

# REGIONAL DEVELOPMENTS

## RECOGNISING THE TESTIMONIAL COMPETENCE OF PERSONS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN SOUTHERN AFRICA: LESSONS FROM LESOTHO

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### 1 Introduction

On 3 May 2008, the disability rights movement celebrated the coming into force of the Convention on the Rights of Persons with Disabilities (CRPD), which brought hope for the realisation of the rights and fundamental freedoms of all persons with disabilities.<sup>1</sup> In Africa, as in other parts of the world, the CRPD has been received with great enthusiasm with 49 of the 55 African states ratifying the CRPD since its adoption in 2006.<sup>2</sup> In the Southern African Development Community (SADC), all the 16 member states have ratified the CRPD, indicating a willingness to abide by its norms and standards.<sup>3</sup> However, 14 years after

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1 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/adopted by the General Assembly, 24 January 2007, UN Doc A/RES/61/106 (2007).

2 United Nations Treaty Body Database 'Ratification status for CRPD – Convention on the Rights of Persons with Disabilities' [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD&Lang=en) (accessed 28 November 2022).

3 The 16 member states of the Southern African Development Community (SADC) ratified the CRPD on the following dates: Angola ratified the CRPD on 19 May 2014; Botswana ratified on 12 July 2021; Comoros on 16 June 2016; and the Democratic Republic of Congo on 30 September 2015. The Kingdom of Eswatini ratified the CRPD on 24 September 2012; the Kingdom of Lesotho ratified on 2 December 2008; Madagascar on 12 June 2015; Malawi on 27 August 2009; Mozambique on 30 January 2012; and Mauritius on 8 June 2010. Mozambique ratified the CRPD on 30 January 2012; Namibia on 4 December 2007; Seychelles on 2 October 2009; South Africa on 30 November 2007; United Republic of Tanzania on 10 November 2009; Zambia on 1 February 2010; and Zimbabwe on 23 September 2013. See also United Nations Treaty Body Database (n 2).

the CRPD came into force, many African countries are still grappling with implementing and applying its progressive provisions in various spheres.

One such area is the testimonial competence of persons with intellectual and psychosocial disabilities. In a number of southern African countries, persons with intellectual and psychosocial disabilities are considered incompetent to testify as witnesses in criminal courts due to the nature of their disability, a position that is clearly at odds with the right to access justice enshrined in the CRPD.<sup>4</sup> To date, Lesotho is the only southern African country that has taken the bold step towards implementing the CRPD by altering the legal position on testimonial competence. The recent landmark judgment of the Constitutional Division of the High Court of Lesotho in *Koali Moshoeshoe v DPP (Moshoeshoe)*,<sup>5</sup> as well as the Persons with Disability Equity Act<sup>6</sup> have both transformed the position on testimonial competence for persons with intellectual and psychosocial disabilities in Lesotho. This commentary highlights the lessons that other southern African countries, who are yet to align their laws on testimonial competence with the CRPD, can draw from Lesotho. These countries include Angola, Botswana, Eswatini, Malawi, Mozambique, Namibia and Zimbabwe.<sup>7</sup> Specifically, the lessons relate to the centrality of the right to legal capacity and the related right to support for upholding the right to access justice.

The commentary is divided into four sections. The first section introduces the pertinent issues. In section two, the significance of *Moshoeshoe* for the other southern African countries is explained. Section three sets out the two lessons that can be gleaned from developments in Lesotho and section four concludes the commentary by summarising the main arguments.

## 2 The significance of *Moshoeshoe* for other countries in southern Africa

At issue in *Moshoeshoe* was the constitutionality of section 219 of the Criminal Procedure and Evidence Act, which addresses the testimonial competence of persons with intellectual and psychosocial disabilities.<sup>8</sup> Section 219 provides that:

No person appearing or proved to be afflicted with idiocy, lunacy or inability or labouring under any imbecility of mind arising from intoxication or

4 Article 23 of the CRPD. See section two below for a detailed discussion of the position on testimonial competence in various southern African countries.

5 *Koali Moshoeshoe v DPP (Moshoeshoe)*, Constitutional Case 14/2017.

6 Persons with Disability Equity Act 2 of 2021.

7 This commentary will only focus on these seven countries because of their common legal position on testimonial competence.

8 *Moshoeshoe* at 4.

otherwise whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.<sup>9</sup>

The applicant in *Moshoeshoe* was an adult Basotho man with intellectual disability who had been raped by a fellow villager.<sup>10</sup> He reported the crime to the police, and the matter was subsequently referred to the magistrate's court for prosecution.<sup>11</sup> However, the prosecutor relied on section 219 of the Criminal Procedure and Evidence Act and declined to prosecute on the basis that Moshoeshoe was not competent to testify due to his intellectual disability.<sup>12</sup> In effect, therefore, section 219 declared persons with intellectual and psychosocial disabilities as lacking competence to testify in criminal courts in Lesotho. This approach to the testimonial competence of persons with intellectual and psychosocial disabilities is not unique to Lesotho. Other countries in southern Africa adopt a similar approach.

In Botswana, section 216 of the Criminal Procedure and Evidence Act also provides that persons with intellectual and psychosocial disabilities are not competent to testify in court.<sup>13</sup> Curiously, this provision uses language that is identical to section 219 in Lesotho. To demonstrate this point, it is worth quoting section 216 in its entirety, which reads as follows:

No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or laboring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.<sup>14</sup>

Similarly, the Criminal Procedure and Evidence Act in the Kingdom of Eswatini has a provision that may be used to deny persons with intellectual and psychosocial disabilities testimonial competence.<sup>15</sup> Section 214 of the Eswatini Act is couched in the same terms as section 219 in Lesotho. Eswatini's section 214 states as follows:

No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while under the influence of any such malady or disability.<sup>16</sup>

Namibia's Criminal Procedure Act also contains a similar provision stating that:

9 Section 219 of the Criminal Procedure and Evidence Act 9 of 1981 (Lesotho).

10 *Moshoeshoe* at 4.

11 As above.

12 *Moshoeshoe* at 5.

13 Section 216 of the Criminal Procedure and Evidence Act (Botswana).

14 As above.

15 Section 214 of the Criminal Procedure and Evidence Act (Eswatini).

16 As above.

No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.<sup>17</sup>

The Statute governing criminal procedure and evidence in Zimbabwe also contains a provision that may be used to declare persons with intellectual and psychosocial disabilities as incompetent to testify.<sup>18</sup> Section 246 of the Criminal Procedure and Evidence Act uses language similar to the provision in Lesotho, stating that:

No person appearing or proved to be afflicted with idiocy or mental disorder or defect or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of any reason, shall be competent to give evidence while under the influence of any such malady or disability.<sup>19</sup>

In Angola, the Penal Procedure Code also declares persons with intellectual and psychosocial disabilities as incompetent to testify, though it uses different language. The Penal Procedure Code provides that persons with a 'psychic anomaly' may be banned from acting as witnesses in criminal courts.<sup>20</sup> Persons with intellectual and psychosocial disabilities may fall within the category 'psychic anomaly'.

Similarly, in Malawi, the Criminal Procedure and Evidence Code states that those who are

prevented from understanding the questions put to them, or from giving rational answers to those questions, by immature or extreme old age, disease, whether of mind or body, or any cause of the same kind

are not competent to testify.<sup>21</sup>

Persons with intellectual and psychosocial disabilities may be denied the competence to testify under the category, 'disease of the mind'.

The position in Mozambique is the same. The relevant provision in the Penal Procedure Code reads as follows: '[w]ho is not competent to give evidence as a witness? Those who have been interdicted due to mental illness'.<sup>22</sup> This provision may also be used to deny the testimonial competence of persons with intellectual and psychosocial disabilities.

17 Section 194 of the Criminal Procedure Act (Namibia).

18 Section 246 of the Criminal Procedure and Evidence Act (Zimbabwe).

19 As above.

20 Article 131(1) of the Penal Procedure Code 48 of 2007 (Angola).

21 Section 210 of the Criminal Procedure and Evidence Code, Chapter 4:07 (Malawi).

22 Article 216(1) of the Penal Procedure Code 2015 (Mozambique).

As demonstrated above, several countries in southern Africa adopt a similar approach to the testimonial competence of persons with intellectual and psychosocial disabilities. Denial of testimonial competence is a violation of the right of persons with disabilities to access justice on an equal basis with others, which is enshrined in article 13 of the CRPD.<sup>23</sup> In very simple terms, access to justice refers to accessing the 'systems, procedures, information, and locations used in the administration of justice'.<sup>24</sup> A finding of incompetence means that a person cannot testify in court, and therefore, has no access to the justice system and no means to vindicate their rights and fundamental freedoms.

Lesotho has successfully changed this position through the decision in *Moshoeshoe* and the enactment of the Persons with Disability Equity Act. After prosecution was declined, Moshoeshoe, together with two disabled persons' organisations, the Lesotho Society of Mentally Handicapped Persons, Parents, and Families (LSMHPPF) and the Lesotho National Federation of Organizations of the Disabled (LNFOD), challenged the constitutionality of section 219 of the Criminal Procedure and Evidence Act.<sup>25</sup> The Court agreed with the applicants and ruled that section 219 was unconstitutional because it was inconsistent with the rights to equality before the law and freedom from discrimination enshrined in the Constitution of Lesotho.<sup>26</sup> Consequently, the Court declared section 219 null and void.<sup>27</sup>

Subsequently in 2021, Lesotho solidified its position on the testimonial competence of persons with intellectual and psychosocial disabilities in the Persons with Disability Equity Act.<sup>28</sup> It states that persons with disabilities 'shall be competent and compellable to give evidence in a criminal and civil case in any court in Lesotho, or before a magistrate on a preparatory examination'.<sup>29</sup> As the first country to challenge and alter the common position on testimonial competence, Lesotho is in a unique position to offer lessons to the other countries in southern Africa that are yet to do so.

### 3 Lessons from Lesotho

Two main lessons emerge both from the positive aspects as well as the omissions in *Moshoeshoe* and the newly enacted Persons with Disability

23 D Msipa 'Moshoeshoe v DPP: A missed opportunity for persons with intellectual and psychosocial disabilities in Lesotho?' (2021) 13 *Drexel Law Review* 931.

24 S Ortoleva 'Inaccessible justice: Human rights, persons with disabilities and the legal system' (2011) 17 *ILSA Journal of International and Comparative Law* 284.

25 *Moshoeshoe* at 1.

26 *Moshoeshoe* at 18-19. The right to equality before the law is enshrined in sec 19 of the Constitution of Lesotho. The right to freedom from discrimination is enshrined in sec 18 of the Constitution of Lesotho.

27 *Moshoeshoe* at 8 and 18

28 Persons with Disability Equity Act (Lesotho).

29 Section 32(3) of the Persons with Disability Equity Act (Lesotho).

Equity Act. The first lesson is that upholding testimonial competence requires the recognition of the right to legal capacity. The second is that the recognition of the testimonial competence of persons with intellectual and psychosocial disabilities is not enough on its own, the provision of support is also necessary for effective witness participation. Each of these lessons is addressed in turn.

### 3.1 Upholding testimonial competence requires the recognition of the right to legal capacity

The first important lesson arises from the Court's omission in neglecting to address the right to legal capacity.<sup>30</sup> On its face, *Moshoeshoe* is only about testimonial competence, a concept in the law of criminal evidence and procedure referring to an individual's ability or capacity to testify in court.<sup>31</sup> At its core, however, testimonial competence is about the right to legal capacity.<sup>32</sup> Legal capacity is defined as both the capacity to hold rights and the capacity to act in order to exercise those rights.<sup>33</sup> Both components, capacity to hold rights and capacity to act, must be present, for having rights is of little use without the possibility of acting in order to exercise those rights. Indeed,

[o]ne must have rights and be able to act, for having rights when one cannot act may undermine those rights and one cannot act without a recognised identity that enables one to hold rights in the first place. The unification of both elements of identity and agency in article 12 is to be applauded.<sup>34</sup>

The denial of testimonial competence involves prohibiting individuals with intellectual and psychosocial disabilities who hold rights from acting as witnesses in order to exercise those rights.<sup>35</sup> Therefore, the denial of testimonial competence is tantamount to the denial of legal capacity.

To some extent, the Court in *Moshoeshoe* recognised this when it ruled that section 219 is inconsistent with the right to equality before the law, which is the equivalent of the right to equal recognition before the law found in the CRPD, of which legal capacity is a part.<sup>36</sup> Although the Court identified the nexus between testimonial competence and the right to equality before the law, it did not address the right to legal capacity.

30 Msipa (n 23) 931.

31 DT Zeffert & LH Hoffman *The South African law of evidence* (1988) 369.

32 Article 12(2) of the CRPD.

33 Committee on the Rights of Persons with Disabilities, General Comment 1 – Article 12: Equal recognition before the law, 19 May 2014, UN Doc CRPD/C/GC/1 (2014) para 13.

34 D Msipa 'Survivors of sexual assault with intellectual disabilities: Accommodating difference in the courtroom' LLM thesis, McGill University, 2014 at 50 (on file with the author).

35 Msipa (n 34) 46.

36 *Moshoeshoe* at 10.

Legal capacity is important for the recognition of testimonial competence because it is universal.<sup>37</sup> All persons with disabilities, regardless of the nature and severity of the disability, have the right to legal capacity.<sup>38</sup> Denial of testimonial competence usually occurs after the court assesses the individual, taking into account the nature and severity of the disability. The statutes governing the rules of criminal evidence and procedure bestow upon the court the power to assess the individual and make a determination as to whether they lack testimonial competence. For example, in Lesotho, the relevant provision reads as follows:

It shall be competent for the court in which any criminal case is pending or, in the case of a preparatory examination, for the magistrate, to decide upon all questions concerning the competency or compellability of any witness to give evidence.<sup>39</sup>

Similar provisions giving the court power to assess whether or not the witness is competent are also contained in legislation in Eswatini<sup>40</sup> and Zimbabwe.<sup>41</sup> The recognition of universal legal capacity makes these assessments unnecessary, allowing for the recognition of the testimonial competence of all persons with intellectual and psychosocial disabilities, regardless of severity. Therefore, recognising the nexus between testimonial competence and legal capacity is crucial for upholding the testimonial competence of all persons with intellectual and psychosocial disabilities. Because the Court in *Moshoeshoe* did not address the right to legal capacity, it also neglected to interrogate the related concept of support in relation to giving effective testimony.

### **3.2 The provision of support is necessary for effective participation as a witness**

The second lesson is that it is not enough to simply declare that persons with intellectual and psychosocial disabilities are competent to testify. The provision of support is necessary to facilitate their effective participation as witnesses. Although testimonial competence is a key concept in *Moshoeshoe*, the Court only mentioned it once in its judgment and did not explore the reasons why the competence of persons with intellectual and psychosocial disabilities is contested.<sup>42</sup> Had the Court done so, it would have become apparent that the mere removal of the prohibition to testify is insufficient for upholding the right to access justice. Persons with intellectual and psychosocial disabilities have communication and other needs that may limit their ability to participate effectively as witnesses in

37 Article 12(2) of the CRPD.

38 As above.

39 Section 218 of the Criminal Procedure and Evidence Act (Lesotho).

40 Section 214 of the Criminal Procedure and Evidence Act (Eswatini).

41 Section 245 of the Criminal Procedure and Evidence Act (Zimbabwe).

42 *Moshoeshoe* at 5.

court. Therefore, merely removing the legal impediment presented by the denial of testimonial competence, without the provision of the necessary support, will not empower them to be effective witnesses. In fact, it may have the unintended effect of reinforcing the negative stereotype that they cannot be reliable witnesses in court. Therefore, although the ruling in *Moshoeshoe* has the positive effect of removing the legal impediment to persons with intellectual and psychosocial disabilities testifying in the criminal courts in Lesotho, this, in itself, is not enough.

The second component of the right to equal recognition before the law is the right to receive support in order to exercise one's legal capacity.<sup>43</sup> By including the right to receive support as an essential component of the right to equal recognition before the law, the CRPD dramatically transformed the way support is perceived. Prior to the CRPD coming into force, requiring extensive support in order to exercise one's rights was regarded as a legitimate ground for the denial of legal capacity and the appointment of a guardian to act on behalf of the person with a disability.<sup>44</sup> The CRPD changed this position and legitimised the role of support by recognising the right to receive support and requiring states parties to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity'.<sup>45</sup> Moreover, the CRPD emphasises 'the need to promote and protect the human rights of all persons with disabilities, including those who require more intensive support'.<sup>46</sup> This is why article 12 is widely regarded as 'emblematic of the paradigm shift' in the CRPD.<sup>47</sup>

The right to receive support is in line with the right to access justice, which requires states parties to provide procedural and age-appropriate accommodation to enable persons with disabilities to access justice on an equal basis with others.<sup>48</sup> The term 'accommodation' refers to any

necessary and appropriate modification and adjustments ... where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.<sup>49</sup>

Therefore, any modification, which is made for the purpose of supporting persons with disabilities to participate effectively in court is an

43 Article 12(3) of the CRPD.

44 A Dhanda 'Legal capacity in the Disability Rights Convention: Stranglehold of the past or lodestar for the future' (2007) 34 *Syracuse Journal of International Law and Commerce* 429 at 445.

45 Article 12(3) of the CRPD.

46 Preamble, para j of the CRPD.

47 G Quinn 'Personhood and legal capacity: Perspectives on the paradigm shift of article 12 CRPD: Address at Harvard Law School Project on Disability Conference 3' (2010) (transcript available at Harvard Law School Library).

48 Article 13(1) of the CRPD.

49 Article 2 of the CRPD.



accommodation. Examples of accommodations include simplifying language, giving testimony via closed circuit television or through an intermediary, and conducting proceedings in closed court in order to facilitate effective communication.<sup>50</sup>

Four years after the *Moshoeshoe* judgment, the Persons with Disability Equity Act, which was enacted to domesticate the CRPD, addressed support in the context of the right to access justice.<sup>51</sup> The Act provides for persons with disabilities to receive the support they need in relation to the right to access justice. For example, it mandates the Chief Justice to

make rules for the provision of accessible format methods and any other legal services and procedures which take into account the needs of a person with disability who attends court proceedings.<sup>52</sup>

It further provides that persons with disabilities 'shall be assisted in every possible manner to effectively, directly and indirectly participate in all legal proceedings and other preliminary stages of administration of the judicial justice process'.<sup>53</sup>

Therefore, in addition to removing all legal impediments to testifying in court, southern African countries must also ensure that persons with intellectual and psychosocial disabilities receive the support they need to testify effectively in court.

## 4 Conclusion

Several countries in southern Africa including Angola, Botswana, Eswatini, Malawi, Mozambique, Namibia and Zimbabwe have a common legal approach to the testimonial competence of persons with intellectual and psychosocial disabilities. Each of these countries have provisions in the statutes governing criminal procedure and evidence stating that persons with intellectual and psychosocial disabilities lack testimonial competence, and as such, they cannot testify in criminal courts.

Until 2017, Lesotho had a similar provision in its Criminal Procedure and Evidence Act. Section 219 declared persons with intellectual and psychosocial disabilities incompetent to testify. This provision was declared unconstitutional and void in the *Moshoeshoe* decision. The legislature went on to expressly mention that all persons with disabilities are competent to testify in section 32(3) of the Persons with Disability Equity Act.

50 Msipa (n 23) 940.

51 Section 32 of the Persons with Disability Equity Act (Lesotho).

52 Section 32(1) of the Persons with Disability Equity Act (Lesotho).

53 Section 32(4) of the Persons with Disability Equity Act (Lesotho).

This makes Lesotho the only country in southern Africa to successfully contest and change the legal position on the testimonial competence of persons with intellectual and psychosocial disabilities. As such, the other countries have lessons to learn both from what Lesotho got right and from what it missed. Two lessons in particular can be gleaned from Lesotho's experience. The first lesson is that upholding testimonial competence requires the recognition of the right to legal capacity. Second, the recognition of the testimonial competence of persons with intellectual and psychosocial disabilities is merely a first step, they also need to be given the support necessary for their effective participation. Lesotho's experience therefore, provides useful guidance on how to recognise the testimonial competence of persons with intellectual and psychosocial disabilities in order to uphold the right to access justice enshrined in the CRPD.