African Law Review

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PROMOTING
A CULTURE OF HUMAN RIGHTS

Fundamental Human Rights
Why are they so important?

Implications of using
the K-word

The Criminal Procedure Act
explained

Protecting
Indigenous Knowledge

Sophia De Bruyn
Championing Human Rights

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Basic human rights

Irrespective of where each and every one of us come from, what we believe or how we choose to live our lives – we're all entitled to basic human rights.

The Bill of rights protects the rights of every South African. It's important that we all know our most basic rights.

The Constitution gives human rights clear prominence in the Preamble, with the intention of establishing "a society based on democratic values, social justice and fundamental human rights".

In the pages of this issue, we celebrate and seek to promote a culture of human rights.

We're on the 3rd of a series of articles, seeking to trace the formation and history of the Black Lawyers Association. The article is thought provoking, it demands answers. Where are the black lawyers? What has happened to their ability to help the country find its political compass in the moment of historical uncertainties?

It's difficult to digest that 25 years into democracy, there are still some pretty shocking home truths on violations of the right to equality and free speech.

Racial slurs, with many featuring the K-word occur so routinely amongst South Africans, as explained in the article, *Concerns and implications of using the K-word*.

> **"In the pages of this issue, we celebrate and seek to promote a culture of human rights."**


Mpho Sithole, Editor

"Wathinta bafazi, wathinta imbhokoto" or "You strike a woman, you strike a rock".

Fittingly captured, this powerful saying characterised the 1956 Women's March. A heroine of our time, anti-apartheid activist Sophia De Bruyn shares her insights on women's rights.

There are limited national and international laws to help preserve and protect indigenous knowledge. Often enough, communities don't know that there is value in their traditions and customs. This article explains why it's imperative to promote and protect indigenous knowledge systems, through law and policy.

We've also unpacked the implications of Section 174 of the Criminal Procedure Act 51 of 1977(CPA) on criminal trials.

It's interesting to know, exactly how other countries address certain legal matters. This issue features a Namibian perspective on the concept of bail. What is bail and what it is not?

The lens of a visionary: Keith Kunene, is another special addition to this issue. I personally found Kunene's story fascinating. This lawyer-turned-business mogul, decided that once he got into business it would simply be big business. No matter the political climate – he was bold enough to demand that life be a better reflection of his highest dreams and aspirations.

We can all learn a thing or two from others.
The Kunene story reminded me of the importance of a burning desire, the magic of perseverance and the courage to follow it through.

Success is no accident.

Mpho Sithole

Ethical leadership and strong state institutions

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

The country cries out for a functional democracy permeated by a culture of human rights. Ethical leadership and strong state institutions is a precondition to achieving this ideal. South Africa has emerged from a dark history of gross human rights violations, racial stratification and the systematic subjugation of the majority under the erstwhile apartheid order.

Many of its critics became the victims of persecution, detention without trials, political trials and political elimination. Policy-makers of the time were impelled to formulate policies that will strengthen the regime and create a human rights culture that favoured the minority over the majority.

One of the gross human rights violations which occurred was the forceful removal of black people from their land. Land removals were well-coordinated and supported by a series of legislative instruments. The Legislature that crafted the enabling Acts were devoid of ethical leadership. This and many other misdeeds point to the centrality of ethical leadership in our country as we make positive strides from a shameful past.

South Africans from all sectors of society and cultural backgrounds joined forces in building a united democratic South Africa. Through our internationally revered constitution, we have demonstrated to the world our determination to rebuild a nation from the rubbles and deleterious effects of colonialism and apartheid. We have vowed to entrench a functional state premised on the will of the people and wherein the human rights culture permeates.

Through the Constitution, we have successfully characterised the aspirations we have as a nation. These are aspirations which would, if we all embark on their relentless pursuit, help alleviate the standard of living of all our people and make our democracy a functional reality. Those who occupy positions of power must never forget that we cannot solve unemployment by pretending it doesn't exist, neither can we eradicate slums by ignoring their existence. The eradication of these realities will get us closer to the ultimate goal of restoring the dignity of our people, a fundamental human right. We need ethical leadership, strong state institutions and an independent prosecuting authority underpinned by a transformed and independent Judiciary. The scourge of corruption and other forms of greed, undermine efforts to progressively realise socio-economic rights. We need a corruption watchdog led by ethical leaders who are not malleable and open to manipulation. This is essential for a total entrenchment of a human rights culture our constitution envisages.

The struggle for political and economic emancipation, culminated in a new democratic order premised on the human rights culture and equal participation for all. The relentless struggle was not just for democracy, but a functional democracy with supporting institutions and other organs that remain resolute in the execution of their tasks. Each of these institutions or organs must perform tasks diligently, such diligence will help reduce malfeasance and corruption in public institutions.

Politicians, as our elected policy formulators, hold the superior opportunity to determine the path of our nation. They can plunge us into the path of despair, destruction and deeper chaos.

They can also lead the path to a prosperous and inclusive future, envisaged by the Constitution. Corruption and weak institutions are to blame for our socio-economic stagnation and the widening gap between the rich and poor. As a nation, we are all aware of a corrosive corruption culture that has infiltrated the spine and penetrated the soul of our democracy. Serious allegations of corruption have surfaced, pertaining to *state capture* and a coordinated scheme to weaken democratic institutions to protect the proceeds of corrupt ends. Political meddling and a deliberate subversion of our constitutional values also appears rampant. Corruption, is a scourge which severely limits the state's capabilities to ensure the full realisation of human rights. When resources are squandered for private advantage , the gap between the rich and the poor proportionally widens, inequality soars high as many people are pushed to the slums by the conditions.

The right to equality is recognised as one of the fundamental rights universally, it is amongst the category of inalienable rights. However, the absence of ethical leadership in critical institutions such as the NPA and the Hawks renders the question " are we truly equal?" more pertinent. The culture of selective prosecution we have witnessed over the years must be ended. This can be achieved by appointing ethical individuals to our key institutions. All the commissions investigating allegations of malfeasance and corruption must be supported by each one of us. As our national motto reminds us to foster unity in our rich diversity (*!ke e: ǀxarra ǁke) "Diverse people , Unite",* we must unite against graft in all forms of its manifestation. We must unite in the cause to strengthen our key institutions. Each one must play a role in the entrenchment of a human rights culture that our progressive constitution envisages.

The choices we make today , determine our tomorrow. WE OWE IT TO POSTERITY!!

Sharpening legal minds

By Andisiwe Sigonyela, Acting Director-BLA-LEC

The need to provide continuing legal education and on-going practical legal training to black practitioners is highly imperative.

The Legal Education Centre provides workshops and seminars in various aspects of the law throughout the year. Our courses are designed to improve skills and enhance the competence of members of the legal profession and stakeholders.

2274 legal professionals in various facets of the law benefited from our diverse and enriching programmes in 2018. This year (2019) , we aim to double that figure.

Some of our well-designed programmes and attendance in the first quarter of this year (2019) are as follows:

Peter Volmink teaching, Continuing Legal Education in Johannesburg.

TRIAL ADVOCACY TRAINING (TAT)

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

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Trial Advocacy Training – Practical Legal Training Programme (PLT)	14, 15 &16 January 2019	Johannesburg PLT School (night class)	**59** PLT school pupils attended
	21, 22 & 23 January 2019	Johannesburg PLT School (day class)	**49** PLT school pupils attended
	23, 24 & 25 January 2019	Cape Town PLT School (day class)	**60** PLT school pupils attended
	30, 31 January & 01 February 2019	Pretoria PLT School (night class)	**57** PLT school pupils attended
	30, 31 January & 01 February 2019	Pretoria PLT School (night class)	**57** PLT school pupils attended
	04, 05 & 06 February 2019	East London PLT School (day class)	**33** PLT school pupils attended
	11,12 & 13 February 2019	Pretoria PLT school (day class)	**52** PLT school pupils attended
	13, 14 & 15 February 2019	East London PLT School (night class)	**27** PLT school pupils attended

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Trial Advocacy Training – Practical Legal Training Programme (PLT)	18, 19 & 20 February 2019	Pretoria PLT School (night class)	**57** PLT school pupils attended
	25, 26 & 27 February 2019	Durban PLT School (day class)	**30** PLT school pupils attended
	25, 26 & 27 February 2019	Durban PLT School (night class)	**44** PLT school pupils attended
	12, 13 & 14 March 2019	Polokwane PLT School (night class)	**44** PLT school pupils attended

COMMERCIAL LAW PROGRAMME (CLP)

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

TOPIC	DATE	AREA	NUMBER OF DELEGATES
Regulation Take Over Business	26 January 2019	Johannesburg	**14** delegates attended
Taxation of Business	23 February 2019	Cape Town	**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 historically disadvantaged legal practitioners in South Africa.

TOPIC	DATE	AREA	NUMBER OF DELEGATES
Court Procedure Revision for Board exams	23 February 2019	Polokwane	**20** candidates attended
Procurement Law seminar	30 March 2019	Johannesburg	**16** delegates attended

"Procurement Law is a growing area of concern for South African lawyers and the public at large. We've seen multiple cases where tenders have been set aside by the courts over poor governance, malpractice and unfair procurement process. The workshop broadens the cadre of lawyers that are available to interpret fair procurement processes and achieve a measure of justice for bidders unfairly treated in the process." says Volmink.

UPCOMING TRAININGS

TRAINING	DATE	AREA
CLE - Construction Law	11 May 2019	Polokwane
CLE - Matrimonial Law	18 May 2019	Mafikeng
TAT: Basic Intensive Trial Advocacy	13, 14 & 15 June 2019	Polokwane
CLP: Contract Drafting and Negotiation Skills	04 May 2019	Kimberley
CLP: Risk and Compliance Management	18 May 2019	Pretoria
CLP: Contract Drafting and Negotiation Skills	08 Jun 2019	East London
CLP: Takeover Regulations	22 Jun 2019	Durban

3rd series: The History of the Black Lawyers Association

By Deputy Judge President Phineas Mojapelo, South Gauteng High Court

This is the third 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.

Black lawyering prior to 1977

In the context of the history of BLA, it will be wrong to think of black lawyering as having started in 1977. Indeed, already in the 1950's there were lawyers that practised in Johannesburg. G M Pitje, who is by all accounts the father of the BLA, served his articles of clerkship in the firm Mandela & Tambo from the 1st of April 1955 and was admitted as an attorney on the 2nd of March 1959. The founders of that firm were later to become successive presidents of the African National Congress, one in exile through the unbanning of the organisation in 1990, and the other after the unbanning and became the first president of a non-racial South Africa in 1994.

Very little was known about the organization of black lawyers as a group prior to that.

It appears however that throughout the years the black lawyers associated themselves with the affairs of their community and played a vital role in its development. Describing the formation of the ANC in Bloemforntein on Monday 8th January 1912 William Marvin Gumede in his book writes:

> "It was a young African lawyer, who would bravely point expectation towards that future. The year before at a special meeting of the South Native Convention's executive committee, Seme had issued a clarion call for all the diverse opposing groups in South Africa to unite under a single banner in order to more effectively fight the growing disenfranchisement of blacks...
> In 1910, Boer and Briton had buried the hatched after the bitter Anglo – Boer War of 1899 – 1902 to form the Union of South Africa, in which blacks were regarded as second class citizens. The cruel Native Land Act of 1913 would reduce the entire black population to squatters, forcefully wrestling control of the land on which they had homes, earned a living and hoped to be buried.
> The groundwork for the historic launch of the ANC had been laid a number of years before, but assumed a new dimension when Seme, recently returned from studying at Columbia University and Jesus College, Oxford, joined forces with three more black lawyers, Alfred Mangena, George D Montsioa and R W Msimang, and called for a conference to unite all the various African tribes in South Africa.
> Late that Monday afternoon, when Seme's motion proposing the establishment of the congress was passed unanimously, few were in doubt that they had taken a vital step in the history of their people. Many saw the formation of the congress as equal in significance to the achievement of the whites only Act of Union, which brought the former Boer republics and British colonies together under a single flag"[1]

In the first national executive committee of the ANC, which was formed under the presidency of Rev. John Dube, there were three black lawyers, Pixley Ka Isaka Seme as treasurer, George Montsioa as recording secretary and Alfred Mangena as one of the four vice presidents. Mangena was South Africa's first African barrister.

The role of black lawyers in the formation of the ANC, a movement which was to become Africa's leading liberation movement and the pioneer of her renaissance, was by no measure insignificant. It was vital. They helped to shape its thinking and to point a direction for its future course, which came to fruition eight decades later. They worked together with and were one with magoshi / amakhosi; and they united these traditional African leaders with the new generation of

1 Thabo Mbeki and the Battle for the Soul of the ANC (20015), Zebra Press, pp2 and 3

> **“The role of black lawyers in the formation of the ANC, a movement which was to become Africa’s leading liberation movement and the pioneer of her renaissance, was by no measure insignificant. It was vital. They helped to shape its thinking and to point a direction for its future course, which came to fruition eight decades later.”**

“mission-educated” Africans and the clergy. They also brought together a wide range of separate political organizations and the masses that needed to be led.

It is significant how often it takes lawyers to help shape the political future and framework of a society in need of direction. At those early formative stages of our history, the black lawyers were there to help chisel the path of destiny of their people. They were there again in the late 1950’s, in the persons of Nelson Mandela and Oliver Tambo, when the movement was in dire need of direction, to form and guide the ANC Youth League (ANCYL). The ANCYL was to give new direction to a movement that was starting to run out of ideas and lose direction. They were there in the famous defiance campaign, they were there in the early 1960’s through the Rivonia trial.

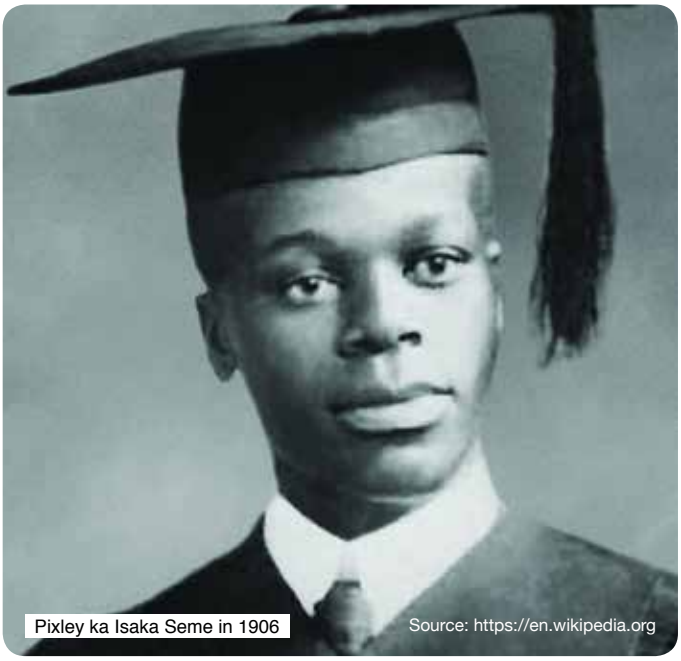
In the early to mid-1970’s, they were again there in the formation of the Black Conscious Movement and then later to form the Black Lawyers Discussion Group. They shaped the BLA that was to be the bedrock of black lawyering in the country. They were there to defend multitudes of their people against the injustices of pass laws and their kindred inhuman migratory labour system and the enforcement of unjust laws. They were there in the early 1980’s to resist the incorporation of parts of South Africa into Swaziland through the evil devices of apartheid government, which was hell bound on getting rid of undesirable black South Africans. They were there and voiced themselves against the infamous and ill-fated tri-cameral parliament of the early 1980’s that sought to co-opt parts of the black community (the so-called Coloureds and Indians) into a white only government. They were again there to serve as a strengthening factor in the community resistance against successive states of emergencies of the mid 1980’s.

Towards the end of 1989 when black South Africans, the throngs of liberation movements and the apartheid white minority government were at the throes of destroying each other and their country, two lawyers in two opposing camps had to step in. They had to point their respective followers in a direction that eventually rescued the country from what was to be military, political and economic ruin. They were there to put the country on a new path of reconstruction, a new society based on the noble notions of a democratic, free and non-racial society. Since then the country, despite a wave of crime and surges in the economic waves, has in the first 25 years realized a new beat of social engineering and economic growth like it had never done before.

Today that non-racial democracy, seems to be floundering a bit in search of leadership direction. The ruling party seems to be threatened with disunity from within itself and within its hitherto strong alliance partners, one asks oneself: Where are the black lawyers?

What has happened to their ability to help the country find its political compass in the moment of historical uncertainties? Am I wrong in thinking that they seem to have withdrawn into the cocoons of their personal interests? Am I wrong in thinking that many have focused their attention on the programme of accumulation of personal wealth and are increasingly withdrawing from public social and community responsibility? What are the chances that the community will pull through this one? Is it not the responsibility of black lawyers to help the South African society preserve the gains of the political struggle that many have paid the ultimate price for?

Allow me, dear reader, to suggest strongly that we need the lawyers of the mantle and foresight that made Pixley Ka Isaka Seme, Alfred Mangena, George Montsioa, A P Mda, Nelson Mandela, Oliver Tambo and Godfrey Mokgonane Pitje. We need lawyers with sufficient interest in the future and leadership of the country. We need lawyers with the spirit which is rooted in social justice. Do we have them in today’s BLA? Nadel? AFT? Or in PRASA? Can you rise? Do you have an offer for the nation? It is indeed the challenge of the BLA and these kindred organizations to produce that type of lawyer. ■



Pixley ka Isaka Seme in 1906 Source: https://en.wikipedia.org

Concerns and implications of using the K-word

By Adv. Tseliso Thipanyane, South African Human Rights Commission CEO

Source: Shutterstock

In the context of the racist colonial and apartheid eras in South Africa, the usage of the word 'kaffir' was used to describe black people and African people in particular. It was meant to imply that they are inferior, uncivilized, backward and not deserving of any respect and dignity. It was a racially demeaning, insulting and hurtful expression towards black people and was central to the racist agendas and attitudes of the old South Africa.

In describing this word, Chief Justice Mogoeng said in *South African Revenue Services v Commission for Conciliation Mediation and Arbitration*: 'The usage of this term captures the heartland of racism, its contemptuous disregard and calculated dignity-nullifying on others.'[1] He also said that 'being called a kaffir is the worst insult that can be visited upon an African person in South Africa.'[2]

The usage of this word in post-apartheid South Africa falls in the category of hate speech prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). This Act which came into effect on 16 June 2003 has, amongst its main objects, the prohibition of the advocacy of hatred, especially racial hatred through hate speech. Section 10 of this Act prohibits hate speech that is hurtful, harmful or incites harm or that promotes and propagates hatred.

The Act also provides for the establishment of Equality Courts with a civil jurisdiction to deal with matters of unfair discrimination, hate speech and harassment. All High Courts in the country are equality courts in terms of the Act and magistrates courts can also be designated the status of Equality Courts.[3] These courts have a wide array of orders they can make in relation to unfair discrimination, hate speech and harassment. These include amongst others, 'payment of damages in respect of impairment of dignity, pain and suffering or emotional and psychological suffering', and any special measure to address unfair discrimination, hate speech or harassment. In the case of hate speech, the order can include a referral of such matter to a Director of Public Prosecution for possible criminal proceedings being instituted against a perpetrator of hate speech.[4] The usage of the word 'kaffir' also constitutes a common law offence of criminal insult -*crimen injuria* - and can carry a prison sentence upon conviction.[5]

The South African Human Rights Commission, an independent constitutional body established to strengthen the country's constitutional democracy through the promotion and protection of human rights,[6] is also mandated by PEPUDA to assist complainants/victims of unfair discrimination, hate speech and harassment. This is the case more especially for disadvantage victims by means of instituting proceedings in

1 2017(1) SA 549(CC) para 56.
2 Ibid, para 53.
3 See sections 16 and 31 of PEPUDA.
4 Section 21(2) of PEPUDA.
5 Ibid.
6 See sections 181 and 184 of the Constitution of the Republic of South Africa, 1996.

Equality Courts on their behalf.[7]

The SAHRC has in this regard, taken several hate speech matters, including incidents pertaining to the usage of the word 'Kaffir.'

One notable matter which the SAHRC took to an Equality Court is that of Ms. Vicky Momberg, who used the word 'kaffir' in respect of a police officer who was trying to assist her following a criminal attack on herself. The Equality Court fined her a sum of R100 000 for the usage of such words and ordered her to do community service and apologize. She also had criminal proceedings brought against her, ending with a term of imprisonment.

Another recent case taken up by the South African Human Rights Commission is that of *Joseph Mona v Harry Leicester and Others*[8] where the court found that the word 'kaffir' was used against Mr. Mona, the applicant, by the respondents several times and that this amounted to hate speech in terms of section of PEPUDA. Mr. Mona was also forced by the applicants to ingest faecal matter and raw sewage and then pushed into a sewage pit. The court in this regard, ordered the respondents to pay Mr. Mona a sum of R200 000.00 within a year of the order, pay his legal costs, make a written and unconditional apology to him and attend for three months, a programme on race relations at the South African Human Rights Commission.

> **"The usage of this word in post-apartheid South Africa falls in the category of hate speech prohibited by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)."**

The usage of this word more than two decades after the May 1994 speech by Former President Nelson Mandela and after the enactment of PEPUDA with the supporting role of the SAHRC in the implementation of the provisions of this legislation highlights the intractable nature of racism in South Africa. It points out the continued disregard of the rights of African people and their dignity. The numerous court findings and sanctions, including increasingly huge fines, largely against racism and hate speech, including the usage of the work 'kaffir,' do not seem to have effectively deterred some individuals. The continued usage of this word also goes against the founding values of the post-apartheid South Africa - values of 'human dignity, the achievement of equality and the advancement of human rights, non-racialism and non-sexism.'[9] This is the South Africa wanted by the majority of its citizens, a South Africa many of its people fought and died for, and a South Africa that its people and its public and private institutions must work hard for until its founding values are attained and enjoyed by the majority of its people. This is a South Africa described by Mandela in his inaugural speech of 10 May 1994 as the first democratically elected president of South Africa where he said: '…never and never again shall it be that this beautiful land will again experience the oppression of one by another...'[10]

The prohibition of the usage of the word 'kaffir' in South Africa today is, according to the recent Equality Court decision, *Joseph Mona v Harry Leicester and Others*,[11] meant to prevent 'disruption of public order and social peace, psychological harm, and social conflagration and political disintegration.'

The consolidation of democracy in South Africa will thus not be attained if racism in all its forms and manifestations continues, especially the continued usage of the word 'kaffir' both in the public and private sphere of the South African society. The usage of this word, is not only divisive and hurtful to the majority of African people in South Africa but invokes painful memories of an era and a past that the country has to move away from as fast as possible. The continued usage of this word can also spark racial conflict in the country and in this way, undermines the important constitutional democracy project the country has embarked upon. It will also undermine and devalue the great sacrifice of many people in struggling for human rights, democracy and for a better South Africa.

It is thus important that all necessary measures should be taken to discourage the usage of this word by all lawful and reasonable means necessary. This including harsh penal sanctions for those who continue to use this word in full knowledge of its meaning, impact on victims and possible consequences.

The Prevention and Combating of Hate Crimes and Hate Speech Bill[12] once enacted will and should make a significant contribution in this regard. The Bill provides imprisonment for a maximum of three years on first conviction and a maximum of five years imprisonment on a second conviction for hate crimes and hate speech.[13]. This provides harsher sanctions than those that are currently provided for under the common law offence of *crimen injuria*.

More awareness and education around the usage of this word and the context in which it is used would be helpful. It is also important that the promotional aspects of the PEPUDA- chapter 5 - are brought into operation. These provisions make it clear that there is a legal duty and responsibility on each and every person (natural and juristic) to promote equality and prevent hate speech including the usage of the word 'kaffir.'[14] Section 25 of PEPUDA also requires the state, with the assistance of relevant constitutional institutions, develop and implement awareness programs to promote equality, combat racism and provide necessary advice and training

7 Section 25(2) of PEPUDA - the South African Human Rights Commission's enabling legislation, Act 40 of 2012 also allows the SAHRC to litigate on human rights issues in its own name or on behalf of victims of human rights violation in general and hate speech and the usage of the work 'Kaffir.'

8 Equality Court for the District of Ekurhuleni East, Springs. Case No: EQ 1/2018 (decided on 25 February 2019).

9 Section 1 of the Constitution of the Republic of South Africa, 1996.

10 Nelson Mandela's inauguration speech as president of South Africa, 10 May 1994: http://www.mandela.gov.za/mandela_speeches/1994/940510_inauguration.htm (8 July 2018).

11 Above note 8, para 53.

12 [B9-2018]

13 See section 2 of the Bill.

14 See section 24 of PEPUDA.

on issues of equality. The South African Human Rights Commission is also required to prepare assessment reports on the extent to which unfair discrimination including racism persists in the country, the effect of this, and make recommendations on how the scourge of unfair discrimination, especially racism and hate speech can be best addressed.[15]

The failure to bring these aspects of PEPUDA into operation has undermined the much needed efforts by all people of South Africa to join hands in advancing equality in the country and in confining the usage of the work 'kaffir' to the dustbin of the country's lexicon/lexical history. The failure by the state and to some extent the South African Human Rights Commission in this regard, has led to limited public awareness of the provisions of PEPUDA and the role of the Equality Courts in combating racism and the usage of the word 'kaffir'. This effect is seen in the declining usage of the Equality Courts by the general public.

In 2016/2017, 480 equality matters were registered with Equality Courts in the country compared with 558 matters in 2015/2016 - a decrease of 14%.[16] The situation worsened in 2017/2018 with a 50.8% reduction in matters reported to all Equality Courts in the country - from 480 matters in 2016/2017 to 236 in 2017/2018.[17] There was also a reduction in the percentage of judgments passed by these courts: 64% judgments in 2015/2016 and 30% judgments in 2016/2017.[18] This is an unsatisfactory usage of these courts in a country with high levels of racism, xenophobic attacks and deep seated gender inequalities in economic and social spheres of the South African society.

It is unfortunate that in the midst of high levels of racism in all its forms and manifestations including the continued usage of the word 'kaffir' Equality Courts, that provide free services to victims of racism including appropriate relief for their pain and suffering are not being effectively used. It is also unfortunate that the National Assembly and its relevant portfolio committees have not been much effective in ensuring that this situation is corrected.

There is a need for greater public awareness about the undesirability of the usage of this word by all people in South Africa even in private spaces. There should be more anti-racism awareness campaigns in schools, at places of work, in the media and in religious institutions. The eradication of racism in all its manifestations including the continued usage of the word 'kaffir' should be a national responsibility and all the people in the country should play a greater role in getting rid of it from our lexicon and from everyday usage.

> **"The usage of this word, is not only divisive and hurtful to the majority of African people in South Africa but invokes painful memories of an era and a past that the country has to move away from as fast as possible."**

Victims of the usage of this word should be empowered to take action against those who use this word in order to undermine their dignity and sense of self-worth. Victims must be made aware of all available resources that they can use in this regard. The work of the South African Human Rights Commission in combating racism including efforts against the usage of this word should be supported more and publicized. The Prevention and Combating of Hate Crimes and Hate Speech Bill[19] provides in this regard that persons who want to lodge complaints about hate crimes and hate speech should be assisted and advised accordingly.[20]

In *Joseph Mona v Harry Leicester and Others*, the Equality Court said that: '[w]hen a black man is called a 'kaffir' by somebody from another race, as a rule the term is one that is disparaging, derogatory and contemptuous and even causes humiliation. It follows that the 'k' word was meant to visit the worst kind of verbal abuse ever, on another person. It has been calculated to deliver the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.'

The continued usage of the word 'kaffir' and the underlying racism that informs its usage, and the failure to bring into full effect the promotional aspects of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) will interfere with the process of healing the divisions, wounds and injustices of the past and, as per the preamble of South Africa's constitution, of establishing a society based on 'democratic values, social justice and fundamental rights.' This continued usage and the failure to fully implement the provisions of PEPUDA will frustrate and delay the importance of attaining the South Africa the majority of its people want and have struggled and sacrificed so much for. It undermines the work and efforts done in terms of laws, policies and institutions to achieve a truly free South Africa where the dignity of all the people of South Africa including black people and African people in particular is affirmed.

15 Section 28(2) of PEPUDA.
16 Department of Justice and Constitutional Development Annual Report 2017 at p 41.
17 Department of Justice and Constitutional Development Annual Report 2018 at p 33.
18 Department of Justice and Constitutional Department Annual Report 2017 at p 43.
19 Above note 8 para 75.
20 See section 9 of the Bill.

Judicial Recusal: A South African perspective

By Lultia Ntshauba, TM Chauke Attorneys, Candidate Attorney

The Constitution of the Republic of South African vests the judicial authority on our courts.[1] The values that undergirds our constitutional democracy among others include supremacy of the constitution and the rule of law.[2] The courts are independent and subject only to the constitution and the law, which they must apply impartially and without fear, favour or prejudice. [3] Although the principle of judicial impartiality owes its genesis to the common law, this fundamental principle has been constitutionalised under section 165 of the Constitution.

Before the era of constitutional democracy and constitutional supremacy (parliamentary sovereignty), our courts derived the duty to be impartial from common law injunctions and rules. However, the courts under the erstwhile order took a stance that this common law obligation can be altered by an express legislative enactment.[4] This was the then reality which summarised a sharp contrast between constitutional sovereignty and parliamentary sovereignty.

Few cases on the essence of judicial impartiality and recusal have reached the Supreme Court of Appeal and the Constitutional Court since the dawn of constitutional democracy. All decisions from the two top courts agree that the principle of judicial impartiality is now to be found in the constitution. This will be demonstrated through an in-depth analysis of the jurisprudence stemming from these courts on the concept of judicial recusals.

Basis for recusal under common law:

In *S v Malindi and Others* 1990 (1) SA 962 AD at 969G-I the court stated the following:

> 'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v Radebe* 1973 (1) SA 796 (A) a*nd South African Motor*

1 See section 165 of the 1996 Constitution,
2 See section 1 of the constitution.
3 S165 (2) of the Constitution.
4 Council of review , *South African Defence force v Monnig* 1982 3 SA 482 (A)

“A study of comparative common law jurisdictions reveals that there are two circumstances in which a presiding officer must recuse himself or herself. The first is where the judge is actually biased or has a clear conflict of interest. The second is where a reasonable person, in possession of the facts, would harbour a reasonable apprehension that the judge is biased.”

Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.’

Grounds for recusal

A study of comparative common law jurisdictions reveals that there are two circumstances in which a presiding officer must recuse himself or herself. The first is where the judge is actually biased or has a clear conflict of interest. The second is where a reasonable person, in possession of the facts, would harbour a reasonable apprehension that the judge is biased.

There is however, instances of “actual bias” wherein a presiding officer is equally expected to recuse himself or herself. Our courts have however sparingly interrogated the concept of actual bias as a ground for recusal. When a judge for instance, is related to one of the parties in a legal dispute before him or her that constitutes ground for recusal on the basis of “actual bias”. [5] Generally, financial interest in the matter may also serve a ground for recusal. However, judicial pronouncements in this regard show that the question of whether a judge should recuse himself depends on the remoteness of the financial interest in question. The prevailing jurisprudence around this concept shows that a remote or insignificant financial interest should not give rise to a need for recusal.[6]

The litmus test: “reasonable apprehension of bias”

The pertinent question which arises then becomes what constitutes a reasonable apprehension of bias? Should a mere anxiety on the part of the litigant, that a presiding officer will not bring an impartial mind suffice?

The Constitutional Court in President of the *Republic of South Africa v South African Rugby Football Union (SARFU)* authoritatively held as follows:

> “It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it, rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial” [7]

Therefore, the requirements of the test are as follows: (1) There must be a suspicion that the judicial officer might, not would, be biased. (2) The suspicion must be that of a reasonable person in the position of the accused or litigant. (3) The suspicion must be based on reasonable grounds.[8]

Analysis

It appears from the above Constitutional Court judgment that there is a somewhat subtle injunction to parties not to question judicial impartiality, whimsically and without cogent evidence to validate their anxiety. Judicial officers take an oath of office which cannot be taken lightly and recusals should be sought where it can be objectively discerned that they may not pass the impartiality threshold. This then places the party seeking recusal at a crucial role of trying to rebut the long-standing principle of judicial impartiality. This heavy burden can only be lifted by convincing evidence as opposed to personal

5 SA Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T) at 811 B – 813 H; BTR Industries SA (Pty) Ltd v MAWU 1992 (3) AA 673 (A) see also : *S v Roberts* 1999 (2) SACR 243 (SCA) at para [26] where the court stated that: ‘It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further “proceedings” a nullity...’

6 *BTR Industries SA (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 672 (A) at 694 I

7 1999 (4) SA 147 (CC) at para 48.

8 *S v Roberts* 1999 (2) SACR 243 (SCA) at paras [32] to [33],

preferences or unfounded anxiety. In more direct terms, the party seeking recusal bears the burden of proof.[9]

The effects of unlawful failure to recuse

The effect of an improper failure to recuse from proceedings when grounds for recusal exist, vitiates the proceedings. [10] The result is that proceedings will be set aside and must start afresh. In *SARFU*, the Constitutional Court also noted that where one member of a bench should not have heard a matter, the effect is that the hearing is rendered void.

In *SACCAWU v Irvin & Johnson*[11], the constitutional court held that "the question of judicial recusal is a constitutional matter"[12] and that an appeal on judicial bias is "competently directed to this Court." Recusal is a constitutional matter because the impartial adjudication of disputes in both criminal and civil cases is a "cornerstone of any fair and just legal system".[13] A judge who sits in a case who ought not to do so by reason of actual or perceived bias "acts in a manner that is inconsistent with s 34 of the Constitution, and in breach of the requirements of s 165(2)17 and the prescribed oath of office."[14]

"Recusal is a constitutional matter because the impartial adjudication of disputes in both criminal and civil cases is a cornerstone of any fair and just legal system."

Consequences of Judicial recusal on proceedings:

In *S v Stoffels* and 11 Similar Offences 2004(1) SA SACR 176 (C) the full bench adopted the approach that the situation where a magistrate has recused himself from a case after evidence has been adduced is akin to a situation where the magistrate has died, become incapacitated to continue with the case, dismissed or has resigned. In such a case, the part-heard proceedings before him are aborted and are therefore a nullity. The same applies to a situation where the magistrate has recused himself from proceedings. The trial may then proceed de novo before another magistrate.

In the *S v Stoffel*s and 11 Similar Cases matter (supra) the Court held as follows:

> "[3] Section 118 of the Criminal Procedure Act 51 of 1977 provides that if the presiding officer before whom an accused at a summary trial has pleaded not guilty, is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other presiding officer of the same court.
>
> [4] Where a magistrate dies or has become incapacitated or where he or she has been dismissed or has resigned, the part-heard proceedings before him or her are aborted and therefore a nullity. The same applies where the magistrate has recused himself or herself. The trial may then commence de nova before another magistrate without an order of the High Court setting the earlier proceedings aside. See *R v Mhlanga* 1959 (2) SA 220 (T); *S v De Koker* 1978 (1) SA 659 (O); *S v Molowa* 1998 {2) SCAR 422 (O) and *S v Pole*/a 2002 (2) SACR 734 (NC).» where the matter is part heard before a magistrate who becomes unavailable on account of resignation, or death such proceedings become a nullity and should be commenced *de novo*"

The essence of judicial impartiality cannot be over-emphasized. It is crucial for our courts to enjoy legitimacy and public trust. Indeed, judicial officers shall not be entangled in matters involving litigants. They must discharge their duties impartially and without fear, favour or prejudice as sanctioned by the Constitution and the law. In case their impartiality is compromised , judicial officers must recuse themselves. They must exercise their constitutional duties objectively and impartially. Most certainly, Judicial officers must heed the following remarks made by Chief Justice Mogoeng in:

South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (CCT19/16) [2016] ZACC 38; [2017] 1 BLLR 8 (CC); (2017) 38 ILJ 97 (CC); 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC)

> "[13] Judicial Officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a Judicial Officer, amounts to a dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office."

9 Id at para 13.

10 See *R v Milne & Erleigh* (6) 1951 (1) SA 1 (A) at ; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Services* 1996 (3) SA 1 (A) at 13H; Council of Review, *SADF v Monnig 1992* (3) SA 482 (A) at 495 B – C.

11 *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC).

12 ID para 2

13 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) at para 35

14 Id at 30

Protecting indigenous knowledge systems

By Jane Mufamadi, Freedom Park CEO

Knowledge is a means by which some people exercise power over others. These forms of knowledge are embedded in more familiar kinds of power (e.g. coercion, economic exploitation) and can be combined in different ways and used for different purposes and hence likely to be fought over (contested) by historical actors. (Elphick 182).

The role that Indigenous Knowledge Systems (IKS) should play, inclusive of identity, culture, heritage, spirituality and so forth - have become the major socio-political issues occupying center stage in political, social, and even economic discourses.

Indigenous or African epistemologies and knowledge systems have become rapidly expanding fields of investigation, primarily focused on how some should locate themselves within the context of global discourse and context. South Africa and the rest of the African continent in general, continue to be characterised by a diversity of languages, cultures and practices. These elements have, for a long time been used and abused for continued division and separation.

Pre-colonial African societies have had a sense of social cohesion, political stability, systems of governance and a scientific knowledge base which have, hitherto, amazed all those who deemed these societies to be backwards, uncivilized and downright primitive (Serote,2001).

The dawn of the twenty first century, strategically dubbed the African century by political leaders, scholars and Pan Africanists alike, has seen a deliberate ideological and theoretical shift. The understanding of the role that Africa has and should continue to play within the global systems of knowledge production, dissemination and development has changed.

The liberation of South Africa has catalysed such a process by ushering in a deliberate agenda and desire for an egalitarian society based on a non-racial, non-sexist and democratic disposition. Pregnant with a sense of fluidity that renders nugatory any pre-given assumptions about the concepts of knowledge systems and the dissemination thereof. This emancipatory disposition has challenged and continues to challenge, the one-dimensional understanding of knowledge and its producers as well as its disseminators.

It becomes crucial in the spirit of liberatory aesthetics to bring into center space systems that have, as a result of the colonial discourse and segregation, remained in the margins of developmental discourse. All in the quest to prioritise western hegemony in the market place of intellectual development. Africa, Africans and African knowledge systems now seek to center themselves within a global discursive construct, not as poor cousins in a globalising world but as unapologetic equal partners in their own right and terms. The drivers for adopting such a position include, amongst others, fundamental questions that Africans and the world in general should continue to ask: Is the world, in its current political and social construct, conducive to quality of both human and other forms of life? How can world poverty, diseases, terrorism, oppression, exploitation, racism, and all other negative phenomena that

are prevalent, be overcome. This more especially in the southern part of Africa, where almost half of the population is subjected to, and impacted upon, by the foregoing, or a varied combination thereof?

INDIGENOUS KNOWLEDGE AND ITS CHALLENGES

IKS are embedded in the cultural milieu of all people, irrespective of race. People are historically and culturally bound and thus have a peculiar knowledge system, which enables them not only to survive, but also to become a civilised community (Ntuli, 1999; Vilakazi, 1999).

Catherine Alum Odora Hoppers (2001:4) defines Indigenous Knowledge Systems as knowledge that is characterised by its "embeddedness in the cultural web and history of a people including their civilisation and forms the backbone of the social, economic, scientific and technological identity of such a people".

An IKS consists of a total system of knowledge that encompasses soil and plant taxonomy, cultural (identity, history and language) and genetic information, animal husbandry, medicine and pharmacology, ecology, education, religion and philosophy, climatology, zoology, music, arts, architecture, judicial, political and many others.

Canadian researcher Louise Grenier provides a succinct definition of Indigenous Knowledge (IK) as being: "… the unique, traditional knowledge existing within and developed around specific conditions of women and men indigenous to a particular geographic area" (Grenier 1998).

What makes the knowledge *indigenous* is its inalienable link to the native people of a particular locality: "It is knowledge peculiar to the cultural system of such communities in a given locale" (Grenier 1998). It has been found to be structured and systematic, with gender and age-specific training taking place, "is stored in peoples' memories and activities and is expressed in stories, songs, folklore, proverbs, dances, myths, cultural values, beliefs, rituals, community laws, local language and taxonomy, agricultural practices, equipment, materials, plant species and animal breeds.

IK is shared and communicated orally, by specific example, and through culture. It is intimately linked with a traditional economy and entails considerable innovation in its attempts to adapt to change.

In International context, the term 'indigenous' is understood (mostly by Europeans) as being similar or synonym to 'traditional', 'aboriginal', 'vernacular', 'African', 'Black', and 'native American' (Loubser, 2005: 76). The phrase 'indigenous' people refers to a specific group of people occupying a certain geographic area (ibid: 75) for many generations. They possess, practice and protect a total sum of knowledge and skills constitutive of their meaning, belief systems, livelihood constructions and expression that distinguish them from other groups (Dondolo, 2005: 112; Hoppers, 2005; Nel, 2005).

While there is not one definition of IKS, many of these definitions share commonalities and complement each other. However, the contemporary politics of indigeneity and identity are as such that people have multiple and overlapping identities shaped by the present political and economic dynamics. Their manifestation on the socio-cultural context should also be taken into consideration in the debate about who is indigenous. The Indigenous Knowledge Systems Policy, as adopted by Cabinet in 2004, lays in place the first important milestone in our government's effort to recognize, affirm, develop, promote and protect IKS in South Africa, whilst unearthing the complexities and challenges associated with IKS.

> **"Africa, Africans and African knowledge systems now seek to center themselves within a global discursive construct, not as poor cousins in a globalising world but as unapologetic equal partners in their own right and terms."**

Although IKS are steadily gaining a space and place in the African political, cultural and (to some extent) academic contexts, there remains a host of external and inherent challenges to address before these systems are fully embraced as independent and/or complementary sources of knowledge and mainstreamed as consummate agents of innovations and natural resource-management (Osman, undated).

Anwar Osman's assertions are supported by many authors, who believe that while progress has been made, there are still challenges related to putting IKS on par with other IK, particularly because of what they term 'gate keeping'.

Odora Hoppers (2002) indicates that on the surface, the issue around IKS revolves around explaining and justifying its existence, over centuries, and pleading with mainstream 'keepers of the gate' to please allow this body of knowledge to come in and kindly play its part in local, national and global development.

Dr Mogomme Alpheus *Masoga* (2002) argues that research in South Africa has largely been a 'powerful' affair and remains so to this day. The 'powerful' monopoly of research skills could be attributed to the fact that conditions at 'powerful' institutions were favourable and still are.

When one looks at the Intellectual Property Rights (IPR) and IKS research, the question of power remains, and probably will always be. According to him, the current IKS research in South Africa vividly displays a lack of space.

The indigenous epistemology world has been invaded and occupied apparently without any ethical consideration. There is no regard for ethical implications in this boundary 'jumping' and there is no 'conversation' that takes place in occupying this space. Therefore, IKS research in South Africa is still mainly a practice of power at the expense of the powerless.

Wally Serote (2001) asks the question; what is it that we must do as Africans, to on the one hand, shift Africa and Africans to enter the centre of the world stage, and do so, in

our own right? On the other hand, how do we do so as a manner of contributing to a liveable human experience? Serote further notes that Africa and Africans are at the margins of global development, and asks what must we do to shift from the margins and why are we in the margins? What are the possibilities, both objective and subjective, which can anchor our shift?

These authors seem to agree that one area of struggle for IKS is to overcome the obvious gap between the periphery (margin-space) and the centre (centre-space). The proposal here is that there should be a partnership between centre and periphery. However, the challenge remains, that is, is it possible for the centre to move to the periphery? The concern calls for 'genuine' conversation between the centre-space and the margin-space (dialogue between organic intellectuals and modern intellectuals). The IK research should offer both the centre and periphery a space to converse and converge.

They seem to both agree that no IK research and IPR are research enough until they wrestle with the question of power relations. Conversation allows openness, presence, honesty, life, honest critique and tapestry. In this process, the opportunity arises for 'trained' professionals to gain deeper insight of the realities of the margin-space discourse.

Some of the challenges can be summarised as follows:

- Lack of forum for emerging researchers and scientists in IK
- Validation of IK using Western frameworks and paradigms
- Bridging the gap between IK custodians, practitioners, emerging researchers and scientists
- Lack of policy influence
- Institutional commitment
- Interface between IK and other knowledge systems.
- Politics of knowledge and publishing

ISSUES AROUND PROTECTION

IK is a national asset and it is therefore in the national interest to protect and promote it through law, policy and both public and private sector programmes. Odora Hoppers (2002) argues that as a continent, Africa is seeking its own renaissance and seeking to establish the terms of its development and its own science. Although IKS have existed for thousands of years, their concept and practice began to emerge in the science spheres only about three decades ago.

The development of new political, economic and cultural realities and postmodern methodologies created grounds and new ways to approach and embrace IKS. That is to say, the political recognition of indigenous people, failure of development planning to achieve the desired results, the growing disillusionment of communities with the promises of the modern "Western" science. At the same time increased public awareness of the value of the cultural Heritage, and that 'science' must find its locality in the social and cultural context (Nel, 2008), are some of those new realities and developments.

> **"Indigenous Knowledge is a national asset and it is therefore in the national interest to protect and promote it through law, policy and both public and private sector programmes."**

Masoga states that we have to understand IK and its role in community life from an integrated perspective that includes both spiritual and material aspects, as well as the complex relation between them. It is also necessary to understand and explore the potential contribution of IK to local development. The protection of IK and its use for the benefit of its owners and the communities where it is practised require research. This research should ideally be carried out with the participation of the communities in which it originates and is held (www.nrf.ac.za/funding/guide/iks.stm).

Institutions are another aspect of IK whose significance have been extensively studied by among others, David Lan, who in his seminal work notes, "Until the structure of ancestral authority finally cracks up and gives way, any attempt to establish political legitimacy will only succeed if it obtains the endorsement of the ancestors. For the ultimate test of the legitimacy of any political system is in its ability to provide fertility, ensure that crops grow, that the people prosper and are content" (Lan, 1985: 228).

While in the African continent, some postcolonial states preach the non-relevance of indigenous power. This perception is often dispelled during electioneering campaigns, where political leaders visit indigenous institutions to only galvanize support and power but to a greater extent seek the blessings of these institutions, to attain victory at the polls. It therefore becomes questionable to doubt their legitimacy. Ancestral power calls for respect of indigenous institutions such as traditional authorities as long as they are adapted to suit current needs and the exigencies of empowerment. Despite their exclusion from the mainstream political decision making processes, the might of indigenous institutions and their systems is frequently demonstrated within our political realm.

In the area of law and jurisprudence, Indigenous Law should form the basis of addressing various forms of transgressions, rather than using them only as appenditures. Generally, what is referred to as law and taught in all countries that were colonised is either rooted in English Common Law or Roman Dutch Law or both. The jurisprudence which underpins these legal systems is based on the idea of retributive justice, in which an impersonal state hands down punishment with little consideration for either victims or perpetrators (Tutu, 1999:51). Disorder is approached in terms of adversarial trial, proof, guilt and punishment (Peat, undated). Jurisprudence in traditional law is anchored in the idea of restorative justice. Here, the central concern is

not retribution or punishment, but the healing of breaches, the redressing of imbalances, and the restoration of broken relationships. This kind of justice seeks to heal both the victim and the perpetrator, who can be given the opportunity to reintegrate with the community he or she has injured. The processes are focused not so much on the establishment of the factuality of what has occurred but rather on seeking a way of restoring balance. Thus the perpetrator may be asked to suggest some action that would satisfy all parties (Tutu, 1999:51).

The discussion so far has revealed that though with challenges, IK is an essential element in the development process and the livelihoods of many local communities. One key question regarding the sustenance of indigenous principles and knowledge, however, is whether the conditions that made them effective in the past are still intact to cope with the dramatic social changes the world has been experiencing over the recent past. Furthermore, having been suppressed for many years, local communities have also lost confidence in their knowledge systems, amongst others:

- Communities do not know what knowledge they preserve
- Communities do not know how to identify preserve and protect the knowledge
- Communities do not know that their knowledge has a value
- Limited national and international laws to help them preserve and protect their knowledge to reflect their traditions and customs without limitations.

A major challenge that we continue to face is how to reconcile indigenous knowledge and modern science without substituting each other, respecting the two sets of values, and building on their respective strengths. Other threats to the importance of IK are patents and copyrights, formalised by law, to protect IPR. Some of these laws are formulated and operate in a different manner in terms of how IK is structured and operates. To prevent IK that is already in the public domain from being patented as a new invention in another country, it is vital to provide written documentation of such practices. This way, indigenous communities can challenge IPR being patented to others for practices that are traditionally their own.

The central weakness we are faced with is that the cultural and political nature of indigenous structures are often minimized and marginalized. Still in the 21 century both colonial and neo-colonial perspectives remain the structures that have "arrested" Africa's development. This is despite the fact that indigenous institutions have always been the pivot of African societies. This is despite the fact that South Africa has an Indigenous Knowledge Policy (2004) and also the Protection, Promotion, Development and Management of Indigenous Knowledge Bill (2016) aimed to address concerns regarding bio piracy, misappropriation, the promotion of registration of IK, recognition of prior learning of practitioners, benefit sharing for communities, facilitation of research and development and creating mechanisms for dispute resolution for the communities. Certain elements of this Bill seem to want IK practitioners to conform to Western paradigms instead of them being recognised based on their African practices and paradigms.

It is also important to note that South Africa is a multicultural society with diverse indigenous cultural communities, that while they have areas of commonalities, they are not homogenous. They have certain elements of uniqueness.

It has been argued that as Africa enters into a new phase of knowledge development, disciplines like science, law, health, agriculture, amongst others are equally asked to rethink their methods and theories to embrace this emerging challenge.

Broadly, this article suggests that IK, which encourages local cultures, and contexts, which integrate culturally-sensitive approaches, has the potential for driving change, poverty alleviation, peace and stability and socio-economic development. Ultimately IKS needs to be interfaced with other knowledge and technology systems to meet the challenges of globalisation and sustainable development in 21st Century.

> **"The discussion so far has revealed that though with challenges, Indigenous Knowledge is an essential element in the development process and the livelihoods of many local communities."**

Perhaps we need to acknowledge that the significance and possible inclusion of indigenous institutions in the mainstream political arena is likely to be attained through an inclusive social learning system. The dynamic context in which we live provides a continual stream of information that as individuals we process at different rates into new understanding. If we belong to social learning systems, we are enabled to transfer and reshape our understanding that our governance system is an inclusive entity.

Adopting an inclusive social learning system will develop our understanding of the dynamics of our governance system so that we are better able to direct and manage our actions. Relying on social learning systems will enable us to learn and act together with common cause as a way of coping with the stresses of a changing world. Perhaps we need to use the indigenous knowledge versus western knowledge crisis as an opportunity to transform to a more desired state. Perhaps one can conclude by arguing that IKS is supposed to be the backbone of our school curriculum, our constitutional democracy, and at the centre of economic development initiatives, as well as our day to day living.

The Criminal Procedure Act

By Justice Legoabe Wille Seriti, Supreme Court of Appeal Judge


Source: https://www.thetrentonline.com

The normal procedure in a criminal trial is for the state to lead evidence. If necessary the defence cross examines every state witness. The prosecutor might re-examine state witnesses, thereafter the state closes its case. The defence might call witnesses to testify and the said witnesses might be cross-examined, re-examined and thereafter the defence will close its case. Closing arguments from both parties will follow and thereafter judgment.

Section 174 of the Criminal Procedure Act 51 of 1977(CPA) creates an exception to the normal criminal trial procedure. It is mainly to relieve the trial court of the burden of proceeding with a full trial in circumstances where, after the close of the state's case, it's clear that the state will not succeed to secure a conviction.

Section 174 reads as follows:

> "If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty".

The wording of the section is similar to the wording of its predecessors in the 1917 and 1955 Criminal Codes.

In *S v Khanyapa* 1979 (1) SA 824 (A) at 838F, when dealing with the 1955 Act the court said that the words "no evidence" mean no evidence upon which a reasonable man can convict the accused.

In *S v Mphetha* 1983 (4) SA 262 CPD the court considered the meaning of section 174 of the 1977 Act. The court referred to the words "no evidence" contained in the section and

at p263H said "it is generally accepted that the words 'no evidence' mean no evidence on which a reasonable man acting carefully might convict".

It is trite that the words "no evidence" which appear in section 174, mean no evidence upon which a reasonable person might convict the accused.

In *S v Legote* 2001 (2) SACR 179 (SCA) at para 8-10 the court stated that a court has a duty to discharge the accused where there is no prima facie case. The court has this duty even if the accused is represented.

In *S v Lubaxa* 2001 (4) SA 125 (SCA) 2002 (2) at para 18 the court said that the accused whether represented or not, is entitled to be discharged at the close of the state's case if there is no possibility of a conviction other than if he testifies and incriminates himself of herself.

The court further stated that failure to discharge an accused in those circumstances, if necessary mero motu, is a breach of the accused's constitutional rights. This would ordinarily vitiate a conviction based exclusively upon his or her self-incriminatory evidence.

The court went further and said these considerations do not necessarily arise where there is a possibility of incrimination of the accused by the co-accused.

In *S v Maliga* 2015 (2) SACR 202 (SCA) 161 at para 18 the court said "if at the end of the state's case, the state has not made out a prima facie case, in other words there is nothing for the accused to answer. The presiding officer must raise this question mero motu, especially in the absence of an application for discharge".

The decision to refuse a discharge is a matter within the discretion of the presiding officer and may not be questioned on appeal – see *R v Lakatula and Others* 1919 AD 362 and *R v Afrika* 1938 AD 556. In *S v Van Deventer and Another* 2012 (2) SACR 263 (WCC) at 61 the court held that there cannot be an appeal against the decision of a court not to discharge, as it is a step of an interlocutory nature.

In *S v Lubaxa* supra at para 9 the court said that the refusal to discharge an accused at the close of the prosecution's case, entails the exercise of a discretion and cannot be the subject of an appeal.

Section 309 of the CPA provides that any person convicted of any offence by a lower court may appeal against that conviction and/or sentence to the High Court having jurisdiction.

In terms of section 316 of the CPA any person convicted of any offence by a High Court may appeal after obtaining leave to appeal against such conviction or against any resultant sentence or order.

Both sections make provision for appeal after the conviction of the accused. There is no legal provision which sanctions an appeal against an order which dismisses an application in terms of section 174.

In a case where a judge or magistrate sits with assessors, the judge or magistrate alone decides on whether to grant the discharge or not – see *S v Magxwalisa and Other*s 1984 (2) SA 314 N.

In the case where the accused, at the close of the state's case, applies for a discharge in terms of section 174 and the application is dismissed, the accused has two options. The accused can either, lead evidence and proceed with the trial or the accused can close his/her case without leading any evidence.

> **"If the accused or his legal representative is of the view that although the section 174 application was dismissed, but the quality of the evidence of the state witnesses is such that the state has failed to prove its case beyond a reasonable doubt, the defence can close its case without leading any evidence."**

It is trite that at the stage of a consideration of the section 174 application, the test applied is whether there is a prima facie case against the accused. If there is a prima facie case against the accused, the application of the accused will be dismissed.

It is also trite that the test which is applicable at the close of the state's case is whether the state has proved its case beyond reasonable doubt.

If the accused or his legal representative is of the view that although the section 174 application was dismissed, but the quality of the evidence of the state witnesses is such that the state has failed to prove its case beyond a reasonable doubt, the defence can close its case without leading any evidence.

On the other hand, if the evidence led by the state is of such a nature that it requires the accused to answer to the allegations levelled against him or her, it is advisable that the accused should lead evidence in his/her defence.

The defence, after the dismissal of the section 174 application needs to carefully consider the above-mentioned options and choose the option that best suit their case. Any error in the choice of the route to follow might be fatal to the case of the accused.

Epistemic violence

By Rorisang Moloi, Candidate Attorney at Moodie and Robertson

Diversity, justice and traditions have shaped the intellectual history of South Africa

Epistemic violence is to strongly impede and undermine non-Western methods or approaches on knowledge. It aims to change the historical and social native consciousness, to erase all traces of original ways of thinking and overwrite it with something 'more appropriate'. It attempts to regulate the thoughts and minds of others, it mutes their voice, forces a loss of identity and creates stereotypes.

In South Africa, colonisation birthed apartheid and apartheid birthed racism. Apartheid succeeded not only through physical violence but through intellectual and epistemic violence. It's important to explain how various traditions have affected black people's intellectual history through different periods; from colonialism to apartheid to post-apartheid.

> "In South Africa, colonisation birthed apartheid and apartheid birthed racism. Apartheid succeeded not only through physical violence but through intellectual and epistemic violence."

Liberalism is totalitarianism with a human face

In the beginning, there was natural law. This refers centrally to universal morality, as opposed to law as it is. It is naturally inscribed in the conscience of all thinking and living people all over the world.[1] Thus, it is not a set of rules. Natural law has undergone numerous changes: from objective to subjective, from cosmological to individual. Natural law started fading into the background, with the establishment of 'the government'. Then came liberalism, it came to South Africa with the expectation that it would emancipate those who had been oppressed on their own land, that it catered for the individual.

According to one of the founders of "liberal" political philosophy, John Locke; people surrendered their 'rights' to natural law when a government was established through what is called 'the social contract'.[2] This contract gave government the right to rule over citizens in ways they thought best, thus apartheid.

In South Africa, legislation such as the Black Land Act 27 of 1913,[3] for example, was enacted to prohibit black people from residing anywhere else but areas designated to them. This alone was a violation to human dignity. This is but one indication of how the white minority used liberalism to oppress black people.

Law as it is

Positivism is the very narrow approach that was used to initiate apartheid. Today many individuals still presuppose the positivist norms that moulded ideas and regulated apartheid's tools and institutions. It was instilled by the white minority that wanted black people to assimilate to their ways.

With legal positivism, there is no connection between law as it is and morality, which is law as it ought to be. Judges in the apartheid era were prohibited from using inventive methods to assert the legislature's intention. They decoded the statutes to the will of parliament and did not justify their decisions. They rejected legal values, (such as freedom from cruel and unusual punishment and equality before the law etc...)[4]. Thus, according to John Dugard,[5] legal positivism is based on two beliefs: the truth of the theory of command and the strict separation between law and morality.

However, even if judges were given an instruction to be creative in their interpretation of the law, they would have still leaned towards the laws of parliament to uphold the status quo. The Bantu Education Act 47 of 1953,[6] Terrorism Act of

1 W Le Roux 'Natural Law Theories' 25.

2 W le Roux 'Natural Law Theories' (see note 1 above) 43.
3 Black Land Act 27 of 1913.
4 J Dugard 'The Judicial Process, Positivism and Civil Liberty' (1981) 98 The South African Law Journal 197.
5 J Dugard (note 5 above) 183.
6 Bantu Education Act 47 of 1953.

1967,[7] and the Groups Areas Act 41 of 1950[8] were some of the statutes that were interpreted through legal positivism and evidently prejudiced the other.

"The worker of the world has nothing to lose, but their chains, workers of the world unite."[9]

Marxism focuses on how entities that regulate the means of production (owners of factories, machinery, mines etc.) regulate how the rest of society lives. Marx distinguishes between the working class (exploited, thus oppressed) and the capitalists. In South Africa, the working class comprised mostly of the black population, the owners of production were the white minority. Marx proposed that people could overcome exploitation through a class revolution. Such a revolution never happened in South Africa but the two class divisions were clearly present and still are. When the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) was adopted,[10] it sought to transform the country and heal it from the injustices created by its predecessors. Transformative constitutionalism, the legal culture of justification and purposive interpretation approaches are what we now rely on to 'revolutionise' the conditions of the working class and to ensure that exploitation is avoided.

Transformative constitutionalism refers to the interpretation of law to give effect to the Constitution.

"Motho ke motho ka batho ba bangwe."[18]

African nationalism's focal point is unity of the African people for emancipation and reclaiming their cultural and historic pride lost during colonisation. As early as the 1880s, African people were already uniting against racial injustices. Africans initially wanted a claim over their land and encapsulated violence.

During apartheid, the South African Natives National Congress (now known as the ANC) were prepared to conquer apartheid through intellect and politics, discourse and rebellion][11].

As the ANC membership grew, it birthed a youth league and became more inclusive permitting Indians, Coloureds and women to join. During the Rivonia Trial Nelson Mandela stated: '…being an African is foregrounded together with an inclusive nationalism,'[12] no more would the goal be to drive the white man into the sea.

Nationalism forms part of our constitutional-era, infested in the concept of *uBuntu*, a philosophy of life that encompasses group solidarity, personhood, morality, compassion, human dignity and so forth.[13] Although not entrenched in the Constitution,[14] judges are encouraged to consider it when creatively interpreting the Bill of Rights and other legislation.[15] *uBuntu* recognises the African people, and section 211 provides a platform where they can continue practicing the cultural beliefs, laws and principles that they were deprived of before 1994,[16] and section 39(2) encourages the courts to give effect to (among others) customary law.[17] The Promotion of National Unity and Reconciliation Act 34 of 1995,[18] was also enacted as a step towards healing the injustices of the apartheid regime.

uBuntu is an African concept, but is inclusive and applies to all South Africans regardless of their skin colour, ethnicity or gender.

'Black man you are on your own.'[19]

Critical racial theories allude to supremacy and sovereignty. They suggest that even post-apartheid, power is still in the hands of the white minority in South Africa.

The theories lean in a direction that 'the law protects the white people' by use of institutionalised racism and white privilege, the law is not as colour blind as it ought to be. The question then becomes; 'was power ever transferred from the white minority to the black majority when apartheid ended?' Mogobe Ramose argues not, in that redistribution of wealth never happened when apartheid ended, up until today the majority of land owners are white people.[20] Reparations were swept under the carpet and reconciliation was put on the table instead.

The Black Consciousness Movement (BCM) however, aimed to oppose this 'norm'. From the 1930s, black students were already uniting to oppose the isolation situation of being black in a white world.[21] BCM recognised that the world they were living in was white, in culture, wealth, law and so forth. The movement also realised the importance of reclaiming their black identity.[22]

'Freedom is something that can only be taken, not given.'

On many grounds epistemic violence succeeded in oppressing the other. Black people were deprived natural rights, oppressed through liberal traditions and later oppressed through positivist laws.

The other never assimilated to the Western definition of 'civilised', the other continued to reclaim identity and have its voice unmuted. Through the influence of Marxism and the law, the other 'revolutionised' against the oppressive status quo of apartheid birthed by colonisation. Today the other's culture and practices are reincarnated as *uBuntu*. The other is free on their land, and still fights towards ultimate decolonisation, decolonisation of the mind, because *uBuntu* recites that the living pursue justice as determined by the living-dead on behalf of themselves and the yet-to-be-born.[23]

7 Terrorism Act of 1967.
8 Groups Areas Act 41 of 1950.
9 A Karl Marx quote.
10 Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).
11 R Suttner 'African Nationalism' in Vale, Hamilton and Prinsloo (note 19 above) 130.
12 R Suttner 'African Nationalism' in Vale, Hamilton and Prinsloo (note 19 above) 139.
13 R Suttner 'African Nationalism' in Vale, Hamilton and Prinsloo (note 19 above) 317-318.
14 The Constitution (see note 12 above).
15 Y Mokgoro 'uBubtu and the Law in South Africa' (see note 18 above) 319.
16 Section 211 of the Constitution (see note 12 above).
17 Section 39(2) of the Constitution (see note 12 above).
18 Promotion of Reconciliation Act 34 of 1995.
19 M.P More 'The Intellectual of the Black Consciousness Movement' in P Vale, L Hamilton and E.H Prinsloo (eds) The Intellectual Traditions in South Africa: Ideas, Individuals and Institutions (2014) 189.
20 M.B Ramose 'An African Perspective on Justice and Race' https://them.polylog.org/3/frm-en.htm (accessed 28 March 2017).
21 M.P More 'The Intellectual of the Black Consciousness Movement' in Vale, Hamilton and Prinsloo (note 28 above) 173.
22 M.P More 'The Intellectual of the Black Consciousness Movement' in Vale, Hamilton and Prinsloo (note 28 above) 174.
23 M.B Ramose 'An African Perspective on Justice and Race' (note 29 above).

Fundamental Human Rights

By Nonhlanhla Ngwenya and Fhumulani Mbedzi

The right to just administrative action

By Fhumulani Mbedzi, African Law Review Researcher

Source: https://www.flickr.com/photos/baktuelt

South Africa has emerged from a dark history of systematic human rights violations. She has gallantly risen from her shameful past to establish herself as a sovereign state founded on democratic values such as supremacy of the constitution and the rule of law.[1]

Informed by our past, the constitution proclaims our collective resolve to reconstruct a society based on democratic values, social justice and fundamental human rights. Before the dawn of the democratic dispensation, all rights mentioned in the Universal Declaration of Human Rights and other international human rights instruments were directly or indirectly violated. The right to just administrative action was no exception. Administrative decisions which adversely affected black people were taken without due regard to their rights as no law sanctioned this transparent and democratic move. South Africa now has a justiciable Bill of rights in its Constitution a unique feature in contemporary constitutional law. Each right in the Bill of rights is fundamental and this includes the right to just administrative action.

Section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. It further states that anyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

The Legislature, acting pursuant to S33 (3) of the Constitution enacted the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) ("PAJA"). This Act was enacted to give effect to the right to administrative action that is *lawful, reasonable and procedurally fair* and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution ; and to provide for matters incidental thereto.[2]

Human rights are often characterised as political or socio-economic in nature. This distinction is often also attributed to the inherent notion of significance attached to these rights. My view is that all rights are fundamental, and none should be denied on the basis of a narrow and imagined sense of their varied significance.

Bearing in mind that South Africans will visit their polling stations in May 2019, one may argue that the right to vote is the most important, but how about the right to life, the right to food and water, the right to adequate housing, education and dignity? How about fair labour practice and lawful administrative action? However, for the purposes of this article, I will focus squarely on the right to just administrative action, its implications and why it is so important in a constitutional democracy.

A right to just administrative action is a fundamental human right. It allows citizens to challenge the manner in which their government treats them. Judicial review is also recognised as a mechanism, in which government's decisions may be subjected to judicial scrutiny. This right allows a court to review administrative action to ensure it is lawful, reasonable and procedurally fair. The court can also set aside an administrative decision that does not surpass the lawfulness, reasonableness and procedural fairness threshold.

PAJA seeks to make the administration effective and accountable to people for its actions. S33 of the Constitution

1 The Republic of South Africa is one, sovereign, democratic state founded on the following values:
a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
b. Non-racialism and non-sexism.
c. Supremacy of the constitution and the rule of law.
d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

2 See Preamble to PAJA. See also the long title of the Act.

and PAJA ensures that people have the right to ask for written reasons when administrative action has a negative impact on them. State organs make many decisions on a daily basis that could affect the lives of citizens adversely. These decisions must comply with the prescripts of PAJA. It is therefore critical that state organs understand PAJA in its entirety. The citizens must also know their S33 right and how they can utilise PAJA to enforce it.

It bears emphasis that state organs must follow the prescripts of PAJA at all costs. By so doing, they will effectively give meaning and practical expression to the constitutional right to Just administrative action. It is through the S33 constitutional right that *individual citizens play a role in the decision*-making process of those they have elected to govern. The reality of our constitutional dispensation is that the government is elected by the people. This means that the governors must account to the public and must act transparently. The Constitutional Court has authoritatively reminded elected representatives as to why they must account to the people, in the following terms:

> *"Amandla awethu, mannda ndiashu, maatla ke a rona or matimba ya hina (power belongs to us) and mayibuye iAfrika (restore Africa and its wealth) are much more than mere excitement-generating slogans. They convey a very profound reality that State power, the land and its wealth all belong to "we the people", united in our diversity".*[3]

Section 33 right essentially protects citizens against the possible arbitrary use of power by state officials. It requires public officials to thoughtfully and deliberately consider the impact of their decisions and listen to those likely going to be affected before the decision is taken. This is in accordance with the dictates of fairness and justice. This right is essential as it demands of government to promote participatory democracy. It promotes an efficient administration and good governance. It creates a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function. It is through this right that government is required to respect and observe democratic decision-making processes. It is through this right that the governed have a right to influence the decisions of those with governmental power.

This right nurtures good democracy and good governance. It is important as we now have a functional judiciary and a vibrant civil society that assists the governed in reviewing irrational and unlawful governmental decisions. Judicial review is a vital tool available in the enforcement process of this right. It is also critical for the entrenchment of the rule of law. Gone are the days wherein the whims of the governors will routinely supersede human rights and other legitimate considerations. Administrative action needs to be taken in a lawful, reasonable and procedurally fair manner. Failure to do so will result in that decision being set aside by the courts.

3 United Democratic Movement v Speaker of the National Assembly and Others (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) , at para 7

The right to freedom of movement

By Nonhlanhla Ngwenya, Candidate Attorney at Phukubje Pierce and Masithela Attorneys

Apartheid taught many South Africans that the colour of their skin was a determining factor on their movement.

Apartheid's effect had an impact on a simple night out on the town. A curfew was imposed, which meant there were consequences for black people who found themselves on the streets at the wrong time, in their own country.

The issue of movement becomes important at this point of South Africa's democracy. In order to safeguard the ideals of the Constitution one must embrace change. It's the kind of change that requires those with the ability to exchange ideals that only a certain type of person is allowed in a particular area to a new ideal, that movement gives you freedom.

One of the key outputs of apartheid was the ability to restrict movement in a manner that caused a great amount of administration and discomfort. The restrictive nature of apartheid laws meant that the expansion or reduction of ones movement of operation was dependant on a persons allocated area, in accordance to various laws including the Group Areas Act.

A notable provision inserted as part of the Bill of rights is the right to freedom of movement and residence. It affords one the right to have a passport to enter and leave the country.

This right was systematically violated by the apartheid government who, in pursuit of racist policies, heavily restricted the free movement of black citizens to and from urban areas through Pass laws.

In the current Constitutional dispensation this right means the right to enter, to remain in and to reside anywhere, in the Republic. This is a second generation right which is important in promoting the ability to travel, not only for those who were historically limited but all citizens.

This right is however limited in accordance to Section 36, in a reasonable and proportional manner whose extent matches the importance of the aim served by the limitation of the right.

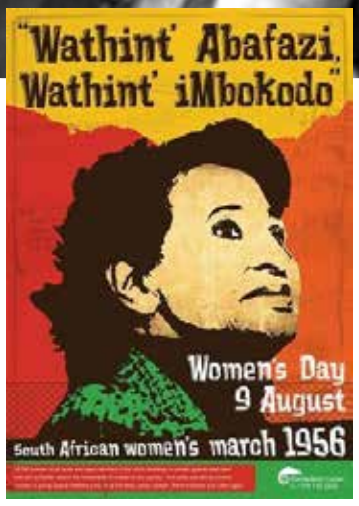
An example of a reasonable and proportional limitation which restricts the movement of persons as part of a criminal process, for instance imposes bail conditions. It also establishes eligibility requirements, or excludes entry into public or certain private land and premises.

A Heroine: Reflecting on women's rights

In the words of Sophia Theresa Williams De Bruyn

By Mpho Sithole, African Law Review Editor

Source: https://topwomen.co.za



Source: https://bruinou.com

Anti-apartheid activist Sophia Theresa Williams-De Bruyn is the last living leader of the Women's March that took place on 9 August 1956 in Pretoria. De Bruyn was barely 18 years old when she braved the streets, marching arm in arm at the head of the throng, alongside leaders - Lilian Ngoyi, Albertina Sisulu, Helen Joseph and Rahima Moosa. The *African Law Review* thought it imperative to find out what Human Rights means to an icon of her time.

I believe in freedom from discrimination, the right to equality, freedom of belief and religion, the right to education, the right to social security and the right to freedom of association and assembly. The Bill of Rights protects the rights of every South African. According to a 2017 report by the South African Human Rights Commission, the right to equality is the most violated in the country.

Human rights to me, means that as much as we all have rights we should remember to respect those of others. This is irrespective of race, colour, religion, gender, language or any kind of status and political views. It also reminds me of the countless women and men, comrades and compatriots who through sheer determination, deep commitment and dedication strove and perished to manifest Human Rights day.

Women not only played meaningful roles in society, they entered the workplace in order to supplement their meagre

income to support their families. Once in the factory or whichever workplace they entered, women organized their colleagues for the cause of better working conditions and better pay. They fought for non-discrimination at the workplace and recognition of their trade union rights.

The role women played against oppression has unfortunately been sparsely documented, to the extent that their political contributions are seemingly invisible. Women of that time were docile, subordinate and semi or illiterate in the interest of patriarchy.

Throughout the ages women were and still are today, an integral part of resistance against oppression, domination and segregation. One is reminded of the countless campaigns that women have participated in over the decades. The famous passive resistance, factory strikes, boycotts during the apartheid era, the Freedom Charter, the beer hall protests, potatoes boycott, the numerous pass law protests which culminated in the 1956 historic march to the Union buildings in Pretoria.

I am eternally grateful and proud of the humble contribution I have made, alongside all the beloved icons and martyrs of my time. The roles they played towards bringing democracy and enabling our human rights dispensation is admirable.

I believe a firm foundation was laid and good examples were set. Through my experiences and interaction with scores of young women, it brings a lump of joy to my throat and a deep sense of pride, for their assertiveness, confidence and wise choices. Whether they opt to be business women, cadets in our army or generals, pilots, marine scientists or the specialities and areas of careers open to them. The magnitude of the business they desire is amazing and equally possible, their smartness and sophistication is incredible and often times I say to them:

"No longer is the height of the sky the limit for you when it is said 'the sky is the limit'. I say to you in reality, you can go beyond the skies, you can even become an astronaut."

As much as I rejoice at their keen capabilities and achievements on the other hand, I am also deeply saddened. The undignified disrespect and insensitivity towards the elderly, downtrodden, the most vulnerable and senseless destruction of not only educational property but all other property and sundry are disappointing.

"The role women played against oppression has unfortunately been sparsely documented, to the extent that their political contributions are seemingly invisible."

Our women should always remember that they bring life into the world, they should always strive to be good examples by living ethical and up-standing lives. This would afford their offspring the opportunity to emulate early in their own lives, also striving to be reputable and good, upstanding citizens and great role models to an up-coming generation. Those that are not only the future generation but the now generation.

I see great militancy, determination and bravery in them. I do however plead that they do not misplace their positive qualities. They should use them only for the right reasons, at the right moment for the obvious tumultuous times before us.

During our time we faced and fought one enemy; the apartheid administration. Today our young women and men have to eventually face multiple enemies; deeply entrenched corruption which robs the poor and the vulnerable; the scourge of rape and violence against women and children, extreme poverty; a lack of efficient health facilities and all forms of crime and unemployment.

I nevertheless draw courage and strength from the knowledge that our young women and men are equipped with good skills. They have access to knowledge and education, high-class modern technology which is frequently upgraded and continuously renewed.

Our smart minded, young people's preparedness to take on the battle against the many scourges and ills that bedevils our land is obvious. Our people and country places it's future in their capable hands. You dare not disappoint and fail us. Too much is at stake for our beloved people and land.

The Women's Living Heritage Monument at Lillian Ngoyi Square in Pretoria

Source: https://www.sa-venues.com Photo credit: Kalden Ongmu for Africa News Network

What bail is and what it is not: A Namibian perspective

By Pombili Shipila, Legal Practitioner of the High Court and the Supreme Court of Namibia

In terms of sections 59 and 60 of the Criminal Procedure Act[1], a person who has been arrested on suspicion of having committed an offence may be released from custody upon payment of a certain amount of money (bail) before the commencement of his/her trial.

> "The idea is not that once bail is paid, the accused is free to go and offend again or to abscond. To the contrary, the idea is that what is paid as bail serves as security that the accused will return to court and thus to ensure that he or she will stand trial and once the trial is over, he or she will receive their money back."

Contrary to popular misconception, bail or the denial thereof is not a form of punishment.

The concept of bail is premised of the right of the accused or suspect as the case may be, to be presumed innocent until proven guilty in a competent court or tribunal and in accordance with the law,[2] read in tandem with the right to liberty[3] both of which are found in chapter three of the Constitution of the Republic of Namibia.

The idea is not that once bail is paid, the accused is free to go and offend again or to abscond. To the contrary, the idea is that what is paid as bail serves as security that the accused will return to court and thus to ensure that he or she will stand trial and once the trial is over, he or she will receive their money back.

1 Act 51 of 1977 as amended

2 Article 12(1)(d)
3 Article 7

It has often been said that people out on bail may go and "re-offend". This, in my view is a redundant statement and technically incorrect.

The fact that a person is on bail does not denote that he has been found guilty of an offence. Being a suspect or an accused is not the same as being a convict.

Thus, to say that a person should be denied bail because he or she may go and "re-offend", while knowing that the said person has not yet stood trial and had not been found by a competent court to have offended in the first place, is an unwarranted attack. It denies such a person, the right to be presumed innocent until proven guilty and further denotes an unfounded attack on the right to liberty.

In 1991, the High Court of Namibia in the case of *S v Acheson*[4] set out some factors to which regard must be had when dealing with the question of bail. The key consideration is whether or not the accused will return to court if released and ultimately whether they will stand trial. For this purpose, regard must be had to how deeply the accused is attached to this jurisdiction. If for instance he or she has a home, assets of substantial value or family ties, he or she may be considered less likely to flee unlike a person with no ties to Namibia.

Also, the ability to police or monitor the movements of the person concerned have a bearing on the question. This includes an assessment of whether or not it would be practically possible to trace the accused and return them to custody in the event of them fleeing.

For this purpose, regard is had to the nature of our national borders and how effectively they are policed as well as possible co-operation and other agreements between Namibia and countries to which the person is likely to flee. The International Co-operation in Criminal Matters Act[5] was enacted to facilitate the provision of evidence and the execution of sentences in criminal cases and the transfer of the proceeds of crime between Namibia and foreign States. It is also to provide for matters connected therewith and lists a number of countries with which Namibia has arrangements to co-operate in such matters.

The likelihood of the person to interfere with investigations in the matter and the commission of further offences while out on bail is also regarded. To this end, the person's ability to access the docket, records and witnesses is an essential consideration.

However, as regards the possibility to commit further offences while out on bail, there is no substantial manner of determining whether or not a person is likely to commit an offence in future. This consideration is thus purely speculative.

4 1991 NR 1 (HC); 1991 (2) SA 805 Nm
5 Act 9 of 2000

It is an established principle of our law that where there are other less drastic ways of allaying fears of the state regarding the release of the accused on bail, these must be explored first.

These methods may include:

- Reporting conditions in terms of which an accused is to report to the nearest Police station on a set schedule.
- The limitation of movement such as the surrender of travel documents or non-contact provisions in terms of which an accused is cautioned not to have contact, directly or indirectly with certain persons.

A violation of any of these conditions will render the accused liable to re-arrest.

Technically, our system is sound and on the basis of the above, the administration of bail should be smooth.

However, in certain instances, a lack of capacity amongst the personnel responsible for operating the system leads to undesirable circumstances unfolding.

For instance, an accused person may be arrested three times but is entered into the system with different particulars each time. As a result, if he has previously been convicted of a similar offence, it becomes virtually impossible to detect this.

All in all, it must be understood that while there is absolutely no guarantee of what a person is going to do after release on bail, the question of bail is decided on a balance of probabilities based on the evidence before court in any given matter. Further, each case is decided on its own merits. If there is evidence that the accused is not a good candidate for bail, let such evidence be placed before court in order of a just decision to be made in accordance with the law. In the absence thereof, the court will have to rule on the basis of what is available.

Courts make decisions according to law and not according to emotions as the law is constant and consistent unlike emotions that may change depending on which side of the law you find yourself. ■

"Courts make decisions according to law and not according to emotions as the law is constant and consistent unlike emotions that may change depending on which side of the law you find yourself."

The lens of a visionary: Keith Kunene

By Mpho Sithole, African Law Review Editor

"The history in our country speaks to our highest values of people who did not accept things as they are and go along with them. They resisted, they refused to accept the world as it is, they demanded it to be a better reflection of the their highest dreams and highest aspirations."

The words of American Politician, Cory Booker are fitting for a man such as Keith Kunene. Be it in law or business, he dared to dream and forge his own path. He broke boundaries and created new markets, to manifest the values and ideas he espoused. He didn't wait for apartheid South Africa to first fall before he could realise his desires. By the time, political changes after 1990 introduced an empowerment dimension to black business, changing its nature and size – it was clear to see, Kunene was a cut above the rest.

He grew from humble beginnings in the township of Vosloorus on the East Rand.

"My upbringing was a very good, sweet one. I am the eldest of 7 children, my two sisters are now late, one of them was an educationalist like both my parents. My father was a very active headmaster, a teacher who also had a passion for music."

> "My father was a fantastic man, he took six children to university. He stressed on education. He was also entrepreneurial. He bought a combi which he operated as a taxi after school hours, weekends and holidays. He drove people to the homelands over the Christmas period."

After matriculating from the Inkomana Catholic High School in 1960 Kunene took his father, Mr Fortune Kunene's advice and applied to study Medicine.

Both the universities of Fort Hare and Zululand rejected his application, citing his poor Maths results.

He then opted to find other forms of employment. Over the next six years, Kunene worked odd jobs in various manufacturing companies and even in a hospital.

As the eldest child, Kunene's father was unhappy with his choice of work. He warned that not going to university would set a bad example for his siblings.

So in 1967, Kunene was accepted to study a *Bachelor of Science* degree at the University of Zululand. A month later he changed his mind about pursuing the course. He then wrote his father a letter explaining that he wanted to study a Bachelor of Arts, Law degree instead. His father agreed.

"My father was a fantastic man, he took six children to university. He stressed on education. He was also entrepreneurial. He bought a combi which he operated as a taxi after school hours, weekends and holidays. He drove people to the homelands over the Christmas period." Kunene says.

While studying towards his law degree, Kunene was deeply invested in student politics, he was soon elected president of the student representative council.

The history books will show that during the 1960s and 1970s, South Africa bred some of its finest crop of leaders, including one Steve Bantubonke Biko who was amongst the new radical political activists studying at the university - with Kunene being no exception.

> **"I loved being a Lawyer but what excited me most was business and not just any business, big business. Eventually I came to a point where work was piling up at my office, while I chased big business deals. I eventually resigned, sold my business and building around 1997."**

KUNENE THE LAWYER

Upon completing his degree, Kunene registered at Unisa, were he qualified for his B. Proc degree. He served his articles. Just before he qualified, his principal decided to place an advertisement in the newspaper and sell the practice.

Two people, who happened to be an Afrikaner and Jew responded. They decided to team up as they couldn't afford to buy the practice individually. The one partner, an Afrikaner said he would only buy on condition that Kunene stayed, he promised to offer him shares in the practice once he qualified.

"I was admitted on the 10th of May 1977 and on the 1st of June I was a full partner in the firm." Kunene says. Within a few months, Kunene informed the partners that he had decided to branch out on his own, to establish his own practice.

THE FORMATION OF THE BLA

The formation of the Black Lawyers Association was sparked by the apartheid governments discriminatory provisions against black attorneys who practised mainly in Johannesburg and Pretoria.

"Colleagues were being charged under the Group Areas Act for practising in town. The Act did not allow black people to secure office space in so called white areas." Kunene says.

The idea to formalise the organisation was born out of a series of meetings which began in 1977. Kunene was amongst a group of black, male attorneys including George Maluleke, Dikgang Moseneke who got together at meetings convened mainly at Godfrey Mokgomana Pitjie's initiative. He was the most senior black attorney in the Transvaal at the time.

The meetings revolved around talks on challenges in the profession, things that were happening in government and politically.

'We held a meeting where we discussed a strategy. I had friends who were doctors, I was prompted by what they were doing, they were having discussions. So I suggested to the group of attorneys, that we formalize our engagements.' Kunene recalls.

ESTABLISHING THE LEC

Black legal practitioners in the country experienced many challenges and obstacles in the 1970's.

"People like myself and the likes of George Maluleke were trained in small white firms but never did real commercial work like our white counterparts. We complained to government and government would say you are not experienced. Not much has changed even today." Kunene says. The pool of skilled black lawyers was very minimal in the late 1970's.

"We could bump into each other. We were referred to as attorneys of west of west street. The magistrate court, maintenance court and divorce court were west of west street in Johannesburg and all our courts were on the western side of west street," he says.

The idea of the Legal Education Centre was born out of the need to equip black lawyers with sufficient skills and knowledge. The trainings focus on a variety of topics, aimed at teaching matters never accessible to black judges before the courts.

'We got articulate judges to conduct trainings. In the early years, the BLA invited some American lawyers and judges to assist the centre with training programs." Kunene says.

BUILDING THE KUNENE EMPIRE

"I loved being a Lawyer but what excited me most was business and not just any business, big business. Eventually I came to a point where work was piling up at my office, while I chased big business deals. I eventually resigned, sold my business and building around 1997. Prior to that I was pushing my father to retire from the teaching profession, he was already in his seventies." Kunene says.

Upon retirement in 1978 Kunene senior started a butchery, he sold vegetables and also rented out vehicles. While still practising as a Lawyer, Kunene assisted a widow to sub-let her

trading licence for selling milk and fruit juice in Vosloorus. He secured the sub-lease for his father who then acquired a distribution licence to operate a fresh milk outlet in the township. He built a lucrative enterprise. Three of the five brothers, Zanosi, Zoli and Menzi joined the business on a full time basis. One of the brothers, Dudu, who was a medical doctor joined the group on a full time basis much later (1998). The timing was ironically perfect, the brothers had been kicked out of Turfloop University over their political assertions.

In 1983, the Kunene Brothers won a tender to take over a liquor outlet, previously owned by the government in Vosloorus. Business also bolstered at the milk outlet, when the brothers started selling Coca-Cola products on a wholesale basis. Kunene senior acquired the wholesale licence for the soft drinks distribution under his milk and fruit juice licence. He passed away in 1981, shortly after Mrs Kunene who had gone blind, also passed on.

"My father kept us together, he taught us not to be selfish. There's a very conscious hierarchy at home, when he died I became a father figure for my brothers. They didn't do things without letting me know." He says.

> **"The Kunene brothers were fast making a name for themselves, becoming game changers in the growth and diversification of a small African trading business."**

The Kunene brothers were fast making a name for themselves, becoming game changers in the growth and diversification of a small African trading business. The brothers soon expanded business in the East Rand, securing three Coca-Cola wholesale outlets in Vosloorus, neighbouring Katlehong and KwaThema.

By 1991, the brothers operated one of the largest distributors of Coca-Cola products in South Africa. In 1994, at the dawn of democracy, the Kunene's were well positioned to successfully negotiate the acquisition of an initial 51% interest in Coca-Cola Bottling Mpumalanga (Pty) Ltd (CCBM) from Coca-Cola. This deal placed them well enough, to begin expanding and formalising their business interests, through Kunene Bros. Holdings. It was the most opportune platform for the business's future developments.

"Our success was achieved through mutual respect, acknowledgement of hierarchy, honesty, unselfishness and believing in each other. When we saw opportunities, we went after them." Kunene says.

The Kunene brothers business expansion represented a crucial shift, not only in South Africa's business development, but the continent at large. They were setting new trends in the black business landscape through market liberalisation and enterprise.

"Don't look at the Khumalo's, as the English saying goes – cut your suit according to your clothe. We've all taught this to our children and that's how they live. There's a black people sickness, we have a pulling down syndrome. The Indian, Jewish and Portuguese communities uplift each other. It reminds me of a time when we owned a building in Vosloorus – we rented out shops. We watched with envy at what one of the tenants who was a Portuguese national was doing. He allowed families from Madeira wanting to better their lives in South Africa to find their feet by working at his shop. Once they found their feet, they stopped working at the shop – another family would come in and so the same. These are the same people who were growing and assisting each other and essentially living off black people's money." Kunene says.

He was the founding partner of the legal practice Kunene Inc.

"I used to brag that mine was the longest black law partnership, at 15 years. There is no wish to help each other, black people get together, a good vision collapses after two years." Kunene recalls.

He became an executive Director of Kunene Bros. Holdings in January 1998 when he joined the group on a full time basis. He was also Chairman of the group.

Today at 77 years old, Kunene is no longer heavily involved in the business. He looks forward to the time he spends with his family; the international holiday trips and road trips with his wife, Mary, his brothers and their wives.

" I enjoy the road trips, it's 5 couples, 5 cars." He says. Kunene keeps a watchful eye on the country's commissions of enquiry and political developments.

"I have no political affiliation. I don't see President Cyril Ramaphosa in person but I often send him smses reminding him to make sure that he's surrounded by good people." Kunene says. ■

Keith Kunene's past, present community and professional involvement includes:

(1984-1986)
Chairman of the Vosloorus Centre for the Disabled

1991-1992
- Chairman of the National Soccer League

- Executive member of the Black Lawyers Association (past Chairman)
- Past Chairman of the Mpumalanga Gaming Board
- Past Chairman of the Council of the University of Zululand
- Past Chairman of the Central Energy Fund
- Past Non-executive directorships
  - Aveng Ltd.
  - McCarthy Retail. Ltd.
  - Southern Bank of Africa Ltd.
  - Glenrand - MIB Ltd.
  - National Employment Trust
  - Fortune Beverages Ltd
  - National Exhibition Centre

1997
In the January issue of Ebony SA, Keith was voted as one of South Africa's 50 most influential black people

Xolobeni High Court Judgement:

The rights of indigenous people over proposed mining extractivism

By Sbusiso Dimba, Black Lawyers Association Student Chapter Former Chairperson, UNISA Tshwane

"There lies a responsibility for every society to discover solutions to the pressing issues of the day. The rights of indigenous people to their land are critical. The mining companies demands to extract minerals beneath the ground at whatever cost, has to come to a stop. Governments complicity across the board is a cause for concern."

Sabelo Dumisani Dladla is a resident of Nkolokotho, a village near the site of mining undertaken by Tendele Coal Mining Pty (Ltd) which owns Somkhele Mine in KwaZulu Natal. He points out that he and his family were opposed to coal mining in the area from inception. Since the company began mining operations, the quality of life has changed drastically. Every morning the village is greeted by the grim sight of grey mine dumps that tower into the sky. The entire area was used for grazing purposes before Tendele arrived in 2009 to fence off the area, without notice.

In 2014, Dladla's family lost two herds of cattle. The fence put up by the coal mining company was not properly maintained. Goats belonging to his family would enter the mining area and not return. No compensation was given by Tendele. At one point the family owned 15 goats and now it has none.

There lies a responsibility for every society to discover solutions to the pressing issues. The rights of indigenous people to their land are critical. Mining companies demands to extract minerals beneath the ground at whatever cost, has to come to a stop. Government's complicity across the board is a cause for concern.

In a constitutional democracy such as ours due process has to be followed. Justified decisions must be made to cause little or no harm to the people and their way of living.

The Mineral and Petroleum Resources Development Act together with the Interim Protection of Informal Land Right Act must be thoroughly understood in order to allow a situation where communities consent or object to proposed mining expeditions as was also found by the Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd*.

Given the value of land, minerals and patterns of land ownership in South Africa, this paper will attempt to investigate the rights of indigenous people in rural areas and former homelands. It will uncover their rights in mining projects and anything connected therewith aided by the Constitution, the Mineral and Petroleum Resource Development Act and Interim Protection Informal Land Rights Act.

Background

In October 2018 the Constitutional Court delivered a ground breaking judgment on mining, affecting communities and their right to decline proposed mining expeditions. The Court reaffirmed the importance of informal land rights under the Interim Protection of Informal Land Rights Act.

Conflict arose when the Department of Mineral Resources granted mining rights to a company without the consent of the indigenous people. This resulted in communities being stripped of their rights to reject the proposed mining project. At prima facie, indigenous people concluded that the department failed to make a distinction between the legal deprivation and physical deprivation of rights of communities to their land. In light of the above, it is clear that the awarding of the rights without proper consultation and consent obtained, constituted a legal deprivation. The land rights of the indigenous people were taken away.

In the matter between *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Lt*d, the Court confirmed that section (11)(1) of the Mineral and Petroleum Resources Act must be read concurrently with Interim Protection of Informal Land Rights Act[1]. Moreover, in practice, the Department of Mineral Resources has been prioritizing the MPRDA and dispossessing communities of their land by bypassing informal land right holders and relying on traditional leaders to obtain consent.

This judgment came as a result of an application for leave to appeal against an earlier judgment and an order of the High Court, North West Division, in Mahikeng.[2] The judgment ordered the eviction of some 13 families represented by 38 applicants who were members of the Lesetlheng Community farming at the Wilgespruit farm in the North West.

On 12 April 2003, the Traditional Council of the Bakgatla-Ba-Kagafela tribe registered Itereleng Bakgatla Mineral Resources (Pty) Ltd (IBMR) to obtain a prospecting permit. A year later IBMR was awarded the prospective permit. On 19 May 2008, the company was granted mining rights of the Wilgespruit Farm.

Prior to the arrangement in 2007, a meeting over the proposed mining was convened with members of the community, who are a constituent part of the Bakgatla tribe.

> **"The judgment ordered the eviction of some 13 families represented by 38 applicants who were members of the Lesetlheng Community farming at the Wilgespruit farm in the North West."**

At a separate meeting, a resolution was passed that a surface lease agreement would be approved between IBMR, Bakagtla tribe and the Minister of Rural Development and Land Reform under terms that the Bakgatla tribe leased the farm to IBMR for mining purposes.[3]

In 2015, the applicants obtained a spoliation order against the respondents after mining operations began. The applicants' success in obtaining the order was short-lived. The respondents approached the High Court were they sought an order to evict the residents and all persons who have the right of occupation. They also sought an interdict restraining the residents from entering, remaining or farming on the farm. The respondents asserted that they had consulted with interested parties as required by the Mineral and Petroleum Resources Development Act (MPRDA) and other statutory prescripts at all stages of the process both when they applied for a prospecting right and a mining right in relation to the farm.[4]

The community opposed the application; they contended that they were the true owners of the farm who were never consulted in terms of the MPRDA. They asserted that they were also not consulted by the respondents as required by section 2(1) of IPILRA nor did they consent to being deprived of their informal rights to the farm.[5] Therefore, their informal rights to the farm were not validly extinguished. The respondents had not complied with section 25(2) (d) of the MPRDA which requires a holder of a mining right to comply with all applicable laws,[6] in particular the zoning scheme of the relevant local authority. They alleged that the mining right upon which the respondents relied was invalid by virtue of the fact that they were not consulted before the respondents were awarded the mining right. The respondents were precluded from securing an interdict against them until and unless any dispute relating to their surface rights over the farm had been resolved in terms of section 54 of the MPRDA.[7]

The High Court rejected all defences raised by the indigenous people. The court held that the applicants were not the farm owners and therefore there would be no duty on the respondents to consult with them as owners. The farm was owned by the Minister in trust for the Bakgatla-Ba-Kgafela Community. The applicants were a constituent part consulted and agreed upon before the kgotha kgothe (a form of direct democracy within the Bafokeng system of governance) on 28 June 2008, for the Minister to conclude a lease with IBMR for the latter to conduct mining operations on the farm. The applicants had not impugned the validity of the mining right by way of review as they should have done. A collateral challenge

1 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another* (CCT26517) (2018) ZACC41
2 Ibid.
3 Ibid.
4 Ibid.
5 Ibid.
6 Section 5 (3) of Minerals and Petroleum Resources Development Act no. 28 of 2008
7 Section 5 (3) of Minerals and Petroleum Resources Development Act no. 28 of 2008

did not avail them, the respondents in exploiting their mining rights were not exercising public power.

Concerning the surface lease, the High Court added that in any event of its conclusion it was not a pre-requisite before the respondents. They could exercise their mining rights because section 5(3) of the MPRDA, granted a mining right holder access to the land which the mining right relates. Consequently, the High Court issued an order evicting the applicants from the farm. It also granted an interdict restraining the applicants from entering or remaining and erecting any structures on the farm. In the High Court, the respondents accepted that a mining right itself does not extinguish other surface rights, including ownership on the land to which the right relates.[8] The owner or other person in whom surface rights vest is at liberty to enjoy his or her surface rights subject to the limited real right of the mining holders.

Personally, I find this position patronizing and misplaced as communities largely bear the brunt of environmental harms when there is mining. The issue canvassed by communities is procedural. It requires that proper consultation and consent is achieved before any mining project commences.

Consequently, the case ultimately hinges on the legal interpretation of two separate laws — one that aims to promote mining, the other to protect the interests of communal land owners.[9] Legal counsel for the Xolobeni residents said both laws, the Mineral Resources and Petroleum Development Act (MPRDA) of 2002 and the Interim Protection of Informal Rights to Land Act (IPILRA) of 1996 — were enacted to redress economic and territorial dispossession and to restore land and resources to black people.[10]

IPILRA makes it clear that customary communities have a right to decide whether or not development occurs on their land, while the MPRDA requires that the community is consulted before companies are awarded a mining right, but it does not expressly require that they consent.[11] The residents submit that both laws must be read to work together, not to conflict. The only way to do that is to hold that both IPILRA and the MPRDA apply. The community must be consulted under the MPRDA and must consent in terms of IPILRA.[12]

However, the Ministry of Mineral Resources argues that the 2002 Mining Act trumps the 1996 Land Act.

In the *Madiba Crisis Committee v Trans World* at the Constitutional Court, the Xolobeni community counsel argued that if the community's wish to veto mining decisions succeeds, it would allow it to veto any mining unless there was a high degree of pro-mining consensus.

[13] The mining ministry argues: "At its core, this application seeks to reinstate the right to sterilize the extraction of national mineral resources by declaring that consent from communities with informal rights to land must be obtained before mining can occur on the land which they informally occupy. This would have the effect of resurrecting the old mineral regime, by reviving the extinguished right of consent and in effect giving communities with informal rights to land the ability to sterilize the extraction of national mineral resources."

The Minister has failed to show how free prior informed consent will sterilize development. In any case, at the centre of mining is or should be the development of societies and the economy. Free prior informed consent is an international right that accrues to all indigenous people of the world and South Africa must give effect to this right.[14]

> **"Section 24 of the Constitution Act 108 of 1996 provides that 'everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations..."**

The Constitutional and Statutory Rights of Indigenous people (especially women)

Across Southern Africa, mining affecting communities are engaged in protracted campaigns fighting for the right to say no to mining projects, carried out without their consent. Women and children are often the most affected by such transactions. As such women have also organized themselves to be at the forefront of decision making to determine the type of development that can take place on their land.

This campaign is based on the internationally accepted right of Free Prior Informed Consent for communities threatened by proposed mining projects. A right recognized in the United Nations Declaration on the rights of indigenous people to say no to proposed mining projects. Section 24 of the Constitution Act 108 of 1996 provides that 'everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development[15]. The department of mineral resources is constitutionally obliged to ensure ecologically sustainable development, an environmental, economic and social issue from Brundland to Rio (2012)[16]

8 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another* (CCT26517) (2018) ZACC41
9 *Madiba Crisis Committee v Department of Mineral Resources*
10 Mineral Resources & Petroleum Development Act no. 49 of 2008
11 Interim Protection of Informal Rights to Land Act of 1996
12 Nonhle Mbuthuma, South African indigenous community wins environmental rights case over mining company.(2018)
13 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd & Another* (CCT26517) (2018) ZACC41
14 Ibid.
15 Section 24 of the Constitution of the Republic of South Africa 1996
16 The principles of sustainable development, United Nations Conference Rio De Janeiro Brazil https://www.e-education.psu.edu/

Interpretation of the powers of the Minister of Mineral Resources

Upon closer analysis of the Minerals and Petroleum Resources Development Act, particularly section 10(1) (b)which deals with consultation with interested and affected parties, one finds that the legislature failed to characterize the content of the process of consultation. Its nature and purpose is open ended and that on its own creates uncertainties and vagueness.[17] Instead of the landowners, it uses interested and affected parties or informal land holders as people to be consulted.

Furthermore, section 10 (1)(a) provides that within 14 days after accepting an application lodged in terms of section 16, 22 or 27, the Regional Manager must in the prescribed manner-make known that an application for a prospecting right, mining right or mining permit has been accepted in respect of the land in question. The process of making known an application to have been accepted according to my view contributes to problems often arising in the mining sector. Before a Minister or delegated officials can even accept an application, I believe the process of consultation should precede acceptance.

That path in this regard will be in line with democratic principles of government by the people for the people. The preliminary study conducted in Xolobeni in 2011 revealed that the department, as the custodian of mining licenses failed to protect the the communities human rights. The department didn't allow the community the right to participate in the proposed mining project as required by the Minerals and Petroleum Development Act 73 of 2002.

Xolobeni community members celebrated at the North Gauteng High Court after Judge Annali Basson ruled that the Department of Mineral Resources has to obtain consent from mining communities before granting a mining right to a company.

Source: https://www.groundup.org.za Photo credit: Zoë Postman

Recommendations

The Constitutional Court in *Maledu v Itereleng Bagatla Mineral Resources (Pty) Limited and Another* opened with a quote from *The Wretched of the Earth* by Frantz Fanon that: "For a colonized people the most essential value, because the most concrete, is first and foremost the land: the land which will bring them bread and, above all, dignity".[18]

I would recommend as was in this land mark judgment that both MPRDA and IPILRA should in practice be interpreted to complement each other as opposed to working against one another. The Department of Mineral Resources needs to recognize the right of consent to mining by indigenous people in order to prevent conflicts often abound and arising in this sector. The Minerals and Petroleum Resources Development Act must be amended to include consultation by the state with the land owners and not companies as a first measure. The consultation process must take place before mining licenses are granted and after environmental impact assessments have been concluded.

Conclusion

Continued pursuit of mining projects without meaningful participation of indigenous people threaten their constitutional rights. One wonders if economic development supersedes lives and sustainability. Communities are not against economic development nor are they against progressive change in their material conditions. What indigenous people want is that their land produces livelihood for the present and future generations, they want guarantees of economic security, dignity and freedom.

17 Section 10 (1) (b) of Mineral Resources & Petroleum Development Act no. 49 of 2008
18 *The Wretched of the eart*h by Frantz Fanon

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Success in the legal profession

By Mongezi Mpahlwa, Director at Cliffe Dekker Hofmeyr Inc.

In the foreword to "*The Civil Practice of the Superior Courts in South Africa*" by Herbstein and Van Winsen, Davis wrote:

> **"Ours is a fine profession: it is the pursuit of justice and of truth, and these are surely well worth pursuing for their own sake, regardless of reward. And they should be pursued, too, regardless of consequences."**

The profession that these honourable scholars refer to is the profession as it was around 1979; elitist in its membership, no women and a few black practitioners. Fast-forward to 2019 – 40 years later and 25 years into democracy not much has changed. Less than 20% of practising advocates are black and legal work is often distributed on the basis of links to the old networks reinforced by the so called *old boys clubs*, language, racial and cultural affinities, prejudices and friendships forged on golf courses.

Amongst the victims bearing the biggest brunt are the law graduates , (who are mostly black), seeking to join the noble profession upon attaining their qualification either through articles of clerkship with a law firm or pupillage with the bar council.

> "Most conversations about the legal profession in South Africa always refer to the need for its transformation. These conversations are not novel; they date back a long time."

The legal profession today

Most conversations about the legal profession in South Africa always refer to the need for its transformation. These conversations are not novel; they date back a long time.

It is fair to say without exaggeration that issues relating to transformation in the profession have been raised *ad nauseam*.

Another way in which the need for transformation is sometimes expressed is that the legal profession needs to reflect among its members, the diversity of the South African society. What is missing in these conversations is the lack of employment for law graduates entering the profession.

Mindful of the challenges of transformation, I pause for a moment to point out that, purely by numbers, there are more black law graduates than any other racial group.

Women tend to fare far better than men academically.

Proceeding on this basis then, one would think that the portrait of our profession as elitist, male and white-dominated should be shifting at a rapid pace. Sadly, this is not the case.

There are a host of reasons why transformation has not to date been achieved, one of them being "*the old guard*" or *"gatekeepers"* (as coined by most young professionals) believing that the new entrants are not adequately trained, ill-prepared, ill-disciplined, useless and of less ethical value and so forth.

There is also the longstanding outcry (whether legitimate or otherwise) on the quality of the newly qualified law graduates.

Whilst various principals of candidate attorneys and mentors of pupils apportion blame the universities for producing half-baked graduates, universities blame the Department of Basic Education for failing to prepare students for tertiary education.

None of the players seem willing to accept any responsibility for the challenges facing law graduates, such as access to employment and to provide meaningful solutions to the problem.

Other issues concerning those law graduates (candidate legal practitioners/ young legal practitioners) fortunate enough to work their way into the system include working conditions relating to acceptable minimum salaries and an issue often left in the periphery; sexual abuse and the mistreatment or lack of training of young (mostly female) legal practitioners.

The key role players

The profession relies on law schools to provide suitable candidates to be appointed into the various streams of the profession and the need to embrace, nurture and develop this crop of graduates by all role players cannot be overemphasized.

At the top of this hierarchy are the big five law firms, collectively they're perceived to be the leading law firms in the country. These are the so-called white male dominated firms of the profession. From the vantage point of the big five firms, one gets to look down on the rest of the members of the profession.

Then there is the advocates profession consisting of various sets of chambers (called "groups") who have various statuses of elitism, mostly male dominated and white.

The other avenues are the public service and the corporate world. Parts of the public services such as the state prosecutor's office are not elitist but remain largely male and white especially among its senior ranks. The change is not that much faster in this space either.

The so-called corporate lawyer, excluding those who serve state-owned enterprises, generally mirror in composition, the law firms.

A further challenge is that young lawyers who stand a chance to really make it in corporate are generally those who have had an opportunity to be trained by the elite of our profession. The other problem here is the reluctance by those who hold senior positions to transfer skills to younger lawyers and using past experience to empower and/or impart knowledge.

Bridging the divide

One other avenue capable of absorbing law graduates within the profession is the Office of the State Attorney. It has long been said that the State is the biggest procurer of legal services, which are procured through the Office of the State Attorney. It is hard to divine why the Department of Justice and Constitutional Development (DOJCD) cannot design and develop an incubation programme through this office as is the case with the medical profession - through the Department of Health. The DOJCD could annually select a pool of excelling matriculants interested in studying law, assist them with funding towards their LLB qualification and once they have qualified, offer them an internship programme in the form of articles. This programme may be implemented in collaboration with various state departments. Given the high demand for employment in the traditional sector within the profession, it would be a noble opportunity for law graduates to be given a chance to be employed. It would be the opportune start of their careers, allowing them to gain exposure in various fields of law within government. The pressure currently faced by law firms and bar councils as the only vehicle through which law graduates can start out a career, would be redirected elsewhere.

"A further challenge is that young lawyers who stand a chance to really make it in corporate are generally those who have had an opportunity to be trained by the elite of our profession."

There is no quick fix to the start of one's career or addressing any of the challenges highlighted above. However, collectively, the profession (and the state) have a role to play in breaking those barriers to entry that make this profession seemingly elite, thereby removing some of those hurdles historically created with no justifiable reason for their existence 25 years into democracy. A collaboration from all key role players can only conduce to success to those who have been deprived of an opportunity to carve out a career for themselves.

Caster Semenya takes on IAAF

By BLA-LEC desk

The Differences of Sex Development (DSD) Regulations against Caster Semenya are discriminatory on many grounds – including gender, sex and physical appearance.

Photo by Michael Dodge/Getty Images
Source:www.thesouthafrican.com

This is the argument brought before the Court of Arbitration for Sport (CAS) by the double Olympic champion's lawyers.

Semenya is challenging proposals by the International Association of Athletics Federations (IAAF) that aim to restrict female athletes' testosterone levels.

> "Semenya is challenging proposals by the International Association of Athletics Federations (IAAF) that aim to restrict female athletes' testosterone levels."

Should they wish to continue competing as women, the IAAF wants to force athletes with DSD to seek treatment that will lower their testosterone levels below a prescribed amount.

The regulations would attempt to classify Semenya and other female DSDs as *"biologically male"* or as having a male *"sports' sex"*.

The athletics governing body argues the move will make participation criteria fair, for all other female athletes.

At the same time Athletics South Africa (ASA) has accused the IAAF and its president Sebastian Coe of breaching a confidential agreement several times.

ASA said confidentiality agreements were entered into by the IAAF, Semenya and ASA ahead of arbitration at CAS. Coe's has been accused of insensitivity, and publically criticizing DSD athletes in an interview.

CAS has delayed its ruling on the matter since the hearing in February.

It said it would not issue a verdict just yet, as both sides had filed additional material.

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AFRICAN LAW REVIEW

Rebirth of the African Law Review: Reclaiming Legal and Constitutional Space

The African Law Review (ALR) is a quarterly journal designed to enrich our Jurisprudence, promote excellence and diversity of views.

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- intensify national and international discourse(s)
- promote necessary legal reforms and transformation
- ventilate issues affecting the legal profession and the public

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