African Law Review

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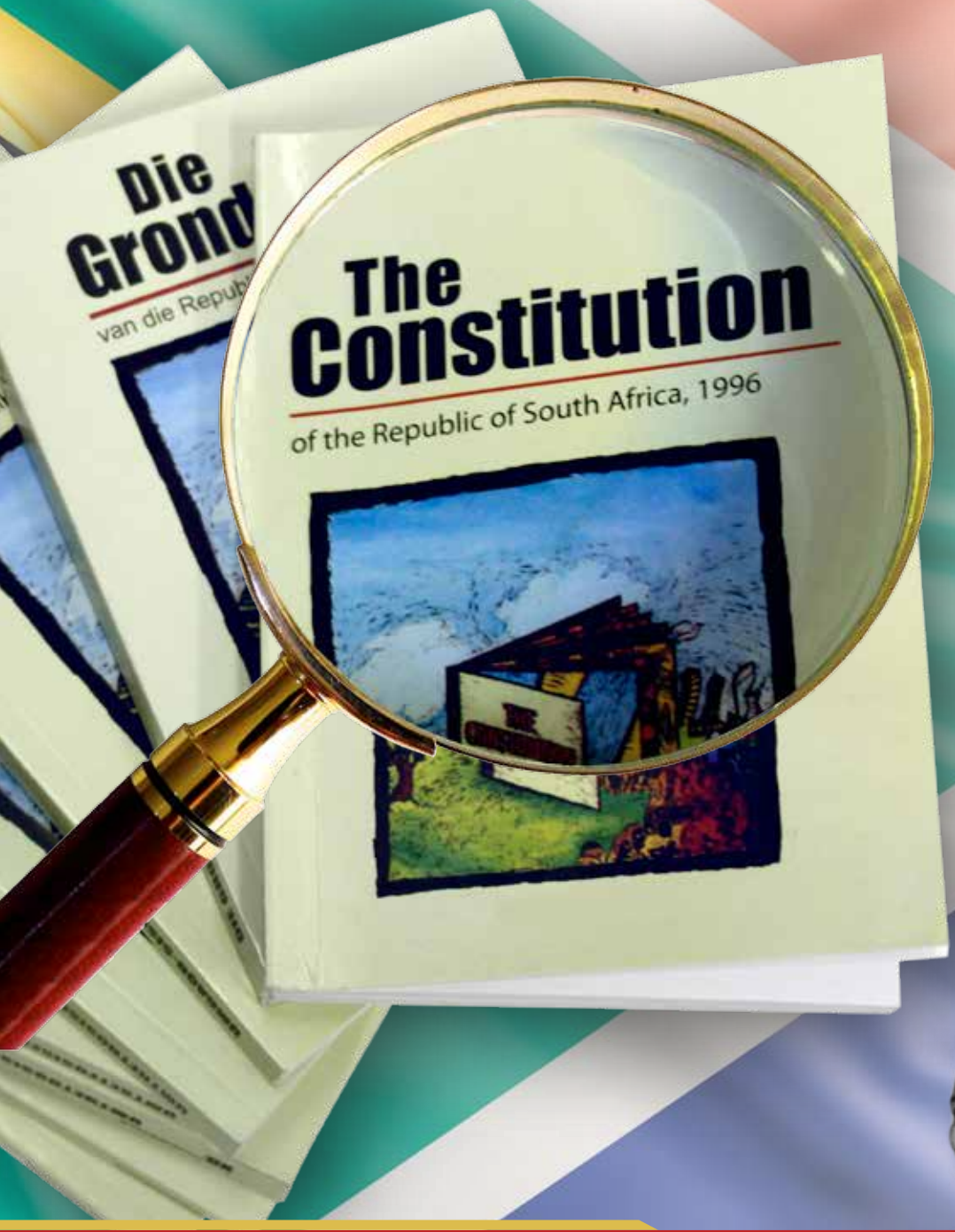
A Closer Look



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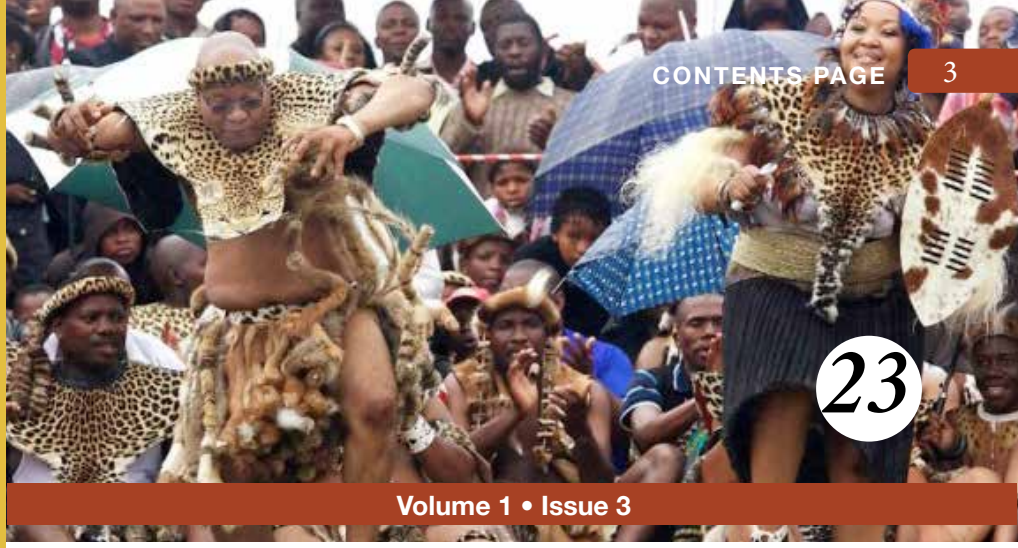

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2018, what a year!

So many events shook the year into transformation and action.

Most of those events revolved around aspects of the South African Constitution - the highest law in the land.

In Issue 3 of the African Law Review, sections of the country's Constitution come under focus. The Constitution serves as the foundation for a democratic country, free of oppression and discrimination. In accordance with the Bill of Rights, as enshrined in the Constitution, every South African citizen has the inalienable right to life, equality, human dignity and privacy. Signed into law by former President Nelson Mandela in Sharpeville on 10 December 1996, the Constitution become operational on 4 February 1997. It was a triumphant occasion but a long walk to an inclusive Constitution. It had been amended 17 times thereafter.

Each new change aimed to deepen democracy and strengthen the independence of the judiciary.

Prior to this significant day, South Africa had several other constitutions; the 1910 Constitution granted the country independence from Britain, the 1961 Constitution declared the country a republic and the 1983 Constitution established a tri-cameral parliament. As important as they were, the Constitutions ignored the everyday rights of black South Africans, barring them from voting and political participation.

In an article by retired Judge Albie Sachs, *Decolonizing South Africa* he explains that the key struggle within the constitution-making process was to ensure that it would be made by a Constitutional Assembly chosen by the whole nation on a one person one vote basis instead of self-appointed negotiators under apartheid conditions.

As the year comes to a close, we're all fatigued more especially as the cost of living seems to be shooting up in one direction. Besides that, the year 2018 came with a list of achievements among them is the Black Lawyers Association – Legal Education Centre (BLA-LEC) training close to 2000 legal professionals this year

> "The Constitution serves as the foundation for a democratic country, free of oppression and discrimination.

We cannot ignore momentous changes like the appointment of a new head of the National Prosecuting Authority, Advocate Shamila Batohi who's tasked with restoring public confidence in the criminal justice system.

This is also the year, President Cyril Ramaphosa announced a decision to amend the Constitution to expropriate land without compensation following a series of nationwide hearings. The land issue will continue to be a hot topic, so hot that US President Donald Trump startled South Africans on August 23 – with a tweet that he had instructed his secretary of state to investigate the country. Without any proof to prove the claim, Trump deliberately became a victim of fake news claiming the South African government had started seizing land from white farmers. The land debate is broadened in an opinion piece by Attorney Sphesihle Nxumalo, who questions the Constitutionality of the land reform agenda. The South African Constitution has been hailed as one of the most progressive in the world. If section 25 is to be amended it would become a defining moment in the history of our constitutional democracy, marking the first amendment of the bill of rights.


Mpho Sithole, Editor

Customary marriages got the country talking, especially following the death of rapper Robert Tsambo known as HHP. Within this issue the national house of traditional leaders gives guidelines on the application of customary law under the guide of the constitution.

As the festive season is upon us, irrespective of your levels of intoxication, yes drunken driver you too have rights as explained in the article *No provision for drunken driving jail time* by Howard Dembovsky. On that tipsy note, as we all head out in different destinations to say *Happppppyyyyyy,*

The celebrated South African constitution provides a lovely closing remark;

May God protect our people.
Nkosi Sikelel'iAfrika.
Morena boluka setjhaba sa heso.
God seën Suid-Afrika.
Mudzimu fhatushedza Afurika.
Hosi katekisa Africa

Mpho Sithole

The preamble to the Constitution

By Adv. Mc Caps Motimele SC: BLA-LEC Chairperson

The Preamble to our Constitution is concise, commemorative and edifying. It contextualises our constitutional project with enlightening exactitude. In simple terms, it frames the constitution with a commentary of hope, vision, transformation.

Correctly observed, it's part of a poem, part of a song and more subtly, a national prayer. It opens with a significant phrase *"we the people of South Africa"* , to signify our collective resolve to build a united South Africa premised on democratic values and ideals.

It is regrettable that society at large knows very little about the Preamble to the constitution and its profound opening. Despite its potential to serve as an educational clause and instil a sense of national consciousness , policy-makers appear to overlook the essence of the preamble. Comparative constitutional law teaches us that preambles to constitutions have played crucial roles in both law and policy making throughout the world.

Justice Albie Sachs in *S v Mhlungu* 1995 (7) BCLR 793 (CC) correctly observed:

> " The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes. This is not a case of making the Constitution mean what we like, but of making it mean what the framers wanted it to mean; we gather their intention not from our subjective wishes, but from looking at the document as a whole"

And in *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19, Chief Justice Mogoeng correctly remarked:

> " A preamble is after all a succinct expressionary statement that sets out a constitution's purpose and underlying philosophy. By design and like all others, our Preamble captures the essential principles by which we the people seek to govern our affairs. It is such a crucial part of our Constitution that, if only every citizen were to internalise it and live according to its terms, our aspirations would most likely be expeditiously realised."

Although South Africa achieved or made major strides in the struggle for freedom and quality, the vestiges of colonialism and apartheid are still evident.
These are pernicious systems. Racism and other despicable tendencies which epitomise racial intolerance are still prevalent, in all sectors of society. This is a clear indication that the preamble is not yet fully internalised. The ideal society envisaged in the preamble of the constitution will continue to elude us as a people until such time we recognise its importance in nation building. To negate this reality will render nation building an elusive dream.

The Preamble acknowledges the evils of apartheid and makes a clarion call to all, to honour those who suffered for justice and freedom in our land and unite regardless of diverse backgrounds and cultural heritage. Indeed, South Africa belongs to all who live in it , united in our diversity. What we ought to learn from the text of the Preamble is that it is a foundation for a peaceful co-existence, healing, transformation, pursuit of justice, tolerance, reconciliation and nation building etc...

Our preamble succinctly proclaims that the sovereign power rest with *" we the people of South Africa*". The " we ", demonstrates our common identity as a nation. The preamble outlines our objectives in adopting the constitution such as; to heal the divisions of the past and establish a society based on democratic values , social justice and fundamental human rights.

Concerted efforts must therefore be made to ensure that every South African understands this fundamental basis of our constitutional scheme. Policy makers have a critical role to play. For example, in our schools, learners must be taught to recite the preamble. This will constantly fortify their consciousness and understanding of the country's history, present and future aspirations. For example , in the United States of America , learners are required to pledge allegiance to the US flag each morning. South African leaners may well be taught to pledge their allegiance to the Preamble and the constitution in its entirety. This will serve as a powerful affirmation, planting the seed and spirit of reconciliation, transformation and peaceful co-existence in their hearts. The strength of the Preamble lies not only in the legal sphere but also in its social function and effect, ours is an integrative preamble. It fosters integration by forging common identity, drawing people together, contributing and promoting social cohesion. Surprisingly, despite its importance, the study of the preamble remains a neglected subject in the South African constitutional theory and receives scant attention in literature as well. It is cause for concern that law professors rarely teach and that courts rarely cite the preamble. Yet I remain hopeful, that in time the preamble will become the credo of our young society; grounding morality, shaping dreams and the pursuit of happiness. As Martin Luther King Jr once said, *the time is always ripe to do right*.

Empowering legal minds

By Andisiwe Sigonyela, Acting Director-BLA-LEC

Labour Lawyer, Madoda Nxumalo teaching one of the TAT sessions in Namibia.

Continuing legal education and training is at the centre of the Black Lawyers Association-Legal Education Centre goals.

We are dedicated to providing the legal and allied professions with advanced skills and information, ensuring that they excel in their professions.

Our aim is to enrich and enhance their competitive edge to benefit the very ordinary members of society.

Increasing the number of black lawyers is also of high on the agenda of the BLA-LEC.

Close to 2000 lawyers in various facets of the law benefited from our diverse and enriching training programmes in the year 2018. We aim to expand our reach in the year 2019.

We would like to extend our sincerest gratitude to all our sponsors , instructors and participants who made it all possible.

Our training this year also extended beyond South African borders, visiting Windhoek, Namibia.

Some of our well-designed programmes and attendance in the fourth quarter of 2018 are listed as follows:

TRIAL ADVOCACY TRAINING (TAT)

This training is designed to ensure trial lawyers present a good argument before the courtroom. The programme helps lawyers acquire and develop the skills and confidence they need to become competent litigators.

Attorneys And Advocates

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Advanced Trial Advocacy Training	19 – 24 November 2018	Namibia	**30** attended

Universities

Unisa	09 – 10 October 2018	Durban	**17** attended
Unisa	09 – 10 October 2018	Nelspruit	**11** attended
Unisa	09 – 10 October 2018	Johannesburg	**14** attended
Unisa	11 - 12 October 2018	Pretoria	**30** attended
Walter Sisulu University	11, 12 & 13 October 2018		**44** attended
University of Fort Hare	18, 19 & 20 October 2018		**69** attended
University of the Western Cape	25, 26 & 27 October 2018		**13** attended

PLT school(s)

Bloemfontein PLT School (night class)	04, 05 & 06 December 2018	Bloemfontein	**21** attended

Commercial Law Programme Training (CLP)

This programme covers important areas such as purchase and sales agreements, mergers and acquisitions, dispute resolution and other significant areas of commercial law.

TOPIC	DATE	AREA	NUMBER OF DELEGATES
Competition Law and Merger Filing	10 November 2018	Durban	19 delegates attended

Continuing Legal Education (CLE)

This programme is aimed at primarily building capacity and enhancing the skills of lawyers. It assists in making the law accessible to all black and or historically disadvantaged legal practitioners in South Africa.

TOPIC	DATE	AREA	NUMBER OF DELEGATES
Prospecting & Mining Law	28 November 2018	Polokwane	**15** delegates attended

Advocate Helen Ngomane training Nelson Mandela University students

North West University students listening attentively as training is underway

2nd series: The History of the Black Lawyers Association

By Deputy Judge President Phineas Mojapelo, South Gauteng High Court

This is the second in a series of articles that seeks to trace the formation and history of the Black Lawyers Association (BLA). The writer shall welcome any comments, particularly by lawyers who were part of the process.

The coming together of the Black Lawyers Group in 1977 and the ultimate formation of BLA in 1978/9 must be seen within the context of the political atmosphere that prevailed at the time. The year before had seen the student march of June 16, 1976, which started in Soweto. On the fateful day, the South African Police force shot and killed more than 20 black school children and pupils; they also injured and arrested many. All in Soweto, all on that very day. It was news that shocked the world.

The year 1976

The year of youth power and student power.

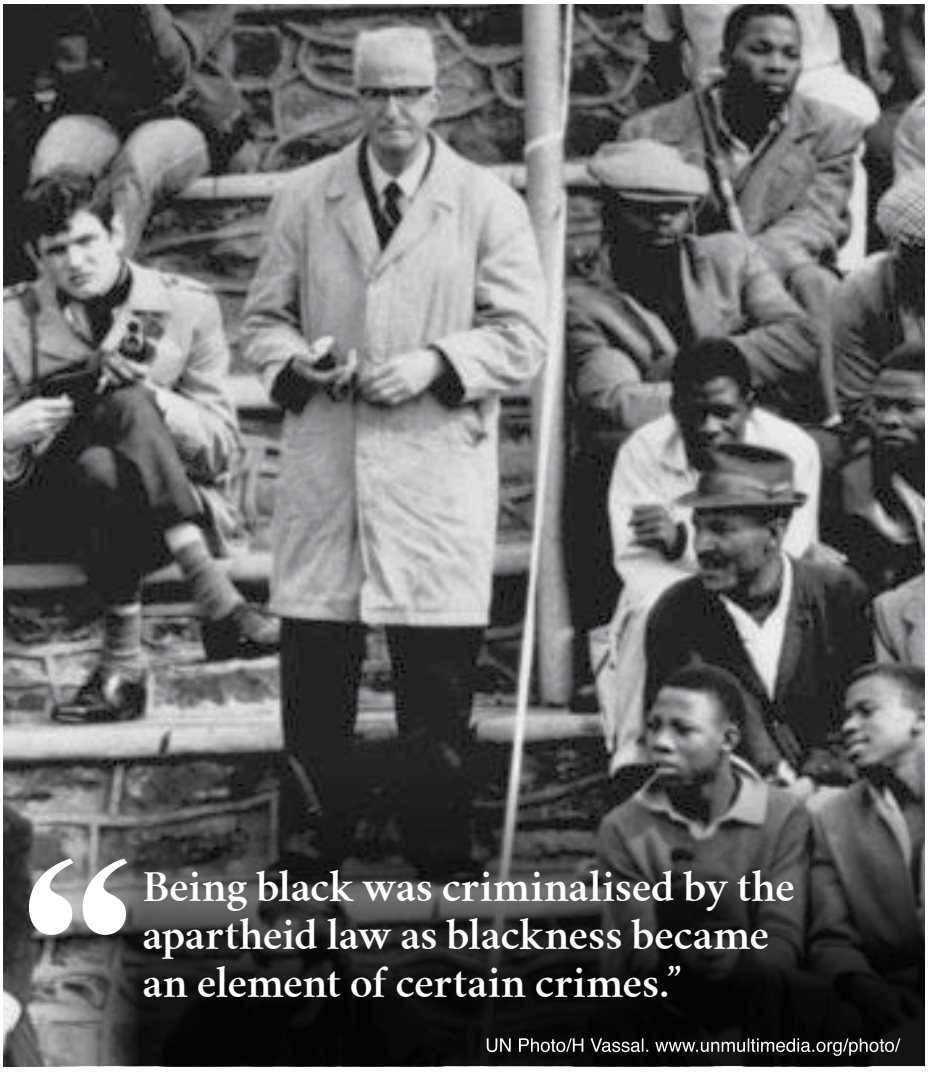
On June 16, the youth wrote into the South African calendar and in our collective conscience. They turned the tide of the country's history and liberation movement.

This was also a year of extreme apartheid police brutality against unarmed and defenceless children whose only crime was to insist on their rights.

16 June 1960

Repression, shootings, blood, maiming and crippling injuries. Howh…!!!? What is wrong with the number 6, and particularly 16 in our history: 1960 – Sharpville massacre; the 1960's - the genesis of the Rivonia trial; 16 June 1976 – Soweto uprisings and students' massacre, 16 August 2012 – the Marikana massacre!

Back to 1976. The students uprising



had spread throughout the country resulting in the arrest and detention of many people. Many more children were killed in various other parts of the country as students' uprisings and youth power spread like an unstoppable inferno in the days that followed. The political atmosphere throughout the country became highly charged.

Up until then, there was no formal structure of black lawyers in the country. Many of them would however from time to time come together as a group to discuss common problems and to defend black people who were prosecuted under pass laws for exercising their birth rights in the country of their birth.

Under these laws black people were arrested and brought before courts for offences such as: (a) failing to produce a "dom pass" upon demand by the police officers; (b) entering or remaining within a prescribed area without a permit; (c) loitering, and (d) many other offences for which only black people could be prosecuted. Being black was criminalised by the apartheid law as blackness became an element of certain crimes.

The lawyers would from time to time organise themselves in groups to defend these pass law offenders and thus gem the system. In the absence of legal representation, the pass law offenders would often be brought before the special pass courts and would be tried and sentenced summarily to imprisonment with the option of a fine.

Those who pleaded not guilty would often be remanded in custody on several instances. Pleading guilty was thus a way of getting out of custody at the earliest appearance in court. People were pressurised and manipulated to plead guilty for no crime. The system of prosecuting people en-mass was essential for the enforcement of the pass law offences, for which people would often be picked up in the street as a form of harassment.

Black lawyers would often clock up the system, in their organisational efforts to defend people.

In the presence of a legal representative, proper procedures had to be followed: charges had to be read and interpreted to each accused. He or she had to plead to the charges and then the state had to lead witnesses who were then cross examined. The full proper procedure had to be followed, in each and every case right up to sentencing if found guilty. There was often one magistrate and one prosecutor a day, between them they processed many offenders in a day.

"The best strategy was to be ready to proceed with the case. Or on another day, the group of black lawyers would change tact and apply for bail for each and every one that was brought to court. Prosecution would never know what was coming on any day the lawyers came."

With black lawyers lined up at court to defend each and every case called on any day, prosecution of pass offenders en-mass became impossible. State witnesses were often not available, and if available they would often not remember who arrested who, where and under what circumstances. A large number of black people would often have been picked up in one swoop all over the city on a big truck called 'khwela-khwela'.

Remembering where each was picked up was often a nightmare, which police had failed to anticipate. The alternative was for them to fabricate evidence, which many did.

Fabricated evidence is a nice meal for a seasoned cross examiner. The system was gemmed whenever black lawyers appeared to defend pass offenders in a particular court. There was thus prior to the formation of the BLA an informal ad hoc organisation of black lawyers. The formation was essentially for community legal work to defend the human rights of other black people, despite the denial of such rights under the laws of the time.

Black lawyers had to organise themselves to take turns to defend offenders. The system was to get the mandate of each and every arrested person and to defend them all or most of them on a particular day.

The black lawyers did this for no fee, there was no legal aid system for pass offenders. Seeking funding for those one represented would lead to their cases being postponed whilst they remained in custody. That was undesirable.

The best strategy was to be ready to proceed with the case.

On other days , the group of black lawyers would change tact and apply for bail for each and every one that was brought to court. Prosecution would never know what was coming on any day the lawyers came.

The element of community service did not stop with the formation of the BLA as an association. On the contrary, a basis was created around which people could organise themselves for that purpose.

The system that started in Johannesburg was replicated whenever black lawyers opened offices in other towns, and the approach of working together in defence of pass offenders was extended to victims of other apartheid laws.

The BLA from the beginning committed itself to advance and promote respect for the rule of law and the protection of human rights. ■

BLA OUT *and* ABOUT

The GM Pitje Memorial

AGM 2018

Social Responsibility

**19 October 2018, Cape Town,
Silikamva High School**

The Land Reform Agenda

By Sphesihle Nxumalo, Baker McKenzie Associate Attorney

Source: https://theconversation.com/
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Is there a dichotomy between the contemplated amendments to the Constitution and the constitutional fabric?

If there ever was a Methuselah[1] of grand questions around the law reform agenda in its current formulation, this is it.

On 15 November 2018, the Joint Constitutional Review Committee (JCRC) crossed the Rubicon when it adopted its report, calling for the amendment of section 25 of the Constitution.

This was to make it possible for government to expropriate land without compensation in the public interest, signalling a momentous move from the catatonic constitutional dispensation to a transformative constitutional dispensation.

The *status quo* of the expropriation regime under section 25 of the Constitution is one in which extinction of rights in property can only be constitutional if such is against the payment of just and equitable compensation.

> **“The Constitution guarantees the right to compensation, which is just and equitable in the event that property is expropriated.**

In other words, the Constitution guarantees the right to compensation, which is just and equitable in the event that property is expropriated. It further states that expropriation can only be for a public purpose or in the public interest. The contemplated amendments to section 25 seek to overcome the restrictions imposed by the very section 25. The land reform agenda is without a doubt a key policy objective, consonant with transformative social justice.

But when we steer clear of the socio-moralistic viewpoint, we are left to answer the sensible and preeminent question of whether the contemplated amendments to allow for expropriation of land without compensation are in conformity with the Constitution. There is a small but significant wave of distress that the JCRC has just set in

1 According to the Holy Bible, Methuselah is said to have lived for nine hundred and sixty-nine years (Genesis 5:27).

full swing a socialist carousel that will trump the rule of law in its wake.

There is some comfort (*albeit* dubious) in that the opponents and proponents of land reform all sing from the same hymn sheet of the sanctity of the rule of law as a founding value of the Constitution and not mobocracy. Transformative social change is the major divide.

The ANC government's economic philosophy comprises a social democratic approach to social reform. There is an urgent imperative to underwrite the improvement in the quality of life of the poor and to reduce inequalities as white minorities and black South Africans are at a saddle point.

White minorities at a relative maximum and black South Africans at a relative minimum to economic means of production, including access to land and standard of life.

The land reform agenda in its current formulation is a mechanism in which government seeks to rectify this socio-economic disparity. Its mainly caused by large scale historical dispossessions of blacks, by way of land acquisition without compensation and redistribution.

Section 2 of the Constitution (the so-called "supremacy clause") is non-esoteric , it states; "*The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*."

This provision does not invalidate amendments to the Constitution. Indeed, the supremacy of the Constitution does not render it unchangeable and section 74 is in fact the repository of the National Assembly and National Council of Provinces' powers to amend the Constitution. To amend section 25 (which is a Chapter 2 provision) will require the support of at least two thirds of the members of National Assembly and six of nine provinces in the National Council of Provinces.

Does this mean virtually any provision of the Constitution can be amended as long as the thresholds to amend it are met? The answer is yes, but that's not the end of it – the amendments would still need to pass constitutional muster to keep us farther away from a dystopian world, where political forces and ruling parties mold the Constitution into what they want it to be from time to time.

> "There is an urgent imperative to underwrite the improvement in the quality of life of the poor and to reduce inequalities as white minorities and black South Africans are at a saddle point.

But there is no defined start and end point to the inquiry – the constitutionality of texts is contextual and is informed primarily by the rule of law. The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions.

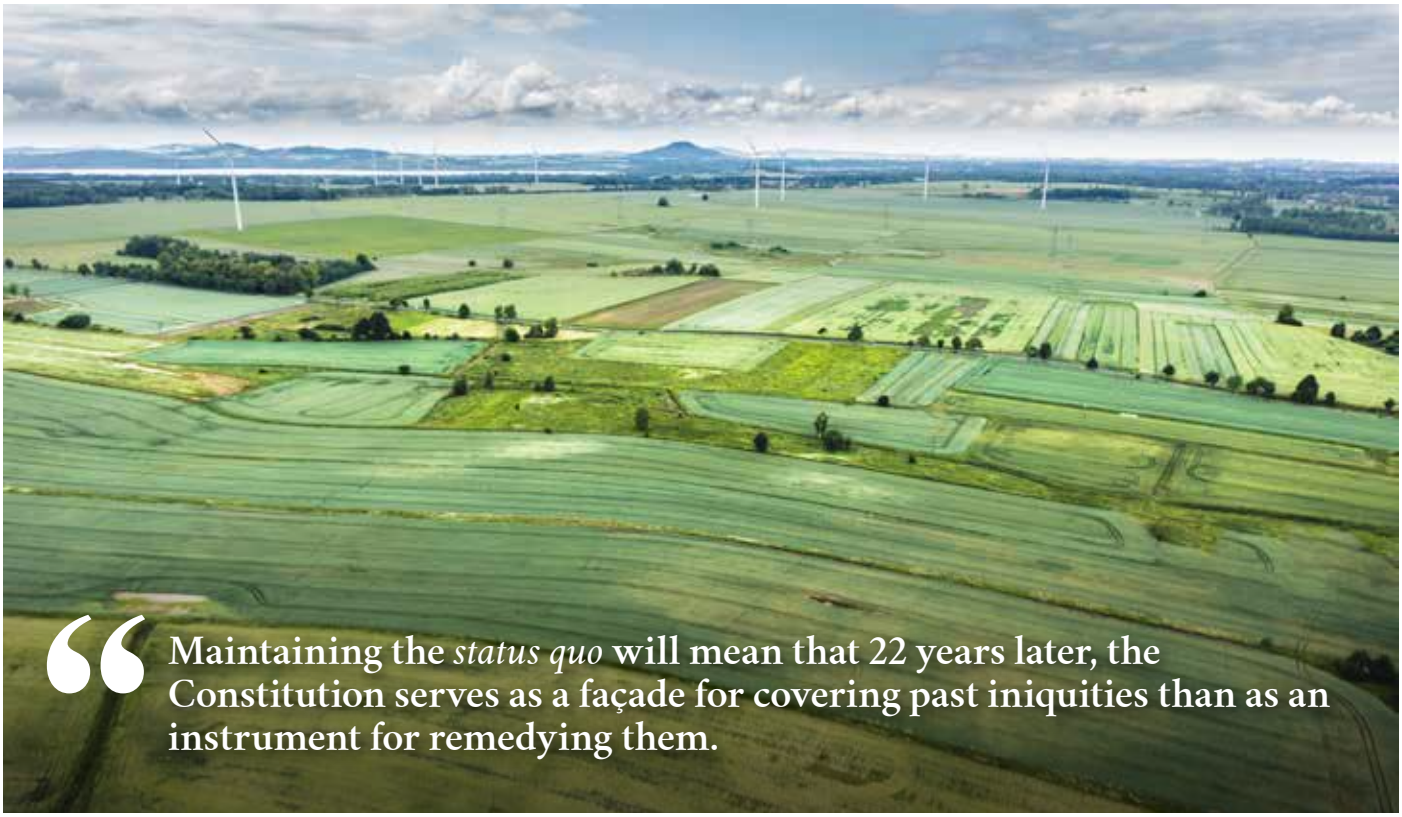
Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power. This begs the question: how do we know what constitutes arbitrary and abusive use of government power? That is the question Professor Cora Hoexter tackles with didactic insight in *Administrative Law in South Arica*. Prof. Hoexter posits that at common law, action is said to be arbitrary when it is irrational or senseless, without foundation or apparent purpose. Indeed, our whole constitutional heritage rebels at senselessness of decision and policy-making by government, and this case is no exception. What obviates the arbitrariness of the ANC government's decision to pursue land reform in the manner contemplated, and indeed the JCRC's decision, are the extensive consultations and public hearings that have taken place. Due to the sweeping changes that will be brought about by the contemplated amendments, government has certainly gone overboard in following due process on the issue as ours is a participatory democracy.

In debating the constitutionality of land reform, one cannot lose sight of the Preamble to the Constitution. It is convenient to set out its telling words:

> "***We, the people of South Africa, recognise the injustices of our past;*** *honour those who suffered for justice and freedom in our land…*" and thus adopted the "*…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****...*".

The text of the Preamble supports a flexible system of government with the capacity of passing laws necessary to meet the needs and challenges of contemporary South Africa while at the same time embedding certain liberties deemed essential by a consensus of *We, the people of South Africa*. If the rule of law means anything, it means that changes to the Constitution should come from a strong consensus of *We, the people of South Africa* acting pursuant to, *inter alia*, the ideals of healing the divisions of the past and establishing a society based on social justice and the improvement of the quality of life of all citizens, amongst other things.

Whilst I do not discount the real prospect of a constitutional challenge to the amendment of section 25 of the Constitution, the very Constitution is supposed to represent a consensus among *We, the people of South Africa*,



> Maintaining the *status quo* will mean that 22 years later, the Constitution serves as a façade for covering past iniquities than as an instrument for remedying them.

and not the policy preferences of a few judges. Furthermore, at some point we have to stop philosophical tap-dancing and reading texts in isolation of their historical contexts. For a moment, I found myself in the unfortunate position of the curate given a stale egg at the bishop's table; I considered parts of the argument by opponents of land reform that amending the Constitution will trump fundamental human rights (i.e. property rights) persuasive, others not. Assuming in their favour, the question then arises, if *We, the people* determined what fundamental rights are deserving of constitutional sanctity, thus protection from state interference, then what does that mean of the texts of the Constitution – does it really make any sense to sanctify and 'freeze' the texts of the Constitution at some point in time? Well, it does and does not. The contemplated amendments will represent the normative consensus of the South African society, and this does not suggest the violation of human rights, rule of law or any other highly popular provisions of the Constitution.

Maintaining the *status quo* will mean that 22 years later, the Constitution serves as a façade for covering past iniquities than as an instrument for remedying them. Considering that land reform is a key policy objective, the courts could declare the contemplated amendments as unconstitutional in the event that there is a breach of the constitutional provision establishing the amendment powers and thresholds. When our founding fathers forged the Constitution, they were well aware of the social and economic urges in the country. But they were anxious that we should not hurry to achieve socialism instantly overnight. They would have made it clear in unequivocal terms had the intention been that a Chapter 2 provision such as section 25 cannot be amended in the manner contemplated today because to do so would be, for lack of a better word, preposterous. After all, social and economic conditions can be altered by legislative amendments.

Whilst I cannot say the die has been cast yet, the JCRC's decision clearly jibs to the monumentality of the Constitution, and ushers in an era where section 25 has no value in the transformative democratic South Africa anymore. The contemplated amendments are indeed not reflective of the subjective moral and philosophical preferences of the ANC government, rather in a democratic and socially crippled society, the pendulum of transformation swings in favour of a Constitution that seeks to address the urgent needs and values of a majority of the South African society – this is transformative constitutionalism. As already stated, the Constitution is the work of *We, the people*, and *We, the people* did not produce a 'frozen-in-time' Constitution. I must emphasise that it cannot be that re-engineering the socio-economic dynamics of the South African society to address the conspicuous grim social disparities between Whites and Blacks, by abandoning obsolete systems and, indeed constitutional provisions that continue to perpetuate socio-economic disparities, borders on unconstitutionality.

The "evolution" of constitutionalism did not begin at the World Trade Centre in Johannesburg and did not end in Sharpeville, Vereeniging. Thus, we have to ask with respect to contemporary constitutional issues, particularly insofar as accelerating land reform is concerned, what really is a sensible response? When the text of the Constitution proves unable to assimilate restorative justice and transformative narratives, people do create new texts – they amend the Constitution. This cannot be unconstitutional.

The Prevention of Organised Crime Act

By Justice Legoabe Willie Seriti, Supreme Court of Appeal Judge

The legislature enacted s 35 of the Criminal Procedure Act 51 of 1977 (CPA) as a mechanism to combat crime and alleviate its scourge on society. In essence, s 35 deals with forfeiture of articles to the State and is stated in the CPA as follows:

"35 Forfeiture of article to State
(1) A court which convicts an accused of any offence may, without notice to any person, declare-

(a) any weapon, instrument or other article by means whereof the offence in question was committed or which was used in the commission of such offence; or
(b) if the conviction is in respect of an offence referred to in Part 1 of Schedule 2, any vehicle, container or other article which was used for the purpose of or in connection with the commission of the offence in question or for the conveyance or removal of the stolen property, and which was seized under the provisions of this Act, forfeited to the State:. . . . "

> "At the outset we must remind ourselves of the nature of the legislation we are concerned with. POCA was enacted in pursuit of legitimate and important government purposes of combating serious organised crime and preventing criminals from benefiting from the proceeds of their crimes.

In terms of these provisions, a court can declare an article or instrument utilised in the commission of an offence forfeited to the State only after conviction of an accused. In the absence of a conviction, the court cannot declare any instrument utilised in the commission of the offence forfeited to the State. This is the position even if the accused was acquitted on a technicality and not on the merits.

Section 35(2) provides that a court which convicts an accused or which finds an accused not guilty of any offence, shall declare forfeited to

the State any article seized under the provisions of this Act which is forged or counterfeit or which cannot lawfully be possessed by any person. There are certain articles mentioned in this subsection which can be declared forfeit to the State even if the accused is acquitted of the charge he or she was facing.

In terms of the provision of s 35(2) the court has an obligation to declare forfeited to the State articles therein mentioned.

In order to improve or strengthen the State's efforts to combat crime, the legislature enacted the Prevention of Organised Crime Act 121 of 1998 (POCA).

In its introduction POCA states its purpose and aim as being to combat organised crime, money laundering and criminal gang activities and to provide for the civil forfeiture of criminal property that has been used to commit an offence.

> **"'We should embrace POCA as a friend to democracy, the rule of law and constitutionalism and as indispensable in a world where the institutions of State are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them'.**

Its preamble states amongst others - that no person should benefit from the fruits of unlawful activities, nor is any person entitled to use property for the commission of an offence. The preamble further states that legislation is necessary to provide for a civil remedy for the preservation, seizure and forfeiture of property which is derived from unlawful activities or is concerned in the commission or suspected commission of an offence.

In *National Director of Public Prosecutions v Mohamed NO & others* 2003 (1) SACR 561 (CC); 2003 (4) SA 1 (CC) para 16, when dealing with POCA, the Constitutional Court said:

> "The present Act (and particularly Chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation and domestic interest to ensure that criminals do not benefit from their crimes. . . ."

Organised crime has become a burgeoning international problem and countries such as ours are particularly susceptible to organised crime groups. It is generally accepted that ordinary criminal law measures are ineffective in effectively dealing with organised criminal syndicates, thus necessitating extraordinary measures such as civil forfeiture in terms of chapter 6 of POCA.

In *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC) para 59; the Constitutional Court said:

> "The POCA is an important tool to achieve the goal of reducing organised crime. Its legislative objectives are set out in its Preamble which observes that: *(a)* criminal activities present a danger to public order and safety and economic stability and have the potential to inflict social damage; and *(b)* South African common law and statutory law fail to deal adequately with criminal activities and also fail to keep pace with international measures aimed at dealing effectively with such activities. Its scheme seeks to ensure that no person convicted of an offence benefits from the fruits of that or any related offence, and to ensure that property that is used as an instrumentality of an offence is forfeited."

In *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC); 2013 (4) SACR 429 (CC); 2013 (4) BCLR 379 (CC) para 22 Jafta J said:

> "At the outset we must remind ourselves of the nature of the legislation we are concerned with. POCA was enacted in pursuit of legitimate and important government purposes of combating serious organised crime and preventing criminals from benefiting from the proceeds of their crimes. Among the arsenal of tools employed to achieve these objectives is the authorisation of seizure of property and restraint orders. These orders authorise state officials to seize property suspected to be the proceeds of crime or an instrumentality of an offence."

Chapter 6 of POCA deals with Civil Recovery of Property and the relevant sections are ss 37-62. It is divided into Parts 1 to 4.

Part 1 contains only s 37. This section provides that proceedings under this chapter are civil proceedings and not criminal proceedings. It further states that rules of evidence applicable in civil proceedings apply to proceedings under this chapter.

Part 2 which contains ss 38 to 47 deals with preservation of property. Section 38 deals with preservation of property orders and reads partly as follows:

> "Preservation of property orders
>
> (1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
>
> (2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned-
>
> *(a)* is an instrumentality of an offence referred to in Schedule 1;
>
> *(b)* is the proceeds of unlawful activities; or
>
> *(c)* is property associated with terrorist and related activities.
>
> (3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order."

Schedule 1 of POCA lists various serious offences, for instance murder, rape, kidnapping, extortion, perjury, drug offences, illicit dealing or possession of precious metals or precious stones, etc.

When the National Director approaches the Court in terms of s 38 by way of an ex parte application, the application will be set down as provided for in Uniform rule 6 (4)(a) and shall be heard in camera.

Section 39 requires the National Director to give notice of the order to all persons known to the National Director to have an interest in the property which is subject to the order and to publish a notice of the order in the Gazette.

Any person who has an interest in the affected property may, if they wish, enter an appearance to defend which shall be accompanied by an affidavit.

This shall state the nature and extent of his or her interest in the property concerned and the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of interests from the operation thereof.

Section 40 deals with the duration of preservation of property orders. It provides that a preservation order shall expire 90 days after the date on which notice of the making of the order is published in the Gazette. The order can be rescinded before the expiry date.

Part 3 which contains ss 48 to 57 deals with forfeiture of property. Section 48 provides that if a preservation of property order is in force the National Director may apply to a high court for an order forfeiting to the State all or any of the property that is subject to the preservation order. The National Director is obliged to give at least 14 days' notice of the application to every person who entered an appearance to oppose the granting of the order.

In terms of s 50 of POCA the high court shall grant a forfeiture order if the court finds on a balance of probabilities that the property concerned is an instrumentality of an offence referred to in schedule 1 or is the proceeds of unlawful activities or is the property associated with terrorist and related activities.

The validity of the order is not affected by the outcome of the criminal proceedings. As stated earlier s 35(1) of the CPA entitles the Court after conviction of an accused to declare forfeit to the State any property which was used in connection with the commission of any offence.

Unlike the forfeiture provisions of POCA, s 35 of the CPA entitles the Court to declare forfeit to the State any property which was used in the commission of any offence.

In terms of POCA, the offence involved must be one stipulated in Schedule 1 thereof, which offences are generally serious offences.

In my view, the forfeiture provisions contained in s 35 of the CPA are easier to invoke after the conviction of the accused, but prior to any conviction or in the absence of a conviction, the provisions of s 50 of POCA offers a speedy and effective remedy to the National Director of Public Prosecutions.

In an instance where more than one potential forfeiture process exists in a given instance, it must be left up to the National Director and his/her officials to determine which would be the most effective and appropriate procedure to adopt.
See *Ex Parte National Director of Public Prosecutions* 2018 (2) SACR 176 (SCA) para 28.

Section 50 of POCA grants the court a discretion and not an obligation to grant a forfeiture order. The discretion must be exercised judicially and attention should be given to the nature and value of the article. The role played by the article in the commission of the offence and the effect of the forfeiture on the affected person.

Whether or not the accused is convicted of an offence, any article seized from him which is found to be forged or counterfeited will be forfeited to the State.

If no criminal proceedings are carried out in connection with the article that has been seized, and the article is not needed as evidence in any court, then it will be returned to the person from whom it was seized. If no such person is available, then the article will be handed over to the State.

In *Prophet v National Director of Public Prosecutions* 2005 (2) SACR 670 (SCA) paras 30 and 37 it was said that a court may decline to make a forfeiture order if the particular deprivation is disproportionate to the crime. The owner of the property needs to place before the court the necessary material for a proportionality analysis before the court.

POCA particularly Chapters 5 and 6 represent the culmination of a protracted process of law reform which has sought to give effect to SA's international obligation and domestic interest to ensure that criminals do not benefit from their crimes. Chapter 5 (compromising ss 12 to 36) provides for the forfeiture of the benefits derived from crime but its confiscation machinery may be invoked only when the 'defendant' is convicted of an offence. Chapter 6 (comprising ss 37 to 62) provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction based.

Within 90 days of the grant of the preservation order the National Director must apply for the forfeiture of the property. Section 40 provides that a preservation of property order shall expire 90 days after the date on which notice of making the order is published in the Gazette.

To conclude, in *National Director of Public Prosecutions v Elran* 2013 (1) SACR 429 (CC) para 70 it was put as follows:

> 'We should embrace POCA as a friend to democracy, the rule of law and constitutionalism and as indispensable in a world where the institutions of State are fragile, and the instruments of law sometimes struggle for their very survival against criminals who subvert them'. ■

When does a debt prescribe?

By Adv. Fhumulani Mbedzi, BLA-LEC Researcher

It is trite that in terms of African Customary law a claim does not prescribe. Across all South African indigenous people we have a principle to the effect that "a claim does not prescribe", for instance in Tshivenda, Sepedi and IsiZulu they say, "Mulandu a u sini", "Molato a o boli" or "Icala aliboli".

S 211(3) of the Constitution obliges the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

It cannot be demonstrated that the articulated principle is at odds with the constitution, neither can it demonstrated that it is not "applicable" when prescription plea is raised in matters affecting black people.

For some reason, when matters relating to prescription of debts are brought before court, it is the Prescription Act which finds application and not the African Customary Law. This is so even when litigants are black people. In most cases where a special plea of prescription finds application, it succeeds. The prescription Act regime now appears to be the preferred avenue in our courts. In terms of this Act a debt prescribes.

This approach somehow favours "civil law" over African Customary law. The focus of this article is the Prescription Act and the law of extinctive prescription in general and its effects on creditors and debtors.

Section 11 of the Act provides for the periods of prescription of debts as follow:

Periods of prescription of debts

The periods of prescription of debts shall be the following:

(a) thirty years in respect of-
  (i) any debt secured by mortgage bond;
  (ii) any judgment debt;
  (iii) any debt in respect of any taxation imposed or levied by or under any law;
  (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals or other substances;

(b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a);

(c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a)or (b);

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

Section 11(C) provides for the prescription of debts arising from a bill of exchange or negotiable instruments. Negotiable instruments (Bill of exchange included) are regulated by the Bills Of Exchange Act 34 of 1964. Under the Bills of Exchange Act, negotiable instruments include; Bills of exchange , Cheques, Promissory notes, Treasury bill and Traveller's cheques complying with all requirements for the bill. If a debt arises out of these instruments of payment, it will prescribe after six years unless a longer period applies in respect of the debt in question as provided for in terms of s11 (a)or (b) of the prescription Act.

Pleading prescription

In terms of the Act , prescription should be raised in pleadings.[1]

A court shall not of its own motion take notice of prescription.

It is trite that a party to a litigation who seeks to invoke prescription shall do so in a relevant document filed of record in the proceedings and that a court may allow prescription to be raised at any stage of the proceedings. [2]

Prescription as a special plea must set out sufficient facts to show on what basis the defence is based. [3]

The onus is therefore on the defendant to show that the claim is prescribed but if in reply to the plea, the plaintiff alleges that prescription was interrupted or waived , the onus would be on the plaintiff to show that it was so interrupted or waived. [4]

1 See S 17 in this regard
2 See S17 of the Act, see also stolz v Pretoria North Council 1953 (3) SA 884 (T)
3 *Hurst , Gunson , Cooper , Tabler Ltd v Agricultural supply Association pty ltd 1965* (1) SA 48 (W)
4 *Yusuf v Bailey and others* 1964 (4) SA 117 (W)

Why prescription

One of the philosophical justifications for prescription of debts is that 'society is intolerant of stale claims'. (*Cape Town Municipality v Allie NO* 1981 (2) SA 1 (C) at 5G-H.

In *Road Accident Fund & another v Mdeyide* 2011 (2) SA 26 (CC) Van der Westhuizen J explained the importance of extinctive prescription as follows:

> 'In the interests of social certainty and the quality of adjudication, it is important, though, that legal disputes be finalised timeously. The realities of time and human fallibility require that disputes be brought before a court as soon as reasonably possible.[5]

Didcott J in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at (para 11) remarked as follows :

> 'Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it.'

Due debt

The phrase 'debt is due' is not defined in the Prescription Act. But it is now settled that the term must be given its ordinary meaning, that is a debt owing and already payable or immediately claimable or immediately exigible at the election of the creditor.[6]

"Debt" for purposes of prescription

The word 'debt' in s 12(1) of the Prescription Act is a wide concept which does not equate to a cause of action'. It includes the broader concept of a 'right of action'. In *Drennan Maud & Partners v Town Board of the Township Pennington* 1998 (3) SA 200 (SCA) Harms JA put it as follows:

> '[I]n short, the word "debt" does not refer to the "cause of action", but more generally to the claim. . . In deciding whether a 'debt' has become prescribed, one has to identify the "debt", or, put differently, what the "claim" was in the broad sense of the meaning of that word.'

Furthermore, and in *Barnett & others v Minister of Land Affairs & others* [2007] 2007 (6) SA 313 (SCA) at para 19, the term 'debt' was given a broad meaning to refer to an obligation to do something, such as payment or delivery of goods or to abstain from doing something.

When prescription begins to run

Our courts have clarified when exactly prescription begins to run against the creditor.

In *Minister of Finance & others v Gore NO* 2007 (1) SA 111 (SCA) the following was stated (at para119J-120A):

> ''This court has, in a series of decisions, emphasised that time begins to run against the creditor when it has the minimum facts that are necessary to institute action. The running of prescription is not postponed until a creditor becomes aware of the full extent of its legal rights, nor until the creditor has evidence that would enable it to prove a case "comfortably".

It bears emphasis that the aim of the Prescription Act is not to extinguish the cause of action, but to take away the right of an inactive creditor to sue after a particular time. Farlam JA succinctly put it in *Unilever Bestfoods Robertsons (Pty) Ltd v Soomai & another* 2007 (2) SA 347 (SCA) at 359F-H:

> 'What prescribes in terms of the Prescription Act . . . is a "debt", that is to say, not a "cause of action", but a "claim".'

Prescription act and the Constitution

The Constitution proclaims its supremacy and enshrined a number of fundamental human rights. One of the sections recognising a fundamental right is S34 which provides as follows:

"Access to courts"

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum"

The constitutional Court has held that the Act limits s34 Constitutional rights.[7]

In *Road Accident Fund and Another v Mdeyide* 2011 (2) SA 26 (CC) , the Constitutional Court, having expressed reservations on whether an obligation may constitute a debt contemplated in the Prescription Act, stated that failure to meet a prescription deadline set in terms of the Act, could deny a litigant access to a court.

Although the Prescription Act limits S34 constitutional rights, it cannot be attacked purely on the basis that it preceded a democratic constitution.

The purpose of the law of extinctive prescription should be served.

Stale claims diminish the quality of Justice and matters must reach finality before human frailties such as forgetfulness creep in.

Immediately after the debt has become due, creditors are allowed to pursue the recovery of debts failure of which the law cannot help. Depending on the debt, their legal claims will prescribe over time.

That is to say their right to claim will soon cease to exist. With regard to the prescription law, parties should know that it is not the merits of the case that matters, it is the time. If the time has lapsed , S34 right is legitimately limited.

5 Para 2

6 *Electricity Supply Commission v Stewarts & Lloyds* SA (Pty) Ltd 1979 (4) SA 905 (W) at 908E.

7 *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* [2017] ZACC 32 at para 33

Decolonising South Africa

By retired Constitutional Court Justice Albie Sachs

> "Our clear and constant goal was to destroy the whole racist system and replace it in its totality with a dispensation based on the will of all people."

Oliver Tambo's whole life was dedicated to decolonising South Africa. When the British handed over power to the whites through the creation of the Union of South Africa in 1910, they excluded the majority black population from the new sovereignty.
While whites achieved self-government followed by full independence, the black South African majority continued to be treated as colonised subjects. The only difference was that instead of being ruled from London, they were now being dictated to from Pretoria and Cape Town. In terms of the Constitution and the law they were denied the vote, excluded from owning land in 90 per cent of the country, forced to carry passes and subjected to a migrant labour system which treated them as temporary sojourners in the towns.

To cap it all, the Governor General (later the State President) was declared to be the Supreme Chief of all 'natives'. A large part of my practice as a young advocate was devoted to dealing with people being prosecuted and harassed under laws called the Natives Urban Areas Act, the Natives Land Act, the Native Administration Act.

The term 'Natives' was changed to 'Bantus' and then to 'Blacks', but the reality of life for the majority was that of living as if in an occupied country under a colonial-type and overtly racist administration.

This reality meant that the struggle for self-determination in South Africa had important differences from the struggle for independence in the rest of the continent.

In the 1950s, first Ghana and then one country after the other on the African continent gained independence. This, each one did through the establishment of a new internationally recognised state separated from the former metropole (primarily Britain, France and Portugal).

South Africa, on the other hand, was already an independent state – in fact, it had been one of the founders of the United Nations.

When the international movement spearheaded by Tambo succeeded in getting apartheid declared a crime against humanity, it was not South Africa as a country that was expelled from the United Nations, but representatives of the racist government who were thrown out.

So the struggle for self-determination in our country did not take the form of a fight for independence and separate statehood, it was not based on a notion of territorial secession. On the contrary, self-determination in South Africa took the form of destroying the system of internal colonialism apartheid in an already independent state and achieving majority rule in an undivided country.

For those of us who saw ourselves as part of the Congress movement, this was the vision of the Freedom Charter adopted in 1955, two years before Ghana obtained independence.

We had no doubt that distructing the apartheid system in South Africa would be part and parcel of the struggle to free the entire Continent from colonial rule.
The perverse reality in our country under apartheid rule was that the notion of independence was in fact being invoked not by the oppressed majority but by the racist rulers.

The opposition to the Bantustans not only crossed ethnic divisions, it ensured the evolution of a commonality of purpose


Oliver Tambo with Nelson Mandela Source: https://www.golegal.co.za

across the political divides that existed between supporters of the ANC, PAC and Black Consciousness.

The result then, was that the struggle for self-determination in our conditions of national oppression was not first to get independence and then to adopt our own constitution.

The struggle over the Constitution was the equivalent of our struggle for independence.

The key struggle within the constitution-making process itself was to ensure that it would not be made by self-appointed negotiators under conditions of apartheid, but by a Constitutional Assembly chosen by the whole nation on a one person one vote basis.

In short, what we fought for was the ultimate adoption of a constitution guaranteeing a united, non-racial democratic South Africa based on majority rule. In practice , our equivalent of independence would then be black majority rule, coupled with a Bill of Rights based on the principles of human dignity, equality and freedom.

Our clear and constant goal was to destroy the whole racist system and replace it in its totality with a dispensation based on the will of all people.

Just as it would have been absurd to ask for civil rights under a system of slavery or of colonialism, so we regarded it as ludicrous to demand an expansion of people's rights within the system of white supremacy.

Accordingly, we were not fighting for civil rights for each and every oppressed person. We were struggling for self-determination for the oppressed majority.

The form in which self-determination would be expressed was that of destroying the system of apartheid and installing in its place a constitutional democracy based on majority rule in an undivided country. We believed firmly that only when the system of apartheid had been destroyed from top to bottom could the question of securing fundamental human rights for all be resolved**.** It was in articulating these concepts that the constitutional intelligence of Oliver Tambo was to play such a critical role.

Although originally trained as a science and maths teacher, Tambo qualified himself as a lawyer and was by nature a constitutionalist. Just as he experienced and fought against the use of law as an instrument of oppression, so in deep African tradition he saw the great possibilities of law. Possibilities serving as a mechanism for giving voice to all the people and providing for orderly, participatory and accountable forms of government.

So he worked closely with Chief Albert Luthuli on reformulating the ANC Constitution in the late 1950s in order to enhance its democratic character, incorporating into it what he regarded as the broad vision of African nationalism embodied in the Freedom Charter.

In 1961, Dr Hendrik Verwoerd organised a referendum among the white population on whether South Africa should become a republic.

Tambo and Nelson Mandela were at pains to declare that although the African people had no problem with the country severing all ties with the British monarchy, they did object to the status of the country being altered without the involvement of the African majority.

They then issued a demand to call a National Convention to draft a new democratic constitution for the country.

When this call was disdainfully rejected , the liberation movements now completely illegalised in racist South Africa, embarked upon an armed struggle.

During the years of his leadership in exile Tambo went on to extend his constitutionalist bent to the internal workings of the ANC itself.

In the early 1980s he called me from Maputo to Lusaka to help prepare the text of a Code of Conduct for ANC members. This code established clear procedures for dealing with violations against the ANC's Constitution., expressly banning the use of torture.

It became like a combination of a Bill of Rights and a Criminal Procedure Code for a liberation movement in exile. As far as I know, it was unique amongst the scores of exiled liberation movements.

At the ANC's watershed Consultative Conference in Kabwe, Zambia in 1985, Tambo saw to it that several hours were devoted to discussing how the ANC's statutes should be updated. Many of the provisions cited in disciplinary hearings today date from then.

He was meticulous about language, insisting on getting the formulations exactly right.

But, important though they were, getting the statutes right was not the main theme of the conference. Its key thrust was to increase mass mobilisation inside the country and internationally, intensify the armed struggle and make South Africa ungovernable and apartheid unworkable.

Simultaneously, he sought and received a mandate to engage in negotiations should the circumstances be propitious for such a course. Immediately after the conference he set about establishing a Constitutional Committee of the ANC to prepare for governance in South Africa under what would be black majority rule.

Tambo was particularly keen at that stage to ensure that the ANC would shift discussion about a new constitutional dispensation away from group rights and power-sharing between racial blocs, as was being propagated with considerable international support by the racist regime.

In fact, right until negotiations at CODESA broke down in 1992, FW de Klerk was still insisting on three Presidents

> **We have become so used to one person, one vote on a common voters roll and a President chosen by and answerable to a democratically elected Parliament, that people today cannot even imagine how important Tambo's intervention was at the time.**

representing the three leading parties in Parliament. Mandela, De Klerk and Mangosuthu Buthelezi would rotate in office for six months each, ruling by consensus. The inevitable result would have been a barely disguised white minority veto, since no change could be brought about without the consent of the whites.

We have become so used to one person, one vote on a common voters roll and a President chosen by and answerable to a democratically elected Parliament, that people today cannot even imagine how important Tambo's intervention was at the time.

Strongly denouncing group rights and power-sharing between different racial groups, he firmly placed on the table the vision of non-racial democracy and majority rule. Majority rule would be coupled with a Bill of Rights which would protect all South Africans against abuse, not because they belonged to the majority or the minority, and not because they were black or white but because they were human beings. The Bill of Rights idea, I should add was introduced into the constitutional debate by ANC historian Pallo Jordan. He pointed out in 1985, long before the fall of the Berlin Wall, that the ANC had advanced a claim for a Bill of Rights as far back as 1923 and repeated it in its African Claims document of 1943 and then adopted the Freedom Charter in 1955.

Seen against this historical background, the adoption of a non-racial Constitution by the democratically elected Parliament in 1996 represented full political redress, not only of the apartheid programmes installed in 1948, but of the Imperial betrayal of 1910.

Someone recently told me that when as parliamentary officer he placed the text of the 1996 Constitution in front of Mandela to be signed into law, Mandela said to him: 'Does it provide for majority rule?' He answered that it did. 'Good,' Mandela told him, 'then I can sign it.'

At the time the achievement of black majority rule in an undivided South Africa was the equivalent of independence in other African states. For those of us who had spent our lives in the National Liberation struggle, the consequences were huge. All the formal political structures of apartheid were brought down. The so-called Bantustans were reincorporated into a united South Africa. The myriad racially separated departments of government were brought together into a single public administration. Command of the army, the police and the public administration passed from exclusively white into overwhelmingly black hands. At a more general level, the racial bloodbath predicted by many in South Africa and much of the rest of the world did not come to pass. Moreover the racist assumption that black majority rule would lead automatically to social disorder and a collapse of the economy, was refuted.

The team headed by Nelson Mandela took over the reins of government with style and dignity. South Africa now had a Constitution made by a freely elected Parliament made up in large measure by black people who had survived years of imprisonment, exile and underground work in the liberation struggle. Tambo's life goal of destroying the political system based on white domination was realised.

And yet – profound though it was in its own terms, political redress did not in itself produce socio-economic and cultural transformation. The structures of inequality in terms of land ownership, the access to education and skills and the cultural hegemony engineered by the British and further systematised by the Afrikaner Nationalists, remained largely undisturbed. Those of us who had been involved in creating our great new Constitution were fully aware of this. What gave us confidence was the knowledge that the country had been completely reconfigured. Instruments of democratic power and accountability had been made available to deal with the next phase of struggle. With these tools in hand, our society could tackle the continuing colonial-type inequalities experienced by the majority of the people in their daily lives. We had no doubt that, far from being a brake on transformation, the text of the Constitution cried out for change. This was clear from the Preamble, the Foundational Principles and the inclusion of explicit social and economic rights. It was also evidenced by the strong protections given to the rights of women and of workers. If anyone had doubts about what subjectively was uppermost in the minds of those of us who had driven the constitution-making process forward, they needed to look no further than the Reconstruction and Development Programme (RDP) which we created at the time.

Now, in this current period of national stock-taking, four points seem to be clear. Firstly, despite major achievements, deep-going and powerful initiatives will be needed to deal with the huge inequalities that still remain in our country. Without far-reaching land restoration in both urban and rural areas, Tambo's national liberation project remains incomplete. Secondly, our institutions of democracy have been deeply implanted and provide a secure foundation for orderly and meaningful processes to bring about the second process of liberation that is required. Thirdly, is that major transformations are still required in the psycho-social and cultural spheres to change mindsets, practices and habits generated by centuries of racial domination. It is a sad fact that what was overt and intentional slides easily into becoming covert and subliminal. Our public life is still far away from being imbued with the full rich humanity of African culture as expressed by visionaries such as Albert Luthuli, Robert Sobukwe, Oliver Tambo, Steve Biko, Nelson Mandela, and Albertina Sisulu.

Finally, whatever path may be chosen to achieve full emancipation, no significant breakthrough can be made without taking our education system to new and greater heights. Tambo never lost his interest in education.

Understanding customary marriages

By Inkosi Sipho Mahlangu, The National House of Traditional Leaders, Chairperson


Source: www.youthvillage.co.za

The recognition of customary law by the Constitution and in particular, the right to culture has created challenges in the application of customary law by the courts.

Customary marriages are valid in terms of the Recognition of Customary Marriages Act 120 of 1998.

Certain requirements were set out in the Act that must be complied with, such as:

- The marriage must be negotiated.
- It must be entered into or celebrated in accordance with customary law
- The parties getting married must be 18 years or older; if any party is a minor, such minor needs the consent of his or her parents or guardian.
- The parties must consent to be married to each other by customary rites.

The aforementioned requirements appear to be easy to fulfil, however, if regard is given to the prerequisite that *the marriage must be negotiated and entered into or celebrated in accordance with customary law,* this entails that the customs, traditions or rituals that have to be observed in the negotiations and celebration of customary marriages, have to be complied with.

This includes the negotiations leading to the provision of Lobola and the handing over of the bride to the bridegroom's family, or the bridegroom himself.

Customary marriage is defined as a marriage concluded in accordance with customary law. If the two families subscribe to different customary laws, there is usually negotiations regarding the differences and a compromise agreement is reached which still bears the main principles of both customary laws.

The grooms family, will usually familiarise themselves with the customary laws of the bride. This is to allow them to have a general understanding of the bride's practices when they go into negotiations. This paper seeks to provide clarity on customary marriages in practice and to highlight the salient points that are mostly overlooked. Families should not be concerned about the possessions a groom brings as the said possessions

are unfortunately in some instances the cause of infighting while the actual reason why two people have come together , is forgotten.

It is important to understand the customary law applied at the time Lobola was issued.
Furthermore, it is important to understand from a customary point of view the meaning of what concludes a marriage.

Customs and customary law were designed to ensure that even the most poorest of persons – without wealth or possessions such as cows, goats, sheep may marry and build a family. Customary law was designed in a manner that allows a person to enter into an agreement of issuing Lobola at a later stage, but be declared married.

Within the Nguni people there is a saying " Umfazi akaqedwa".

In its literal sense, the saying means that *a man does not finish paying Lobola and cannot issue out all the Lobola cows at once.* In an extended explanation the saying means *a man cannot finish appreciating the family that gave birth and raised the woman being married into his family.* As a husband or family that received the bride, the in-laws will forever appreciate her for raising a child who is now a part of them. The saying also anticipates that there will be children born out of the marriage, bringing the two families together.

In simple terms customary law allows (after negotiations), that if a person does not have a cow or money to pay Lobola, such a person can still be married.

When the daughter of a married man (who was allowed to marry without issuing out Lobola) marries, the outstanding Lobola of the mother (the woman who was married without Lobola being issued) will be taken from that.

A man may therefore have a wife without paying Lobola which is to be paid at a later stage. However there must at least be a goat, which will be used to perform rituals to bring the two families together.

Custom does not recognise an individual over a collective. A collective (the family) is important in ensuring that what was agreed upon is realised. This is the reason why there are Lobola negotiations to begin with; it is agreement between two families on the marriage of their two children.

> "Families should not be concerned about the possessions a groom brings as the said possessions are unfortunately in some instances the cause of infighting while the actual reason why two people have come together , is forgotten.

The matter of HHP (Lerato Sengadi vs Robert Tsambo)

Lerato Sengadi made an Application to the High Court to confirm that she was the legally married customary wife of the late Jabulani Tsambo (HHP). The Court ruled that by law, she is Tsambo's, customary wife. Judge Ratha Mokgoatleng ruled in favour of Sengadi, stating that the Customary Marriages Act lists three requirements for a valid customary marriage. Now, the questions that need to be answered are as follows:

- Did the Court come to the correct conclusion?
- Why was the marriage challenged by Tsambo's family?

The Courts Conclusion

It should firstly be noted that the National House abides by any ruling made by a court of law. Nonetheless, the National House does reserve the right to express its views on such rulings. In this instance, on the question whether this particular ruling was correct, our view is affirmative. According to the reports[1], a sum of R45,000.00 was required as Lobola by Sengadi's family.

It is important to look at the amount as representing the number of cattle to be issued. It must be borne in mind that Lobola is not necessarily determined on monetary terms but on cattle terms (thus the value of a certain number of cattle).

The money issued is therefore calculated in terms of the cattle; it is not called money but the cattle that are provided as a sign of appreciation to the family that they are releasing their child to be the child of another family. The Tsambo family was unable to issue out all the cattle required, instead they issued out R35,000.00 of the R45,000.00 required[2]. The Tsambo family issued more than fifty percent of the number of cows agreed upon during negotiations. Furthermore, according to reports, there was a celebration of the union between the two families.

The celebration was in a form of a lunch of shared food. It is a common custom that a person you do not want cannot share food with you. It is furthermore a common cause that successful Lobola negotiations are celebrated either by a private lunch or shared food by the two families.

In this case, no person argued that there was no Lobola issued. The argument which the Court did not agree with, was that the bride was not handed over to the Tsambo family by the Sengadi family. The Tsambo family seemed to have missed the point that irrespective of the handing over or not, the Sengadi family accepted the Lobola or the cattle brought.

In customary practice, Sengadi was declared Tsambo's wife the moment Lobola was accepted, she immediately became a member of the family.

The couple were both over 18 years at the time the marriage was concluded. They both consented to the marriage. The fact that the Tsambo family went to the Sengadi family to ask for a bride indicates that they gave consent.

Under normal circumstances, when the prospective husband's emissaries arrive at the bride's home and indicate that they have come for *Sekgo sa metsi*, the family will ask the girl whose name was mentioned by the emissaries if she knows the people and whether she is willing to be married to their son (giving name of the son).

1 The Star; 2 November 2018: Mpiletso Motumi

2 Ibid

She will respond positively, allowing for Lobola negotiations to start. Should she respond negatively, Lobola negotiations will not take off.

The negotiations and part of the Lobola being issued, is indicative that Sengadi agreed to be married to Tsambo. It is therefore our view that the court came to the correct conclusion because both parties met the age requirements and the Lobola was also negotiated.

The Judge was also correct to say that the argument presented by HHP's father, that the bride had to be handed over in order for the marriage to be recognised, was not valid.

The marriage between the pair was concluded when Lobola was issued and accepted. Therefore, Lerato is the wife of Jabulani and is required to mourn and perform all the rituals in line with the Tsambo family.

A customary marriage entered into after the commencement of the Recognition of Customary Marriages Act, is a marriage in community of property and of profit and loss between the spouses. This is unless such consequences are specifically excluded in an pre-nuptial contract.

The wife and the children have full rights and responsibilities over the affairs of the late husband. It is therefore in the best interest and unity of the families to always engage each other so matters do not end up in Court.

The customary wife has the right to all that belonged to her late husband.

Siblings and/or parents of the late husband do not have any right to demand any of their late son's belongings from their daughter in-law. The responsibility of the family is to assist the widow to lay her husband to rest and show her the mourning process.

The matter of King Makhosoke II vs Nozipho Mnguni[3]

Nozipho Mnguni approached the Divorce Court in KwaMhlanga (Mpumalanga) for the annulment of her marriage to His Majesty the King of AmaNdebele, King Makhosoke II. The court annulled the marriage on the basis that His Majesty was not party to the marriage.

3 Sowetan; 24 May 2017: Lindile Sifile.

> **"Customary law was designed in a manner that allows a person to enter into an agreement of issuing Lobola at a later stage, but be declared married.**

According to His Majesty's Legal Counsel Thulani Mtsuki, the King never consented to the marriage; it was the emissaries of the royal family who negotiated everything.

His Majesty was only going with the flow. The Court agreed with the argument of His Majesty that he was not a willing participant to the marriage.

In the court papers, Ms Mnguni cited the reason for her application for the divorce as the monarch was aloof and uncaring. The above seems to indicate that the time for arranged marriage is getting obsolete.

The family may want a woman or a man to be married to someone else, but if any of the parties is not accepting, such a marriage will not be in line with the law.

The divorce by His Majesty indicates that as long as one is not a willing participant or has not consented to a marriage, it is sufficient reason to grant a divorce.

The lesson to learn; it is not about the people who may arrange a marriage, those who enter into the marriage must be willing to do so. The annulment also indicates that the Lobola was issued without the consent of His Majesty.

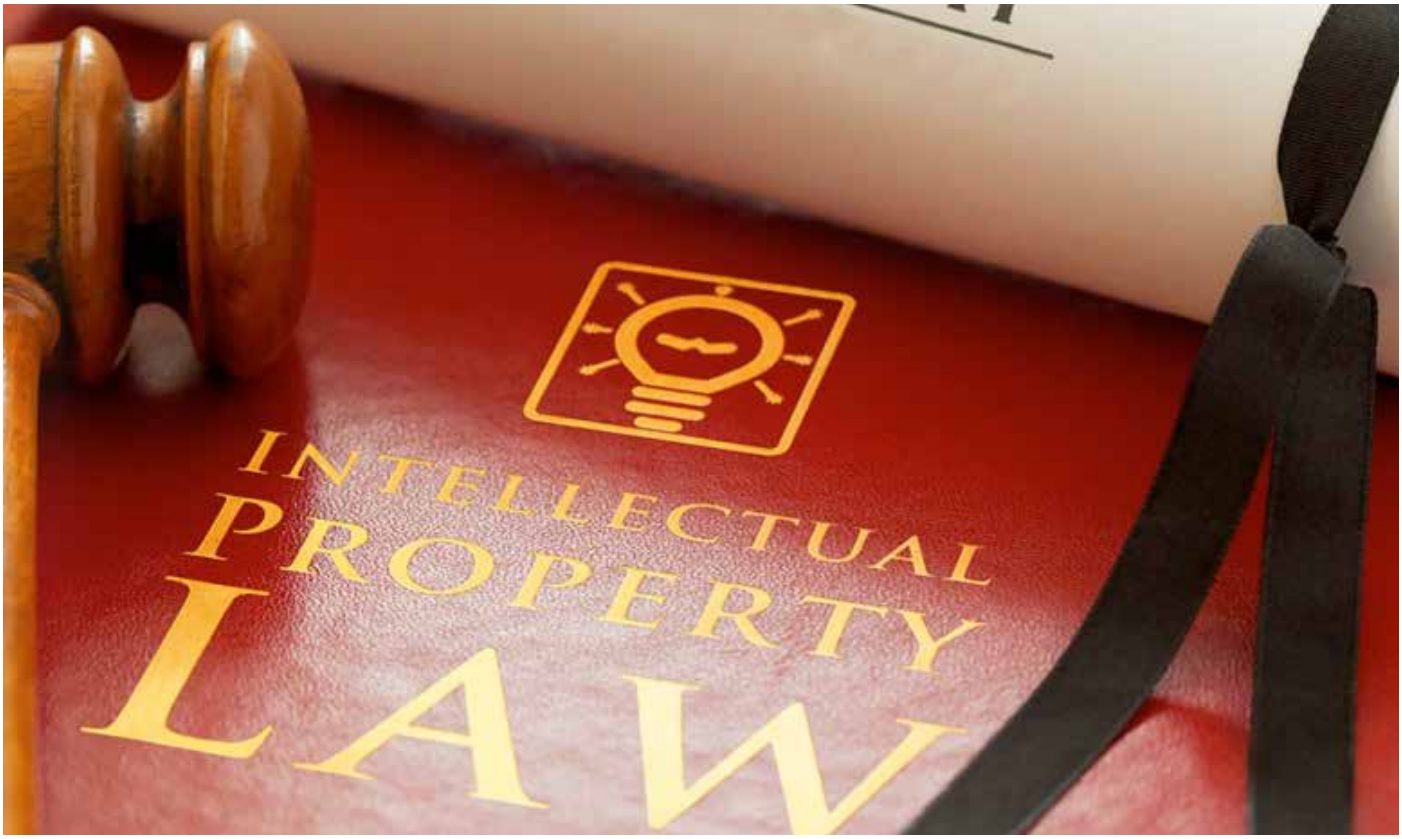
There is a need to educate members of the public on the Recognition of Customary Marriages Act. The research conducted by Prof Chuma Himonga and Dr Elena Moore[4], in the book called "Reform of Customary Marriage, Divorce and Succession in South Africa" mentioned a need to further engage on the matter of customary marriages.

Their research showed that many communities do not understand the requirements of the Customary Marriages Act as well as its registration.

The research confirms that a marriage can be concluded without Lobola being issued, just as long as there is an agreement to that effect. It is therefore important that it must be understood that the handing over of a bride to the family is not necessarily a requirement for the conclusion of a customary marriage. The requirement is the agreement by both parties who want to be tied into marriage and the negotiations for Lobola. The pair are important in ensuring that the marriage is correctly concluded. ■

Protect your intellectual property

By Ursuley Matjeke, Mashabela Attorneys Inc, Professional Assistant



It has become customary for all South Africans from all walks of life to have an opinion on legal matters affecting society and making news headlines.

More especially on criminal matters (think the Oscar Pistorius or Karabo Mokoena cases) every Tom, Dick and Harry was suddenly a legal expert. When such cases make the news its not very often that legal experts are jumping onto the topic to offer their expertise. Ordinary members of society are often left tangled in their own interpretations. The Casper Nyovest ("Casper") vs Benny Mayengani ("Benny") matter is one such example.

It was alleged that musician, Casper had instituted proceedings against Benny after he had allegedly learned that Benny was using Casper's **#Fillup** trade mark to promote his upcoming event.

Besides the fact that this story failed to gather momentum, the public's verdict was that Casper is a bully with no shame for going against an unlikely threat. I for one cannot help but think that , had this been an assault or robbery matter involving the same two parties, the hype around it would have intensified.

As a Trade Mark Attorney, I can tell you that the public missed an opportunity to be schooled on Intellectual Property ("IP").

It is well known that certain fields of law are still uncharted for most practitioners and the public at large. While Black Lawyers (Attorneys, advocates, legal advisers, etc.) are still trying to make it in the fields of property/conveyancing, commercial law/commercial litigation, tax and banking - fields such as constitutional law, finance law, maritime law, corporate law, mineral and mining law just to name a few, remain barely untapped by black lawyers.

Likewise, IP is probably the least known field/s of legal practice in our Country.

What is Intellectual Property? Popularly IP refers to the application of the mind to develop and/or create new or original ideas, such as, inventions (e.g. anything which offers a technical solution, such as, the different components which make up a cell phone, but not the entire cellphone), artistic, literary and musical works (e.g. paintings, books and music), designs (e.g. aesthetic designs, such as, a ring or a cellphone, or functional designs, such as, a screwdriver or hammer), symbols and names (e.g. logos, slogans and company names).

The fields of IP are traditionally classified as Patents (inventions or technical processes), Designs (aesthetic and functional), Copyright (artistic, literary and musical, to name a few) and Trade Marks (symbols and names). However, there are fields of IP practice which IP lawyers normally and almost exclusively deal in, such as Plant breeders rights, domain names, franchising, licensing and assignments of IP.

IP is protected by law which enables the proprietor/s and their business to benefit financially from their own creations.

IP can either be in material form or in the way a particular thing is done or obtained.

As such, from all this information, it an easily be seen how so many of our people, if not all of us, are affected by IP and/or interact with IP and/or are carrying IP and/or are in the business of making IP for a living, but probably don't know.

In fact, as one of the few IP attorneys, I can confirm that the majority of experts in the business of research and development don't know that, they have IP in their possession once they have completed a particular project.

In most cases IP needs to be registered in order for the proprietor to enjoy protection.

In the case of copyright, only Cinematograph Films may be registered (this is optional), however, copyright rights exists immediately after the material is created.

The Companies and Intellectual Property Commission ("**CIPC**") is the sole office for IP filings and registration in South Africa.

Essentially IP is part and parcel of who you are and what you do.

IP is either part of the goods you produce or the services you provide or part of an identity which distinguishes you from other traders.

The consequences of not registering your IP could be detrimental to your financial status and your position as its owner.

> **"The fields of IP are traditionally classified as Patents (inventions or technical processes), Designs (aesthetic and functional), Copyright (artistic, literary and musical, to name a few) and Trade Marks (symbols and names).**

As such the advantages of registering IP are as follows:

The legal protections you enjoy over your IP offers you the remedy to instituting legal proceedings for infringement against a third party who has unlawfully and unduly used your IP.

It acts as a deterrent for potential infringers or anyone who wishes to file a similar idea. The examination process by the CIPC examiners will probably prevent any party from registering IP which closely resemble or is similar to your IP, regardless of whether that party was aware of your IP or not.

As an owner of IP, you may attract licensees who wish to use your IP. You stand to make an income when you commercialise and license your IP.

That said, coming back to the Casper vs Benny matter. If Casper is the proprietor of the Trade Mark **#Fillup,** then it is no brainer as to why he supposedly instituted legal proceedings against Benny, he had every right to do so.

IP rights and protection exist to afford the proprietor statutory monopoly over their IP and against everyone else. Unfortunately for the music and live events industry, Casper decided to file a trade mark for a phrase commonly used to promote events. Effectively this means Casper is the owner of the term **#Fillup** to the exclusion or everyone else and by using the term **#Fillup**, Benny infringed Casper's IP.

Again unknown to many, including most lawyers, the court roll is obviously not populated with IP matters yet IP violations and possible legal proceedings are very common.

Casper's move is very common in our field and there is nothing malicious or strange about it, as most members of society had conceived. In fact, that is exactly the reason why you need to register your IP, so as to enjoy protection against potential infringement and to deter those with the same ideas from registering their ideas as it might cause confusion and deception.

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JUDGE PRESIDENT
MALESELA FRANCIS LEGODI
Mpumalanga Division of the High Court

Judge Legodi was born at a farm near Maphooto in Limpopo. He completed his B.Proc degree in 1981 at the University of the North (now University of Limpopo). He had initially registered for a B.Com degree in 1976. In that same year, he switched to a B.Proc following inspiration from attending a B.Proc first lecture. In 1978 he had to put his studies on hold after running out of money to pursue the course, but returned in 1979 to continue.

After his graduation he worked as an interpreter, clerk of the court and a prosecutor at Magistrate Thabamoopo, Lebowakgomo in Limpopo up until 1982. He was offered a contract of article ship by Attorneys Ngoepe and Machaka in Polokwane in that year.

In 1984 he moved to Mbombela to work in the only black attorneys firm at the time, Phosa Mojapelo and Partners and admitted as an attorney during October 1986.

In 1987 he partnered with AK Khoza to open a firm of attorneys under the name Legodi, Khoza and Partners in Bushbuckridge, Mpumalanga.
He specialised in human rights cases, defending political activists across the province.

Later, in 1998, he went solo and opened Francis Legodi and Associates, which he ran until 2004 before he was appointed permanently to the Bench.

Judge Legodi served on many structures before his appointment to the Bench, inter alia, was a monitor during the first democratic elections, electoral presiding officer for Lydenburg.

He became one of the first members of the then Mpumalanga Tender Board after having assisted in its drafting from 1994-1998. In 1998, he was a member of the Ngobeni Commission which investigated corruption in the Legislature and later became its Chairperson.

He was also the Chairperson of the Mpumalanga Parks Board during 1996-1998.

He was Chairperson of the Magistrates Commission from 2010. He was also one of the members of the Arms Procurement Commission in 2011, but later resigned for personal reasons. Upon his appointment as a Judge he has taken up motivational speaking, delivering speeches at schools, universities and other community structures and non-governmental organisational work which he continues to do.

ADS *of* COURTS

Source: https://www.timeslive.co.za/ Image: Len Kumalo

JUDGE PRESIDENT
FIKILE CHARLES BAM

Fikile Charles Bam was born on 18 July 1937, in Tsolo, Eastern Cape.

He attended St. Peter's Secondary School. He studied law at the University of Cape Town (UCT) in 1960. Bam was a member of the Yu Chi Chan Club (Chinese for guerrilla warfare) which was a study group that met to discuss means of achieving liberation.

In 1960, Bam was arrested and detained following the Sharpeville and Langa Massacres, when a State of Emergency was declared in South Africa.

He was sentenced to imprisonment on Robben Island in 1963. He served an 11 year sentence, from 1964 to 1975. Bam was detained with other prominent political leaders, such as Nelson Mandela and Walter Sisulu. He obtained a Bachelor of Law degree from the University of South Africa (UNISA) in 1975 after his release from prison. In 1976, he obtained a Baccalaureus Procurationis from the same institution.

Bam applied to join the Pretoria Bar Council in 1978 but was refused. During the same year he was enrolled and admitted as an attorney for the Republic of South Africa.

Over the years Bam has served in various positions, including the Acting Chairman for Lawyers for Human Rights, Deputy Chairman of the Vista University Council and Deputy Chairman of the University of the Witwatersrand Council. He was also Chairman of the Transkei Bar from 1984 to 1985.

Bam has also served as a director of various South African and international companies, including KAPBeteiligungs in Germany, Putco, Volkswagen SA, First National Bank, Iscor Ltd., Armscor, Silver Oak Industries and Consol.

He was a partner in Deneys Reitz Attorneys firm from 1994 to 1995, a member of the South African Broadcasting Commission (SABC) from 1993 to 1996 and director of the Legal Resources Centre in Port Elizabeth in 1985.

Bam was Judge President of the Land Claims Court from 1995 and a member of the Eastern Cape Bar and the Industrial Courts of the Ciskei and Transkei.

He was appointed Commissioner of the Goldstone Commission from 1992 to 1993. He was an advocate in both the Supreme Court of South Africa and the Transkei.

His legal expertise has also been applied in various capacities, including his involvement in the Independent Mediation Services of South Africa in 1987, the Open Society Foundation, Project Literacy, and the Trust for Educational Advancement in South Africa.

In 1994, when the first democratic elections took place in South Africa, Bam served as a mediator for the Independent Electoral Committee.

In the academic arena, Bam was a Visiting Fellow to Yale University in 1985. He served as Chancellor of the University of the Witwatersrand from 1997 to 1998. Rhodes University awarded him an Honorary Doctor of Laws degree in 2001. He was also Professor Extraordinary of Stellenbosch University.

Bam passed away on 18 December 2011 at Milpark hospital in Johannesburg.

Image: Elmond Jiyane GCIS

JUDGE PRESIDENT **RAYMOND ZONDO**

Raymond Zondo was born at Ixopo, Kwa-Zulu Natal, he obtained his secondary and high school education at St Mary's Seminary. He studied law at the University of Zululand, University of Natal (now University of Kwa-Zulu Natal) and later at the University of South Africa.

He holds the following degrees:

- B. Iuris (University of Zululand)
- LLB (University of Natal)
- LLM (cum laude) in labour law (University of South Africa)
- LLM with specialisation in commercial law (University of South Africa)
- LLM (in patent law) (University of South Africa)

Justice Zondo served part of his articles of clerkship under anti-apartheid activist Victoria Mxenge's law firm in Durban. Zondo ceded his articles of clerkship after Mxenge's assassination by apartheid agents in 1985.

He moved to Mthembu & Partners to later join Chennels Alberton Attorneys.

After being admitted as an attorney Zondo became a partner in Durban law firm; Mathe and Zondo Incorporated.

He also served as mediator and arbitrator part-time. In 1991 and 1992 Justice Zondo served in two committees of the Commission of Inquiry; the Prevention of Public Violence and Intimidation (also known as the Goldstone Commission) which investigated violence in South Africa during the early 1990's.

In 1994 Zondo was appointed as a member of the Ministerial Task Team. The team was tasked with producing a draft Labour Relations Bill for post-apartheid South Africa, the Bill was later passed as the Labour Relations Act, 1995.

In 1996 he was appointed the first chairperson of the Governing Body of the Commission for the Conciliation, Mediation and Arbitration (CCMA) from which position he resigned upon his appointment as a Judge. On 1 February 1997, Justice Zondo was appointed Acting Judge of the Labour Court and on 1 November 1997 he was appointed Judge of the Labour Court. In April/May 1999 he was appointed Judge of the then Transvaal Provincial Division of the High Court (now the North Gauteng Division of the High Court) in Pretoria. Almost three months later on 1 August 1999 he was appointed Acting Judge President of the Labour Appeal Court and Labour Court. A year later on 1 May, Zondo was appointed Judge President of the Labour Appeal Court and Labour Court for a 10 year term.

While he was Judge President, Zondo served in the following ad hoc committees established by the Heads of Courts;

A committee, chaired by Chief Justice P.N Langa, which drew up a document to be used by the Judiciary in dealing with complaints about racism and sexism within the Judiciary.

A committee chaired by Judge President Ngoepe, established by the Heads of Courts to organise the first and second Conferences of Judges in post-apartheid South Africa. Justice Zondo also chaired a committee of the Heads of Courts which looked into the use of official languages in courts.

After completing his term of office as Judge President in 2010, Zondo returned to the North Gauteng Division of the High Court and resumed his duties as a Judge of that court.

Justice Zondo was appointed Acting Judge of the Constitutional Court on 1 November 2011-31 May 2012. On 13 August 2012 he was appointed Judge of the Constitutional Court with effect from 1 September 2012. Justice Zondo was appointed as Deputy Chief Justice of the Republic of South Africa on 1 June 2017.

JUDGE PRESIDENT
DENNIS DAVIS
Competition Appeals Court

Justice Dennis Davis was educated at Herzlia School, University of Cape town (UCT) and Cambridge University. In 1977, he began teaching at UCT, he was appointed to a personal chair of Commercial Law in 1989. Between 1991 and 1997 he was Director of the Centre for Applied Legal Studies of the University of the Witwatersrand. Justice Davis held joint appointment at Wits and UCT from 1995 - 1997.

While at CALS, he was legal advisor to the multi-party conference that drafted the South African constitution. He was appointed a Judge of the High Court in 1998 (Cape High Court) and President of the Competition Appeal Court in 2000. Since his appointment to the Bench, he has continued to teach constitutional law and tax law at UCT where he is a honorary Professor of law. He is a member of the Commission of Enquiry into Tax Structure of South Africa. He served as the Deputy Chairman of the Katz Commission of Enquiry into certain aspects of the tax structure of South Africa during the country's transition to democracy. During 2013, he was appointed by then Finance Minister, Pravin Gordhan to Chair the Commission of Enquiry into Tax Policy Reform.

Judge Davis is the author of 10 books. He has hosted a TV programme, Future Imperfect which was an award winning current affairs programme between 1993 and 1998. He's held visiting professorial posts at universities in Toronto, Melbourne and Florida, Harvard , NYU, Brown and Georgetown. Judge Dennis Davis, personally didn't want to be a Judge, but it was the first Chief Justice of a democratic government; Ismail Mohamed, who persuaded him to allow himself to be considered for an appointment to the bench.

JUDGE PRESIDENT
JEREMIAH BUTI ZWELIBANZI SHONGWE
Electoral Court

Judge President Shongwe was born on 3 December 1948, in Pretoria. He completed his Matric at Edendale Technical College, Pietermaritzburg. In 1974, he obtained a B.Proc degree from the University of Zululand. He was registered for the LLB degree at the University of Zululand during 1975 – 1976, his final year of the degree was not completed due to political unrest. Judge Shongwe has been awarded a Doctor of Laws degree (Honoris Causa) by the University of Venda in 2007. Shongwe was admitted as an attorney in 1979 following completion of articles of clerkship.

He practised as a professional assistant for three years and thereafter practised for 20 years as an attorney mainly specialising in human rights law. Judge Shongwe practiced law as an Attorney from 1981 until 2000. He was an Executive Member of Black Lawyers Association from 1989 – 1990.

He acted as a Judge of the South Gauteng High Court from 1999 to 2000 (then Witwatersrand Local Division) and was elevated to the bench as a permanent Judge of the North Gauteng High Court from January 2001. He was appointed the Deputy Judge President of the same Division from 2005 until his elevation to the Supreme Court of Appeal in 2009.

Judge President Shongwe was appointed to head the Electoral Court from May 2014 . He is a Judge of the Supreme Court of Appeal appointed in December 2009 to date. He is the Acting Deputy President of the Supreme Court of Appeal from April 2017 to date.

Legislative oversight: The Transkei Marriage Act

A commentary on *Holomisa v Holomisa and Another* (CCT 146/17) [2018] ZACC 40

By Adv. Gugulethu Nkosi, University of South Africa

Somehow, regardless of the legal developments aimed at emancipating women, the detrimental effects of section 7(3) of the Divorce Act 70 of 1979, read with section 39 of the Transkei Marriage Act 21 of 1978 remained.

This legislative oversight was brought to light in *Holomisa v Holomisa and Another*. In this case, the Constitutional Court had to decide on the constitutionality of section 7 (3) of the Divorce Act in relation to section 39 of the Transkei Marriage Act.

The applicant (Mrs Holomisa) and the first respondent (Mr Holomisa) entered into a marriage under the Transkei Marriage Act in 1995. In 2014, the first respondent instituted a divorce action on the ground of the irretrievable breakdown of the marriage.

In terms of section 39(1) of the Transkei Marriage Act, a marriage contracted under the Act produces legal consequences of a marriage out of community of property and of profit and loss. This is unless the parties enter into an ante-nuptial contract which provides for community of property or of profit and loss. In this case, the parties did not conclude an ante-nuptial contract.

Section 7 of the Divorce Act regulates redistribution of spousal assets in the event of divorce.

In this regard, section 7 (3) limits the application of its provisions to persons married out of community of property in terms of an ante-nuptial contract before the commencement of the Matrimonial Property Act 88 of 1984; and those married in terms of the Black Administration Act 38 of 1927 before the commencement of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

This provision does not make any reference to marriages out of community of property under the Transkei Marriage Act.

Regional Court

This case was first heard in the Regional Court. The first respondent asserted that the marriage with the applicant was out of community of property. The applicant however, denied this assertion and pleaded that the marriage was concluded in community of property.

In making its decision on the matrimonial property regime, the Regional Court considered the provisions of Marriage Extension Act 50 of 1997 (the Extension Act).

The purpose of the Extension Act was to extend the operation of the Marriage Act 25 of 1961 to the whole of South Africa. The Regional Court found that the Extension Act applied retrospectively. Consequently, all marriages concluded without an ante-nuptial contract after 27 April 1994, in the former Transkei, Bophuthatswana, Venda and Ciskei (TBVC) areas were deemed to be South African marriages.

As a result of the Extension Act, according to the Magistrate, the Marriage Act was applicable to the marriage of the applicant and the first respondent.

Notably, unlike in the former Transkei, the primary matrimonial system in South Africa is the universal community of property. This means that marriages concluded without an ante-nuptial contract were deemed in community of property and of profit and loss.

This provision, as discussed above, stands in direct contrast to section 39(1) read with subsection (2) of the Transkei Marriage Act.

The Magistrate granted a decree of divorce; and made a ruling that the marriage was in community of property.

High Court

The first respondent then appealed to the High Court. The High Court confirmed the decision that the marriage was in

community of property. However, the Court rejected the reasoning of the Magistrate that the Extension Act impliedly repealed the Transkei Marriage Act.

The High Court said that the retrospective effect of the Extension Act does not alter the matrimonial property regimes of marriages solemnised after 27 April 1994.

Instead, the High Court based its decision on the fact that the first respondent failed to present a copy of the marriage certificate as evidence that he and the applicant were domiciled and married in the Transkei, in terms of the Transkei Marriage Act.

Failure to present the said evidence meant that the first respondent could not argue that section 39(1) of the Transkei Marriage Act was applicable.

> "Unlike in the former Transkei, the primary matrimonial system in South Africa is the universal community of property. This means that marriages concluded without an ante-nuptial contract were deemed in community of property and of profit and loss.

Supreme Court of Appeal

The first respondent further appealed to the Supreme Court of Appeal.

In the Supreme Court of Appeal the applicant made a new submission, namely that that section 7(3) of the Divorce Act was unconstitutional as it did not allow the applicant and other vulnerable women married without an ante-nuptial contract, under the Transkei Marriage Act, to seek a redistribution of the spousal assets.

However, this submission was not considered by the Court. The Court said that it will not allow a new point to be raised for the first time on appeal.

The Supreme Court of Appeal subsequently reversed the High Court decision and held that the marriage was out of community of property. The Supreme Court of Appeal rejected the High Court decision on the basis that it is common cause that the marriage was solemnised in Transkei and that the Transkei Marriage Act was applicable at the time when the marriage was concluded. Furthermore, the Supreme Court of Appeal held that there was no just cause that the applicant did not wish her marriage to the first respondent to be out of community of property. Had she preferred that the marriage be in community of property, she would have concluded an ante-nuptial contract or made a joint declaration to that effect with her husband-to-be, before a magistrate or marriage officer prior to the solemnisation of the marriage; as provided in section 39(2) (a) and (b) of the Transkei Marriage Act.

Constitutional Court

As a result of this ruling which declared that the marriage was out of community of property, the applicant sought an order from the Constitutional Court to be granted direct access to the said court in order to challenge the provisions of section 7(3) of the Divorce Act 70 of 1979.

The applicant averred that section 7(3) of the Divorce Act is unconstitutional in as far as it does not allow a spouse married out of community of property as contemplated in section 39 of the Transkei Marriage, the right to claim a redistribution of property on divorce. As indicated, by the Supreme Court of Appeal, not unexpectedly, rejected this new submission, as it is not the court of first instance. The Constitutional Court nevertheless, granted the applicant direct access; and deliberated on the matter.

Legislative anomaly

Before passing its decision, the Constitutional Court provided an account of why the irrational application of section 7(3) of the Divorce Act still remains standing. Various statutes aimed at creating uniformity in marriage laws throughout South Africa, including the former homelands, were passed over the years.

The Justice Laws Rationalisation Act 18 of 1996 (which commenced in 1997) extended the operation of various laws including the Divorce Act 70 of 1979 and the Matrimonial Property Act 88 of 1984, to the whole of South Africa.

Furthermore, the Extension Act extended the operation of the Marriage Act 25 of 1961. The Extension Act applied retrospectively. However, as indicated above, the matrimonial property regimes could not be altered through the Extension Act. Hence, the provisions of section 39 of the Transkei Marriage Act remained valid.

Although the Recognition of Customary Marriages Act 120 of 1998 (which commenced in 2000) finally repealed section 39 of the Transkei Marriage Act, it did not invalidate the said provision retrospectively. As a result, the provisions of section 39 still applied to a certain category of marriages.

In deciding on the validity of section 7(3) in relation to section 39 of the Transkei Marriage Act, the Court found that there was no rationale in the persistent discrimination against women married in terms of section 39, under the Transkei Marriage Act. The Court therefore declared section 7(3) unconstitutional in as far as it discriminates against women married out of community of property in terms of the now repealed section 39 of the Transkei Marriage Act. The Court suspended the declaration of constitutional invalidity for twenty-four months in order to allow Parliament to remedy this defect. During the period of suspension section 7(3) of the Divorce Act must be read to include marriages "entered into in terms of the Transkei Marriage Act as it existed before the repeal of section 39, without entering into an ante-nuptial contract or an express declaration in terms of the repealed section 39(2) before the marriage".

The decision of the Constitutional Court is commended. The Court observed the constitutional imperatives and halted the discriminatory application of section 7(3) of the Divorce Act.

Drunken driving: Jail time or not?

By Howard Dembovsky, Justice Project South Africa, Chairperson

"Drunk drivers beware, you could spend seven days in jail before getting bail"[1].

You've got to hand it to whomever crafted that sensational headline for triggering a skewed media frenzy. As a result, wide public interest in just one of the road traffic offences the Road Traffic Management Corporation (RTMC) and Department of Transport (DoT) is seeking to have "re-classified" to Schedule 5 offences in terms of the Criminal Procedure Act, 51 of 1977 (CPA).

As Justice Minister Michael Masutha's spokesperson, Mukoni Ratshitanga correctly pointed out to the Sunday Times reporter "That proposal dates back to when Dipuo Peters was minister".

In fact, it dates back to 12 January 2016 when Ms Peters held a media briefing to announce the December 2015 to January 2016 festive season road fatalities.

At that briefing, she stated that her department would continue in its endeavour and quest to have all road traffic offences re-classified to Schedule 5 of the CPA in order to introduce "a mandatory minimum sentence for drunken driving, inconsiderate, reckless and negligent driving"[2].

At that same media briefing, RTMC Chairman Zola Majavu stated: "we want people arrested for traffic offences to spend seven days in prison awaiting bail applications, like other people facing serious offences"[3]

In April 2017, it was then Transport Minister, Joe Maswanganyi's turn to speak about "the department's long-term strategy to curb road casualties", when announcing the horrific Easter period road death toll[4].

In the 4 November 2018 Sunday Times report, the RTMC's CEO, Advocate Makhosini Msibi is quoted as having said "Above all, it must not be automatic, you must spend seven days [in jail] before you can bring the application for bail", thus echoing Mr Majavu's assertions.

Over the years, the RTMC and DoT have flip-flopped between claiming that the "strategy" arises out of road traffic offences currently constituting Schedule 3 (in 2015, 2016 and

1 Drunk drivers beware: you could spend seven days in jail before getting bail – https://www.timeslive.co.za/sunday-times/news/2018-11-04-drunk-drivers-beware-you-could-spend-seven-days-in-jail-before-getting-bail/

2 See https://sarf.org.za/wp-content/uploads/2016/08/festive_report_2015.pdf .

3 More jail time for errant motorists – https://www.iol.co.za/motoring/industry-news/more-jail-time-for-errant-motorists-1970040.

4 Guaranteed jail time on the cards for drunk drivers in South Africa – https://businesstech.co.za/news/government/171717/guaranteed-jail-time-on-the-cards-for-drunk-drivers-in-south-africa/

2017) and now Schedule 2 (latest claim) offences. They have also flip-flopped between "re-classifying" these offences to Schedule 5 and Schedule 6 of the CPA.

What's remained consistent is the RTMC's and DoT's desire to introduce minimum sentences and to force those arrested for any alleged road traffic offence to spend seven days in holding cells. This would be prior to being allowed to be brought before a lower court for a bail application to be heard.

These inconsistencies cannot be attributed to inaccurate reporting by the media.

I have been present at some of and watched other media briefings held by the DoT and the RTMC on TV and have heard these assertions first-hand.

I have also repeatedly called out these assertions for what they are: incorrect interpretation and quotation of the law and a clear attempt by the Department of Transport and RTMC to depart from the South African system of Jurisprudence and indeed, the Bill of Rights enshrined in the Constitution of the Republic of South Africa, 1996.

Now please don't take me wrong, I am not in any way opposed to the concept of introducing mandatory terms of imprisonment where the commission of a serious road traffic offence results in the death or serious injury of other, innocent road users. On the contrary, it is my view that doing so may cause some motorists to think twice before engaging in dangerous driving practises.

But as Professor James Grant of the University of the Witwatersrand's faculty of law correctly stated to the Sunday Times "The idea that you're going to curb traffic offences and solve the problem by making it harder to get bail is preposterous". He was also quoted as saying that "it is also absurd to equate speeding with murder and rape". Respectfully, I have to say that it goes much further than that. As is revealed on page 5 of the RTMC's "Revised Strategic Plan 2015 – 2020 and Revised Performance Plan 2018 -2019"[5], signed off by the latest in a string of Ministers of Transport, South Africa has seen over the past three years, Msibi states that "One of the initiatives [of the RTMC] is to **re-classify all road traffic offences** to Schedule 5 of the Criminal Procedure Act (CPA)".

Page 34 of that same document goes on to state that "Driving under the influence of alcohol is currently a **schedule 3 offence** and as such, equivalent to minor crime and action against such is not severe. The Corporation through the Department of Transport aims to **re-classify all road traffic offences** to Schedule 5 of the Criminal Procedure Act".

At least this "strategic plan" brings a little clarity to what the RTMC thinks the applicable Schedule under which driving under the influence of alcohol is contemplated in the CPA. It also clarifies which Schedule the RTMC and DoT feel this offence should be "re-classified" fall under. But that, I am afraid is where it begins and ends.

Anyone who has access to the CPA and its schedules will be able to observe that driving under the influence of alcohol or a drug having a narcotic effect (DUI) does not appear **anywhere** in Schedule 3 of the CPA. Nor does "reckless or negligent driving". Furthermore Schedule 3 applies **solely** to the specific offences listed therein, and in respect of which a fine may be paid in order to **completely avoid formal prosecution**, in line with Section 341 of the CPA.

These offences are:

- Any contravention of a by-law or regulation made by or for any council, board or committee established in terms of any law for the management of the affairs of any division, city, town, borough, village or other similar community;
- driving a vehicle at a speed exceeding a prescribed limit (speeding);
- driving a vehicle which does not bear prescribed lights, or any prescribed means of identification (number plates);
- leaving or stopping a vehicle at a place where it may not be left or stopped, or leaving a vehicle in a condition in which it may not be left;
- driving a vehicle at a place where and at a time when it may not be driven;
- driving a vehicle which is defective or any part whereof is not properly adjusted, or causing any undue noise by means of a motor vehicle;
- owning or driving a vehicle for which no valid licence is held; and/or
- driving a motor vehicle without holding a licence to drive it.

Just so it's crystal clear, the offence of DUI does not feature in Schedule 2 either, or indeed, in **any** of the eight schedules in the CPA. Equally, nowhere in the CPA are minimum sentences prescribed. Minimum sentencing guidelines are prescribed in the Criminal Law Amendment Act, 105 of 1997 (as amended).

The penalties in terms of the well over 2,000 offences[6] that are created by the National Road Traffic Act, 93 of 1996 (NRTA) read with the National Road Traffic Regulations, 2000 are prescribed in Section 89 of the NRTA.

In the case of driving under the influence of intoxicating liquor or a drug having a narcotic effect (Section 65), as well as reckless driving (Section 63), the prescribed penalty is a fine of up to R120,000 or imprisonment not exceeding six years[7]. Noticeably absent is the term "or both, a fine and imprisonment", or indeed "imprisonment without the option of a fine".

A conviction for negligent driving (also Section 63) is subject to a fine of up to R60,000 or imprisonment not exceeding three years[8]. The longest term of imprisonment prescribed in the NRTA is nine years, for contravening Section 61(1)(a), (b)(c) or (f) of the NRTA, which constitutes "hit and run"[9]. Even here, the option of a fine is included.

5 RTMC Revised Strategic Plan 2015 – 2020 and Revised Performance Plan 2018 -2019 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Road_Traffic_Management_Corporation_APP_201819.pdf

6 See Schedule 3 of the Administrative Adjudication of Road Traffic Offences Regulations, 2008.

7 See Section 89(2) of the National Road Traffic Act, 93 of 1996 as amended on 10 November 2010, with effect from 20 November 2010.

8 See Section 89(5)(b) of the National Road Traffic Act, 93 of 1996.

9 See Section 89(4)(a) of the National Road Traffic Act, 93 of 1996.

> **“Surely, common sense would dictate that if the RTMC and the DoT want to see convicted persons sentenced to a term of imprisonment exceeding six months, it would review Section 89 of the NRTA to incorporate penalties which do not include the option of a fine?**

But what the RTMC and DoT are asserting in the RTMC's strategy document doesn't stop at the re-classification of serious road traffic offences, it includes **all** road traffic offences.

Surely, common sense would dictate that if the RTMC and the DoT want to see convicted persons sentenced to a term of imprisonment exceeding six months, it would review Section 89 of the NRTA to incorporate penalties which do not include the option of a fine?

Therefore, all the DoT needs to do is remove the option of a fine from any and all penalties prescribed in Section 89 of the NRTA.

This would have the effect of mandating law enforcement officials to arrest any person who contravenes any provision of the NRTA or its regulations. This would include arresting a person for driving a motor vehicle which has a blown tail lamp and as patently absurd as it may sound, this is exactly what the RTMC's policy seeks to do.

Doing so would automatically elevate such offences to Schedule 1 of the CPA, which includes the crimes of "murder, rape, theft and fraud" the media loves to quote and would negate the need for any of the legislation which falls within the purview of the Department of Justice to be interfered with.

In the case of persons who have previously been convicted thereof, or where a person violates their bail conditions, the offence would automatically be escalated to Schedule 5 of the CPA.

As a direct consequence, it would also have the effect of negating the Administrative Adjudication of Road Traffic Offences (AARTO) Act, 46 of 1998 which the DoT appears to be determined to implement nationally as soon as it can get it past the National Council of Provinces.

Most worrisome however, is that what the RTMC seeks to do is to punish persons who stand **accused of** any road traffic offence up-front, by causing them to be detained in holding cells for seven days prior to being brought before a court for a bail hearing to commence.

Nowhere in the CPA is this concept even contemplated, let alone prescribed. On the contrary, Section 50(1) of the CPA specifically prescribes that a person who has been arrested without a warrant must be brought before the court within a maximum of 48 hours of his or her arrest, or if the court is not in operation within that period, on the first day after which the 48 hours has elapsed.

This, of course, only applies if the accused person has not been released on police bail as is prescribed in Section 59(1)(a) of the CPA, which practice is what the RTMC clearly feels should be abolished.

The purpose of Schedule 5 of the CPA is to give effect to the prescripts of Sections 58, 60(11)(b), and 60(11A) of the CPA. Notably Section 60(11)(b) of the CPA requires that "the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law. This is unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release [on bail]".

It is true that bail proceedings are often postponed, to enable the accused's legal representatives of those accused of a Schedule 5 offence to formulate arguments.

As to why the interests of justice or State formulates why they would or wouldn't permit the accused to be released on bail, does not mean the accused must spend seven days in detention before being brought before court.

It is my view that if the reckless "7 days in jail before bail" approach the RTMC is championing was to miraculously make it past the Department of Justice and Parliament, which it would have to do in order to amend the CPA, then South Africa's prison population would explode way beyond its current 137% of capacity[10], without even amending Section 89 of the NRTA.

10 See https://www.iol.co.za/news/south-africa/masutha-says-south-african-prisons-at-137-occupancy-15026418

Corporal punishment leads to negative outcomes in children

Section 12 of the South African Constitution provides that everyone has the right to freedom and security of the person

By André Lewaks and Suleiman Henry, Sonke Gender Justice

The recent Constitutional court hearing about the constitutionality of the use corporal punishment in the home has sparked conversation amongst activists, legal experts and members of the general public. The case is an appeal to a judgment by the South Gauteng High Court which struck down the defense of 'reasonable chastisement' in October 2017.

The High Court found that a defense that allows parents to physically discipline their children violates their rights and protection from all forms of violence, which is critical in our context of alarmingly high levels of violence against children.

The judgment reinforced submissions by the Children's Institute, The Peace Centre, and Sonke Gender Justice – all represented by the Centre for Child Law – which had underlined the high levels of violence against children and the link between corporal punishment and other forms of violence.

Source: www.mg.co.za

> "It is almost impossible to discuss child discipline without addressing the issue of rights. The Constitution of South Africa ensures that every person in South Africa has the right to equality, dignity, security of the person and to be protected from arbitrary application of the law.

At present, the common law defense of 'reasonable chastisement' practically allows parents to spank their children with the justification of corporal punishment being a form of discipline. The central question before the Constitutional Court is whether this practice should continue to be allowed or whether it needs to be prohibited since it violates children's rights. Those in support of corporal punishment or reasonable chastisement argue that its use is necessary to ensure that children are disciplined.

In contrast to this argument, it is important to emphasize that discipline is an integral part of parenting and is defined as a process of conveying knowledge and skills to teach children self-control as well as acceptable behaviour (Papalia, Olds & Feldman, 2006). Corporal punishment is the opposite, it's defined as any punishment that makes use of physical force intended to cause some degree of pain or discomfort, even if it is a light degree of punishment (Sonneson, 2005). The intention of corporal punishment is often intended to elicit a punishing consequence, as a means to decrease the likeliness of a recurrence of a child's unacceptable behaviour (Gershoff, 2013). This article explores the linkage between corporal punishment and the normalisation of violence. It also demonstrates how corporal punishment links to other forms of violence and violates the human rights of children in general.

Corporal punishment and violence

There is a clear linkage between corporal punishment, other forms of violence and social problems children experience. Very often, parents do not understand the long term effects of such punishment on perpetrating further violence. In a meta-analysis, Gershoff's (2002), concluded that there was a clear link between corporal punishment and aggression and that there was a small to moderate effect of parental use of

physical punishment on children's aggression and a moderate effect on adult aggression. There are previous studies that draw a clear link between the association between physical punishment and children's aggressive behaviour (Halpenny, Nixon & Watson, 2010).

Patterson (2002), indicates that parents that use harsh and coercive strategies to discipline misbehaving children, unwittingly model and reinforce aggressive exchanges with their children.

Corporal punishment forms part of a cycle of violence and it teaches children that violence is an acceptable form of resolving conflict thus contributing to the normalisation of violence in society.

South Africa as a country is currently suffering with high levels of violence. Physical punishment is amongst the most commonly practiced forms of violence in the country.

Of the nearly 60% of parents that reported hitting their children, the majority used a belt or other objects. The most common age for beatings of children is 3 - 4 years (Dawes et el, 2005).

Children that are subjected to violence are often also subjected or exposed to emotional violence and neglect. A previous study found that 35 - 45% of children had witnessed their mother being beaten, while about 15% of children reported that one or both their parents had been too drunk to care for them (Seedat et al, 2009).

In analyzing the effect of corporal punishment on children, it is important to examine the developmental risk factor since the use of corporal punishment is associated with social and emotional problems amongst children and young people. Some of these problems includes impaired parent-child relationships and challenging behaviors (Gershoff, 2002; 2013).

An American survey conducted with 34,000 adults between 2004-2005 found the experiences of harsh childhood corporal punishment were associated with social problems such as an increased risk of mood and anxiety disorders, alcohol and drug abuse and personality disorders in adulthood (Afifi, Mota, Dasiewicz, MacMillan, & Sareen, 2012).

Corporal punishment violates children's rights

Sonke Gender Justice argues that corporal punishment violates children's rights.

The human rights activists believe South Africa is obligated to prohibit all forms of corporal punishment for the following reasons:

- It has ratified both the United Nations Convention on the Rights of the Child (UNCRC), in 1996 and the African Charter on the Rights and Welfare of the Child (ACRWC), in 2000.
- Although there's no specific article which deals with corporal punishment in either of these two conventions, the committees which monitor their implementation have interpreted both conventions to explicitly prohibit corporal punishment.

Section 12 of the South African Constitution provides that everyone has the right to freedom and security of the person. This includes the right to be free from all forms of violence from either public or private sources and the right not to be treated or punished in a cruel, inhuman or degrading way.

Reflecting on child discipline

The word discipline itself implies something positive. It's derived from the same root as the word 'disciple', which refers to someone who learns from another. The literal interpretation of this word refers to teaching and learning, thus interpreting discipline as corporal punishment is simply inconsistent with the words meaning.

Positive discipline incorporates a variety of techniques, to ensure that a child's learning and development becomes the essential and most central value when enforcing discipline.

It includes guiding, teaching and modelling good behaviour. As Durant J, notes in a 2007 resource on Positive Discipline[1]. Positive Discipline excludes the negative effects and consequences that accompany harsh forms of punishment and builds on a more relational approach that helps children internalise the desired behavioural outcomes.

1 Joan E. Durrant, Ph. D. - Positive Discipline:What it is and how to do it

It is almost impossible to discuss child discipline without addressing the issue of rights. The Constitution ensures that every person in South Africa has the right to equality, dignity, security of the person and to be protected from arbitrary application of the law.

Any law that allows for harsh and punitive forms of discipline does not purport to carry forward the principles and rights of the Constitution. Harsh discipline allows for the law to discriminate on the basis of age and for parents to infringe on the dignity of the child. Harsh forms of discipline can be humiliating to the child, directly impacting their dignity. It also does not allow for the child to be free from harm. The Constitution describes these rights as non-derogable, therefore they may not be limited by a law of general application. It cannot be said that infringing on these non-derogable rights is in the best interests of any person in South Africa thus it cannot be allowed to operate arbitrarily against children.

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A Symbol Beyond His Lifetime

By Nkosinathi Biko , Executive Trustee of the Steve Biko Foundation

We are a people immersed in a culture of symbolism. One such symbol is that which marks the grave of the departed, in modern day form this is a tombstone.

While designed to mark the end of life, many African communities believe that the end of one form of life is, in fact, the beginning of another.

For this reason, solace is often derived from the conviction that having been beckoned to the world of ancestors, one's dearly departed joins those departed before them and from their ancestral world, continues to cast an eye over their erstwhile earthly home.

Forty-one years ago the Biko family erected a tombstone to mark the grave of one of their sons, Bantu Stephen Biko. He is buried in what has since become known as the Biko Garden of Remembrance, which is located on the edge of Ginsberg township.

> "For many, Biko's murder seemed to signify the end of an era. Indeed, many have defined 12 September 1977 as a sunset moment in South African history.

On 18 August 1977 he had left his home a healthy thirty-year-old man, by 12 September 1977 he was dead, becoming a victim of police brutality.

The memories of what happened to him in detention were refreshed by the recent inquest into the murder of Ahmed Timol, who like Biko and many others, were victims of torture and death in detention.

For many, Biko's murder seemed to signify the end of an era. Indeed, many have defined 12 September 1977 as a sunset moment in South African history.

Recently, I walked past the graves that have since filled the cemetery, on the way to his. I noticed for the first time something that is otherwise glaringly obvious, that most of the tombstone messages were of a personal nature such as, rest in peace, missed by, survived by. On his tomb stone the message is simply: Bantu Stephen Biko Honorary President Black People's Convention. Born 18 – 12 - 1946. Died 12 – 9 - 1977. One Azania One Nation. It is so because his death was a loss to the nation and thousands came to join his family to share in its pain, thus the message of unity, which had been the rallying cry of the Black Consciousness Movement. Biko himself had argued that, "Death can itself be a politicising thing."

Since the funeral on 25 September 1977, I have been a regular at his grave, to carry out various duties otherwise to pay my homage, often in the company of a visitor or three who also wish to do the same.

As is customary in our tradition, a close relative of the deceased has the responsibility to conjure the spirit of the family ancestry and to announce the presence of visitors at a graveside.

In isiXhosa this act is referred to as *ukubika* and the message *umbiko*, a word that is at the root of my family identity. It is then and only then that the visitor may place a pebble on the grave as a gesture of salutation. The visitor may also proceed to convey such message, as they deem appropriate, either audibly or in quiet contemplation, in augmentation of *umbiko*. Lastly, following a visit to the grave the visitors are expected to present at the home of the deceased for a hand washing ceremony.

Over the years I have come to learn that legacies that live in people's hearts are most resilient. Unlike Jimmy Kruger who was left "cold" by the death of Steve Biko, for many Biko is, as one elder described him, a "warm feeling."

As important as commemorative days are, it is what happens in between them that is of more significance.

In the case of Steve Biko thousands of visitors make this annual visit and participate in the traditional homage, albeit that theirs might be totally dissimilar.

These visitors originate from all over the country as well as from an increasing number of international cities and institutions.

Refreshingly, it is young people who, for the most part, visit on school tours or through other organised youth formations that frequent the Biko Trail, which includes his home, No. 698 Leightonville, now known as the Biko Monument.

This was our grandparent's house to which he was banned and banished for the last five years of his life. His house therefore was a room within this home, which was shared by the broader family. It is the location of many fond childhood memories including the tugging smell of my grandmother's freshly baked bread, which still comes alive at every visit, long after her death in November 1995.

Following the birth of my brother Samora, in August 1975, my parents, then with a growing family, were on the lookout for a house and had in fact secured tenancy at No. 700 Leightonville from the local rent office, shortly before my father's death. At the time, full-title tenure was not available to Black people. This was to be our new home and my father was to seek an amendment to his banning order to allow him to move house, but death struck sooner than occupation. In fact transfer to our new family home coincided with his to his ancestral home.

The Biko Trail also passes his former office, No.15 Leopold Street, the regional offices of the Black Community Progammes where Biko was Regional Executive Director.

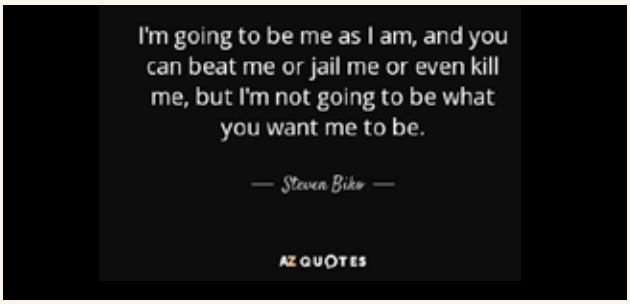
The office ran a number of self-reliance initiatives including Njwaxa, which made leather products, Zimele Trust Fund, which supported families of former political prisoners, as well as bursary schemes and other initiatives. These offices were a hive of political and development activity that brought hope to many. This is one of the more unique aspects of the legacy of Black Consciousness – its ability to take ideas into the practical realm. It is a critical but rare skill one wishes had had enough time to take root, the absence of which explains the yawning gap between the poetry of our current day policies and the efficacy of projects that flow from these policies.

The Biko Trail further incorporates Zanempilo Clinic, which was a project of the Black Community Programmes. It was designed to demonstrate to the then apartheid government how little it took to provide quality basic healthcare services, even in the most rural of settings. I have a scar on my forehead to remember Zanempilo by, following a bicycle accident at our neighbour's house, which was one of my many emergency visits there, occasioned by boys being boys. The other is on my right foot following a game of Russian roulette that ended up with a garden fork plunged right through my foot by my friend, Sikhumbuzo Msumza, who was our neighbour's son. He had thought that I would remove my foot on that occasion. We both were very wrong. I remember being stitched together at Zanempilo. On a recent visit to King William's Town I ran into one Zanempilo Madikana, who was amongst the first babies to be delivered at Zanempilo clinic, on 22 September 1977, three days before Biko's funeral. He consequently earned its name for keeps – the place that brings wellness. He is forty plus now and the clinic continues to operate to this day albeit under the Eastern Cape Department of Public Health.

> **"When the late Chinua Achebe delivered the Biko Memorial Lecture he made an interesting observation. He urged that we should not forget Steve Biko, "Not because it is important to him. He is all right where he is. We must do it because it is important to us."**

Steve Biko and Mamphela Ramphele *Source: Gallo*

When the late Chinua Achebe delivered the Biko Memorial Lecture he made an interesting observation. He urged that we should not forget Steve Biko, "Not because it is important to him. He is all right where he is. We must do it because it is important to us." It is for this reason that evoking the spirit of the founders of our democracy is a developmental imperative, not a luxury. ■



JUSTICE THOLAKELE HOPE Madala

By Adv. Dumisa Ntsebeza SC, University of Fort Hare Chancellor

I think I met Mr Tholakele Hope Madala for the first time in 1976.

I was accused No. 1 in a trial where my co-accused were Lungisile Ntsebeza, the late Matthew Goniwe, Meluxolo Silinga and the late Michael Mgobozi. We had been arraigned on charges of seeking to overthrow the Republic of South Africa, under the then Suppression of Communism Act No. 44 of 1950.

Madala was an attorney in Mthatha, whom on this day, was assisting defence Advocate JNM Poswa, (who later became a Judge of the High Court of South Africa) with carrying files into the court room. In 1977, the four of us were convicted and sentenced to 4 years imprisonment, while Mgobozi got off with a suspended sentence.Behind bars, I studied and had acquired a B. Proc degree that enabled me to register as a candidate attorney in 1982.My next encounter with Madala was in the early 1980's, I now was an attorney in Mthatha. From 1984, I practised as an attorney and partner in the Sangoni Partnership while Madala had since been called to the Mthatha Bar.

I was thus privileged to establish a relationship with him in his capacity as counsel, with me instructing him in a number of matters, some of them political trials, in some of which he was Junior Counsel to either JNM Poswa or the late Tembile Skweyiya (who himself ended up as judge of the Constitutional Court).

In the mid-1980's, as a member of the Umtata Democratic Lawyers Association (UDLA), Madala served in a committee that campaigned for the abolition of the death sentence. In 1985, he together with myself became a founder member and director of the Prisoners Welfare Programme (PRIWELPRO). Through PRIWELPRO, we provided legal and financial assistance to political detainees, ex-political prisoners and their families.

MADALA AS A JUDGE

As South Africa was on its way to becoming a constitutional democracy, Madala became a judge in the then Transkei Supreme Court in 1994. It was clear that there would be a need to fill in positions in the Constitutional Court, a first of its kind in the history of this land.

South Africa's first post-Apartheid Minister of Justice, the late Abdullah [*Dullah*] Omar one day phoned me and asked if he could submit Madala's name to President Nelson Mandela for judicial appointment to the Constitutional Court. Without even consulting Madala, I told Minister Omar that Madala would be available for appointment to South Africa's first ever apex Court. This was so, I argued, [and Dullah agreed], because there were only three Black judges in South Africa at that point. *Dullah* and I agreed that Madala was the more qualified in many respects, of the two Africans who were judges at that time.

The fact that I had not consulted Madala, beforehand became a problem. Dullah reverted, saying Madala had told him that I had no right recommending him for judicial appointment to the Constitutional Court when I had not even consulted him. He had no plans to relocate from Mthatha to Johannesburg. We were in a crisis because his name apparently had been mentioned to President Mandela. I told Dullah that I would prevail upon Madala and that he could go ahead and make the requisite preparations for his appointment.

I then went and humbled myself before Madala, apologised for having been so presumptuous. My close relationship with the family helped cushion the blow of a crisis. When he was sufficiently mollified, we both reflected on the enormity of the task that lay ahead of him. It was at that point, where we both realised that this was history in the making. There was a job to be done and we accepted that there was no room for him, not to accept the challenge. The historical significance of him being the very first African sitting judge to be available for judicial appointment to the Constitutional Court was not lost

on both of us. We recognised the heavy burden that would lie on his shoulders. Neither of us, however expected what would happen when his appointment was announced.

One Carmen Rickard decried his appointment in an article in the Sunday Times. She wrote that her sources had referred to Judge Madala as "*a legal non-entity*" whose appointment to the Constitutional Court was "*tokenism*". She also wrote that it was "*unacceptable that he should be appointed over candidates such as Judge [John] Didcott*". Quoting her anonymous "*lawyers*" she wrote *that:*

> *"…… while appointments of Black and women lawyers were essential to make the new court legitimate, there were several eminent qualified candidates who fitted this category. Judge Madala is not one of them*", she wrote.

What actually was the subtext of Rickard's assertion that there were "…. *several eminent qualified candidates who fitted the category…."* was that there were several eminent **"**white" Judges who should have been appointed to the Constitutional Court, given that the only three Black judges at that time were Mahomed J, Madala and Khumalo JJ.[1]

It is reasonable, therefore, to infer that Carmen Rickard meant that there was no "…. *eminently qualified Black [African] judge"* to be appointed to the Constitutional Court in 1994.

In my capacity as the Publicity Secretary of the Black Lawyers Association, I reacted with indignation to Rickard's denigration of Judge Madala. I wrote, also in The Sunday Times, that her article was defamatory. I described it as "*yet another manifestation of liberalist intervention in the affairs of the nation*" and a "*manipulative endeavour by the liberals and their press to choose and pick our leaders for us*".

I was a much younger man in 1994 than I am today. Madala J's elevation to the Constitutional Court was thus the proverbial "*baptism of fire*".

MADALA J'S CONTRIBUTION

A quick research for this article has yielded results which more than justify his elevation to the apex Court, the attacks on his competence notwithstanding. His pen has contributed, in no small way to the development of our constitutional jurisprudence.[2] Time and space do not permit me to do justice to analysing, and exposing the richness of his judgments, which display a rare profundity of thought. Between 1994 and 2008, Madala wrote at least 13 judgements. His very first judgment was in *State v Makwanyane,* which is to me significant for two reasons. Firstly within it, he endorsed the abolition of the death penalty because of his convictions whilst he was an activist member of the anti-capital punishment committee of the UDLA. UDLA had campaigned for the abolition of the death sentence, in the 1980's, long before the matter came for argument before the Constitutional Court. Secondly, concurring in the judgment of Chaskalson P (as he then was), he held that the death penalty rejected the possibility of rehabilitation of the convicted person; that such a rejection of rehabilitation as a possibility did not accord with the concept of *ubuntu*. He held that there was a need to bring traditional African jurisprudence to the determination of issues such as the debate about whether the death sentence was competent for any criminal offence and that research should not be confined to South Africa only but be extended to the continent at large. He further held that it was neither necessary nor desirable that public opinion should be sought by obtaining the views, aspirations and opinions of the historically disadvantaged and previously oppressed people of South Africa for the court to come to a conclusion that the death sentence was incompetent in a constitutional democracy founded on the values of equality, freedom and human dignity.[3] In *Satchwell v President of the Republic of South Africa* and Another 2002 (6) SA 1 (CC), a challenge was made to the constitutionality of sections 8 and 9 of the Judges Remuneration and Conditions of Services Act 47 of 2001 , on the basis that these sections gave benefits to heterosexual spouses of judges, but not to same sex life partners. Madala J, writing for a unanimous court, held that the benefits contemplated in the Act should be extended to same sex partners who are judges where reciprocal duties entailed in a marriage can be demonstrated to exist in a same sex relationship. The Court consequently ordered sections 8 and 9 to be read as applying to same sex partners if they demonstrated that in their same sex relationship, there were [same/similar] reciprocal duties that one would find in a marriage of heterosexuals.

I would have loved to deal with those judgements in which Madala J dissented because that would demonstrate his independence and a resolute courage of his convictions.

I for one, (and I admit that I am not unbiased because I was close to him), believe that he lived up to all the expectations of those of us who "*gambled*" on his competence for the job. He did not disappoint the late President Mandela who, in appointing him, must have believed that he was not only suitably qualified to be a judge in the apex court, but was a fit and proper person to be elevated from the Transkei Division of the Supreme Court to the very first Constitutional Court in South Africa.

The late Justice Madala was also a BLA stalwart who served as a member of the Board of trustees of the BLA-LEC.

May his soul rest in peace.

1 *Khumalo J had been a judge in Swaziland, and had returned to Bophuthatswana to serve as a judge when that Bantustan became a "republic"*

2 *I am greatly indebted to Pupil Advocate Ms Polao Alice Tlokotsi who, under pressure, did desktop research into leading Constitutional Court judgments that were penned by the late Justice Tholakele Hope Madala, in some cases writing for a unanimous court, and in some cases writing minority dissenting judgments.*

3 *See Headnote*

South Africa's new National Director of Public Prosecutions (NDPP)

By BLA-LEC desk

Advocate Shamila Batohi will take over the reins of the National Prosecuting Authority in February.

President Cyril Ramaphosa announced Batohi's appointment as the new National Director of Public Prosecutions on 04 December 2018 after receiving recommendations from his advisory panel.

His announcement follows a Constitutional Court judgement which declared former prosecutions boss Shaun Abrahams' appointment invalid. Over the years the NPA has been marred with several challenges, including leadership instability and a sharp decline in public confidence.

In making the order, the court highlighted, among others that :
"*The rule of law dictates that the office of the NDPP be cleansed of all the ills that have plagued it for the past few years."*

The court was concerned about the dysfunctionality of the NPA when it said:
"*With a malleable, corrupt or dysfunctional prosecuting authority, many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds…*
"*If you subvert the criminal justice system, you subvert the rule of law and constitutional democracy itself."*

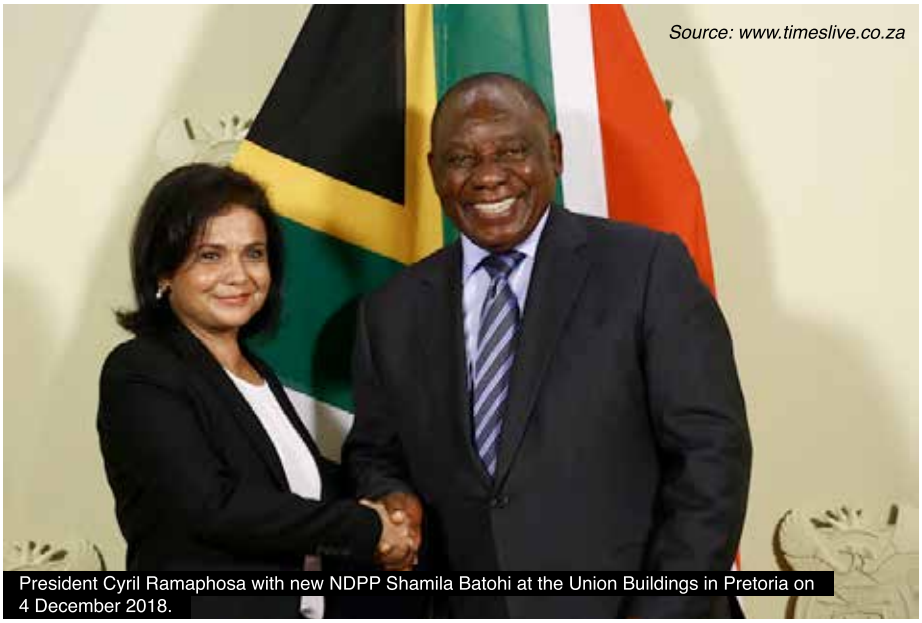
In appointing Batohi, Ramaphosa said: "The NDPP occupies a vital position in our democracy, and makes an essential contribution to upholding the rule of law and ensuring the efficiency and integrity of law enforcement."

Advocate Batohi steps into a position that none of its appointees has come even close to surviving the full ten-year term since the establishment of the NPA after the 1994 election. She is also the first woman to lead the NPA itself but she's no stranger to leadership in a legal fraternity that's largely male dominated. She had already become the first woman to be a Director of Public Prosecutions in KwaZulu-Natal.

Ramaphosa also commended Batohi saying that throughout her "*distinguished career*" she had shown herself to be a "*fit and proper person*". Batohi began her career in public service, where she was a junior prosecutor in the Chatsworth magistrates' court in 1986 and steadily rose through the ranks.

Batohi's no-nonsense approach resulted in her being seconded to the Investigation Task Unit established by President Nelson Mandela in 1995. For much of the past decade, she had served as a Senior Legal Advisor to the prosecutor of the International Criminal Court.

Speaking on her appointment as the new head of the NPA, Batohi said "We in the NPA have important work to do, which includes devoting our efforts to holding accountable those who have corrupted our institutions, who have betrayed the public good and the values of our Constitution for private gain, especially those in the most privileged positions of government and corporate power."



Source: www.timeslive.co.za

President Cyril Ramaphosa with new NDPP Shamila Batohi at the Union Buildings in Pretoria on 4 December 2018.

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