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THE JUDICIARY

JSC INTERVIEW FOR DEPUTY CHIEF JUSTICE

SITTING OF THE NEEC

ASYLUM SEEKERS IN SOUTH AFRICA

DURBAN COURTS RESPOND TO FLOODS

TRIBUTE TO JUDGE MAKHANYA

PRESIDENT OF THE SPECIAL TRIBUNAL

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FROM THE EDITOR

DEAR COLLEAGUES,

We are pleased to present to you the winter edition of the Judiciary Newsletter.

Much work has taken place over the past months to fill judicial vacancies in the Superior Courts. Most recently, the Judicial Service Commission (JSC) interviewed Madam President Justice Mandisa Maya of the Supreme Court of Appeal (SCA) for the position of Deputy Chief Justice of the Republic. Please see page 2 for more on this.

Furthermore, on 8 June 2022 the President of the Republic announced that he had appointed Judge Owen Lloyd Rogers as a Judge of the Constitutional Court of South Africa, with effect from 01 August 2022. The President of the Republic has also in the recent past made judicial appointments in the High Court. We bring you all these news and take this opportunity to congratulate all our colleagues on their appointment!

Shortly after taking office as the Head of the Judiciary, Chief Justice Raymond Zondo committed to pursuing a number of priorities. One of these was improving the efficient operation of the courts. On 26 May 2022, Chief Justice Zondo chaired a meeting of the National Efficiency Enhancement Committee (NEEC), a structure that exists to ensure the efficient operation of the courts. This was the first meeting of the NEEC that Chief Justice Zondo has had the opportunity to chair since becoming the Head of the Judiciary. The outcomes of this meeting can be read on page 4.

In April, severe flooding and landslides caused by heavy rainfall affected southern and south-eastern South Africa, particularly the Provinces of KwaZulu Natal and Eastern Cape. The Acting Judge President of the KwaZulu Natal Division of the High Court, Judge Mjabuliseni Madondo, has led activities to coordinate the response of the courts in the Province to this disaster. To this end, a special project has been initiated to facilitate, streamline and expedite any inquests related to the floods. We applaud our colleagues in KwaZulu Natal for their proactive approach in this regard. Please see page 26 for more.

There is more in this full-on edition of the Judiciary Newsletter. We hope you will enjoy reading it. Should you have any feedback on the publication, please do not hesitate to send us an email at **OCJ-Communication@judiciary.org.za.**

Kuze kube ngokuzayo!

Judge President Dunstan Mlambo
Chairperson: Judicial Communications Committee

JUDICIAL SERVICE COMMISSION (JSC) INTERVIEW FOR DEPUTY CHIEF JUSTICE

On 20 June 2022, The Judicial Service Commission (JSC) interviewed President M M L Maya, President of the Supreme Court of Appeal.

This was in accordance with section 174(3) of the Constitution which requires that the President as head of the national executive, after consulting amongst others the JSC, appoints the Deputy Chief Justice. Following the interview and subsequent deliberations, the JSC announced that it will advise the President that President Maya is suitable for appointment as Deputy Chief Justice of the Republic of South Africa. ■

01

1. The Judicial Service Commission sat on the 20th of June 2022 to interview Justice Maya for the position of Deputy Chief Justice of the Republic of South Africa.

2. Chief Justice Zondo in conversation with members of the Judicial Service Commission - Adv. K Pillay SC, Ms D Tshepe *(standing)* and Adv. S Baloyi SC.

3. Chief Justice Zondo posing questions to President Maya, who attended the interview virtually.

4. The spokespersons of the Judicial Service Commission, Adv. S Baloyi SC and Ms D Tshepe, briefing the media following deliberations by the Commission.

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FOCUS ON THE EFFICIENT FUNCTIONING OF THE COURTS

On 26 May 2022, the Chief Justice of the Republic of South Africa, Chief Justice R M M Zondo, chaired his inaugural National Efficiency Enhancement Committee (NEEC) meeting.

The NEEC, established in 2012, is mandated to bring together, at the highest level, the leadership of the Judiciary and other key stakeholders in the Justice system, in order to enhance performance and outcomes in the delivery of quality justice.

Shortly after his appointment as the Chief Justice of the Republic, Chief Justice Zondo outlined key priorities for his tenure. One of the important areas the Chief Justice committed to focusing on improving the efficiency of the court system by enhancing access to quality justice for all, affirming the dignity of all users of the court system and to ensuring the effective, efficient and expeditious adjudication and resolution of all disputes through the Courts, where applicable.

The work of the NEEC is critical to attaining this aim. In this regard, Chief Justice Zondo had stated in a media interview following his appointment to the position of Chief Justice that the NEEC and Provincial Efficiency Enhancement Committees (PEECs), which had been established during Chief Justice Mogoeng's time, were some of the structures that were already in place which Chief Justice Zondo intended using to improve the efficient functioning of the Courts.

Present at the meeting were Heads of the Superior Courts, as well as representatives of Magistrates' Courts and representatives of the following stakeholders: the National Prosecuting Authority, Department of Justice and Constitutional Development, the South African Police Service (SAPS), Department of Correctional Services, Legal Aid South Africa, the Road Accident Fund, the Legal Practice Council, the Law Society of South Africa, the General Council of the Bar, the South African Board of Sheriffs,

> the Chief Justice committed to focusing on improving the efficiency of the court system by enhancing access to quality justice for all ”

Community Advice Offices of South Africa, the Department of Public Works and Infrastructure, the Department of Health and officials from the Office of the Chief Justice (OCJ).

The meeting of the NEEC was a great success. The discussions revolved around various matters which affect the efficient functioning of the Courts including addressing challenges in respect of delays in finalising cases, matters affecting infrastructure at the courts, monitoring the backlogs at the SAPS forensic laboratories, and reporting by structures within the NEEC.

The PEECs, chaired by the Judges President in the respective Divisions, challenges and progress made on previous resolutions taken by the NEEC were also discussed. As the NEEC had not sat for some time as a result of the lockdown, it was decided that there should be three meetings of the NEEC this year, instead of the usual two meetings in a year.

The NEEC will meet again in August 2022 to track the progress made in relation to resolutions taken at the meeting. ■

01

1. Stakeholders of the National Efficiency Enhancement Committee met to discuss improving efficiencies in the court system.
2. Chief Justice Zondo, chairing his first NEEC as the Chief Justice of the Republic of South Africa.
3. Judge President Makgoba and Judge President Mbenenge at the NEEC meeting.
4. L-R: Deputy Judge President Hendricks of the North West Division, Deputy Judge President Ledwaba of the Gauteng Division and Judge President Tlaletsi of the Northern Cape Division, attending the NEEC meeting.

02

03

04

TRANSFORMATIVE SOCIAL CHANGE AND THE ROLE OF THE JUDGE IN POST-APARTHEID SOUTH AFRICA

By Judge President Dunstan Mlambo

INTRODUCTION

It has been emphasised many times that our Constitution embraces an aspiration and an intention to realise, in South Africa, a democratic, egalitarian society committed to social justice and self-realisation opportunities for all. In Makwanyane, Chief Justice Mahomed said that our Constitution—

> *"represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic caring and aspirationally egalitarian ethos, expressly articulated in the Constitution."*[1]

Similarly, in Soobramoney[2] Chaskalson CJ said that a "commitment ... to transform our society ... lies at the heart of the new constitutional order".[3]

It is clear that the notion of transforming our society plays a key role in our Constitutional democracy. In this address, I want to briefly discuss transformative Constitutionalism, and why it necessarily requires that, in the Judiciary but legal sector in general, we transform legal culture and judicial mindset in line with Constitutional dictates, and then I want to reflect on how judges have performed in fulfilling the spirit and objects of the Constitution.

1 *S v Makwanyane 1995 (6) BCLR 665(CC) at para 262.*

2 *Soobramoney v Minister of Health, KwaZulu-Natal 1998(1) SA 765 (CC); 1997 12 BCLR 1696 (CC). This is also clear from the preamble to Constitution, which provides: "We, therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations".*

3 *Id at para 8.*

MEANING OF TRANSFORMATIVE CONSTITUTIONALISM?

Karl Klare, in thinking about the rule of law and adjudication in the "new South Africa" posed the question whether it is possible, in our democracy to conceive of a form of adjudication that at the same time meets the constitutional standard of interpretive fidelity but is also committed to establishing a society based on democratic values, social justice and fundamental rights. His seminal piece considered whether it was possible for lawyers to be inspired by a commitment to social transformation but also faithful to the norms and expectations of their professional role. For Klare, the answer to this question would predict whether "transformative constitutionalism" – a process of social change through processes grounded in law – was possible. By the term transformative constitutionalism, he meant:

> *"a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive politic developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform' but something short of or different from 'revolution' in any traditional sense of the word. In the background is an idea that a highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the 'private sphere.' The major question underlying the scholarly initiative of which this part forms a small part is whether it is possible to achieve this sort of dramatic social change through law-grounded processes."* [4]

our Constitution also encompasses a less obvious innovation. It invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals ”

Expanding on this theory, Klare explained that over and above the transformative aspirations of our Constitution, our Constitution also encompasses a less obvious innovation. It invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. Indeed, judicial methodology is a part of the law and therefore judicial mindset and judicial methodology must necessarily be examined and revised so as to promote the culture of democracy, the transparent governance and the fundamental rights that our Constitution envisages. Under a transformative constitutionalism, he warned, that traditional legal methods – and the inbred formalism of the legal culture – would act as a brake on the social and legal transformation our Constitution both envisages and requires.

Klare also explained, however, that our Constitution's drafters were alive to this danger, and to avert it, they mandated a process for reconsidering and reworking the common law and the legal infrastructure. The drafters assumed that we would not progress towards social justice with a legal system that rigs a constitutional superstructure onto a common law base inherited from the apartheid past. As a result, the drafters included the socalled "development clauses" into our Constitution. Together, these two clauses place our country's judges under a duty actively to promote constitutional values. They express the clear mandate that, in developing the common law, judges shall fulfil the democratic values of human dignity, equality and freedom.[5]

The two clauses are section 39(2) and section 8(3)(a) of the Constitution, which both contain peremptory or commanding language. In terms of section 39(2), Courts "must" promote the spirit purport and objects of the Bill of Rights. In terms of clause 8(3)(a), when giving effect to a right in the Bill of Rights, Judges "must" develop the common law and fill gaps in legislation to give effect to the rights enshrined in our Constitution. These two clauses therefore require Judges to fulfil and promote the constitutional vision in all circumstances, especially where the legislature might have failed to do so, or where the legislature has done so inadequately. While Judges must of course be mindful that the legislature has superior competence to make law, Judges under a transformative constitutionalism must not shy away from developing the common law, given that they are both authorised and bound by a Constitutional injunction to fulfil the constitutional vision. I must also bring in section 172 of the Constitution. That section mandates and authorises judges to strike down any law or conduct that does not comply with the Constitution. This section is important in our constitutional scheme, to enable judges and courts to ensure the achievement of constitutional aspirations in bringing about a socially and economically transformed society.

4 *K Klare (1998) Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14:1 at 6.*

5 *Section 7(1) of our Constitution explains that the Bill of Rights, which is a cornerstone of our democracy, enshrines the rights of all people in our country and affirms that democratic values of dignity, equality and freedom.*

This authorises an important role for our courts: the Constitution mandates so called "Judge-made" law, by directing judges to develop new methods for approaching adjudication and new criteria for resolving common law questions. This new methodology is one that is underpinned and informed by the values and aspirations of the Bill of Rights, and the constitutional aspiration to lay the foundations of a just, democratic and egalitarian social order. It is also a methodology – and an approach to adjudication – that acknowledges the politics of the law. As Langa explained when he gave this lecture in 2006—

> "[T]here is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked." [6]

> Without a doubt, the judiciary has a very different role to the executive and legislature but all the arms of government have the same obligation to promote the "spirit, purport and objectives" of the Constitution ”

Klare also understood that a necessary implication of transformative constitutionalism is that the project takes on a political character. On this score, Klare argued that the traditional bright-line framing of the law/politics dilemma in adjudication is simplistic. In short – judges personal/political values and sensibilities cannot be excluded from the interpretative process of adjudication. In the circumstances, Klare argued that judges – and other legal practitioners – should instead just acknowledge and forthrightly accept their political and moral responsibility in adjudication.[7]

HOW HAVE JUDGES PERFORMED?

Before considering if judges and the courts have lived up to the Constitution's developmental injunction it may be important to consider some of the constraints that may have influenced the performance of the courts in advancing transformative constitutionalism. I mention two. South African legal practice and in a sense the judiciary have a conservative setting. In fact borne out of our apartheid past, our legal culture is conservative. This has been referred to by Klare and Liebenberg in their writings. This is also illustrated by the reluctance and in fact unwillingness by courts, to develop the common law in line with the Constitution. This led to the famous statement by the Constitutional Court that there were not two systems of law – the Constitution and common law but one – the Constitution.[8] That reluctance is dissipating but there is residual deference to common law which should be turned around in the fullness of time.

Another constraint is probably the diverse backgrounds from which current members of the bench are drawn. Our own lived experiences have a huge bearing on how we process legal issues hence the importance of constitutional conscientisation through judicial discussion forums by members of the judiciary. I have elsewhere mentioned the value add of judicial colloquia involving judges and legal scholars such as you have in this University. Such engagements will go a long way into dismantling the conservative legal culture and mindset that most us come from and still adhere to.

With this in mind, it is apposite to ask - how have South African courts and Judges performed? As a judiciary, have we fully embraced the duty implicit in section 39(2), especially at the High Court level?

Klare and Davis, writing in 2010, commented that the full implication of the development clauses were only just beginning to dawn 15 years after the Constitution was adopted.[9] In their assessment, until the Constitutional Court's seminal judgment in Carmichele our courts were very slow to acknowledge their constitutional responsibility to develop the common law. For the most part, it was business as usual at the courts, and in law faculties which did not revise their approach to teaching the common law. Klare and Davis also noted that while there were significant transformative advances in certain areas of the common law, these tended to be confined to e.g. the law of delict, how we understand the protective duties of the state[10] and the inclusion of outsider identity groups[11]. There was not, in their view, the kind of large-scale renovation of the legal infrastructure and paradigm shift in legal culture that our Constitution contemplated. Finally, the authors noted that while transformative advances were happening at the level of the apex courts, the High Courts had not fully absorbed the message that the development clauses cast the judicial role in a new light.

The Carmichele case was a watershed moment. Very briefly, a man had already been charged with the rape of another woman when he viciously assaulted Alix Carmichele. Despite the seriousness of the alleged crime and the fact that the man had a prior rape conviction, the police and prosecutor had agreed that the man be released on bail pending trial. The man after his release, violently attacked Carmichele. She sued the Minister of Police for damages, arguing that the police and prosecutors had negligently failed to comply with a legal duty they owed to her to take steps to prevent the man from causing her harm. Both the High Court and the Supreme Court of Appeal – without assessing the current state of the common law - dismissed her claim, holding that the police and prosecution did not owe her a duty of protection. On appeal, the Constitutional Court set aside the orders of the lower courts and remanded the case to the High Court for trial. It held that the State is obligated by the Constitution and international law to protect

6 *Langa, P "Transformative Constitutionalism" Stellenbosch Law Review (2006) 351 at 353.*

7 *Klare also tied this in with the requirement in section 41(1)(c) of the Constitution which requires that organs of state at every level must provide transparent, accountable and coherent government.*

8 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 at para 44.*

9 *Davis D and Klare K "Transformative Constitutionalism and the Common and Customary Law" Journal on Human Rights (2010) Vol 26 Part 3.*

10 *In this regard, see Carmichele, K, Rail Commuters and Modderklip.*

11 *As examples the authors cite Bhe and Fourie.*

the dignity and security of women and in the circumstances, the police recommendation for the assailant's release on bail could amount to wrongful conduct giving rise to liability. The Court also held that prosecutors, who are under a duty to place before the court any information relevant to the refusal or grant of bail, may be held liable for negligently failing to fulfil that duty.

> the interpretation of every law must be through the "prism" or "lens" of the Constitution

Carmichele had an enormous impact in the context of protective duties of the state, as the case confirmed that state actors had a positive obligation to protect people from violence. But outside of cases dealing with state protective duties, other aspects of the common law were much slower to change. A good example is the line of case law dealing with fairness in contract. The Supreme Court of Appeal has handed down a string of cases which reflect a firm reluctance to develop the law of contract in line with the Constitution. See for example Brisley, Afrox, Barkhuizen and more recently the Supreme Court of Appeal's judgment in Beadica where the Court simply applied the general common law rule that contracts are enforceable unless enforcement was unconscionable or contrary to public policy. By contract, the Constitutional Court in Beadica, recognising the opportunity to develop the common law, said that public policy imports values of fairness, reasonableness and justice and that Ubuntu, which encompasses these values, is recognised as a constitutional value and informs public policy. In the course of its judgment the Court emphasised that constitutional values should be used creatively by courts to develop new constitutionally-infused common law doctrines.

WHAT SHOULD JUDGES BE DOING?

In order to achieve the kind of transformed society that our Constitution envisages, Liebenberg has argued that our courts and our judges need to engage with the normative purposes and values which our Constitution seeks to achieve.[12] Liebenberg argues that courts and judges need to abandon traditional and formalistic approaches to legal interpretation and rigid understandings of separation of powers in favour of more 'flexible and dialogic models'. I have no quibble with what Liebenberg advocates up to a point. We operate in a context requiring important deferential approaches. We are as the judiciary, not superior to the other arms of Government, nor do we possess superior wisdom especially in polycentric matters. Without a doubt, the judiciary has a very different role to the executive and legislature but all the arms of government have the same obligation to promote the "spirit, purport and objectives" of the Constitution.

Regarding the common law, Judges should take note that every common law case is an opportunity to develop the common law and to construct social and economic relationships in one way or another consonant with the transformative agenda of the Constitution. Every common law decision has implications that are political, moral, economic and distributive. In this context, the obligation in section 39(2) is one that must be borne at all times, not merely occasionally. In Carmichele the Constitutional Court said the following:

> "[T]he courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights . . . this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2)."

The Constitutional Court in Carmichele also provided a necessary two-stage enquiry to be taken when a court is to consider whether or not to develop the common law. The first enquiry is whether, given the objectives of section 39(2), the existing common law should be developed beyond the existing precedent. If this is answered in the positive, the next enquiry is how the development should occur.

There are normally at least two instances when the common law is to be developed: when the common law is inconsistent with a constitutional provision or when the common law is not inconsistent with a specific constitutional provision but falls short of the spirit, purport and objects of the Constitution.

Aside from developing the common law, the injunction in section 39(2) also applies when interpreting any legislation. Therefore, the interpretation of every law must be through the "prism" or "lens" of the Constitution. In the context of socio-economic rights law, Liebenberg has argued that courts must offer a substantive interpretation of the right in question, not only to develop the content and values of socio economic rights themselves but also in relation to how they are connected to other rights in the Constitution.[13] For example, with reference to the Grootboom judgment Liebenberg commended the Court for recognising that the right to housing "entails more than bricks and mortar." Justice Yacoob in Grootboom acknowledged that—

"The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them."

Against this framework, the fundamental values that underpin our Constitution – dignity, equality and freedom – lie at the center of legal interpretation. How these values play out is of course impacted by our current context of South Africa, and as a judiciary we need to navigate some of the stumbling blocks that hold back our appetite to advance the transformative project: systemic and entrenched inequalities, weak public institutions delivering socio-

12 *Sandra Liebenberg. Socio-Economic Rights. Adjudication under a Transformative Constitution. Claremont: Juta, 2010.*

13 *Liebenberg Socio-Economic Rights. Adjudication under a Transformative Constitution. Claremont: Juta, 2010.*

economic rights for the poor, a society that remains divided, corruption and inequalities in accessing justice to name but a few.[14]

CONCLUSION

I want to conclude by talking briefly about the current socio-political context especially its impact on the work of the courts and Judges. I also emphasise that I speak about these issues as the leader of a Division of the High Court that has dealt with and continues to process more litigation touching on sensitive political and separation of powers issues, to mention just two. The handling of these matters by judges and courts generally but specifically the Constitutional Court, has given rise to a number of what, I term politically antagonistic themes directed at the courts in particular. Currently there are themes that seek to suggest that our Constitution has been a failure in that it has not resulted in better living conditions for the poor masses; there are themes that suggest that judges and courts have become a Juristocracy that impedes the socio economic development of the poor masses; there are yet other themes that suggest that courts and judges, unelected as they are, have become too powerful and must be reined in and that South Africa could do better under a parliamentary supremacy framework. Propagating these themes are predominantly, political party members, members of parliament, members of the executive in the different spheres of Government who openly decry the power of judges and courts. We should also factor the role of the media in all this.

I cannot stand here and deny that there are fault lines on a number of fronts in this country, be it service delivery and worrying levels of corruption especially in state departments and state entities. My Colleague Justice Kollapen, recently stated that for many in this country, the Constitution remains "an illusion far on the horizon." He said the masses "impatiently wait to feel its presence and effect and to deliver on its promise of a better life for all." Yes we have also seen unprecedented levels of litigation seeking to hold the state accountable and/or to deliver on a number of service delivery fronts. Such litigation transcends into Government departments, State Owned Entities, political parties and internal political party structures and yet it all comes to the courts to resolve.

> Liebenberg argues that courts and judges need to abandon traditional and formalistic approaches to legal interpretation and rigid understandings of separation of powers in favour of more 'flexible and dialogic models ”

14 *Brickhill and Van Leeve 2015 Transformative Constitutionalism: Guiding Light or Empty Slogan?*

This must give us all cause to reflect on why our constitutional project is failing. I offer the following thoughts. In the first place the Diagnostic report of the Planning Commission, released some years ago, listed nine (9) key failings of our constitutional transformative agenda, However, none of the listed failings cite the courts and judges. Instead almost all of those failings reside elsewhere in our constitutional governance framework. An example is that our Government has spent billions of rands funding a commission that was mandated to investigate alleged malfeasance in the state context of unimaginable proportions. Our Constitution is premised on its supremacy i.e. all levels of government being bound by and subject to its dictates. When all three arms of government function well our Constitution will surely deliver on its promise.

Lest we forget, the Judiciary was not the dominant player in the Constitutional Assembly deliberations that gave us our Constitution. We didn't ask let alone insist on having the developmental provisions of the Constitution and section 172. But this was all the product of indepth political engagements. Let us remember the submission of the dominant party in those engagements, the ANC to this effect – "The supremacy of the Constitution should not be a system against the state, but it should be a system for the democratic state, to guard against the state degenerating into anarchy, arbitrariness, and illegality without a framework of rules. Such a state would undermine democracy and democratic practices."

In this context, therefore, one truth remains stark and that is - for social and economic transformation including growth to translate into social and economic parity and development, the state, as the duty-bearer must adopt rights-informed legislation and social justice policies that follow a distributional pattern of focusing on the poor and ensure the availability of financial and human resources for the implementation of such policies. Courts and judges are but one of the three arms of government and holds the others to the boundaries of their power prescripts. It is counterproductive to seek to find blame in what the courts are mandated to do by the Constitution. In any event one searches in vain for policies and other transformative programmes that have been stymied by the courts. All that the courts have done is to point out deficiencies in policies that have come before and referred these back for improvement in line constitutional dictates. It would augur well for all of us, to soberly engage and identify where the fault lines lie. We cannot as a nation rely on litigation to solve all our problems. Some of them require a simple but profound realization that the solution lies in getting back to our constitutional principles and deliverables. After all there must be a lot of sense in subscribing to the maintenance of comity between us and the other arms of government. That way we will achieve a lot more than screaming headlines that achieve acrimony at best.

In this context the separation of powers principle becomes more important. It is the principle by which we as arms of government can use to ensure that the comity that we need amongst each other remains the glue that binds us together and enables us in our spheres to understand our respective roles and to strive towards achieving our respective objects. We in the judiciary are acutely aware of the separation of powers principle and it is due to this awareness on our part that the Constitutional Court has developed deferential but effective jurisprudence around budgetary and resource allocation matters which firmly reside in the domain of the Executive in particular. I have in mind Constitutional Court decisions such as Grootboom[15] but more importantly, National Treasury v Opposition to Urban Tolling.[16] The following statement by Moseneke DCJ says it all – "Thus the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of executive function and domain. What is more, absent of any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to the budgetary appropriations by Parliament."[17]

Our Constitution is human rights based, forward looking and arms us with developmental tools to advance its constitutional project. This behoves all of us, not just courts and judges, to realize this. As we observe Human Rights Day we should all realize that political hostility towards courts and judges will in time, delegitimise the courts and that will sound the death knell to our constitutional transformative project as a nation. ■

We cannot as a nation rely on litigation to solve all our problems. Some of them require a simple but profound realization that the solution lies in getting back to our constitutional principles and deliverables ”

15 *supra*

16 *[2012] ZACC 18, 2012 (6) SA 2233 (CC)*

17 *At para 67*

ASYLUM SEEKERS IN SOUTH AFRICA AND COVID-19: A CATALYST FOR SOCIAL SECURITY LAW REFORM?

By Professor Marius Olivier and Judge Avinash Govindjee

First published in the South African Journal on Human Rights, published online 15 April 2022.

This contribution interrogates selected social security law issues applicable to asylum-seekers. It does so from the perspective of among others the impact of Covid-19-related labour market and social security regulations and directives (issued in terms of the Disaster Management Act) and against the background of recent statutory and policy developments, and jurisprudential responses. The overarching objective of the article is to provide guidance as to the complex balance between, on the one hand, immigration law principles and, on the other, the imperatives embedded in a human rights-infused approach, with particular reference to the right to (access to) social security, other related fundamental rights, and the principles underlying the limitation of these rights. A set of guiding principles, responsive to Covid-19 regulatory realities, are developed and proposed.

The Covid-19 pandemic has affected lives and livelihoods across the world. In South Africa, the government's response has included a stimulus package reportedly worth R500 billion, a temporary employer/employee relief scheme funded by the Unemployment Insurance Fund (UIF), Compensation Fund benefits for contracting the coronavirus occupationally and an increase in the value of existing social assistance grants. A special Covid-19 Social Relief of Distress Grant (R350 per month) has also been introduced only for unemployed citizens, permanent residents and refugees, thereby excluding various categories of non-citizens. More recently, however, this grant was extended to asylum-seekers and foreigners who are holders of special dispensation permits.

This kind of limitation of rights is consistent with the traditional, arguably conservative, social protection regulatory approach towards non-citizens in South Africa, as demonstrated by the Department of Home Affairs' 2017 'White Paper on International Migration' and the Refugee Amendment Act 11 of 2017 (RAA). This has necessitated a variety of court applications in order to realise basic human rights, such as dignity, equality, access to health care and access to social security. Most of the existing jurisprudence has focused on the entitlements of permanent residents, refugees and asylum seekers. The dominant trend has been the emergence of creative statutory interpretation and attempts to juxtapose immigration law and human-rights principles, with potentially far-reaching implications sanctioned by the judiciary. Also, relevant global human rights standards are embedded in international instruments (of which some have been ratified by South Africa). These standards need to be considered for purposes of interpreting the relevant fundamental rights enshrined in the Constitution of the Republic of South Africa, 1996, also considering comparative jurisprudence in this context.

This contribution seeks specifically to interrogate selected social security law issues applicable to asylum-seekers. It does so from the perspective of among others the impact of Covid-19-related labour market and social security Regulations and Directives (issued in terms of the Disaster Management Act 57 of 2002) and against the background of recent statutory and policy developments, and jurisprudential responses.

The overarching objective of the proposed contribution is to provide guidance to legislators, the executive and judiciary as to the complex balance between, on the one hand, immigration law principles and, on the other, the imperatives embedded in a human rights-infused approach, with particular reference to the right to (access to) social security, other related fundamental rights, and the principles underlying the limitation of these rights. A set of guiding principles, responsive to Covid-19 regulatory realities, are developed and proposed. These principles are drawn from

the 'White Paper' essentially adopts a risk-based approach with little appreciation of vulnerabilities experienced by refugees and asylum seekers ”

a detailed analysis of the applicable constitutional principles and jurisprudence, international standards and comparative experiences in a manner that, ideally, may inform the future regulation of social security entitlements for asylum-seekers, as well as the judiciary's interpretation thereof.

For purposes of this contribution, the social security concept covers all measures providing benefits, whether in cash or in kind, to secure protection in relation to the nine 'classical' social risks, traditionally included in ILO instruments,[1] but operationally extended to also include poverty and social exclusions.[2]

1. POLICY CONTEXT

The last decades, especially since 2000, have seen large numbers of asylum seekers entering South Africa through porous borders, mainly from African countries. At some stage, during the early 2010s, South Africa hosted the largest asylum-seeker population in the world, partly aggravated by an inefficient management of applications and appeal. From 2008 until 2012, South Africa received the largest number of new asylum applications worldwide, registering 800,000 new asylum claims, mostly from Zimbabweans.[3] According to the 2020 United Nations High Commissioner for Refugees (UNHCR) report on global trends, still by the end of 2018, South Africa hosted 89,285 recognised refugees, while 188,296 asylum-seeker applications were pending.[4] UN organs entrusted with supervising implementation by South Africa of key UN human rights instruments have criticised the treatment of migrants generally, and asylum seekers specifically, by South African authorities.[5] In October 2018, the Committee on Economic, Social, and Cultural Rights (CESCR) expressed concerns about 'the proposal of establishment of asylum processing centres in border areas' (see the discussion below) and urged South Africa to '[e]xpeditiously clear the backlog of asylum applications pending in the appeal process'.[6] It also took issue with the new legislative drive evidenced by the provisions of the RAA, supported by an adjusted policy regime, discussed below, to curtail the right to work of asylum seekers.[7]

Until recently, the South African policy framework paid scant attention to the situation of asylum seekers, also in the social security domain. The 1997 'White Paper for Social Welfare' merely refers to the need to assess the needs of refugees (asylum

1 *See in particular, International Labour Organisation (ILO) 'Minimum Standards (Social Security) Convention', Convention 102 of 1952.*

2 *The extended operational definition of social security thus comprises ten elements: (i) protection in sickness, including medical care; (ii) protection in sickness, including income support in the form of cash sickness benefits; (iii) protection in disability, including income support but also medical care, rehabilitation and long-term care; (iv) protection in old age, including income support and long-term care; (v) protection of survivors in case of death of a family member; (vi) protection in maternity, including medical care and income support maternity benefit; (vii) protection in 'responsibility for the maintenance of children', including the provision in kind to, or in respect of, children of 'food, clothing, housing, holidays or domestic help' and of cash income support family benefits; (viii) protection in unemployment, including income support in the form of unemployment benefits, and also other labour market policies promoting employment; (ix) protection in the case of employment injury, including medical care, rehabilitation and income support in the form of sickness, invalidity or survivors' benefit; (x) general protection against poverty and social exclusion through social assistance that provides protection to all residents without sufficient other means of income from work and not covered (or not covered sufficiently) by social security branches listed above. See ILO 'World Social Security Report 2010-2011: Providing Coverage in Times of Crisis and Beyond' (2010) 20.*

3 *United Nations Human Commissioner for Refugees (UNHCR) 'Global Trends: Forced Displacement in 2019' (2020) 38.*

4 *Ibid 75.*

5 *See MP Olivier 'Social security: Framework' in The Law of South Africa: Labour Law and Social Security Law 2 ed (2012) para 137.*

6 *Committee on Economic Social and Cultural Rights (CESCR) 'Concluding Observations on the Initial Report of South Africa' (12 October 2018) E/C.12/ZAF/CO/1 paras 25, 26(a).*

7 *Ibid paras 25, 26(c).*

seekers not mentioned) and to develop appropriate programmes.[8] The Committee of Inquiry into a Comprehensive Social Security System for South Africa did not make any proposals suggesting the way forward for introducing a comprehensive social security system in South Africa. The current discussion document informing comprehensive social security in South Africa envisages an integrated social security system for South Africa, which should cover all citizens and permanent residents, including migrant workers – no mention is made of refugees and asylum seekers.[9] Even the 'National Development Plan' makes no mention of an appropriate policy framework in relation to (refugees and) asylum seekers.[10]

The recent but – for now – withdrawn 'Green Paper on Comprehensive Social Security and Retirement Reform' deliberately casts the net wider by insisting that 'Consistent with the requirements of the Constitution, South Africa's integrated social security system should cover all citizens and permanent residents, including migrant workers'.[11] The 'Green Paper' notes in particular that the Covid-19 crisis amplified existing structural gaps, thus calling for Government to review and take drastic measures to accelerate the required comprehensive response.[12] The 'Green Paper' emphasises that there is need to accelerate the implementation of a social security system that is centred on universal coverage.[13]

Recent sectoral policy instruments contain several pointers informing the treatment of asylum seekers, also in social protection terms. In particular, the 2017 National Health Insurance Policy suggests that migrant – who (also) include refugees, asylum seekers and irregular migrants – will receive 'basic health care services in line with the Refugees Act 130 of 1998 and international conventions that South Africa is a signatory to'.[14] Most importantly, and unlike the 1997 'White Paper', the 2017 'White Paper on International Migration for South Africa' contains several important pronouncements. These pronouncements use a rights-based approach as a key policy building block, but deviate from this approach by indicating a range of restrictive measures evidently aimed at reversing some of the positions taken by the judiciary in relation to the legal and policy treatment of asylum seekers, discussed below – apparently in an attempt to limit the perceived abuse of the asylum regime by economic and irregular migrants. Some of the main reflections appearing from the 'White Paper' include:

- International migration, in general, is beneficial if it is managed in a way that is efficient, secure and respectful of human rights.
- Effective provision of protection and basic services to asylum seekers and refugees in a human and security manner.
- Continuation of the non-encampment policy in relation to refugees; however, as indicated immediately below, to some extent the new policy approach towards asylum seekers deviates from this policy.
- Asylum seeker processing centres will be established 'to profile and accommodate asylum seekers during their status determination process'.[15] It is envisaged that governmental departments and international organisations (including the UNHCR) will operate there; low-risk asylum seekers may have the right to enter or leave the facility under specified conditions. Most asylum seekers who fall into low-risk categories could be released into the care of national or international organisations and family or community members. Conditions could include the department receiving written assurances that the asylum seekers will have their basic services provided for by the individual or the organisation.
- One of the key policy changes involves the removal of the automatic right to work and study for asylum seekers – on the assumption that their basic needs will be catered for in the processing centres (of by an individual or an organisation that has made a written undertaking to provide for their basic needs while their status is being determined). Only in exceptional circumstances such as judicial review, will asylum seekers be allowed to work and study.[16]

Unfortunately, the 'White Paper' fails to address the social security position of asylum seekers, apart from a lone sentence suggesting that provision of social security and portability of social security benefits will be facilitated. As has been noted, the:

> *list of legislation considered by the Department in formulating this White Paper excludes most social security-related legislation (only referencing the Unemployment Insurance Act 63 of 2001 (UIA)). Similarly, the international instruments taken into consideration exclude those relating to social security and, unsurprisingly given these omissions, the analysis contained in the document in relation to refugees and asylum seekers falls short of properly describing and explaining the social security position of these categories of non-citizens, although there is some suggestion that basic needs of asylum seekers will be catered in asylum processing centres.*[17]

Also, it is evident that the 'White Paper' essentially adopts a risk-based approach with little appreciation of vulnerabilities

8 *Department of Welfare 'White Paper for Social Welfare' (1997) para 68.*

9 *Inter-departmental Task Team on Social Security and Retirement Reform 'Comprehensive social security in South Africa: Discussion document' (March 2012) 21.*

10 *National Planning Commission 'Our future – make it work: National Development Plan 2030' (August 2012).*

11 *Government Gazette 45006 (18 August 2021) Government Notice 674, 46 (para 4.2). The (withdrawn) 'Green Paper' elaborates: 'All workers with earnings above a minimum threshold should contribute to the pensions and insurance arrangement under consideration. It is therefore proposed that Government should meet part of the contribution costs of lower-income employees. Otherwise, such workers might move into the informal sector to avoid contributing to the fund, which would leave them unprotected and put the system's sustainability at risk. This is one of the ways in which the social security funding arrangements will serve an important redistributive function within the broader and unusually unequal income structure of the South African economy'.*

12 *Ibid 10 (executive summary).*

13 *Ibid 11 (executive summary).*

14 *Department of Health 'National health insurance for South Africa: National Health Insurance Policy' (2017) 21 para 102.*

15 *Ibid 61. On the asylum-seeking process, the duty on the decision-maker to assist asylum seekers and the obligation of the Refugee Appeal Board to observe fundamental administrative law principles, see the recent judgment of the Supreme Court of Appeal in Somali Association of South Africa v The Refugee Appeal Board [2021] ZASCA 124 (23 September 2021).*

16 *Department of Home Affairs 'White Paper on International Migration for South Africa' (General Note 750 in Government Gazette 41009 (28 July 2017)).*

17 *A Govindjee 'Access to social security for refugees and asylum seekers in South Africa: An analysis of recent developments' in MP Olivier, E Kalula & LG Mpedi (eds) Liber Amicorum: Essays in Honour of Professor Edwin Kaseke and Dr Mathias Nyenti (2020) 73.*

experienced by refugees and asylum seekers, including vulnerabilities accentuated by Covid-19. The existing policy domain, also expressed in the orientation of the 'White Paper', is increasingly confirming a highly stratified society and reflecting the embedded unequal treatment of migrants, in particular asylum seekers. This is accentuated by the recent changes in the legislative domain that effectively raise the bar for access to employment, and forces dependency on others for support and services. This may significantly increase their vulnerability given the experiences of the Covid-19 context.

> for unemployed individuals of working age, including unemployed asylum seekers as well, there is no income protection provision in the South African social security system...

2. LEGISLATIVE FRAMEWORK

With one important exception, the current social security legislative regime does not exclude asylum-seeking visa holders. This applies in particular to the contributory social security environment. Asylum seekers are not prevented from contributing to and benefiting from retirement and medical schemes. In addition, they are not excluded from the operation of the Compensation for Occupational Injuries and Diseases Act 130 of 1993[18] and the UIA, in particular since the exclusion of (temporary) migrant workers from the sphere of coverage of the latter Act was recently removed. They are similarly not excluded from the purview of labour legislation that directly or indirectly contains provisions impacting on social security benefits, such as sick and maternity leave and benefits – they remain entitled, for example, to the protection the Basic Conditions of Employment Act 75 of 1997, the Labour Relations Act 66 of 1995 and the Employment Equity Act 55 of 1998. However, essentially, with some exception, the premise of most of these laws is that the asylum seeker is attached to an employment relationship involving an employer. In other words, access to (formal) employment is a sine qua non for the asylum-seeker's entitlement to most categories of contributory social security benefits.

Covid-19 has accentuated the precarious position of asylum seekers regarding access to (formal) employment and hence their ability to be covered by and benefit from contributory social security arrangements in South Africa. Firstly, even if they had worked in the formal economy, 'The Covid-19 pandemic exposed many workers and households to vulnerability, as some were retrenched due to employers closing operations'. Yet, 'For some workers, they would some savings while for others little or none'.[19] The Temporary Employee Relief Scheme (TERS), introduced in response to Covid-19, would have been available and accessible to contributing asylum seekers who held formal economy positions, but in their case, as non-nationals, other savings and/or family or societal support may not have been readily available. Secondly, asylum seekers who work as atypical workers, self-employed or informal workers, do not meet the definition of 'contributor' and 'employee' in terms of the UIA and the Unemployment Insurance Contribution Act 4 of 2002 (UICA), hence would not be covered under South Africa's unemployment insurance regime. As noted in the (for now withdrawn) 'Green Paper on Comprehensive Social Security and Retirement Reform', 'workers who may be self-employed, in the informal sector or so-called platform or gig economy have not been covered and had had access to no form of relief except possibly the R350 SRD grant'.[20] It has therefore been suggested that:

> *Extending UIF benefits to self-employed workers is urgent in view of the heavy losses of income and work suffered by these workers following the Covid-19 pandemic. Whereas other categories of workers classified as employees have had access to relief funds, including UIF benefits and the Temporary Employee Relief Scheme (TERS), self-employed workers have been excluded. Incorporating these workers into social insurance schemes such as the UIF to alleviate the hardship endured by them and their families should be treated as a matter of critical importance.*[21]

This may be particularly apposite to many asylum seekers, who have had to resort to work in an informal or self-employed capacity, in view of lack of formal economy opportunities, also due to the Covid-19 pandemic.[22]

Thirdly, for unemployed individuals of working age, including unemployed asylum seekers as well, there is no income protection provision in the South African social security system, apart from the special Covid-19 Social Relief of Distress (SRD) grant. In fact, 'Noting that the distress faced by this group spans even before the Covid-19 crisis due to the high levels of poverty, unemployment, inequality and food insecurity, there has been growing calls for consideration of some permanent measures that provide income guarantee security for all'.[23] It has been suggested that for this group, a number of interventions could include a mix of measures, including, some form of phased-in social assistance income support; active labour market interventions such as allowances linked to skills development and the expanded public works programme; further education and training; and youth employment programmes.[24]

The exception to the requirement of an employment relationship relates to the South African social assistance regime. Unlike

18 *Even in the event of an asylum-seeker who may not have applied for asylum status yet, and assuming that the contract of service concluded by such a worker is 'invalid' (although this may be challenged on constitutional grounds – see Discovery Health, discussed below), the Act states that the Director-General has a discretion to deal with a claim as if the contract was valid at the time of the accident: s 27.*

19 *'Green Paper' (note 11 above) 19 (executive summary).*

20 *Ibid 50 (para 4.4.4).*

21 *Ibid 50. The 'Green Paper' (note 11 above) suggests that declaring persons to be contributors necessarily means that they must also be deemed to be employees for purposes of the UIA and UICA.*

22 *As noted in the 'Green Paper' (ibid) 31 (para 3.4.1), the hardships experienced by many workers have resulted in the call for atypical workers to be included in the UIF coverage.*

23 *Ibid 30 (para 3.3.1).*

24 *Ibid 30.*

refugees, asylum seekers have not been included in the provisions of the Social Assistance Act 13 of 2004 and its implementing regulations. Lately, however, as discussed below, and for purposes of the recently introduced Covid-19 Social Relief of Distress grant, as a consequence of the judgment in Scalabrini Centre v Minister of Social Development,[25] the Department of Social Development was ordered to remove the exclusion of asylum seekers from eligibility for the grant. Even so, the value of the Covid-19 SRD grant (R350) has been severely criticised as being 40% below the poverty line, making a very small dent to people experiencing hunger and starvation. This has re-ignited the debate as to whether South Africa should not implement a universal grant (for everyone), which is potentially more efficient, cost-effective and better targeted resulting in fewer exclusions.[26]

The newly foreseen legislative regime may impact dramatically on the position outlined above. Firstly, the National Health Insurance Bill (B 11-2019) extends coverage to refugees, but treats asylum seekers on par with 'illegal foreigners', by stipulating (in clause 4(2)) that an asylum seeker or illegal foreigner is only entitled to (a) emergency medical services; and (b) services for notifiable conditions of public health concern. However, it also stipulates that all children, including children of asylum seekers or illegal migrants, are entitled to basic health care services as provided for in s 28(1)(c) of the Constitution (clause 4(3)). The restriction is evidently a retrogressive development and one likely to be met with a constitutional challenge given the constitutional rights to social security and health care services. In fact, it may well be argued that a pandemic context requires much more extensive access to medical treatment and services. This is justified by the heightened vulnerability experienced by asylum seekers in the event of a public health emergency, including pandemics, such as the Covid-19 context.

Secondly, the implications of the significantly altered regime applicable to asylum seekers in terms of the provisions of the RAA have to be noted. Currently, in principle, refugees enjoy full legal protection, which includes the fundamental rights set out in chapter 2 of the Constitution.[27] Concomitant to this is that refugees qualify for the constitutionally entrenched right to access to social security and social assistance, as well as the other socio-economic rights in terms of s 27 of the Constitution. The same protection is not accorded to asylum seekers. However, on the basis of constitutional jurisprudence, it was clear that asylum seekers could not generally be barred from employment – whether wage- or self-employment – as discussed below. This would bring them under the protective umbrella of most of South Africa's social insurance laws, at least as far as wage-employment is concerned,.

Now, however, the right to work is severely curtailed. Section 22(8) of the Refugees Act, as amended by RAA, commences from the premise that the right to work in the republic may not be endorsed on the asylum-seeker visa of any applicant, who –

(a) is able to sustain himself or herself and his or her dependants;

b) is offered shelter and basic necessities by the UNHCR or any other charitable organisation or person; or

(c) seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): Provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of s 21 is still pending.

The impact of these provisions is severe, also from the perspective of asylum-seekers' ability to contribute to and benefit from contributory social security. Ruvi Ziegler notes:

Since asylum seekers are now required to make an application for asylum within five days of entry into the Republic, and since their dependants have to be declared as part of the application, an asylum seeker has five days to communicate with friends and family and obtain confirmation of their support before they lodge their application. They are denied the right to work whilst the initial assessment takes place. Implicitly, they will not receive an employment endorsement until and unless they can offer proof of a negative — that they cannot receive assistance from UNHCR or other organisations. There could thus be lengthy periods during which asylum seekers would neither be able to self-sustain nor rely on others (let alone the state) for support, potentially leaving them destitute.[28]

Also, it is questionable whether these measures required to be taken by asylum seekers are feasible in a pandemic context: the Covid-19 pandemic underscores the reality that there may be factors that would restrict, if not inhibit, the possibility of securing the necessary support or finding an employer willing and able, and committed, to offer (formal) employment.

Furthermore, asylum seekers are excluded from all forms of self-employment and work in the informal economy by these newly inserted provisions – irrespective of whether they can self-sustain or rely on others. It is questionable whether these exclusions would pass constitutional muster, in view of the approach adopted by constitutional jurisprudence, in particular in *Minister of Home Affairs v Watchenuka*[29] *and Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism*,[30] discussed below. To this should be added the fact that asylum seekers may be left destitute as a result of the non-refoulment principle, and in the absence currently of state financial support to asylum seekers.[31] This would constitute a clear infringement of their human dignity, as indicated in the jurisprudence. Recently, in Al v The Director of Asylum Seeker Management; Department of Home Affairs, the Western Cape High Court in a related matter held that:

The applicants have shown that they will suffer harm if the interim relief is not granted. They will not be able to work

25 *Scalabrini Centre v Minister of Social Development [2020] ZAGPPHC 308.*

26 *'Green Paper' (note 11 above) 57–58 (paras 4.14.1 & 4.14.2).*

27 *Refugees Act s 27(b). According to s 27 of the Act, a refugee is entitled to a formal written recognition of refugee status in the prescribed form; and enjoys full legal protection, which includes the rights set out in chapter 2 of the Constitution (except those rights that only apply to citizens); is in principle entitled to permanent residence after a certain number of years' continuous residence in the Republic from the date on which he or she was granted asylum; is entitled to an identity document referred to in s 30; is entitled to a South African travel document on application; and is entitled to seek employment.*

28 *R Ziegler 'Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications' (2020) 10 Constitutional Court Review 99.*

29 *Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA).*

30 *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism 2015 (1) SA 151 (SCA).*

31 *Watchenuka (note 29 above) para 32 and Somali Association (ibid) para 44.*

unless they are employed on an illegal basis and will, at the very least, face resistance should they try and enrol their children at school. They will find it difficult, if not impossible to obtain medical attention at a state hospital. It is so that the respondent's undertaking means that they will not be deported, and thus their right to non-refoulement will be respected, but this is only one of a conspectus of rights that allow people in their position to live a life of dignity.[32]

These sentiments ring particularly true in the context of situations accentuating vulnerability, as illustrated by the Covid-19 experience.

3. RELATED CONSTITUTIONAL CONSIDERATIONS

3.1 Vulnerability, applicability, rights and values

Several overarching constitutional principles in relation to the treatment of different categories of non-citizens have been recognised in the South African constitutional jurisprudence. Firstly, the vulnerable status of non-citizens as a group, and of particular categories of non-citizens – such as children, refugees and asylum seekers – has been recognised by the courts and been given constitutional significance.[33] Those affected, including and in particular marginalised groups, such as asylum seekers, have experienced intensified vulnerability as a result of Covid-19. As has been noted, 'The crisis has also shown us that everyone is vulnerable, and that we need a responsive social security system that can mitigate shocks as well as prevent and mitigate routine and predictable social harms that sustain inequality, poverty and unemployment'.[34]

Secondly, the Bill of Rights has been held to apply to citizens and non-citizens, except for those provisions that evidently apply to citizens only (such as provisions regarding political rights (s 19); or the right to choose one's trade, occupation or profession (s 22),[35] as discussed below).[36] This has caused the courts to accept that the term 'everyone', as it is used in relation to, for example, the constitutional right to access to social security, including the right to access social assistance,[37] includes non-citizens as well. This right is underpinned primarily but not exclusively by two other fundamental rights: the right to human dignity (contained in s 10) and the fundamental right to equality (enshrined in s 9).

The courts have also struck down the purported drawing of a distinction between citizens and non-citizens in other (more general) areas of fundamental rights protection, for instance regarding the applicability of the right to access to the courts and the right to human dignity.[38] Some of these exclusions are contrary to the treaty obligations to which South Africa is bound. For example, in Minister for Welfare and Population Development v Fitzpatrick[39] the Constitutional Court held the provision in the then Child Care Act 74 of 1983[40] that prohibited foreigners who qualified for naturalisation but had not yet applied for citizenship from adopting a child born of a South African citizen to be invalid: the Court held that, not only does the Act offend against certain of the fundamental rights in the Constitution of South Africa but also infringes upon inter-country adoptions, as provided for in article 21 of the UN Convention on the Rights of the Child (1989).

In relation to the constitutionally entrenched *right to access to social security (s 27(1)(c)), in the key Constitutional Court decision of Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* (concerning the then legislative exclusion of permanent residents from accessing social assistance), the Court held that the constitutional entitlement to access to social security accruing to 'everyone' includes 'all people in our country'.[41] To exclude permanent residents from entitlement to social assistance would fundamentally affect their (human dignity) (which is both a constitutional right – see s 10 – and a constitutional value) and equality (which is likewise both a constitutional right – see s 9 – and a constitutional value).[42] The Court reiterated that non-citizens constitute a vulnerable group in society and that it needed to be determined whether excluding permanent residents from the social assistance system would amount to unfair discrimination. If the exclusion were to be upheld, that would imply that permanent residents would become a burden on other members of the community – something which would impair their dignity and further marginalise them.[43] Considering the competing considerations and intersecting rights that were involved, the Court held that the statutory exclusion of permanent residents from the scheme for social security (that is social assistance) affected their dignity and equality in material respects. Sufficient reason for such invasive treatment of the rights of permanent residents had not been established. The exclusion could, therefore, not be justified under the Constitution.[44] However, the Court reasoned that it might be reasonable to exclude citizens from other countries, visitors and illegal residents, who have only a tenuous link with the country (e.g., non-citizens in South Africa who are supported by sponsors who arranged their immigration).[45]

The fundamental right to fair labour practices, provided for in s 23 of the Constitution, has also played a key role of ensuring

32 *Al v The Director of Asylum Seeker Management: Department of Home Affairs [2019] ZAWCHC 114 para 25.*

33 *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) BCLR 569 (CC) para 74; Larbi-Odam v Member of the Executive Council for Education (North West Province) 1998 1 SA 745 (CC); Watchenuka (note 29 above); Somali Association (note 30 above).*

34 *'Green Paper' (note 11 above) 11 (executive summary) and also 16: 'Experiences such as the Covid-19 crisis have shown the importance of building a responsive social security system that cushions society from life cycle risks and other contingencies'.*

35 *However, the specific ambit of s 22 needs to be understood. In Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 (4) SA 395 (CC) (para 57; see also para 47) the Constitutional Court held that: 'The Refugees Act guarantees the applicants the right to seek employment. It is the choice of vocation that is reserved only for citizens and permanent 'residents.' In Somali Association (note 30 above) para 38, the Supreme Court of Appeal stated: 'Section 22 of the Constitution does not, as contended for by the respondents, prevent refugees from seeking employment. The emphasis in that section of the Constitution is on a citizen's right to choose his or her trade, occupation or profession freely'.*

36 *Khosa (note 33 above) paras 46–47; Lawyers for Human Rights v Minister of Home Affairs 2004 (7) BCLR 775 (CC).*

37 *Section 27(1)(c) of the Constitution.*

38 *Baramoto v Minister of Home Affairs 1998 (5) BCLR 562 (W); Johnson v Minister of Home Affairs 1997 (2) SA 432 (C).*

39 *Minister for Welfare and Population Development v Fitzpatrick 2000 (3) SA 422 (CC).*

40 *Section 18 (4)(f) of the Child Care Act.*

41 *Khosa (note 33 above) paras 46–47.*

42 *Khosa (note 33 above) paras 58–59.*

43 *Ibid paras 76-77, 80-81.*

44 *Ibid para 573I–J (case headnote summary) paras 80, 83-84.*

45 *Ibid paras 58-59.*

employment protection, even (under certain circumstances) of irregular migrant workers – and may hold important consequences for access to social security benefits provided for in South African labour laws or otherwise. In Discovery Health Ltd v CCMA,[46] the Labour Court extended labour rights to a foreign national whose work permit had expired. The court noted that, although the Immigration Act 13 of 2002 prohibited the employment of foreign workers without work permits, the only consequence of doing so was that the employer was guilty of a criminal offence: it did not render an employment contract with the foreigner invalid. In the new constitutional era, so the Labour Court held, courts are obliged to interpret all legislation in a way that would 'promote the spirit, purport and objects of the Bill of Rights'.[47] In interpreting the provisions of the Immigration Act, the court must ensure that it does not unduly limit the constitutional right of 'every person' to 'fair labour practices'. The Court consequently held that a foreigner whose work permit had expired still had a valid employment contract and was entitled to the unfair dismissal protection provided for in South African labour laws. To rule otherwise would have inequitable consequences and cause abuse by unscrupulous employers.[48] In addition, the definition of 'employee' in the Labour Relations Act did not depend on a valid underlying employment contract. Therefore, the foreigner concerned was thus covered by the provisions of the Act and consequently entitled to the unfair dismissal protection available under the Act.[49] The Discovery Health judgment has to some extent been supported by some, later judgments of the Labour Appeal Court.[50]

Vulnerable persons require extended fundamental rights protection in situations such as Covid-19. Chief among these are migrants, including and in particular asylum seekers, who are already exposed to precariousness.

3.2 The limitation of rights, reasonableness and minimum core

The limitation of the right to access to social security is subject to the provisions of the limitation clause, that is s 36 of the Constitution. Also, in terms of s 27(2), the State is enjoined to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. It needs to be borne in mind that reasonableness goes beyond a rationality review, that is a review based on whether there is a rational connection between, for example, a differentiating law and a legitimate governmental purpose (such as the immigration policy of the country). In Khosa, the Constitutional Court remarked that the standard of reasonableness was a higher standard than rationality. The fact that the differentiation between citizens and non-citizens might have a rational basis did not mean that it was not an unfairly discriminatory criterion to use in the allocation of benefits. The Court held that differentiation on the grounds of

Vulnerable persons require extended fundamental rights protection in situations such as Covid-19. Chief among these are migrants, including and in particular asylum seeker ”

citizenship, while not a ground listed in s 9(3) of the Constitution, was clearly a ground analogous to those listed grounds. It therefore amounted to discrimination. It then became necessary to determine whether that discrimination was unfair.[51]

While one does not take issue with the sense of applying a reasonableness criterion in the light of the constitutional requirement to this effect, one is tempted to ask, as a measure to assist in the interpretation of a socio-economic right such as the right to access to social security, whether is it not possible to identify a core content of the right to (access to) social security (as would be required in terms of international law), given the extensive comparative experience in this regard – despite the rejection of the core content requirement in constitutional jurisprudence?[52] It could be argued that identifying such a core content is not necessarily dependant on the availability of statistical data. To the contrary, from a normative perspective and on a normative level, it can be argued that there is indeed a core content, in particular when it comes to the right to access social security. The interrelated nature of fundamental rights would lead to such a conclusion that a constitutional basis is laid for an entitlement to an adequate level of minimum social security support. Vulnerable people, including asylum seekers, have been exposed to movement restrictions and the associated limitation on income-generation possibilities during Covid-19, underlining the need for a calibrated and integrated approach to the limitation of social security-related fundamental rights. In particular as far as social security is concerned, the Constitutional Court itself remarked, when considering the purpose of providing access to social security to those in need, that:

> *A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human*

46 *Discovery Health Ltd v CCMA 2008 (7) BLLR 633 (LC).*

47 *Section 39(2) of the Constitution.*

48 *Discovery Health Ltd (note 46 above) paras 29-31.*

49 *Ibid paras 35-48.*

50 *In Joseph v University of Limpopo 2011 (12) BLLR 1166 (LAC), for example, a fixed term contract had not been renewed on the basis that a university employee's work permit had expired. The court considered that there was a reasonable expectation of renewal of the employment contract in concluding that the employee reasonably anticipated that the work permit would be obtainable in due course. By frustrating his reasonable expectation, the university was deemed to have unfairly dismissed the employee. In Dunwell Property Services CC v Sibande (2012) (2) BLLR 131 (LAC) an employee had been dismissed on suspicion of being an illegal immigrant, but there was no evidence that the employee had been declared to be a prohibited person. The immigration officer was held not to have complied with this legislation in declaring the employee to be a prohibited person and the employee's dismissal for this reason was held to have been unfair.*

51 *Khosa (note 33 above) 573D-E.*

52 *See, for example, Government of RSA v Grootboom 2000 (11) BCLR 1169 (CC).*

beings and wanted to ensure that people were afforded their basic needs.[53]

4. INTERNATIONAL LAW PRINCIPLES

The South African Constitution accords particular prominence to the role and importance of international law. To the extent that South Africa has ratified these instruments, it is bound by their standards and provisions.[54] Furthermore, when interpreting fundamental rights contained in the Bill of Rights, including the rights covered in the constitutional part of this contribution, courts, tribunals and forums have to consider international law[55] – which, according to the Constitutional Court, includes both binding and non-binding international law.[56] Also, according to s 233 of the Constitution, there is a constitutional preference for statutory interpretation that is aligned to international law. The section stipulates: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. Therefore, in matters concerning the legal status of asylum seekers, the international law-sensitive ethos underlying the Constitution and its interpretation has to be respected. International law norms need to be heeded, as also confirmed by the Constitutional Court in Minister of Home Affairs v Rahim,[57] discussed below: these norms need to be considered in the context of fundamental rights interpretation and have to be applied if contained in a ratified instrument. Even if the international law has not yet been transformed or incorporated in South African law (that is 'domesticated'), it has a major influence as an interpretive tool on the state's obligation to protect and fulfil the rights in the bill of rights.[58] This approach has found the support of both the minority and majority judgments in the Constitutional Court matter of Glenister v President of the Republic of South Africa.[59]

It has increasingly been recognised that asylum seekers should be entitled to at least core forms of assistance, as supported by international, regional and constitutional law (as indicated by various provisions of the Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 19).[60] The UNHCR has recognised the obligation on states to safeguard the welfare of asylum seekers, by concluding that 'asylum seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met'.[61] In principle, this core assistance should, among others, cover basic social assistance / welfare support (which could be in the form of social relief of distress) and (an 'expanded' notion of) emergency medical treatment, if regard is had to at least the entitlements accruing to undocumented migrants.[62] Klaus Kapuy also remarks that international law explicitly provides for equal treatment with nationals in social security, provided that irregular migrant workers fulfil the relevant national and international legal requirements.[63] International law further provides for equal treatment with regular migrant workers, but only in respect of social security rights arising out of past employment.[64] In fact, the UN High Commissioner for Human Rights has concluded that, although 'there may be grounds, in some situations, for differential treatment between migrants and non-migrants in specific areas', these will be permissible only – 'as long as minimum core obligations are not concerned: differentiations cannot lead to the exclusion of migrants, regular or irregular, from the core content of economic, social and cultural rights'.[65] Of course, asylum seekers are to be distinguished from irregular migrants, as they enjoy a special and separate status in international law; yet, it is of comparative value to consider the minimum level, and nature of protection that is assumed in the case of irregular migrants.

Several principles applicable to the social security status of asylum seekers can be derived from international law. Firstly, international law recognises the vulnerable status of asylum seekers, as indicated. Secondly, as far as the UN Refugee Convention[66] and other refugee instruments are concerned, a critical question is whether and when asylum seekers are entitled

53 *Ibid 573A.*

54 *Section 231 of the Constitution.*

55 *Ibid s 39(1)(b).*

56 *Glenister v President of the RSA 2011 (3) SA 347 (CC) para 96; S v Makwanyane 1995 (3) SA 391 (CC); Grootboom (note 52 above). See also Discovery Health Ltd (note 46 above), where the Labour Court emphasised that it is required, in terms of s 39(1)(b) of the Constitution, to consider the provisions of a non-binding (non-ratified) UN Convention and non-binding International Labour Organization (ILO) Convention in relation to the protection available, in terms of international standards, to undocumented or irregular workers (para 42–47).*

57 *Minister of Home Affairs v Rahim 2016 (3) SA 218 (CC).*

58 *Section 39(1)(b) of the Constitution.*

59 *Glenister (note 56 above) paras 107, 182, 189-196. The majority in particular held:*
Section 39(1)(b) states that when interpreting the Bill of Rights a court 'must consider international law'. The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.

This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.

60 *Also see the chapter entitled 'Constitutional framework' in MP Olivier Introduction to Social Security (2005) 153. This is also in line with the position adopted by the government in the 'White Paper on International Migration' (General Notice 529 in Government Gazette 19920 (1 April 1999)), which recognises that there is no constitutional basis to exclude, in toto, the application of the Bill or Rights owing to the status of a person while in South Africa.*

61 *UNHCR ExCom Conclusion No. 93 (LIII) 'Conclusion on reception of asylum-seekers in the context of individual asylum systems' (2002) para (b)(ii). The Supreme Court of Appeal has already upheld the right of asylum seekers (who are awaiting process of their applications) to work or study on a limited basis: Watchenuka (note 29 above). Also see Arse v Minister of Home Affairs 2010 (7) BCLR 640 (SCA).*

62 *This is supported by the constitutional provisions contained in s 27. An 'expanded' form of 'emergency medical treatment', which is not subject to the internal limitation contained in s 27(2) of the Constitution, should ideally include urgent, emergency and necessary forms of medical-related interventions, such as: medical programmes that are preventive or that safeguard individual and collective health; maternity coverage; health coverage of minors; vaccinations foreseen by public health law; diagnosis, treatment and prevention of infective diseases; and activities of international prevention: P Schoukens & D Pieters Exploratory Report on the Access to Social Protection for Illegal Labour Migrants (2004) 11.*

63 *K Kapuy The Social Security Position of Irregular Migrant Workers (2011). See also article 27(1) of the International Convention on the Protection of All Migrant Workers and Members of Their Families (1990).*

64 *See Article 9(1) of the ILO Migrant Workers (Supplementary Provisions) Convention (adopted 24 June 1975, entered into force 9 December 1978) (Convention 143).*

65 *UN Economic and Social Council (ECOSOC) 'Report of the United Nations High Commissioner for Human Rights' E/2010/89 (2010) para 14, emphasis added.*

66 *UNGA Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.*

to the substantive protection accruing to refugees. It has been suggested that the recognition of refugee status is a declaratory act. According to the UNHCR, a person is a refugee within the meaning of the Refugee Convention as soon as he fulfils the criteria contained in the definition (of 'refugee'). This would necessarily occur prior to the time at which his refugee status is formally determined: 'He does not become a refugee because of recognition but is recognised because he is a refugee'.[67] Nevertheless, so the Commission of International Jurists opine, the protection of asylum-seekers' rights will be limited until the state determines whether the refugee's situation fulfils the Convention's definition.[68]

This raises the question whether the refugees' right to wage employment, self-employment and social security, enshrined in the Convention, may be legally limited in the case of asylum seekers. The court in Limpopo apparently assumed the applicability of the Convention's provisions on wage employment (article 17) and self-employment (article 18) to asylum seekers.[69] Regarding social security, article 24 of the Convention stipulates that, countries that have ratified the Convention shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of social security, subject to certain limitations. According to one of these limitations, 'national laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension'.[70] This implies that even for refugees, special and separate arrangements could be made as regards their entitlement to social assistance. Nevertheless, under the International Covenant on Economic, Social and Cultural Rights,[71] and its embedded Article 9, which guarantees the right to social security, the CESR states that:

> *Refugees, stateless persons and asylum seekers, and other disadvantaged and marginalized individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.*[72]

> *It is submitted that the vulnerability caused by poverty- and inequality-inducing scenarios, such as the Covid-19 pandemic, underscores the need for a minimum core approach and measures that would enhance equality of treatment with the nationals, particularly through universal social protection responses.*

5. RECENT CASE LAW: A SURVEY

A number of relatively recent cases have extended dimensions of social protection to categories of non-citizens, most notably asylum seekers. In Ahmed v Minister of Home Affairs,[73] for example, the Constitutional Court had the opportunity to consider whether asylum seekers, including those whose applications for refugee status have been refused, are eligible to apply for other visas and immigration permits in terms of the Immigration Act. The judgment clearly demonstrates the close connection between refugee and immigration law, and specifically focused on a governmental directive imposing a blanket ban on asylum seekers applying for temporary or permanent residence visas under the Immigration Act. The Court concluded that a blanket ban would be ultra vires the Immigration Act and that asylum seekers must be allowed to apply for visas or permits under the Immigration Act, to be granted the visa or permit if they meet the requirements of that Act and that applicants could request a ministerial waiver from the requirement that an application for a visa must be made from outside the borders of the country.[74] One of the consequences of the court's judgment appears to be that nothing prevents an asylum seeker from applying for a visa or permit under the Immigration Act without a valid passport.[75]

Asylum seekers are also protected while awaiting the outcome of judicial review and are entitled to have their permits renewed during this time because of the link between permits and 'a life of human dignity [...] and communing in ordinary human intercourse without undue state interference'.[76]

News reports (referring to an unreported settlement agreement arising from a court action in a matter involving the Scalabrini Centre of Cape Town) suggest that protection for asylum seekers and refugees has now been extended to their families, given that dependants may apply to be documented either through so-called family-joining or on their own terms.[77] The implications appear to be that refugee and asylum-seeker families can be documented together to ensure their rights to family unity and dignity in South Africa (and avoiding such persons from unnecessarily being in an undocumented, and even more vulnerable, state).[78] This has potentially far-reaching implications for the security and social security position of such persons, including reduced likelihood of arrest and detention due to the absence of documentation as well as enhanced prospects of obtaining legal work and broader social protection benefits such as enhancing the likelihood of school attendance. A set of standard operating procedures have consequently been agreed between the Department of Home Affairs and civil society, allowing the documentation of

67 *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection revised ed (2019) para 28. See also Ziegler (note 28 above) 73–74.*

68 *International Commission of Jurists Migration and International Human Rights Law: A Practitioner's Guide (2014) 56.*

69 *Somali Association (note 30 above) para 37.*

70 *Article 24(1)(b)(ii) of the Refugee Convention.*

71 *International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.*

72 *CESCR 'General Comment No. 19: The right to social security (Art. 9 of the Covenant)' E/C.12GC/19 (2008) paras 36-38.*

73 *Ahmed v Minister of Home Affairs [2018] ZACC 39. The discussion on Ahmed and Ruta v Minister of Home Affairs [2018] ZACC 52 draws on Govindjee (note 17 above).*

74 *Ahmed (note 76 above) para 60.*

75 *Ahmed (note 76 above) para 62.*

76 *Saidi v Minister of Home Affairs 2019 (1) SA 1 (CC). But see s 22(5) of the Refugees Act, which authorises the Director-General to withdraw an asylum-seeker visa despite final determination of an application for asylum by the Standing Committee for Refugee Affairs (SCRA), Refugee Appeals Board (RAB) or pending judicial review. See also AI (note 34 above).*

77 *<http://capetimes.newspaperdirect.com/epaper/showarticle.aspx?article=0051d876-a132-472a-bc24-531936f5894b&key=5YELC23YesojQ3hNGdEE1g%3d%3d&issue=64022019062100000000001001>*

78 *Also see the recent decision in Nandutu v Minister of Home Affairs [2019] ZACC 24, in the context of Regulation 9(9)(a) of the Immigration Act not providing foreign spouses and children of citizens and permanent residents with the option of changing their visa status from within the country. The judgment explains the intertwined relationship between human dignity and familial rights and how they function alongside notions of state security and legislative regimes that seek to protect persons within the borders of South Africa. The key finding of the case was to declare an immigration regulation to be unconstitutional because of its unreasonable limitation on the right to dignity (by limiting the rights of persons to marry and cohabit) and children's rights to family care.*

family members of asylum seekers and refugees upon proof of basic documentation such as a marriage certificate or birth certificate, regardless of where this may have taken place. It is apparently also possible for this outcome to be achieved on the presentation of an affidavit in the absence of such basic documentation (although the Department may request a DNA test in cases of serious doubt). This type of family protection would also be relevant in the context of separation, isolation or quarantine of certain asylum-seeking family members due to Covid-19.

> Asylum seekers are also protected while awaiting the outcome of judicial review and are entitled to have their permits renewed during this time

In *Ruta v Minister of Home Affairs*,[79] the Constitutional Court recently addressed, to some extent, the general question as to how the Refugees Act and Immigration Act harmonise with one another. The Court found that enabling the applicant and asylum seekers in his position to have their status determined under the Refugees Act did not result in the conclusion that everyone or anyone has the right to enter the republic anywhere across South African borders – a concern of the Minister of Home Affairs in that particular case. The court found specifically that the Immigration Act could not be read to trump the provisions of the Refugees Act, and held that the two pieces of legislation, which contained a gap in respect of asylum seekers not entering through official ports of entry, should be read in harmony:

> *Though an asylum seeker who is in the country unlawfully is an 'illegal foreigner' under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act […] the Immigration Act affords an immigration officer a discretion whether to arrest and detain an illegal foreigner. That discretion must, in the case of one seeking to claim asylum, be exercised in deference to the express provisions of the Refugees Act that permit an application for refugee status to be determined.*[80]

According to the court, the realities of migration in Africa and elsewhere are more complex than that envisioned by the Immigration Act, which catered only for one narrow category of refugees (namely those arriving at a recognised port of entry).[81] This reality has been complexified further in the context of migration during the Covid-19 era. Significantly, delays in seeking refugee status, presumably also where the reason for such delay is Covid-19-related, cannot function as an absolute disqualification from initiating the asylum application process.[82]

In *Rahim*,[83] the Constitutional Court held that the Minister of Home Affairs must consider international norms when detaining persons in contravention of immigration regulation.[84] Similarly, *Lawyers for Human Rights v Minister for Home Affairs* held sections of the Immigration Act to be unconstitutional given the constitutional protection against detention without trial, freedom and security of the person and the right to challenge detention in court.[85]

Various cases have also protected non-citizens in respect of the process of applying for and renewing their applications for asylum, with potential implications for the processing of such applications during the onset of Covid-19.[86] In *Abdi v Minister of Home Affairs*, the Supreme Court of Appeal held that asylum applicants enjoyed the protection of the Refugees Act and the courts and should be given 'every reasonable opportunity' to apply for asylum despite being in an 'inadmissible facility' in a Port of Entry into the Republic.[87] The practice of requiring asylum seekers to travel to a different part of the country to renew their permits has resulted in orders compelling the opening of Refugee Reception Offices (RRO) in various parts of the country. The Supreme Court of Appeal has linked such orders to the protection of basic rights, including family support available in a specific part of the country and employment prospects.[88] By contrast, other cases have held that resource constraints make it untenable to demand a RRO in any specific part of the country, preferring extended consultations with government officials to resolve the impasse.[89]

The legal entitlement of asylum seekers to Unemployment Insurance Fund (UIF) benefits has always been nuanced as a result of their potentially transient stay or status in the country. For example, asylum seekers may struggle to make contributions for a long enough period (because their temporary stay in the country may cease at relatively short notice in the event that their application for refugee status is denied) to justify permission to contribute to such a fund. In Lucien Ntumba Musanga v Minister of Labour, a settlement agreement was entered into to permit applications for UIF benefits from applicants who could only provide asylum permit numbers. Regulations to the

79 *Note 74 above.*

80 *Ruta (ibid) paras 43, 46 (footnotes omitted in the quotation).*

81 *Ibid para 49.*

82 *Ibid para 56. In this case, the period of delay in submitting the asylum application was 15 months. See also AI (note 34 above).*

83 *Rahim (note 57 above).*

84 *See Ziegler (note 28 above) 75.*

85 *Lawyers for Human Rights v Minister for Home Affairs 2017 (5) SA 480 (CC). The declaration of invalidity was suspended for 24 months. Also see Ziegler (note 28 above) 75.*

86 *The most recent judgment of relevance in this regard is Somali Association (note 30 above).*

87 *Abdi v Minister of Home Affairs 2011 (3) SA 37 (SCA). The court's decision was based on the constitutional protection against subjecting people to physical violence in their home countries: see Ziegler (note 28 above) 76. There have also been cases protecting asylum seekers from a failure to renew permits issued at a different Refugee Reception Office in the country: see Ziegler (note 28 above) 77 and the cases cited at footnote 56.*

88 *Somali Association (note 30 above); Scalabrini Centre v Minister of Home Affairs 2018 (4) SA 125 (SCA).*

89 *Minister of Home Affairs v Scalabrini Centre 2013 (6) SA 421 (SCA). See City of Cape Town v Balus [2020] ZAWCHC 22 for a recent description of the plethora of issues faced by the Department of Home Affairs in respect of the asylum-seeking process.*

UIA, preventing this, were challenged as being unconstitutional and requiring amendment to the UIA, which prevented asylum seekers from receiving UIF benefits.[90] A recent unreported Equality Court case, Saddiq v Department of Labour, has specifically considered the case of an asylum seeker who had been employed for more than two years and made contributions to the UIF, and had been dismissed but not received benefits from the Department of Labour on the basis that the Department had no system to accept or pay asylum seekers claiming unemployment insurance benefits.[91] The Magistrate decided the case based on the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, and found the applicant had been the victim of unfair discrimination and awarded R30,000 as damages in addition to the UIF benefits to which he was entitled. Importantly, the Department of Labour was ordered to correct its computer system to allow any asylum seeker who contributed to the Fund to receive benefits in future. Bearing in mind that the UIA includes provision for maternity, adoption and illness benefits, in addition to traditional unemployment benefits, the ramifications of asylum seekers being able to contribute to and benefit from the UIF during the onset of Covid-19 is apparent, as has also been indicated above.[92]

Judgments have also supported the ability of refugees and asylum seekers to work, with particular reliance placed on the notion of human dignity.[93] In Somali Association, the SCA held that:

> *if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade [...] such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade. This is so given that South Africa has no general social assistance programme for refugees, and none of the existing grants are available to asylum seekers.*[94]

The recently introduced Covid-19 Social Relief of Distress grant (for unemployed persons not in receipt of any other social grant or Unemployment Insurance Fund benefits) initially excluded asylum seekers and special permit holders, entitling only citizens, permanent residents and refugees to this benefit. In Scalabrini, the Scalabrini Centre argued in the North Gauteng High Court that this exclusion was arbitrary, irrational and unreasonable and in violation of the constitutional rights to equality, dignity and access to social security.[95] Drawing on previous judicial pronouncements, it was argued that:

- People on asylum-seeker visas that have expired under lockdown often face dismissal from work, no income, and frozen bank accounts;
- Asylum seekers and special-permit holders are excluded from the majority of governmental financial relief packages;
- Many asylum seekers and special-permit holders are excluded from government food parcels because a 13-digit identification number is required to access this; and
- UIF applications for non-South African citizens are subject to specific delays.
- The court ordered that the asylum seekers and special-permit holders already in the country were eligible for the grant and able to apply for this relief.[96]

6. QUO VADIS? CONCLUSIONS AND RECOMMENDATIONS

The following quotation, while referring directly to the refugee crisis, remains telling and equally applicable in respect of asylum seekers:

> *The Covid-19 pandemic is not a refugee crisis per se but it has created multiple crises for refugees. Refugees are among the most likely populations to suffer both the direct and secondary impacts of the pandemic. In most countries in the world they face pre-existing barriers to protection and assistance, and now are often – though notably not always – excluded from host countries' national Covid-19 responses and relief programs. Lockdowns have affected the organisations they may usually receive assistance from, which in many cases have struggled to provide the same amount and type of support as they previously had, while travel restrictions have limited the access of both aid and personnel to many regions in need. In camps as well as in dense urban areas where many refugees reside, a lack of basic health infrastructure, overcrowding, and poor sanitation all contribute to the risk of transmission and infection.*[97]

The Covid-19 pandemic appears to have had a predictably disproportionate negative impact on categories of migrants and their children.[98] Immigrants are generally at a much higher risk of contracting Covid-19 infection due to a range of vulnerabilities such as higher incidence of poverty, overcrowded housing conditions and high concentration in jobs where physical distancing is not possible. Covid-related mortality rates for immigrants also appear to exceed those of the native-born population.[99] Immigrants are potentially in a more vulnerable position in the labour market due to their generally less stable employment conditions and lower seniority on the job and studies suggest that discrimination increases strongly during times

90 *(Unreported) Case No. 29994/18 NGHC. See Ziegler (note 28 above) 83.*

91 *Saddiq v Department of Labour (Unreported) Case No EQ 04/2017 Equality Court for the sub-district of Emfuleni.*

92 *See the section on 'Legislative framework' above.*

93 *See Limpopo (note 29 above). For a critique of the courts' failure to articulate the normative significance of asylum-seekers as 'presumptive refugees' and their reliance on human dignity instead of international refugee law provisions, see Ziegler (note 28 above) 84, 86. Also see Discovery Health (note 46 above) on the right to fair labour practices for foreign nationals with valid employment contracts in the context of expired work permits.*

94 *Somali Association (note 30 above) para 43.*

95 *Scalabrini (note 25 above).*

96 *See <https://www.scalabrini.org.za/news/press-release-scalabrini-launches-urgent-litigation-on-covid-19-social-relief-of-distress-grant/ >*

97 *E Easton-Calabria 'Exploring the impact of Covid-19 on the Global Compact on Refugees' (October 2020) UNHCR 5 https://data2.unhcr.org/en/documents/download/79498+&cd=3&hl=en&ct=clnk&gl=za.*

98 *OECD 'What is the impact of the Covid-19 pandemic on immigrants and their children? Tackling Coronavirus (Covid-19): Contributing to a global effort' (19 October 2020) https://read.oecd-ilibrary.org/view/?ref=137_137245-8saheqv0k3&title=What-is-the-impact-of-the-COVID-19-pandemic-on-immigrants-and-their-children%3F.*

99 *Ibid. The OECD report suggests that the negative impact on immigrants' labour market outcomes is increased further by the fact that they are strongly overrepresented in those sectors most affected by the pandemic, such as the hospitality industry.*

when the labour market is slack. Perhaps most significantly, from a policy perspective, growing unemployment and the role of international travel in the initial spread of the pandemic typically cause a backlash in public opinion against immigrants.[100] The pandemic has also occasioned unprecedented internal and external mobility constraints. This has affected access to employment (and, consequently, the ability to contribute to social insurance schemes), state support and even self-help opportunities. This set of circumstances, coupled with the general lack of employment opportunities, would, in many cases, necessitate a return of asylum seekers to the home country contrary to the non-refoulement principle.

Although South Africa has been praised for including refugees and asylum seekers as part of its vaccine programme,[101] the emerging evidence suggests that the Covid-19 containment measures adopted by the South African government have deepened the unequal treatment of asylum seekers and refugees in the country.[102] Excluding categories of non-citizens from national response safety nets and failing to include them in economic, poverty and hunger alleviation schemes exacerbate the problem.[103]

Recent developments suggest that the Department of Home Affairs has signed an agreement with the UN High Commissioner for Refugees (UNHCR) to eliminate delays and the existing backlog in decisions for asylum seekers.[104] If properly implemented, this would be a crucial step towards addressing the precarity experienced by asylum seekers post-Covid-19. Asylum seekers are entitled to expect that the state will respect, protect, promote and fulfil the various constitutional and international law rights to which they are entitled, at least while they are in the country. Proper processing of applications for asylum would at least obviate the sense that asylum seekers have increasingly been treated on a par with irregular/'illegal' migrants, also during the pandemic, which is not an approach supported by South African constitutional law and case law.

A more fundamental issue remains. State resources, which have been devoted to various forms of relief for citizens to assist in ameliorating the adverse effects of the pandemic, are particularly scarce at this point in time. This scarcity is likely to manifest in the entrenchment of policies that exclude categories of non-citizens from entitlement to social security. As the survey of recent jurisprudence and policy developments suggests, there is a disconcerting, growing disconnect between state immigration policy and court adjudication of disputes relating to the basic rights of asylum seekers, as reflected in the survey of recent decisions and when considering their Covid-19 implications. The extent of this disparity is extended when considering established international law principles. It is likely that any attempts to unreasonably limit the rights of asylum seekers, through policy and legislation, will ultimately require further court adjudication in the post-Covid-19 era. Clear policy direction post-Covid is necessary, so that there is legal certainty that the array of constitutional rights available to vulnerable non-citizens, as reflected in the jurisprudence of South African courts, will not be forsaken at a time when they are most needed.

The commencement of the RAA and accompanying regulations (on 1 January 2020) appears to be a part-response to some of the judgments mentioned above, affecting the rights of asylum seekers and also threatening the status and rights of recognized refugees in South Africa.[105] As appears from the discussion above, among others the right to work of asylum seekers has been significantly curtailed. For Ziegler, the RAA indefinitely (and arguably in contravention of international refugee law) excludes all asylum seekers from all forms of self-employment and casual work, irrespective of whether they can self-sustain or rely on others, and also excludes asylum seekers who can either self-sustain or otherwise be supported from wage-earning employment.[106]

Importantly also, the current underlying policy framework appears to be particularly problematic from a constitutional perspective. Some of the principles expressed in the 'White Paper' appear to conflict with the jurisprudence that has emerged from the Supreme Court of Appeal and Constitutional Court in relation to enhanced protection of refugees and asylum seekers. The 'White Paper', for example, states that asylum seekers will only be allowed to work and study in exceptional circumstances when they have cases under judicial review. This is a matter that should be addressed, along with possible amendments to social security legislation to provide clarity in respect of the position of asylum seekers, refugees and (particularly given the developments in the recent Scalabrini matter) their family members (including possible access to social assistance for asylum seekers who are children, older persons or disabled in addition to the basic support presently on offer). It should be borne in mind that children of asylum seekers, irrespective of their status (thus also where the application for refugee status has been refused), are entitled to special protection in terms of the South African Constitution, which would require additional supportive (social welfare) measures, not subject to qualifications applicable to the right to access to social security/access generally, that is the adoption of reasonable measures, within the available resources, to achieve the progressive realisation of that right.[107]

100 *Ibid.*

101 *C du Plessis 'Covid-19: SA praised for including refugees, asylum seekers in vaccine programme' (8 March 2021) News24 <https://www.news24.com/news24/southafrica/news/covid-19-sa-praised-for-including-refugees-asylum-seekers-in-vaccine-programme-20210308>.*

102 *See A Akinola 'Covid-19 reinforcing the trend of 'extreme nationalism' from Canberra to Pretoria' (18 March 2021) Daily Maverick <https://www.dailymaverick.co.za/article/2021-03-18-covid-19-reinforcing-the-trend-of-extreme-nationalism-from-canberra-to-pretoria/>.*

103 *F Mukumbang, AN Ambe & BO Adebiyi 'Unspoken inequality: How Covid-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa' (2020) 19 International Journal for Equity in Health 141 <https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-020-01259-4>.*

104 *The backlog apparently stands at 163 000 and R147m will be provided by the UNHCR to the Refugee Appeal Authority of South Africa: M Charles 'Home Affairs signs deal with UN refugee agency to deal with asylum seekers backlog' (22 March 2021) News24 <https://www.news24.com/news24/southafrica/news/home-affairs-signs-deal-with-un-refugee-agency-to-deal-with-asylum-seekers-backlog-20210322>.*

105 *The legislative developments have been criticised for being incompatible with the 1951 Geneva Convention relating to the Status of Refugees for instituting new grounds for cessation of status and for rendering permanent residence and naturalisation less attainable. In particular, the Minister of Home Affairs is authorised to 'cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status. Cessation of status is also authorised if a refugee 'returns to visit' the country of origin, or if there is contact with that country's consular authorities without prior authorisation of the Minister. Perhaps most significantly, the RAA doubles the residence requirement for refugee status certification, which is related to securing the status of permanent residency, to ten years. Ziegler (note 28 above) 88, 89.*

106 *Ziegler (ibid) 100.*

107 *According to s 28(1)(c) of the Constitution, every child has the right to basic nutrition, shelter, basic health care services and social services.*

It should be remembered that the core judgments in support of the right to work in Watchenuka, Union of Refugee Women and Somali Association, read together, lend support for the right to earn a living through wage employment or self-employment (also pending applications for asylum). This opens up further prospects for asylum seekers and refugees to make contributions to existing social insurance funds (as occurred in the Saddiq case). Again, these developments appear to contradict the 'White Paper'.

For asylum seekers who exhaust the limited benefits obtainable in terms of other forms of social insurance (e.g., the UIF) (or who have not had the benefit of even basic forms of employment, and accordingly have not contributed to any forms of social insurance) and who require relief, social assistance, for example in the form of Social Relief of Distress (SRD), ought to be payable. Emergency medical care and treatment should also be available in this instance (as defined above) and payments in respect of road accidents should be made where applicable. There appears to be clear international law authority to the effect that asylum seekers should be entitled to at least core social assistance support. Similarly, should a person's asylum-seeking status be withdrawn, the social security position changes. The person is now considered to be an undocumented / irregular / illegal migrant and restrictions to such a person's social security entitlements would more easily be considered to be proportionate and reasonable. A person whose application for asylum has been rejected should, at the very least, nevertheless be entitled to the return of his / her contributions / joint contributions to a social insurance scheme such as the Unemployment Insurance Fund prior to being deported from the country, and to basic forms of social assistance, while awaiting deportation.

Finally, the Social Assistance Act (and its Regulations) could be amended to specifically provide for such forms of (social) assistance to asylum seekers – bearing in mind the precarity of their position, especially in view of the impact of the provisions of the RAA. In doing so, special attention should be focused on the position of unaccompanied children and mentally disabled refugees / asylum seekers, due to their particularly vulnerable position. With respect to asylum seekers who are mentally disabled, for example, care should be taken to ensure that such persons are not deported in a manner that is detrimental to their health, well-being and rehabilitation and there is a need, in particular, to remove unlawful conditions from the asylum-seeking process.[108]

The recent decision in Scalabrini represents the present high-water mark of case authority relevant to the rights of asylum seekers in the Covid-19 and post-Covid-19 eras. The judgment in that matter follows a set of judgments that has established the enforceability of constitutional rights of asylum seekers, discussed above. The precarity of their position has been noted and any suggestions of a total ban on wage- and self-employment may be rejected on the strength of their authority. Scalabrini boosts the case for (new) forms of non-contributory social assistance to be made available to asylum seekers, despite the restrictive perspectives offered by the RAA and social assistance legislation. Given the challenges in obtaining employment and the state of the economy, which would restrict the ability of asylum seekers to contribute to social insurance schemes, this is particularly apposite, especially in view of the impact of the Covid-19 pandemic. As such, it may be argued that it is the precarity of the position asylum seekers find themselves in at the time of the global pandemic that might well prompt a shift in policy direction to accord with constitutional law, international law and South African case law. Covid-19 may then serve at least one useful purpose amidst the devastation it has caused: to stand as a catalyst for sustainable social security reform for asylum seekers in South Africa. ■

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Professor Marius Olivier, honorary professor, private law, Faculty of Law, Nelson Mandela University, Port Elizabeth, South Africa
Judge Avinash Govindjee, Judge of the High Court of South Africa (Eastern Cape Division)

108 *Federation International des Droits de l'Homme (FIDH) Surplus People? Undocumented and Other Vulnerable Migrants in South Africa (2008) <https://www.fidh.org/en/region/Africa/south-africa/Surplus-People-Undocumented-and>* .

PRESIDENT RAMAPHOSA APPOINTS JUDGE ROGERS AS CONSTITUTIONAL COURT JUDGE

By The Presidency

President Cyril Ramaphosa has, in terms of section 174(4) of the Constitution of the Republic of South Africa, appointed Judge Owen Lloyd Rogers as a Judge of the Constitutional Court of South Africa.

Judge Rogers is a highly experienced Judge who has been serving as a Judge of the Western Cape Division of the High Court. He has been on the bench for the past 9 years following many years in legal private practice.

The appointment of Judge Rogers as Constitutional Court Judge follows the President's consultation with the Chief Justice and leaders of political parties represented in the National Assembly, the interviews conducted by the Judicial Services Commission and their recommendation of four names for the President to consider.

President Ramaphosa wishes Judge Rogers well in his new role, which takes effect from 01 August 2022. ■

> Judge Rogers is a highly experienced Judge who has been serving as a Judge of the Western Cape Division of the High Court ”

DURBAN COURTS RESPOND TO PROVINCIAL FLOODS

From 08 to 12 April 2022, heavy rainfall across KwaZulu Natal resulted in devastating floods that ravaged much of Durban's South Coast and surrounding areas. The floods resulted in the loss of over four hundred lives, more than two hundred people were missing, and thousands displaced. There has been an outpour of support for those who have been displaced and affected.

In response, the courts in the Province, led by the Honorable Acting Judge President, Judge Mjabuliseni Madondo, initiated a special project to facilitate the courts' response the catastrophic flooding. The project is aimed at facilitating, streamlining and expediting the holding of inquests, inquiries and the outcomes thereof. This is important for bringing forth all relevant information on circumstances that led to the floods and for providing the families of the deceased with closure. Furthermore, the inquests would assist in ensuring that similar occurrences and loss of life are prevented in the future.

The first meeting of all stakeholders, which included the members of the Provincial Efficiency Enhancement Committee (PEEC), was held on 10 May 2022 and an Action Plan was compiled and adopted by all stakeholders in that meeting.

The following methods, as suggested by Acting Judge President Madondo, were implemented to circumvent delays in holding of inquests emanating from the floods:

1. A team of Police Officers that investigate the deaths that occurred through the floods, was created. They are responsible for the compilation and submission of dockets to the Prosecution division;
2. The KwaZulu Natal Director of Public Prosecutions (DPP) was requested to organise a team of Prosecutors who will immediately attend to the dockets that will be brought by the team of Police Officers and decide accordingly;
3. The Court Managers will ensure that the inquest clerks enter the inquest documents that will be brought to them by the team of Police Officers in appropriate registers and submit them to the Judiciary;
4. The Chief Magistrates will assign specific Magistrates to deal with inquests of this nature and will prioritise them; and
5. Regular reporting on the progress of the process must be conducted at regular intervals; timeframes to be set within which the process will be completed; and that there will be regular and constant monitoring of the process and evaluation thereof, with a view to establishing bottlenecks, obstacles and problems needing urgent attention.

These processes at their core are aimed at alleviating frustration, further pain and delays that may come with the overwhelming responsibilities faced by families during this time.

By streamlining these processes, the team is able to assist grief-stricken relatives to expedite access to documentation for the purposes of lodging claims for compensation with insurance companies.

The project is still ongoing, as both recovery and clean-up efforts continue in the Province. The project is expected to be completed by end August 2022. ■

SPECIAL TRIBUNAL PAYS TRIBUTE TO JUDGE MAKHANYA

By Selby Makgotho

Retired Special Tribunal Judge, Mlindelwa Gidfonia "Thami" Makhanya has received praises for having rebuilt the Special Tribunal Court, which has not been functional for almost 19 years.

Birthed in terms of the Special Investigating Unit (SIU) and the Special Tribunals Act 74 of 1996, the Special Tribunal was re-established in 2019 with Judge Makhanya as its President for the period between 2019 and 2022. The Special Tribunal has a statutory mandate to recover public funds syphoned from the fiscus through corruption, fraud and illicit money flows.

The proceedings in the Special Tribunals differ from ordinary civil proceedings, which are adversarial in nature. The Special Tribunal adopts a more flexible and expeditious approach to legal actions with its proceedings being inquisitorial in nature and characterised by extensive pre-trial investigations.

The SIU brings applications to the Special Tribunal for the civil recovery actions, which includes forfeiture orders, preservation orders, interdicts, and reviewing and setting aside of contracts that have been concluded (and awarded) in contravention of the Constitution, as well as applicable legislative and statutory prescripts. Judge Makhanya, who until 2019 was the Judge of the High Court in Johannesburg, was identified by President Cyril Ramaphosa for this mammoth task. He identified seven additional High Court Judges to assist him at the Special Tribunal. The Judges are:

- Judge Lebogang Modiba
- Judge Thina Siwendu
- Judge Johannes Eksteen
- Judge Billy Mothle
- Judge Siraj Desai
- Judge David van Zyl
- Judge Kantharuby Pillay

Judges Mothle, Desai and van Zyl have since moved on to other responsibilities within the Judiciary as follows: Mothle (A Judge of the Supreme Court of Appeal), Desai (Legal Ombuds with the Legal Practice Council), and van Zyl (Deputy Judge President of the Eastern Cape Provincial Division).

Judge Makhanya has been credited with getting the Special Tribunal off the ground and drafted the rules and regulations for the conduct of proceedings. He oversaw the recovery of monies estimated at R8.6 billion during the period between 2019 and 2020. These were the results of the malfeasance and corruption where public funds were misappropriated.

Judge Makhanya provided the leadership at the time when the country and the world experienced one of the most life-threatening pandemics (Covid-19). When the Special Tribunal was established in 2019, there was no Covid-19 pandemic. However, it was a game changer for the Special Tribunal. Large contracts were entered into during the period (of lockdown) and subsequently found to have been entered into in violation of the constitutional and legislative prescripts. The turn-around time for the adjudication and disposing of the matters before the Special Tribunal has been largely impressive.

Despite the Covid-19 pandemic, Judge Makhanya ensured that that work of the Judges went ahead unhindered and gave support to both his judicial and administrative personnel during the pandemic. Both President Ramaphosa and Justice and Correctional Services Minister, Ronald Lamola, praised and thanked Judge Makhanya, who has retired.

Judge Modiba, the Judge of the Electoral Court, has been announced as the new President of the Special Tribunal. ■

THE SPECIAL TRIBUNAL HAS A NEW PRESIDENT

Judge Lebogang Modiba has been named as the new President of the Special Tribunal with two High Court of the Free State Division Judges Soma Naidoo and Johannes Daffue, as new additional members. The appointments are effective from 1 May 2022.

Judge Modiba, a Judge of the High Court, Gauteng Division, and Johannesburg and recently appointed to the Electoral Court, has been a member of the Special Tribunal since 2019. Judge Modiba takes over the reins from Judge Mlindelwa Gidfonia Makhanya, who has since retired.

"I hereby, under Section 7(1), (2) and (3)(4) and (5) of the Special Investigating Units and the Special Tribunals Act 74 of 1996, (Act 74 of 1996), after consultation with the Chief Justice of the Republic of South Africa and with effect from 1 May 2022: appoint Madam Judge Lebogang Modiba as President of the Special Tribunal (and) as additional members of the Special Tribunal, Mr Judge Johannes Daffue and Madam Judge Soma Naidoo, (of the) Free State Division of the High Court," reads the Proclamation signed by President Cyril Ramaphosa.

Judges Daffue and Naidoo replace Judge Billy Mothle who has since been appointed to the Supreme Court of Appeal (SCA); retired Western Cape High Court Judge Siraj Desai who is now the Legal Ombuds; and Judge David van Zyl who is focusing on as his role as the Deputy Judge President of the Eastern Cape Provincial Division.

The Special Tribunal Member-Judges who have been retained are Judges Thina Siwendu; Kantharuby Pillay; Johannes Willem Eksteen. ■

> JUDGE LEBOGANG MODIBA

JUDGES OF THE SPECIAL TRIBUNAL

Judge Lebogang Modiba
(President)

Judge Kantharuby 'Kate' Pillay
(Durban)

Judge Namhla Thina Siwendu
(Johannesburg)

Judge Johannes Eksteen
(Port Elizabeth)

Judge Somaganthie 'Soma' Naidoo
(Free State)

Judge Johannes Daffue
(Free State)

JUDICIAL RETIREMENTS & APPOINTMENTS

JUDICIAL RETIREMENTS

Justice D V Dlodlo

Supreme Court of Appeal

Discharged: 04.04.2022

Source: Judges Matter

Justice M S Navsa

Supreme Court of Appeal

Discharged: 01.06.2022

Source: Stellenbosch University

JUDICIAL APPOINTMENTS

Adv I Van Rhyn

Judge of the Free State Division of the High Court

Appointed: 01.06.2022

Adv R G Mossop SC

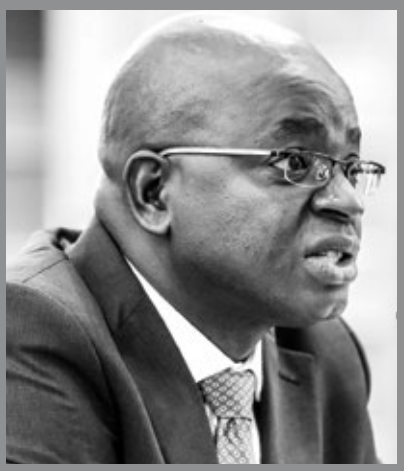
Judge of the KwaZulu-Natal Division of the High Court

Appointed: 01.06.2022

Adv M Naude-Odendaal

Judge of the Limpopo Division of the High Court

Appointed: 01.06.2022



Adv T C Tshidada

Judge of the Limpopo Local Division of the High Court (Thohoyandou)

Appointed: 01.06.2022

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