the Faculty of Law or Professor Sandra Liebenberg, another woman, as a Distinguished Professor who occupies an endowed professorship as the H F Oppenheimer Chair in Human Rights Law. I am mindful of the Centenary Restitution Statement issued by this university's Rector, Professor Wim De Villiers[8]. The importance of this statement lies in its acknowledgement of the university's contribution towards the injustices of the past, the university's unreserved apology to those it excluded from the privilege it enjoyed and the university's commitment to become an inclusive institution.

This is just the beginning. More is expected of the university. The commitment in the Centenary Restitution Statement must become a reality; and the detail of what that reality will be must be thought out carefully, and in a manner that is itself inclusive. I trust that it will take far less than another 100 years for more significant transformative efforts to emerge.

Traditional or conventional thinking has always been that, because human rights "were designed to curb excesses of public power, rather than to regulate 'private' commercial or interpersonal relationships", they are not suited to apply to non-state actors[9]. Tonight I ask that we turn our gaze away from the state. I ask that we look at the human rights duties of private actors. That is, companies and, indeed, ourselves, individuals[10].

I will speak under the following themes. I first discuss the progress, or lack of it, made in the international

arena on human rights obligations of corporations[11]. I next explore the constitutional basis in South Africa for attaching human rights duties to corporations and private individuals. Excluding those instances where it is stated expressly that the right in issue does apply to private persons, that basis is, of course, section 8 of the Constitution. I believe that the section's drafting history and the false start under the interim Constitution support a construction of the provision that private persons are duty-bearers under many Bill of Rights provisions. The debate under section 8 will include a discussion of: the difference between direct and indirect application of the Bill of Rights; and the positive / negative duty controversy. Finally, I briefly discuss two examples of proscriptions of unfair discrimination by private persons under section 9(4) of the Constitution, namely discrimination on grounds of sexual orientation and race.

International law

With all the shortcomings that South Africa may still have, we are nonetheless ahead of most in the rest of the world. In the international law context, there is still a debate whether private parties – particularly multinational corporations – ought to have human rights obligations.

At international law there is an approach that says business corporations need only have a social (not legal) responsibility to respect rights[12]. According to Professor David Bilchitz this has been understood to say that corporations do not have positive obligations towards the fulfilment of human rights[13]. He argues that this is deeply flawed and that at the heart of human rights is human dignity. Human rights violations can emanate from many sources; not just the state. He explains that in our globalised world, corporations can both exacerbate, and aid in alleviating, poverty. It is no wonder then, as Professor Bilchitz points out, that states are required under international law to ensure that human rights are not violated by third parties – which must include corporations. He suggests that a binding treaty that imposes human rights obligations on corporations will be necessary. He explains that—

> "confusion reigns supreme as to the exact nature and status of corporate obligations in this regard. These circumstances demonstrate the need for an international treaty expressly to recognise and clarify that businesses have legal obligations flowing from international human rights treaties."[14]

While there is an ongoing process pushed by our very own government and Ecuador to draft a treaty that is meant to "regulate, in international human rights law, the activities of transnational corporations and other business enterprises",[15] at this point it seems that concrete results are not going to be achieved any time soon.[16] The first draft that was released recently follows the trend set by Professor John Ruggie[17] that says corporations only have a social responsibility to respect rights, which at best requires them not to interfere where people are already enjoying access to various rights.[18]

It is time the dithering came to an end and concrete action were taken to make private persons bound by human rights that can appropriately be applicable to them. Some corporations, in particular multinational corporations, are so powerful that it would be folly to continue to train our sights only on the traditional target for challenges against human rights abuses – the state. We just can no longer afford to do that. As we all know, money has the unfortunate effect of causing many to bow to whatever whim they may be subjected to by those who dangle it. Put differently, money gives immense power. Undoubtedly, most multinational corporations have both – money and power. Some make greater profits than the gross domestic product of many countries. In 2016, the Independent reported that the revenue of the 10 biggest corporations – which include the likes of Apple and Walmart – was greater than the GDP of over 180 countries! South Africa is included in that count.[19] What is more, their combined revenue exceeded the tax collection of China for that year.[20] As Professor Allan Hutchinson explains:

> "There is no choice in dealing with corporations, for their activities pervade the lives of every citizen. How we put food on the table, what food we put on the table, what we pay to put food on the table, and what food we think we should put on the table are all questions that are deeply shaped by the actions of corporations and the life-images that they project."[21]

Axiomatically, with that kind of power and reach comes the potential for abuse and tyranny.

Some of these large multinational corporations operate here in South Africa. And we have our own huge companies operating in a number of industries. Their operations too have an enormous impact on the lives of ordinary people. A few examples of the industries in which they operate are manufacturing,

retail, mining and banking. Our large domestic corporations also wield a lot of power.

The second reason for bringing private persons within the binding force of human rights is a little more homegrown. It is about individual to individual interactions. We are all aware of how apartheid, even though it was state driven, invaded and pervaded some of the most intimate aspects of people's personal lives. This went so far as to pervert our interactions with one another. The daily news and law reports are replete with examples of how, despite nearly 25 years of democracy, our interactions are still poisoned by the legacy of our past. Economic power still reflects that of apartheid. To a large extent, so does social power. Business after all benefitted from apartheid policy.[22] Concentrated economic power, within the context of our peculiar racist history and present, may and does encourage abuse. If we are to take seriously the transformative injunction of our Constitution to "[i]mprove the quality of life of all citizens and free the potential of each person",[23] then our private interactions cannot be left out of the reach of those human rights obligations that may appropriately be borne by private individuals. We cannot take a business as usual approach and maintain the status quo insofar as our private interactions are concerned.

Many other countries also do have economic and social inequalities. This South African homegrown justification for extending the application of human rights to private actors must apply to them as well.

The South African position

Section 8 of the Constitution

Where better to start than the Constitution? Section 8(2) expressly imposes human rights obligations on private persons. How did we get here? It is no secret that the text of our Bill of Rights has part of its genesis in the body of international human rights law. It was within this historical context that the Constitutional Court recently explained in Gijima that "fundamental rights are meant to protect warm-bodied human beings primarily against the State".[24] This is often referred to as a "vertical application" of the Bill of Rights, because it pertains to the relationship between the State and its subjects.

Our interim Constitution itself had an "application clause" which differed markedly from section 8. I needn't dwell on the textual differences.[25] What is important is that the interim Constitution did not expressly state that the Bill of Rights imposed duties on private actors – often referred to as a "horizontal" application. Notwithstanding this, the newly established Constitutional Court was quickly confronted with a matter where a party tried to impose human rights obligations on a private individual. *Du Plessis*[26] was a defamation case between private individuals based on the common law. The defendants, a newspaper and its owner, were sued for alleged defamatory articles about the plaintiffs. They raised a defence that the comments at issue were lawful and protected by the right to freedom of expression.[27]

The majority of the Court famously held that the Bill of Rights under the interim Constitution had no direct horizontal application. In coming to this conclusion, the lead judgment by Kentridge AJ focused closely on the text of the interim Constitution's application provision.[28] Ackermann J's concurrence goes into some philosophical concerns about imposing obligations on private individuals. So, the Bill of Rights under the interim Constitution was held to operate only as between the State and its subjects. Iain Currie and Johan De Waal argue that the conclusion of the majority comports with a traditional or even narrow view of what a Bill of Rights ought to be: a "charter of *negative* liberties"[29]. I revert later to these authors' conception of the majority's approach.

The dissenting judgments of Kriegler J and Madala J come to a different conclusion, and in doing so set out a different philosophical – and dare I say political – vision for the interim Constitution. Kriegler J's harsh dissent takes issue with the concerns raised by the majority and some theorists towards imposing human rights duties on individuals. This is how he describes that concern:

> "The second point concerns a pervading misconception held by some and, I suspect, an egregious caricature propagated by others. That is that so-called direct horizontality will result in an Orwellian society in which the all-powerful state will control all private relationships. The tentacles of government will, so it is said, reach into the marketplace, the home, the very bedroom. The minions of the state will tell me where to do my shopping, to whom to offer my services or merchandise, whom to employ and whom to invite to my bridge club. That is nonsense. What is more, it is malicious nonsense preying on the fears of privileged whites, cosseted in the past by laissez faire capitalism thriving in an environment where

> the black underclass had limited opportunity to share in the bounty. I use strong language designedly. The caricature is pernicious, it is calculated to inflame public sentiments and to cloud people's perceptions of our fledgling constitutional democracy. 'Direct horizontality' is a bogeyman."[30]

Madala J focuses on South Africa's racist apartheid past and the legacies of advantage and disadvantage resulting from it. He says:

> "Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society."[31]

How does the majority address these concerns? It does so through the indirect application of the Bill of Rights.[32] Indirect application occurs where a court interprets a statute or develops the common law in a manner that imports the values of the Bill of Rights.[33] That, of course, would have an impact on private legal relations. And this has become a very popular approach to applying human rights in disputes between private individuals by our courts.

When it came to drafting section 8 of the final Constitution, the *Du Plessis* judgment must have loomed large and, with that in the collective mind, the Constitutional Assembly rejected the approach of the majority. It made explicit provision for the horizontal application of human rights. In a nutshell that is how we came to have section 8. The provision is complemented by section 39(2) of the Constitution which has the effect of requiring the indirect application of the Bill of Rights.[34] But it seems to me the explicit provision for horizontal application of the Bill of Rights did not remove much of the resistance to this idea. And that explains why – to this day – one cannot say there is clarity on this subject. The roots for the resistance are deep; so deep, in fact, that they start with notions of the nature of fundamental rights that should and should not bind even the state itself.

The philosophical underpinnings of the resistance stem from what Professor Sandra Liebenberg and other scholars characterise as a fiction. A fiction that sees civil and political rights to exclusively impose negative duties on the state and socio-economic rights to amount to no more than policy goals or aspirations.[35] What informs this fiction is the notion that civil and political rights are "politically neutral, since their enforcement does not require the judiciary to make policy choices with distributional implications".[36] Professor Liebenberg sees this as the "privileging of [the] negative duties" applicable to the state[37] and essentially argues that it is fallacious. She says:

> "[T]he privileging of negative duties fails to recognise that policy choices are made when judges elect to protect only negative liberties, and fail to respond to the claims of those who lack the resources to participate as equals in society. In other words, enforcement of only negative duties is not an ideologically neutral adjudicative approach. An approach which privileges negative duties, furthermore, fails to interrogate the way in which existing legal rules operate to reinforce poverty and social marginalisation."[38]

What one gleans from this is a restrictive view of the breadth of human rights, and one that attaches to the nature of fundamental rights that should bind the state. This view must surely apply with more force when it comes to whether human rights should apply to private actors at all, and – if so – to what extent. The function of bills of rights has traditionally been seen as one of "shield[ing] citizens against unwarranted state intrusions in their 'natural' rights and liberties".[39] That must mean traditionally bills of rights are not seen as being about shielding individual against individual.

To my mind this goes a long way towards explaining the long road we have travelled, and I believe we are still to travel, before crafting a South African jurisprudence that plainly and fully tells us what section 8(2) of the Constitution truly provides for. Strewn along that road must have been (and continue to be) notions that find the step of imposing human rights obligations on private actors anathema to constitutionalism.

Before I discuss the handful of cases where our courts have given meaning to section 8(2) in a manner that directly applies human rights, I want to say a

few words about Currie and De Waal's "charter of negative liberties" characterisation of the interim Constitution as interpreted by the *Du Plessis* majority. Sir Isaiah Berlin's lecture on *Two Concepts of Liberty*[40] is said to capture the philosophical ideal of liberty or freedom which animates such conception. He spoke of negative and positive forms of the concept, preferring the former and describing it in these terms:

> "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?"[41]

Sir Isaiah was concerned about coercion and an infringement on the autonomy of individual human beings. A charter of negative liberties thus places a check on the coercion of individuals by the state. Our Constitutional Court has had much to say about this conception. And in the early days there was a split in the Court as evidenced by the disparate approaches in the majority and minority decisions in *Du Plessis*.[42]

Today we have appropriately left that behind, by recognising that the status quo cannot be maintained under the guise of a charter of negative liberties. For one thing, the Constitution not only inhibits the state from taking certain action, in many respects it requires it to "respect, protect, promote and fulfil the rights in the Bill of Rights".[43] A specific example is section 25(5):

> "The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."

Furthermore, in South Africa freedom cannot alone come down to individual autonomy and only be understood from a western liberal perspective. The importance of emphasising freedom within our context cannot be understated. Freedom cannot be disassociated from liberation from our colonial and apartheid past. So, in order for the potential of all South Africans, black and white, to be truly realised, the social and economic structures of apartheid society must be undone. Only then can the majority of the country robbed of their dignity through various forms of dispossession and deprivation be considered truly free. So, negative liberties that value individual autonomy at the expense of redressing the injustices of the past are ill-suited to the South African situation. This approach gives meaning to Madala J's words in Makwanyane that ubuntu is a "concept that permeates the Constitution generally and more particularly [the Bill of Rights] which embodies the entrenched fundamental human rights".[44]

How does this all relate to section 8(2)? Simply put: if we refuse to impose human rights obligations on private individuals for fear of interfering with their autonomy, we risk maintaining a perverse status quo which entrenches a social and economic system that privileges the haves, mainly white people in the South African context. By imposing certain human rights obligations on private individuals and companies, we acknowledge that our current social and economic realities have arisen out of our perverted past and cannot be sanitised.

The words of Mahomed J in describing the interim Constitution were prescient:

> "The South African Constitution is different: it … represents a decisive break from, and a ringing rejection of, that part of the past which … accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; [parts of the Constitution] seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination."[45]

If section 8 is to have the effect that the Constitution truly wants it to have, it must be a tool that plays a role in dismantling the legacy of colonialism and apartheid. With that in mind, let us turn to the text of the section. Subsection (1) provides that the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state".

The crucial subsection (2) specifies that—

> "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

The first case in which the Constitutional Court considered the applicability of a fundamental right under section 8(2) was Holomisa, another matter where a newspaper was sued for defamation. O'Regan J held:

> "Given the intensity of the [right to freedom of expression], coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state, it is clear that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution."[46]

With the exception of those rights which – as appears from the language of the section in which they are entrenched – plainly apply to private persons or the state,[47] there should generally speaking be no categorical or bright line approach. On rights enjoyed as against the state, it might be said that their nature makes them more amenable to fulfilment by the state than by private persons, and may not be capable of direct application against private parties.[48] Citizenship rights perhaps best fit neatly into this category.[49] Others have argued that the right to just administrative action should be treated similarly,[50] although that should be read subject to the provisions of PAJA and in accordance with the Constitutional Court's decision in Allpay 2.[51] Under some rights, obligations are expressly borne by, or proscriptions are against, the state.[52] Examples are the right not be unfairly discriminated against by the state, the right of detained and accused persons to have access to state-sponsored legal representatives[53] and the right to access information held by the state.[54]

On the other hand, the nature of some rights makes them directly applicable to private persons. An example is the right to fair labour practices under section 23. Other rights are expressly made applicable to private persons. Take, for example, section 12(1)(c) which specifies that everyone has the right "to be free from all forms of violence from either public or private sources". Also, section 9(4) stipulates that "*no person*" may unfairly discriminate against anyone on one or more of the grounds listed in section 9(3).[55]

But many other rights fall somewhere between these two ends of the spectrum. The socio economic rights are a good example. Many of them are phrased in the following manner:

> "(1) Everyone has the right to have access to [the relevant socio-economic claim concerned].
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

Textually the nature of these rights seems to suggest that they are not applicable to private parties. That cannot be the end of the story. Section 27(3) provides that "[n]o one may be refused emergency medical treatment". Must it be read to apply only to public hospitals and related public facilities like state ambulances? Venturing my personal opinion, I would say I think not. In Soobramoney emergency medical treatment was said to be required where "[a] person … suffers a sudden catastrophe".[56] Such a person "should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment".[57] As we know, in some such emergency situations, the ticking away of a few minutes may mean the difference between life and death. With that in mind, imagine a situation where a private hospital is the only facility within a proximity beyond which the patient in need of emergency medical care would die. Can it ever be that this private hospital would be entitled to let that patient die within its property by refusing her or him access to its building? I think not. Unsurprisingly, Currie and De Waal suggest the obligation created by section 27(3) applies to private hospitals.[58]

What there is now no dispute on is that there is a negative duty against all, including private persons, not to impair the enjoyment of socio-economic rights. As Yacoob J held in Grootboom "there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".[59] In Treatment Action Campaign 2 the Court held that the "'negative obligation' applies equally to the section 27(1) right of access to 'health care services, including reproductive health care'".[60]

What about so-called "positive duties"? Loosely, I would say a positive duty enjoins the duty bearer to take some action to make possible the enjoyment of the right by the right bearer. The question is: does the Bill of Rights impose positive duties on private persons? Different cases, where different rights were asserted, have come to different results. In Juma Musjid, a matter concerning the eviction of a school from premises owned by a private party, the Court held that "there is no primary positive obligation on the [private entity] to provide basic education to the learners".[61] The Court concluded that this obligation rests on the Member of the Executive Council responsible for education in each province.[62]

In *Blue Moonlight* the Court did impose a positive obligation on the owner, a company, by requiring it to continue to house unlawful occupiers who would have been rendered homeless if they were evicted immediately.[63] Interestingly, what motivated the Court coming to this conclusion was the nature of the lessor and its business:

> "It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted."[64]

Those who are averse to accepting the applicability of positive duties to private persons may want to see this as no more than a negative obligation not to evict and render homeless the unlawful occupiers before they have found suitable accommodation elsewhere. Of course, that cannot be correct. The plain reality is that, although *Blue Moonlight* may not expressly have used language that says it was imposing a positive obligation, that is exactly what it did. It told the owner company that the occupiers would "not be evicted before the City [had provided] them with temporary accommodation".[65] So, the owner was being told that he had to provide accommodation to the occupiers for a while. If that is not a positive obligation, I don't know what is. The Court's own language made plain that the owner was required to "provide" accommodation. It said that "a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period".[66] Although this is stated in the negative, it means until the unlawful occupiers had to vacate, which would be after a few months, the owner had to accommodate them.

I would be arrogant not to respect the view the minority in *Daniels*[67] took of the effect of the order in *Blue Moonlight*. Although I am to deal with the *Daniels* matter shortly, I must touch on this issue now as it is relevant to the *Daniels* minority's interpretation of the *Blue Moonlight* order. The minority held that the *Blue Moonlight* order amounted to no more than the Court's exercise of its just and equitable remedial power under section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[68] (PIE).[69] The subtext of this was that this was not a recognition by the Court of an imposition of a positive obligation by the Bill of Rights. Whilst I respect this view, here is an answer I would venture. Amongst others, PIE obviously seeks to prevent evictions that are inconsonant with the provisions of section 26(3) of the Constitution. This section proscribes evictions of people from their homes or the demolition of their homes without an order of court made after considering all relevant circumstances. The preamble to PIE uses this exact language. PIE's procedure before evictions which culminates in the just and equitable remedial power in section 4(8) is but a process aimed at guaranteeing that the eviction of people from their homes meets the requirements of section 26(3). It would be artificial then to suggest that the order in *Blue Moonlight* was not about the right under section 26 of the Constitution.

This positive / negative duty debate came to a head recently in the *Daniels* matter.[70] Now I am embarrassed because I am going to sound like those parents who unendingly and nauseatingly boast to other parents about not so great achievements by their children. That is so because, as you all know, I penned the majority judgment in *Daniels*. But I hope you will excuse me. This matter concerned the question whether Ms Daniels, an ESTA[71] occupier, could – in the face of resistance by the two respondents who were private persons[72] – effect improvements to her home situated on the property of one of the respondents at her own expense. The proposed improvements were modest: the levelling of floors; paving part of the outside area; and installing water supply, a wash basin and ceiling inside the home and a second window. Crucially, the respondents accepted that, without the improvements, the home was not fit for human habitation. In particular, they admitted that the condition of the home constituted an infringement of Ms Daniels's right to human dignity. That notwithstanding, the respondents argued that Ms Daniels was not entitled to effect the improvements. Amongst others, they contended that if the Court concluded that Ms Daniels was entitled to make the improvements, that would be tantamount to indirectly placing a positive duty on them to ensure enjoyment by Ms Daniels of her right under section 25(6) of the Constitution. The respondents claimed that the indirect positive duty would arise as a result of the provisions of section 13 of ESTA. Section 13 makes it possible for a court to order an owner or person in charge of the property on which an occupier's home is situated, to pay compensation

for improvements made by the occupier upon her or his eviction. The respondents argued that, because a court may order compensation, an owner or person in charge in effect finances the improvements.

The majority took the view that this positive / negative obligation debate needed to be confronted head-on.[73] We further said that on a proper reading of section 8(2) of the Constitution, there is no basis for reading that section to mean that, if a right in the Bill of Rights has the effect of imposing a positive obligation, it does not bind private persons. Instead, whether or not a right binds private persons depends on a number of factors. In this regard we said:

> "Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."[75] (Footnotes omitted)

Applying these factors, we then engaged in a balancing exercise and held:

> "The issue at hand arises from a matter of detail: what is the extent of an occupier's constitutional entitlement as expounded in ESTA? Does it go so far as to create an entitlement to make improvements to her or his dwelling with the potential – as the respondents argue – of imposing the positive obligation they are complaining about? This is the question on which the respondents peg their argument on section 13 of ESTA. The positive obligation that the respondents argue an owner or person in charge is exposed to is the possibility of an order of compensation upon the eviction of an occupier.
>
> Whether an owner will be so ordered depends on a variety of considerations. It may or may never happen. This must be weighed against the need of an occupier to improve her or his living conditions and lift them to a level that accords with human dignity. If indeed an occupier is living under conditions that subject her or him to a life lacking in human dignity, the possibility of an order of compensation pales in comparison. The right to security of tenure with the potent cognate right of human dignity are extremely important rights. On the other hand, the possibility of an order of compensation upon the eviction of an occupier, is tenuous at best. That must be compared with the fact that this argument is being made in the context of an occupier who has assumed the truly positive and immediate duty of carrying the cost of the improvements."[76]

Here is how I see the significance of this judgment. As much as *Blue Moonlight* did impose a positive obligation on a private person, it did not expressly say it was doing so. That explains why – in *Daniels* – the respondents thought they could argue that the Bill of Rights does not impose a positive obligation on private persons. *Daniels* helps put that debate to rest. That it took this long for this to happen, is it because up to now there haven't been suitable cases where the Constitutional Court could have grasped the nettle? Is it perhaps because – despite the existence of section 8(2) – the bogeyman Kriegler J cautioned against in *Du Plessis* continued to lurk in the darkness?[77] I will not answer these questions. But I will say this much: this is difficult to comprehend. That is especially so regard being had to the fact that it is now 21 years since section 8(2) took effect.

Section 8(2) does not expressly exclude rights that create positive duties from binding private persons. The binding effect is bounded by "the nature of the right and the nature of any duty imposed by the right". The reference to "nature of any duty imposed by the right" does not inexorably lead to the conclusion that rights that create positive obligations can never bind private persons. Positive obligations differ in oppressiveness. Thus there is no reason to think that "nature" of necessity translates to a distinction between "negative" and "positive". In some instances a positive obligation may not be applicable to private persons depending on the magnitude of its oppressiveness. The tenuous positive obligation complained of in *Daniels* is proof that it cannot be that there is a blanket ban on the applicability to private persons of rights that create positive obligations.

Daniels is only the beginning. We cannot even begin to suggest that it has said all that need be said on this subject. The parameters of the reach of section 8(2) must still be clearly delineated. For now we must take comfort that the initial illusive step has been taken. And we must hope that the bogeyman has been slain for good.

I next deal with the last topic, two examples of proscriptions of unfair discrimination under section 9(4).

Section 9(4) proscriptions

On this I deal with unfair discrimination on grounds of sexual orientation and race. The discussion is to be only on very limited aspects of each of these two facets of unfair discrimination. This subject warrants discussion not because of lack of clarity on what the Constitution decrees.[78] It warrants discussion because unfair discrimination by private persons on the grounds listed in section 9(3) occurs at alarming proportions.

Unfair discrimination on grounds of sexual orientation

All I want to touch on is what perplexes me with some people's attitudes towards same-sex relationships. Not infrequently, some justify these attitudes on the basis of their religious beliefs. Let me immediately make the point that I am quite mindful of the sensitivities that attach to the subject of religion and the need for a delicate balancing exercise when one deals with this subject. Here is what the Constitutional Court said in Christian Education:

> "[R]eligious and secular activities are, for purposes of balancing, frequently as difficult to disentangle from a conceptual point of view as they are to separate in day to day practice. While certain aspects may clearly be said to belong to the citizen's Caesar and others to the believer's God, there is a vast area of overlap and interpenetration between the two. It is in this area that balancing becomes doubly difficult, first because of the problems of weighing considerations of faith against those of reason, and secondly because of the problems of separating out what aspects of an activity are religious and protected by the Bill of Rights and what are secular and open to regulation in the ordinary way."[79]

That said, we often hear of the denial of services, goods or facilities to people involved in same-sex relationships by businesses that otherwise serve the public. This, on grounds of religious belief. One often wonders how far this goes. Does it deny services in all instances where religious belief is implicated? If so, how is that achieved practically? Or, does the denial of services selectively target same-sex couples? If it does, is that not thinly veiled homophobia?

Religious texts have a number of proscriptions. Take, for example, the Ten Commandments in the Bible.[80] One says, "Thou shalt not commit adultery." There must be weddings – and quite a number of them – between people whose unions are the result of adultery that get solemnised at venues that refuse to host same-sex weddings. This may be happening exactly because the owners of the venues never ask questions. But then here is a problem that I have. It is fairly easy to detect that it is a same-sex couple that is requiring the use of a venue or whatever other service. If the denial of services to same-sex couples is genuinely founded on religious belief, it cannot be that the provider of the service will leave it to chance and catch only the conspicuous. Otherwise the provider of the service may well be guilty of what Greenberg JA eloquently described as "fraudulent diligence in ignorance" in *R v Myers*.[81]

I deliberately do not answer the question whether a private service provider who is genuine in her or his religious belief and who applies it to all possible permutations requiring its application would be constitutionally entitled to deny goods or services to same-sex couples.

Each individual has an obligation not to discriminate unfairly on any of the grounds listed in section 9(3) of the Constitution, including sexual orientation. The Constitution has consciously chosen to impose this obligation on private persons. It is an obligation that each of us must take seriously. And none must mask their personal prejudices behind religious belief.

A matter that had the promise of answering some of the imponderables I raised around the denial of services and goods to same-sex couples is the United States Supreme Court case of Masterpiece Cakeshop. Unfortunately, that case did not reach these questions. In that matter Mr Phillips, the owner of a bakery called the *Masterpiece Cakeshop*,[82] refused to "create" a cake for Mr Craig and Mr Mullins, a same-sex couple that was soon to get married, because his religion was opposed to same-sex marriage. He explained this thus: "to create a wedding cake for an event that celebrates something that directly goes against the

teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." Disappointingly, a case as important as this on the interplay between the rights of same-sex couples, a vulnerable group,[83] and religious freedom – having gone all the way to the Supreme Court – turned on the facts.[84]

Unfair discrimination on grounds of race

I want to limit the discussion to a small but, in my view, important aspect. That is unconscious racism. Professor Charles R Lawrence says Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role.[85] This is true of South Africans as well. We also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce in us negative feelings and opinions about those that belong to racial groups other than your own.[86] We sometimes do not realise how our racial, social and cultural backgrounds influence our beliefs about race or our inter-racial interactions.[87] Professor Lawrence then says that "a large part of the behaviour that produces racial discrimination is influenced by unconscious racial motivation".[88] I find his explanation on the underpinnings of unconscious racism quite enthralling. Please allow me to quote copiously:

> "First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognise those ideas, wishes and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.
>
> Second, the theory of cognitive psychology states that the culture – including, for example, the media and an individual's parents, peers and authority figures – transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings. …"[89]

Let me tell a brief illustrative anecdote. One evening I was driving between Dutywa and Mthatha. I came across a white family that had just been involved in a car accident. They were a man, a woman and a couple of young children. They did not appear to be seriously injured. I offered to get them an ambulance, which they accepted. It so happened that across the street from my home in Mthatha there was an ambulance depot. I called home and asked a family member to go across to the depot with her or his mobile phone. Once she or he was there, I asked for an ambulance on her or his mobile phone and gave full details of where the accident was. I was assured that an ambulance would be dispatched. Up to this point all the occupants of all the cars that stopped were black people. Soon thereafter, a car in which there were white people stopped. It was coming from the Mthatha direction. Its occupants came out and went to those of the car that was involved in the accident. Of the latter, I heard the man ask, "The car that bumped us, is it driven by white or black people?"[90] And as he asked, he was pointing in the Mthatha direction. I do not remember what the response was. But as it was dark, I doubt that those being asked would have had an answer. It was only then that I noticed for the first time that a few hundred metres down in the Mthatha direction there was a solitary stationary car. Please forgive me, but I was incensed by the man's enquiry. Why did the race of the driver of the other car involved in the accident matter? Would the man feel less aggrieved if the other driver was white? If so, why? Was it perhaps that if the driver was black, nothing better could be expected of her or him and, if white, it was more likely a true accident? I called those travelling with me and we immediately left. Not long thereafter, we met the ambulance. I had done my part.

I am not even sure that this story illustrates unconscious or conscious racism; I can only hope that it typifies the former. All too often black people are subjected to what may be well-meaning but deplorable and sickening "compliments". "You are intelligent," the subtext of which is that this is an expression of surprise as intelligence was not expected of you as a black person. "You speak so well," which again evinces surprise at a black person's mastery of the English language, and not necessarily an acknowledgement

of the person's oratory. At times the comments may be negative. For example, not infrequently, one has heard the disdain with which some white people will correct the pronunciation of some English words by some of us black people: "It's 'work', not 'wack'"; "It's 'Durban', not 'Derban'"; and so on. Yet, if a non-English speaking Caucasian not only mispronounces most words she or he is using (which happens quite a lot, by the way), but is also butchering the English grammar, that is understandable. At face value, that is on the simple basis that she or he is not a first language English speaker. In truth, it is because she or he is Caucasian. If that were not case, our pronunciation and accents should also be acceptable. Unsurprisingly, the accent of the Caucasian second language English speaker is even complimented for sounding refreshingly exotic.

From all this, we can see that unconscious racism is not benign. The underlying attitudes that inform it may and do insidiously lead to unfair racial discrimination.[91] In the face of the section 9(4) ban on unfair discrimination on listed grounds by private persons, there is no room for unconscious racism.

Conclusion

As the state is unquestionably obliged to honour its human rights obligations, private persons must likewise be so obliged where the fundamental rights in issue are applicable to them; and that must be so whether those fundamental rights impose positive obligations. One can only hope that more concrete and positive action will take place in the area of international law as well.

Thank you

FOOTNOTES

[1] See M A Beale Apartheid and University Education, 1948-1970 (A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy at the University of the Witwatersrand) at 3. Here the author says:

> "Nationalists clearly believed that education could be used to support apartheid. Through its university education policies in the 1950s and 1960s, the Nationalist government aimed to contribute to three key policy aims: first, to entrench segregation, which would also bring about the de facto compliance of academics and students with the ethnically segregated university system; second, to defuse political opposition by changing the political conditions within the universities and university colleges; and third, on the basis of separate institutions, to differentiate between the educational opportunities for different population groups, specifically favouring Afrikaners and disadvantaging black, and especially African, students.

[2] Id at p. 1.

[3] See South African Online "Stellenbosch University" at https://www.sahistory.org.za/place/stellenbosch-university.

[4] See in the context of this University Linda Vergnani 'Revelation of Incoming Rector's Ties to Secret Society Angers Faculty' The Chronicle of [5] Higher Education (21 October 1992) at A47.

See Andrew Bank "The Berlin Mission Society and German Linguistic Roots of Volkekunde: The Background, Training and Hamburg Writings of Werner Eiselen, 1899–1924" (2015) 41 Kronos 166 at 190.

[6] Id at 189, 190 and 192.

[7] Mary-Anne Plaatjies Van Huffel "Patriarchy as empire: A theological reflection" (2011) 37 Studia Historiae Ecclesiasticae 259.

[8] This statement declares:

> "Stellenbosch University (SU) acknowledges its inextricable connection with generations past, present and future. In the 2018 Centenary Year, SU celebrates its many successes and achievements. SU simultaneously acknowledges its contribution towards the injustices of the past. For this we have deep regret. We apologise unreservedly to the communities and individuals who were excluded from the historical privileges that SU enjoyed and we honour the critical Matie voices of the time who would not be silenced. In responsibility towards the present and future generations, SU commits itself unconditionally to the ideal of an inclusive world-class university in and for Africa."

[9] See Marius Pieterse 'Indirect Horizontal Application of the Right to Have Access to Health Care Services' (2007) 23 SAJHR 157.

[10] Depending on context, where I use the terms "private actors" or "private persons", I am referring to natural and juristic persons.

[11] This term is used in a context that does not include organs of state as defined under section 239 of the Constitution whose obligations under the Bill of Rights I believe are beyond question.

[12] See UN Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' A/HRC/17/31 (21 March 2011) Principle 11.

[13] David Bilchitz 'A chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles' in Surya Deva & David Bilchitz (eds) Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect? (2013) at 107-8.

[14] David Bilchitz 'The Necessity for a Business and Human Rights Treaty' (2016) 1 Business and Human Rights Journal 203 at 207.

[15] See UN Human Rights Council, Resolution 26/9, 'Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights' (Res. 26/9), A/HRC/26/L.22/ Rev. 1 (25 June 2014) Preamble.

[16] See the discussion in Doug Cassel 'The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty' (2018) 3(2) Business and Human Rights Journal 1.

[17] The former Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

[18] See Preamble "Zero Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, The Activities of Transnational Corporations and Other Business Enterprises" put forward by the Open-ended intergovernmental working group on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (established under A/HRC/26/L.22/ Rev.1 25 June 2014) available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

[19] See Zlata Rodionova 'World's largest corporations make more money than most countries on Earth combined' (13 September 2016) https://www.independent.co.uk/news/business/news/worlds-largest-corporations-more-money-countries-world-combined-apple-walmart-shell-global-justice-a7245991.html.

[20] Id.

[21] Allan C. Hutchinson 'Mice under a Chair: Democracy, Courts, and the

Administrative State' (1990) 40 University of Toronto Law Journal 374 at 379-380.

[22]See Nicoli Nattrass 'The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation' (1999) 98 African Affairs 373.

[23]Preamble to the Constitution. See further P Langa 'Transformative Constitutionalism' (2006) 3 Stell LR 351; K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 SAJHR 146.

[24]State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 (CC) para 18.

[25]Section 7 of the interim Constitution of the Republic of South Africa Act 200 of 1993 provided:

(1) This Chapter shall bind all legislative and executive organs of state at all levels of government.

(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

(3) Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.

[26]Du Plessis v De Klerk 1996 (3) SA 850 (CC).

[27]Id para 5. Section 15 of the interim Constitution. The case came before the Constitutional Court after the High Court below refused an application for an amendment of the defendant's plea on two grounds: (i) the alleged unlawful conduct occurred before the interim Constitution came into effect; and (ii) that the Bill of Rights had no horizontal application (see id para 6).

[28]Du Plessis above n X paras 45-7.

[29]Iain Currie and Johan De Waal The Bill of Rights Handbook 6 ed (2013) at 30.

[30]Du Plessis above n X para 120.

[31]Id at para 163.

[32]Id at paras 62-3.

[33]See Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) at para 33.

[34]See my earlier reference to Carmichele id on the indirect application of the Bill Rights through section 39(2). Section 39(2) provides:

"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."

[35]Sandra Liebenberg, Socio-economic Rights: Adjudication under a Transformative Constitution pp 54-5.

[36]Id p. 54.

[37]Id p. 55.

[38]Id.

[39]Id.

[40]Isaiah Berlin "Two Concepts of Liberty" in Four Essays on Liberty (Oxford University Press, 1969) at 121.

[41]Id at 121-2.

[42]See also the decisions in Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC).

[43]Section 7(2) of the Constitution.

[44]S v Makwanyane 1995 3 SA 391 (CC) para 237.

[45]Id para 261.

[46]Khumalo v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC) at para 33.

[47]Section 9(4) proscribes unfair discrimination by any person against anyone on the grounds listed in subsection (3).

[48]See Currie and De Waal at 50.

[49]Sections 20 and 21 of the Constitution provide:

20. No citizen may be deprived of citizenship.

21. …

(3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.

(4) Every citizen has the right to a passport.

[50]See Currie and De Waal above n 30 at 50 and Cora Hoexter Administrative Law in South Africa (2011) at 127-8 and 161.

[51]Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2) (Allpay 2) 2014 (4) SA 179 (CC).

[52]This is contained in section 9(3) of the Constitution.

[53]These are contained in section 35(2)(c) and 3(g) of the Constitution.

[54]This is contained in section 32(1)(a) of the Constitution.

[55]Section 9(3) proscribes unfair discrimination by the state on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

[56]Soobramoney v Minister of Health (Kwazulu-Natal) 1998 (1) SA 765 (CC) at para 20.

[57]Id.

[58]Currie and De Waal (above n X) at 49 & 593; S. Liebenberg "Health, Food, Water and Social Security" Fundamental Rights in the Constitution: Commentary and Cases D Davis, H Cheadle and N Haysom (eds) (Juta & Co Ltd, Cape Town, 1997) 354 – 359.

[59]*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 34.

[60]*Minister of Health v Treatment Action Campaign 2002* (5) SA 721 (CC) at para 46.

[61]Governing Body of the Juma Musjid Primary School v Essay N.O. 2011 (8) BCLR 761 (CC) at para 57.

[62]Id.

[63]City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC).

[64]Id para 40.

[65]Id para 103.

[66]Id para 40.

[67]Daniels v Scribante 2017 (4) SA 341 (CC).

[68]Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[69]Daniels above n X para 178.

[70]Above n X.

[71]ESTA is the Extension of Security of Tenure Act 62 of 1997.

[72]They were a company, the owner of the property on which the home was situated, and the person who – in terms of ESTA – is "the person in charge" of the property.

[73]Daniels para 38.

[74]Id para 39.

[75]Id.

[76]Id paras 50-1.

[77]Du Plessis above n X para 120.

[78]Section 9(4) provides that "[n]o person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3)".

[79]Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC) para 34.

[80]Exodus 20:14.

[81]R v Myers 1948 (1) SA 375 (A) at 382 citing Halsbury (2nd ed., Vol. 23, sec. 59).

[82]Masterpiece Cakeshop Ltd v. Colorado Civil Rights Commission 584 US (2018); 138 S Ct 1719.

[83]In *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 25, the Constitutional Court recognised the vulnerability of gay and lesbian people.

[84]Recognising that the last word was yet to be spoken on this subject, the Court held at 18:

"The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognising that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

[85]Charles R. Lawrence, III 'The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism' (1987) 39 *Stanford Law Review* 317 at 322.

[86]Id.

[87]Id.

[88]Id.

[89]Id at 322-3.

[90]Or words of similar purport.

[91]Lawrence above n 85 at 322.

Gauteng Judges introduced to court e-Filing

Courts are increasingly turning towards technology with the aim of making use of technological advances to improve efficiency in the courts and improving access to justice. The OCJ has embarked on a new and exciting journey of developing an e-Filing system for the courts.

Once completed, the e-Filing system will allow courts to make electronic submission of documents, make automatic docket entries, be more proficient in case flow management, issue electronic notices and make it easy to retrieve case documents.

On Saturday, 18 August 2018, The OCJ ICT unit hosted the Court e-Filing Workshop for Judges at the OCJ Midrand offices. The purpose of the workshop was to introduce the Judges to the system, take them through the platform and demonstrate how it works.

The workshop was facilitated by Mr Weldo Nel from Microsoft, and Mr Paul Sachs from Net Master – both of whom representing organisations that have been chosen by the OCJ as partners on the e-Filing project.

Speaking at the start of the workshop, Judge President Mlambo stated that the project is expected to roll-out in early 2019, with both Superior Courts and Magistrate Courts standing to benefit from the programme. The Electronic e-Filing will provide a platform for law firms / litigants to file documents to the courts electronically without physically going to the courts. The e-Filing is meant to fully exploit ICT advancements to minimise not just the physical movement of people and paper court documents from parties to the courts, but also to leverage the benefits of electronic storage within the courts, i.e., faster document filing and retrieval, eradication of the misplacement of case files, concurrent access to view the same case filed by different parties, etc.

The other benefits of e-Filing are that litigants will obtain details of hearing fixtures via email or Short Messaging System (SMS) using their mobile phones.

Within the courts, e-Filing will allow electronic documents to be automatically routed to the appropriate registrar clerk for processing. The system also allows further routing within the courts. This will improve efficiency by minimising paper flow to shorten case processing time. The process will be fast, convenient and efficient.

Within the court rooms, Judges will make use of e-Filing to conduct hearings electronically and registrars for conducting quasi-judicial function hearings.

Judge President Mlambo

Weldo Nel

Paul Sachs

SNAIL PACE OF LITIGATION

AN ENEMY OF ACCESS TO JUSTICE

by Judge President of the Mpumalanga Division of the High Court, Judge Francis Legodi

Justice delayed – justice denied. This is a well-known principle which for many years has not been heeded to by litigants, legal practitioners and our courts despite all the seriousness it deserves.

I write this piece after a newspaper article published on 21 June 2018 titled: "Enough with court delays. Mpumalanga Judge President fed up with tardy attorneys."

Perhaps the words "fed-up" is too harsh to convey the message intended in the judgment that was handed down on 19 June 2018 in the matter of Nthabiseng And Others v Road Accident Fund (3492/2016) [2018ZA]GPPHC409(8 June 20118).

I have been asked to comment on the newspaper article in relation to the case aforesaid. I have also been asked to expand on my sentiments and how my approach with regard to case management can positively impact on access to justice. I do so at the request of Communications Directorate of the Office of the Chief Justice.

The public trust in the judicial system is dictated by how cases are effectively, efficiently and expeditiously disposed of in our courts. A delay in finalisation of cases has a negative bearing on the image of the judicial system as the public and litigants see it as the responsibility of our courts or judicial officers to ensure effective, efficient and expeditious finalisation of cases.

The real question is who drives the pace of litigation. Is it legal practitioners and or litigants? Do our courts and or judicial officers have a role to play in the expeditious finalisation of cases?

For many years in our jurisdiction practitioners and litigants were given the space and freedom to dictate the pace of litigation and unfortunately our courts capitulated. This in turn caused and continues to cause great prejudice to litigants who would want to see their disputes being resolved without much delay. On the other hand, the image of the judicial system becomes a casualty as in the eyes of many and correctly so, our courts should never allow themselves to be by-standers in dictating the pace of litigation.

Introduction of case management re-enforced by the norms and standards issued by the Chief Justice of South Africa in 2014 and to which all judicial officers are bound to comply with, has brought about the need for our courts to be proactive and play a leading role in the pace of litigation.

I deal later in this article with some of the imperatives in the norms and standards. I also deal with some of the forgotten rules of court. For example, rule 37(9) (a) of the Uniform Rules of Court.

I first want to deal with the proposed amendment to the Rules of Court in particular rules 30 and 37 of the Uniform Rules. One hopes that the amendment will be expedited so that any resistance to change by some litigants and legal practitioners can be settled once and for all.

Proposed Rule 30A (1) once approved, would entitle an aggrieved party to apply to court to force the defaulting party to comply with 'an order or direction made in a judicial case management process'.

What is proposed seem intended to follow into the footsteps of paragraph 5.2.4 of the norms and standards in terms of which- (iii) every court is enjoined to establish a case management forum chaired by the Head of that court to oversee the implementation of a case management- (vi) to take control of the management of cases at the earliest possible opportunity.

So, any suggestion that case flow management is not part of our Rules will soon be a thing of the past. In any case, case management in the form of rule 37 has always been there. In my view, at all the times, it meant to introduce some form of case management. The rule in my view, was never optimally utilised by judicial officers.

However, it is imperative to do so. For example, paragraph 5.2.4 (vi) of the norms and standards now

enjoins every head of court to ensure that judicial officers conduct pre-trial conferences as early and as regularly as may be required to achieve the expeditious finalisation of cases.

I deal later in this piece as I have been requested to do, how Mpumalanga Division seeks to deal with the imperative in rule 37 and paragraph 5.2.4 (vi) of the norms and standards. It suffices for now to mention that the proposed amendment is intended to introduce Judicial Case Management process in addition to the procedure set out in Rule 37.

Proposed Rule 37A (1) stipulates that 'the purpose of this rule is to establish and regulate a judicial case management system to apply at any stage after a notice of intention to defend or oppose is filed:

(a) For such categories of defended actions and apposed applications as the Judge President of any Division may determine in a Practice Note or Directive and

(b) For any other proceedings in which judicial case is determined by the Judge President, mero motu, or upon the request of a party to be appropriate.

The provisions of rule 37 shall not apply, save to the extent expressly provided in this rule in matters which are referred for judicial case management. '

Proposed sub-rule (2) of Rule 37A provides that the nature and extent of judicial case management as provided in terms of the rule, should be complimented by the relevant directives or practice manuals of the Division in which the proceedings are pending. In my view, heads of court and judicial officers do not have to wait for the proposed amendment and introduction of case management to become into force before actually implementing what is envisaged therein.
In fact the norms and standards to which all judicial officers are obliged to comply with and read together with the court's inherent power to regulate its own processes as contemplated in section 173 of the Constitution, imposes an obligation on our courts or judicial officers to implement judicial case flow management because its core purpose is directed at enhancing service delivery and access to quality justice through the speedy finalisation of all cases as contemplated in paragraph 5.2.4 (i) of the norms and standards. For this reason, there can be no objection to implementation thereof with or without proposed Rule 37A.

Talking about speedy finalisation of all cases, in terms of paragraph 5.2.5 (1)(a) of the norms and standards, judicial officers in the High Court are required to finalise all civil cases within one year from date of issue of summons. I must CONFESS! I am one of those who never believed that finalisation of civil cases in the High Court within one year from date of summons is achievable. I now know. It is achievable. I have experienced it and as I allude to at the end of this article, it requires the will to accomplish the vision in the norms and standards.

CASE MANAGEMENT IN MPUMALANGA DIVISION

As indicated earlier in this article, I have been requested by the Communications Directorate of the Office of the Chief Justice to expand on the newspaper article published on 21 June 2018 and how case management in Mpumalanga Division can impact positively on access to justice. I therefore do so at the request of Communications Directorate of the Office of the Chief Justice.
I must mention up-front that it is not suggested that the Division is doing it right more so that this is a new Division of the High Court in South Africa. We draw strength, experience and learn from colleagues in other Divisions which have been there before us.

PRE-TRIAL CONFERENCE

Every case that is on the civil roll has gone through judicial case management during which date of trial is determined. The date of trial is suggested by the parties' legal representatives and there and then is determined. For this purpose, every Judge who is in court is expected to have what is referred to as "Weekly Schedule", which is expected to be updated on a daily basis by the Registrar or assistant registrar / clerk in court.

In addition to determining dates of trial during judicial pre-trial conferences, parties' legal representatives are required to complete what is termed "Pre-Trial Minutes and Directives" couched as follows:

"Before the honourable judge: _____ Date: _____

1. This matter is case managed by the judicial officer.
2. This matter is enrolled for trial for the week of _____on merits and quantum.

2.1 On the date in question the court will commence at 8h45 for the roll call.

2.2 It is hereby recorded that…….....

2.3 The defendant is hereby directed to seek to settle the merits by not later than ……., seen in the light of the fact that this is a dependant's claim or seen in the light of the fact that the plaintiff was a passenger in a single or two motor-vehicle collision.

2.3.1 Failure to settle merits by the said date, the defendant is hereby directed to file an affidavit by the said date explaining why merits cannot be settled.

3. The Plaintiff is hereby directed to file all reports by not later than_____, failing which Plaintiff's attorneys are directed to file an affidavit by said date explaining why the expert\reports are not filed timeously.
4. The Defendant is hereby directed to file all its reports, including its investigation reports if so required by not later than _____, failing which the matter will proceed on the basis of the Plaintiff's reports.
5. Parties are hereby directed to file joint minutes by both experts by not later than _____ if there is a dispute setting out the nature of the dispute and agreement if any; necessary for the purpose of trial and hold a pre-trial conference amongst the parties by not later than
and thereafter file pre-trial minutes by not later than _____.
6. Should this matter be settled, parties are directed to file a settlement agreement together with notice of removal by not later than_____; and then enrol the matter on the settlement roll for the following day at 8h45, in which event the enrolment must be filed with the Register by 15h00 of the preceding day.
7. It is hereby recorded that should this matter be settled on the date of trial, parties run the risk of punitive cost order and\or forfeiture of a day's fees, against any person responsible for the late settlement of the matter and any such costs order may include payment out of pocket by whoever is responsible for the late settlement including claim handlers and or attorneys for the parties.

7.1 Furthermore, it is hereby recorded that this matter shall not be postponed or removed from the roll by agreement between the parties and every application for a postponement shall be on a substantive application delivered at least 5 days before the date of trial.

7.2 It is hereby further recorded that should the matter be postponed on the date of trial, the party and or legal representative or any person responsible for the postponement runs the risk of punitive costs order, payment out of pocket including: claim handlers and or legal representatives and forfeiture of a day fee occasioned by the postponement.

7.3 It is further recorded that there shall be no stand downs on the date of trial.

8. The Plaintiff's attorneys are hereby directed to file notice of enrolment by the end of the today.

NB. Please draw a line where not applicable.
Legal representatives of the parties:
For plaintiff
Cell:
Landline:
Email Address:
For defendant:
Cell:
Landline:
Email:

PLEASE NOTE:

1. Completion of the pre-trial minutes as provided above should not be used as a routine.
2. There will be vigorous engagement of parties by the judge during pre-trial conference on

both merits and quantum and therefore attendance of the pre-trial conference is obligatory."

The form also makes a provision for blank spaces under paragraphs 9 to 11 to take care of recording any issue relevant for the purpose of ensuring readiness for trial including a version of each party. The time-frames in paragraphs 3 to 6 of the form are determined by the parties' legal representatives themselves.

A Judge during pre-trial conference proceedings is entitled to assume that the parties' legal representatives as they suggest the dates of trial and time frames, know better the status of their cases and that the time-frames they set for themselves or their clients are achievable.

The biggest chunk of civil rolls in our courts country wide are cases against the Road Accident Fund. The form quoted above is designed to address mainly cases against the Road Accident Fund and medical negligence cases. The form is however used in respect of any case and gets completed whenever is applicable.

CONSEQUENCES OF NON-COMPLIANCE

Paragraph 5.2.4 of the norms and standard provides that judicial officers must ensure that there is compliance with all applicable time-limits. This is very important and in my view, it needs consistency in the implementation of the time-frames in terms of rules of court, practice manuals and judicial pre-trial directives and time-frames in relation thereto.

Lack of consistency very often makes it difficult to achieve the benefit of case management and by so doing promotes tardiness including forum shopping on the part of legal practitioners and or litigants.

I have heard in other quarters that litigants and legal practitioners are asking questions and comments like: There is no legislative imperative to deal with sanctions for non-compliance with either time-frames in the rules and or non-compliance with pre-trial directives by courts or judicial officers as part of case management.

Well, I do not share the views so expressed. The forgotten rule 37(9) (a) referred to earlier in this article reads as follows:

"(9)(a) At the hearing of the matter, the court shall consider whether or not it is appropriate to make a special order as to costs against a party or his attorney, because he or his attorney-

(i) did not attend a pre-trial conference or;

(ii) failed to a material degree to promote the effective disposal of litigation." (My emphasis)

This is a weapon with which cost orders were granted against those responsible for the late settlements and or postponements on the date of trial in the case of Nthabiseng and Others v Road Accident Fund cited earlier in this article.

The time-frames set by the parties' legal representatives during judicial pre-trial conferences as per pre-trial minutes and directives form, make it easier to deal with the defaulters and it works for the Division.

POSTPONEMENT SYSTEM

In Mpumalanga Division there is no case that is postponed sine die or removed from the trial or motion roll until is finalised. When a postponement is warranted, such a case is further case managed and specific time-frames more or less in line with the pre-trial directive form alluded to earlier in this article, are once more set by the parties' legal representatives.

In my view, postponements sine die and removals from the roll are only encouraging laxity and create back-log cases. Further case managing every case that is postponed to a specific date, enables a court to enforce rule 37(9)(a) should there still be un-readiness to proceed on trial on the next date of hearing or settling the case on the date of hearing.

Speaking about rule 37(9)(a) and time-lines set during every postponement like in RAF matters, our courts in this Division now summarily make enquiries there and then and determine whether or not special costs order is envisaged in Rule 37 (9)(a) is justified. We find this useful and it sends a clear message that our courts are there to make it its business in dealing with the slow pace of litigation.

We deal summarily with those who did not comply

with the time-frames they set for themselves including those who settle on the dates of trial or hearing. This is done without inconveniencing those who are ready for trial. In other words, late settlements and postponements on the dates of trial are only attended to once allocation for trial is completed and once matters that proceeded on trial are finalised.

Many attorneys and not their clients, are found to have 'failed to a material degree to promote the effective disposal of the litigation' and as a result, are ordered not entitled to charge their clients with any fee, including a day/ appearance fee, costs and or disbursements connected to or occasioned by the late settlement or postponement.

In fact, rule 37 (9) (a) (ii) obliges a court to make an enquiry in this regard when a matter is postponed or when a case is settled on the date of trial. Paragraphs 6 and 7 of the pre-trial form quoted above and designed for this Division is meant to re-enforce rule 37 (9) (a) (ii).

POKING SYSTEM

Mpumalanga Division has also introduced what is called "poking system". This is intended to deal with stale-mate and forgotten cases. It is aimed at ensuring that as far as is possible the imperative in paragraph 5.2.5 (i) of the norms and standards is adhered to. That is, finalisation of civil cases within one year from date of issue of summons.

This system goes into the filing cabinets and or area and take out those files in respect of which there has not been a movement or action for sometimes. This is randomly done, picking-up on cases irrespective of their status and call on the parties for case management.

Had it not have been for the poking system, the first civil trial in this Division in all probabilities would have been in 2019 to 2020. In fact almost all the cases which came on judicial pre-trial roll have been initiated through the poking system. In other words, the Registrar does not wait for the litigants or legal practitioners to put their cases on a pre-trial conference or case management roll. He or she initiates the process. The process has made our trial roll to keep us on our toes.

RESISTANCE TO CASE MANAGEMENT

The biggest enemy to success and to experience the fruits of new things, is resistance and fear of change. Perhaps it is correct when they say 'fear makes us afraid of doing something that might be beneficial for us. Taking action for change will require us to move into the unknown. That can be scary. But if we give in to our fear of change, we do not move forward. We do not receive the benefit of what we avoided, nor do we gain valuable experience that would make us better informed. As a result, we remain ignorant and ignorance almost always breeds more fear, making it that much harder to push ahead and get things done'.

I think I was initially an enemy to myself consumed by the unknown. That is, fear of finalising cases within one year from the issue of summons. I am not going to claim experienced and knowledgeable about case management. I remain to learn on daily basis and thanks to those practitioners who go extra miles to support and cooperate with the Division and colleagues who drive the process and have the quest for speedy finalisation of cases. We can confidently say, we are now better informed about the advantages and values of case management.

Case management inspired by the vision in the norms and standards has of course raised the obvious question again: Why do people resist change?

I deliberately raise this question because despite all efforts and good intentions in the Division, resistance to case management is still displayed by failure to comply with the time-lines parties' legal representatives set for the themselves. This failure continues to be an enemy to expeditious finalisation of cases.

But of course change is hard for everyone. As they say, 'whenever change is imminent, the first question that pops into people's mind is how the change will affect them'. The truth is, without change and encouraging case flow management, there can be no improvement to slow pace of litigation and it will forever remain an enemy of access to justice.

It is therefore the responsibility of every judicial

officer, every legal practitioner and every litigant to embrace case management. Every one of us has a duty to desire growth and improvement in the pace of litigation. There is only one way of achieving this. That is, to embrace case management at every level of litigation proceedings.

We need the buy in of everyone and judicial officers need to be creative and do something really innovative. On the other hand legal practitioners and litigants need to destroy the old way of dictating the pace of litigation at a snail pace. They need to create something new and join hands with our courts in speeding up the pace of litigation. They should not allow themselves to be paralyzed by the idea and fear of change brought about by the principle of case management.

When they do so, legal practitioners' business accounts will legitimately compete with their trust accounts because more cases are finalised within a short space of time. In that way, there will be no need to succumb to temptation to dip into their trust accounts unjustifiably.

Article Prepared by:
Judge Francis Legodi
Judge President of Mpumalanga Division of The High Court
24 September 2018

The newly built Mpumalanga High Court building

Namibian delegation on benchmarking visit to SA

The Judiciary of Namibia is considering extending the divorce jurisdiction to Regional Magistrates Court. South Africa was identified as one of the jurisdiction in Southern Africa that has extended the divorce jurisdiction to the Regional Magistrates Courts. The Chief Justice of Namibia approached the Chief Justice of the Republic of South Africa in this regard. A delegation of the Judiciary of Namibia intended to undertake a benchmarking visit to the Regional and District Courts in Polokwane from 17 until 24 September 2018."

Judge President of the Limpopo Division of the High Court, Ephraim Makgoba with Mrs Claudia Classen Deputy Chief Magistrate: Training Magistrate's Commission, who headed the visiting delegation.

Judge President Makgoba with members of the Namibian delegation; Polokwane Regional Court Magistrate, Ms JH Wessels accompanied by Mr Masekameng, Chief Registrar.

Judicial skills pivotal in the administration of justice

Opening the Judicial Skills workshop in East London in July, the Judge President of the Eastern Cape Division, Selby Mbenenge impressed on participants that judgeship is not about social status but about serving the community. He said: 'We converge here this week with a view to honing the skills of all who are pivotal in the administration of justice. In other words, when we hone our skills as lawyers we do so because our main objective is to improve and enhance our legal system. Much as you will benefit from your attendance, the constituency that we all serve is the paramount, ultimate beneficiary.'

The workshop was presented jointly by the Law Society of South Africa's (LSSA) Legal Education and Development (LEAD) division and the National Association of Democratic Lawyers (NADEL).
Referring to acting appointments, Judge President Mbenenge noted that he had been 'nudged' by practitioners who wanted to be recommended for appointment as acting judges. He said: 'I must say that is not a dispensation I revere at all. I have simply referred such individual applicants to their professional bodies and requested that such bodies furnish me with names of persons they regard worth considering for acting judgeship. In my view, we become judges because others see in us qualities for being judges, than otherwise. More often than not others resort to judgeship because their practices seem to not be doing well and seek security of tenure. That is a self-serving reason, which none of us should cherish. More often than not those who keep ducking and diving, postponing availing themselves for acting judgeship prove to be the ones worthy of consideration for judicial appointment.'

The aim of the workshop was to equip legal practitioners with the technical and soft skills required of a judicial officer. The high-level workshop, facilitated by serving judges, offered both formal lectures and practical activities, which allowed the participants to come to grips with the demanding life of a judicial officer and test their ability to apply their knowledge practically. Twenty-five candidates were selected to attend this course, with preference given to practitioners from previously disadvantaged backgrounds.

Makgoka JA, Legodi JP, Mbenenge JP, Ledwaba DJP, Roberson J, Bloem J, Tokota J and Jolwana J who not only facilitated the course, but also assisted with the curriculum design to ensure that training achieved the desired outcome.

LSSA Co-chairpersons Ettienne Barnard and Mvuzo Notyesi (who is also President of NADEL) addressed participants at the opening ceremony of the course. They congratulated the participants on their selection to attend the course and also impressed on them to use the skills that they would acquire to serve the public with dignity and diligence.

In a statement, NADEL said: 'The Judicial Skills workshop is one of the intervention strategies by NADEL to ensure that the pool of candidates for judicial appointment is widened, especially to accommodate candidates from historically disadvantaged backgrounds. NADEL, in partnership with the LSSA LEAD, are adding to the commendable initiatives and projects of the Chief Justice through South African Judicial Education Institute. These initiatives become more relevant as black practitioners are still battling to access certain types of legal services, if not being denied briefs at all by the conservative white capital, which remain preferring white practitioners. The briefing patterns in this country remain a major stumbling block to transformation as black practitioners remain side-lined by corporate business and, to some extent, by government itself as it often prefers white male practitioners for lucrative work. The black practitioners are largely excluded and remain intellectually undermined though expected in terms of the Constitution to avail themselves for judicial appointment.'

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REME COURT OF APPEA

A moment in history

The year 2018 marks the 70th year since the expansion of the Supreme Court of Appeal's membership as a result of the Governor-General being empowered to appoint as many Judges of Appeal as deemed necessary: the number was raised from four to six to ensure that the increase in workload which was anticipated would result from the extension of the powers of the Appellate Division (AD) enabling it to hear appeals on fact, and not just on legal grounds, in criminal cases. This expansion coincided with the election of the National Party government and the implementation of the policy of apartheid. Shortly thereafter, a constitutional crisis occurred with a confrontation between the Court and the government of the day precipitated by the introduction of legislation to remove so-called 'coloured' voters from the common voters' rolls in the Cape Province.

In 1952 the Court was faced with a major test when the validity of the Separate Representation of Voters Act was challenged. The Act was passed to remove the coloured voters in the Cape Province from the common voters roll in the Cape Province. In Harris v Minister of the Interior (1) the Court held that even though Parliament was supreme and sovereign, this did not mean that it was free to adopt any procedure when a new law was enacted. The rights of the coloured voters had been entrenched by the South Africa Act and for Parliament to remove this right the legislation needed to be passed by a two-thirds majority of both Houses of Parliament in a joint session. The National Party could not muster such a majority and this procedure was not followed in enacting the Voters Act. On that ground the legislation was set aside. Parliament responded by passing legislation creating a new 'court' – the 'High Court of Parliament', consisting of all members of Parliament - for the sole purpose of reviewing the judgments of the Appellate Division in which legislation was declared invalid. The AD unanimously declared this Act invalid in Harris v Minister of the Interior (2).

In 1955 Parliament enlarged the Senate by a simple majority in order to attain the required majority in a joint sitting of both Houses of Parliament. Prior to this, legislation was passed providing that a decision by the AD on the validity of legislation had to be decided by a court of eleven judges. Five additional judges of appeal were appointed; the Senate enlarged and in 1956 the Voters Act was passed with the requisite majority. Later that year the enlarged Court constituted with eight judges who had not sat in the earlier case and only Schreiner JA dissenting, refused to declare the Act invalid resulting in the coloured voters being removed from the common voters' roll in the Cape Province. This episode tarnished the Court's image, especially as there was a perception that the government had loaded the Bench with supporters.

That perception was compounded by the government's refusal to appoint Schreiner JA, the senior judge in the court after the Chief Justice, to succeed Centlivres CJ when the latter retired at the end of 1956. Instead it appointed Fagan JA, who was junior to both Schreiner and Hoexter. He was the only member of the court who was not a party to the decisions in Harris. In fairness to him he only accepted after consulting with Schreiner JA. Two years later when Fagan CJ retired, Steyn JA, a former chief state law adviser and the only member of the court not to object to its enlargement, was appointed as Chief Justice. Fagan then re-entered politics to campaign against the racial policies of the National Party. One commentator has described Schreiner JA, 'the greatest Chief Justice South Africa never had'.

From the early 1960s and through until the early 1990s, when the ANC was unbanned and negotiations towards democracy commenced, the AD was confronted with a number of appeals seeking to review executive and administrative actions under apartheid legislation, the increasingly stringent security laws and, during the 1980s, two states of emergency. There were also numerous criminal appeals arising out of the same legislation. A narrow approach to the permissible scope of judicial review and a similarly narrow and literal approach to statutory construction characterised its judgments. In combination with an extreme deference to the notion of the sovereignty of parliament, this made it extremely difficult to mount legal challenges to government actions implementing apartheid policies and security legislation. With few exceptions the resultant judgments did little to further human rights and many of the broadly liberal principles of Roman-

Dutch law were subverted in the process. The Court was often criticized for deliberately preferring an interpretation favouring the State in cases where a more equitable construction was available. Later legal commentators generally have an unfavourable view of its record in these areas at this time.

Such criticisms are legitimate and justified. As one former acting chief justice wrote of the court: 'Its public image lay in ruins when apartheid came to an end'. Despite these failings it must also be recognised that this was not the only work that engaged the AD during this period and in other fields of the law significant contributions were made. Toon van den Heever JA was a scholar who delved into the old authorities of the Roman and Roman-Dutch law. Others who followed the same path, such as Steyn, Rumpff, Jansen, Rabie, Joubert, Van Heerden, Hefer and Nienaber were adept at investigating those sources of law. Trollip's judgments in the areas of commercial law and intellectual property remain landmarks. Corbett, Miller and Holmes wrote with great clarity in many fields and Holmes was a master of the memorable phrase. In many areas the Court re-examined, extended, adapted or abrogated old principles in accordance with the needs of a changing society. In some instances this was directed at escaping from principles of English law that had taken hold in areas of the law such as criminal liability, delict, estoppel and nuisance, but in other areas, especially commercial law and intellectual property, reliance was placed on English law and other foreign legal systems in early exercises in comparative law. In a precursor to later constitutional developments, under Corbett CJ the AD extended the scope of judicial review, influenced especially by developments in England. An attempt was made in some cases to re-assert the more enlightened principles of Roman Dutch law. Many of the foundations laid during that period remain intact in the present constitutional era.

Perhaps the last word under this head should be given to Chaskalson CJ, the first head of the Constitutional Court, who in 1989 said:

"[W]e will come to appreciate that we owe much to our old order judges …they have somehow … kept alive the principles of freedom and justice which permeate the [Roman Dutch] common law. The notion that freedom and fairness are inherent qualities of the law lives on … This is an important legacy and one which deserves neither to be diminished or squandered."

Source: *The Department of Justice*

Judges Registrable Interests

Law compel judges to declare their interests

Since the birth of democracy in South Africa in 1994, there was no law that required Judges to disclose their interests. January 2014, marked the turn of the tide for the Judiciary when Judges Registrable Interest law became effective.

Judges Registrable Interest law, is a law which requires Judges to disclose their interests. Interest that Judges are required by the law to disclose varies from financial interests, property, shares, land and other investments.

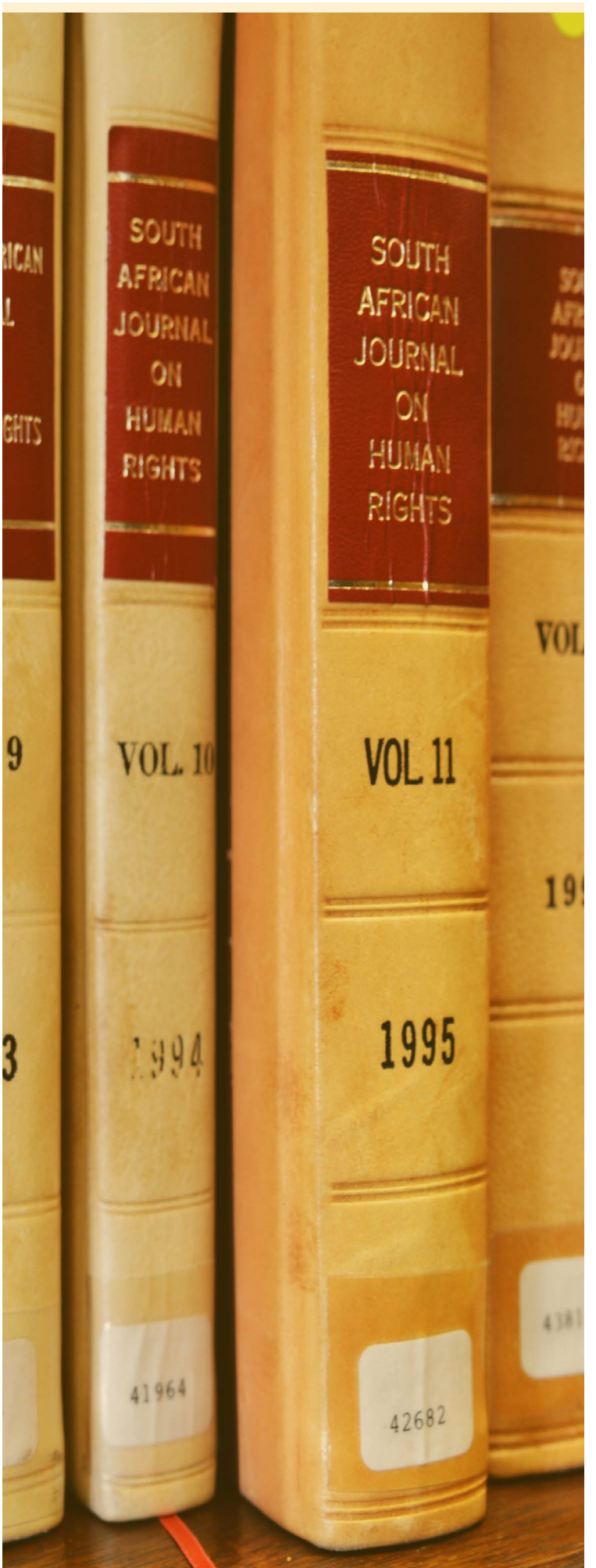
The law requires Judges to disclose in order to ensure transparency, avoid conflict of interest and to ensure integrity in the judicial system.

Judges are expected to disclose within 30 days of appointment. If the Judge fails to disclose within 30 days of appointment, it is the duty of the Registrar to remind the Judge to make the necessary disclosure.

Annually in March, Judges who are in active service must inform the Registrar in writing whether the entries in the register are an accurate reflection of those Judges' registrable interest.

If a Judge does not comply with this law, it is the Registrar's responsibility to report him/her to the Judicial Service Commission (JSC). This would be referred to as misconduct.

The public have the right to know about the interests of every Judge in the country. Members of the public who wish to inspect Judges' interests can arrange with the Registrar at the National Office of the Office of the Chief Justice. Appointment can be made by sending an email to PGagai@judiciary.org.za or call 010 493 2582.





INTERESTS TO BE DISCLOSED BY JUDGES DISCHARGED FROM ACTIVE SERVICE WHO ARE REQUIRED TO BE AVAILABLE TO PERFORM SERVICE IN TERMS OF SECTION 7(1)(a)(i) OF THE JUDGES' REMUNERATION AND CONDITIONS OF EMPLOYMENT ACT, 2001(ACT NO.47 OF 2001)

- Shares and other financial interests in companies and other corporate entities (public part of the Register).
- Directorships, business or financial interests in any business enterprise or any legal entity (public part of the Register).
- Any royalties, income or other benefits derived from the applica tion of section 11 of the Act (public part of the Register).
- Any other financial income not derived from the holding of judi cial office (public part of the Register).

INTERESTS OF IMMEDIATE FAMILY MEMBERS TO BE DECLARED BY JUDGES IN ACTIVE SERVICE IF APPLICABLE

A. In respect of the dependent children of the Judge, the following inter ests, in the confidential part of the Register:

- Immovable property, including immovable property outside South Africa.
- Shares and other financial interests in companies and other corporate entities.
- Directorships, business or financial interests in any business enterprise or any legal entity (public part of the Register).
- Sponsorships, including financial assistance, from any source other than an immediate family member.
- Gifts, other than a gift received from an immediate family mem ber, with a value of more than R1500 or gifts received from a single source with a cumulative value of more than R1500 in a calendar year, and including hospitality intended as such, un less the judge concerned has been discharged from active ser vice.

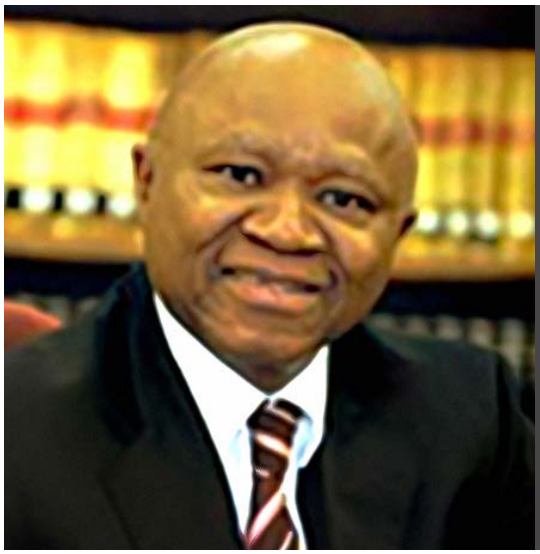
B. In respect of immediate family members, other than dependent children of the Judge, any one or more of the interests listed in A above, that the Judge may, with the consent of the family member, wish to declare in the confidential part of the Register.

WHEN TO DISCLOSE REGISTRABLE INTERESTS

- The first disclosure must be within 60 days of a date fixed by the President by proclamation. The President has fixed a date of 29 January 2014.
- Thereafter, the disclosure must be done annually.
- For newly appointed Judges, the first disclosure must be made within 30 days of appointment.
- A Judge may at any time make disclosures to the Registrar including making a request for amendments of previously dis closed information.
- In the month of March every year, Judges must inform the Registrar in writing whether the entries in the Register are an accurate reflection of those Judges' registrable interests.

Information as found in the Explanatory Notes on the establishment of the Register if Judges' Registrable Interests - click here for full documents

Bereavements



R.I.P

Justice Lebotsang Orphan 'Ronnie' Bosielo

19 August 1957 - 15 May 2018

EULOGY BY JUSTICE MML MAYA, PRESIDENT OF THE SUPREME COURT OF APPEAL, AT THE CEREMONIAL SITTING IN MEMORY OF THE LATE JUSTICE LEBOTSANG ORPHAN RONNIE BOSIELO: 17 SEPTEMBER 2018.

This is a special sitting in memory of our late Colleague, Justice Lebotsang Orphan 'Ronnie' Bosielo.

Justice Bosielo was born on 19 August 1957 at Bridgeman Hospital in Sophiatown, Johannesburg. He matriculated at Lerothodi High School in Bethanie, North West Province. He obtained B.Juris and LLB degrees from Turfloop, the University of the North in 1981 and 1983, respectively, a LLM degree and a Diploma in Advanced Corporate Law, from the University of Johannesburg in 1992 and 1996, respectively.

He started his career in the legal profession as a candidate attorney at Enver Surty Attorneys in Zinniaville. He was was admitted as an attorney in 1986 and commenced practice in 1987, in partnership, under the name Bosielo, Motlanthe & Lekabe in Rustenburg. In 1992 he commenced practice for his own account as Ronnie Bosielo Attorneys. In 1998 he was admitted as an advocate and joined the Johannesburg Bar in 1999.

Justice Bosielo served as Chairperson of the Black Lawyers Association North West branch, from 1992 to 1996 and as President of the Law Society of Bophuthatswana from 1996 to 1998. He was also member of the Magistrates' Commission in the North West Province from 1997 to 1998.

On 29 January 2001 he was appointed as a Judge of the then Transvaal Provincial Division of the High Court. He was appointed as an Acting Judge of the High Court, Namibia in 2001. In 2007 and 2008 he acted in the position of the Judge President of the Northern Cape Division of the High Court in Kimberley. Immediately thereafter, he was appointed as an Acting Judge of Appeal in the Supreme Court of Appeal. He was permanently elevated to the Supreme Court of Appeal on 1 October 2009.

In September 2009 Justice Bosielo was appointed by the Minister of Defence and Military Veterans as Chairperson of the Interim Defence Force Commission. The Commission was tasked to investigate the alleged negative influence of trade unions in the South African National Defence Force (SANDF) and the conditions of service in the military.

He also served two terms as an acting Justice of the Constitutional Court in May 2012 and May 2016.

Justice Bosielo was passionate about the race and gender transformation of the judiciary. To that end, he was involved in judicial training of magistrates, aspirant and newly-appointed Judges. His tireless efforts in creating a pool of competent women Judges, whom he mentored, were recently acknowledged, posthumously, on Women's Day of 2018, at the Annual General meeting of the South African Chapter of the International Association of Women Judges alongside the first woman Minister of Justice in post-apartheid South Africa, Ms Bridgitte Mabandla and retired Judge Navi Pillay.

Justice Bosielo was also passionate about access to justice, especially to ordinary South Africans. He often lamented that the majority of cases adjudicated in the Constitutional Court are brought by the wealthy and do not concern the issues affecting the poor and vulnerable members of our society.

Justice Bosielo was an advocate of restorative justice as an alternative form of punishment, in particular where it was shown that an accused was not a threat to society. As a Judge of the high court, he wrote a groundbreaking judgment in *S v Shilubane* 2008 (1) SACR 295 (T) on restorative justice as a sentencing option. That judgment remains authority to this day for its promotion of alternative forms of punishment and was endorsed by the Constitutional Court in a number of its judgments such as *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); *The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)* 2011 (4) SA 191 (CC).

However, despite being a strong adherent of restorative justice as a sentencing option, Justice Bosielo was acutely aware that it could not be applied in every case. This is evident from his judgment in *DPP v Thabethe* [2011] ZASCA 186.[1] There, the accused was convicted of rape in the High Court for having unlawful sexual intercourse with a girl below the age of 16 years and sentenced to ten years imprisonment, suspended for five years. On appeal to the Supreme Court of Appeal, Justice Bosielo found that, although there were substantial and compelling circumstances, the sentence imposed was disturbingly inappropriate as it failed to take account of the gravity of the offence and the interests of society. Thus, the Supreme Court of Appeal upheld the appeal, set the sentence aside and replaced it with a sentence of 10 years' imprisonment. In his judgment (at para 20), Justice Bosielo cautioned against the use of restorative justice as a sentencing option in respect of serious offences. He observed that the application of restorative justice to inappropriate cases could discredit it as a viable sentencing option.

Justice Bosielo was a consummate constitutionalist. His fidelity to the founding values of our Constitution was unwavering. Those values informed his work as a Judge, and permeated most of his judgments. He was especially passionate about an accused's right to a fair trial entrenched in s 35(3) of the Constitution. To see this one need just read his judgments in *S v Mashinini* 2012 (1) SACR 604 (SCA); *Ndlanzi v The State* [2014] ZASCA 31; *Ngculu v The State* [2015] ZASCA 184; *Msimango v The State* [2017] ZASCA 181 among others.

As an acting Constitutional Court Justice, Justice Bosielo wrote the judgment for a unanimous court in *Raduvha v Minister of Safety and Security & Another* 2016 ZACC 24,[2] which dealt with the rights of minor children arrested in terms of s 40(1)(*b*) of the Criminal Procedure Act 51 of 1977. He found that the arrest and detention of the child were unlawful and held that, despite the presence of the jurisdictional facts set out in s 40(1)(*b*), police officers have a discretion whether or not to arrest; a discretion to be properly exercised in accordance with the facts of the case and the dictates of the Bill of Rights. The police officers' failure to consider the applicant's best interests as a child in exercising their discretion to arrest her, rendered the arrest unlawful. And as the detention of a minor child

1 *DPP v Thabethe* 2011 (2) SACR 567 (SCA).

2 *Raduvha v Minister of Safety and Security & Another* 2016 ZACC 24; 2016 (10) BCLR 1326 (CC); 2016 (2) SACR 540 (CC).

should be a measure of last resort, which was not the case in that matter, the police officers' decision to detain her was therefore inconsistent with section 28(1)(g) of the Constitution and invalid.

Another judgment, in *McBride v Minister of Police & Another* [2016] ZACC 30,[3] concerned the independence of the Independent Police Investigative Directorate (IPID), a body tasked by the Constitution to investigate police misconduct. After examining the IPID Act, Justice Bosielo, in a unanimous judgment, declared certain of its provisions (and certain regulations and proclamations) invalid to the extent that they were incompatible with the Constitution as they unlawfully extended the Minister of Police's powers. The judgment reasserted the independence of IPID.

Although he believed in judicial comity, Justice Bosielo did not hesitate to stand alone when the need arose. In *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA), he concurred in the minority judgment I wrote which was subsequently upheld in the Constitutional Court. The Constitutional Court also upheld his minority judgment in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143.[4] There, the Court agreed with Justice Bosielo's findings that the Promotion of Administrative Justice Act does not apply when an organ of state applies for the review of its own decision and that an organ of state seeking to review its own decision must do so under the principle of legality. See also *Minister of Safety and Security v Booysen* [2016] ZASCA 201.

Justice Bosielo was flowery in expression, and expansive in articulation. In *Radhuva*, for example, he wrote the following prelude in para 6:

'The facts of this case might appear prosaic. And yet they present us with an opportunity to interrogate some constitutional provisions which are crucial to our fledgling constitutionalism and evolving culture of respect for human rights. This is important given our dark and painful history – which we all committed ourselves to eradicate 22 years ago when we ushered in our fledgling constitutional democracy – a past characterised by oppression and repression, abuse of State power and a wholesale denial of human rights to the majority of the people of our country.'

As a human being, Justice Bosielo was warm and compassionate. He treated everyone with respect and dignity, irrespective of their station in life. An ardent Africanist, who dearly loved his country and the African continent at large, a sharp dresser and a man of sartorial elegance, with a ready smile and a raucous laughter – he will be sorely missed in this Court. The judiciary and the legal profession have lost a true servant in this son off the soil.

He is survived by his wife Shirley, two children Keorapetse and Kemogotsitse, granddaughter Tsentle and two brothers Peter and Joseph 'Tex' Bosielo.

Justice Bosielo's Family attendend the memorial service

3 *McBride v Minister of Police & Another* [2016] ZACC 30; 2016 (2) SACR 585 (CC); 2016 (11) BCLR 1398 (CC).
4 *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA).

Members of the Judiciary attended the memorial service to honour Justice Bosielo.

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