

FINALISTS

17 SEPTEMBER

MOST IMPACTFUL CASE

RIGHT2KNOW CAMPAIGN AND SOUTH AFRICAN HISTORY ARCHIVE TRUST V MINISTER OF SAFETY AND SECURITY (NATIONAL KEY POINTS MATTER) (32512/2013)



Cliffe Dekker Hofmeyr's (CDH) Pro Bono Practice was approached by the South African History Archive Trust (SAHA) and the Right2Know Campaign (R2K) to assist with a High Court application to enforce a request for access to information in terms of the Promotion of Access to Information Act, No 2 of 2000 (PAIA) concerning National Key Points declared under the National Key Points Act, No 102 of 1980 (the Act).

The Act allows any property or building to be declared a National Key Point (Key Point) for National Security reasons. Once a place has been declared a Key Point, it is considered a crime to reveal information about it and the Act also makes it a criminal offence to perform certain acts related to Key Points. Notwithstanding that criminal offences attached to certain activities committed in respect of Key Points under the Act, it was not publicly disclosed which places or areas were declared Key Points by the Minister of Police.

Our clients accordingly sought disclosure of the names of the places or areas that have been declared Key Points in terms of the Act under PAIA.

The request was made against a background of serious and widespread concern relating to allegations of excessive and improper reliance on the Act by public officials to restrict various activities including media reportage and political protest and for the misappropriation of public funds for improvements to private properties designated Key Points. It was also invoked to restrict the publication of information by the media about the President's Nkandla residence which has been declared a Key Point.

The Minister and relevant information officers (hereinafter collectively to be referred to as the State) however refused to disclose the list on unsubstantiated grounds relating to the protection of the safety of individuals and the protection of private property and accordingly the matter proceeded to court.

The application was heard in November 2014 in the South Gauteng High Court by Sutherland J and judgement was handed down on 3 December 2014. The matter was of such public importance that M&G Media Ltd (the Mail and Guardian) applied to be admitted as amicus curiae and was subsequently admitted as such by the Court.

In a judgement which made some important findings in relation to the application of PAIA and the proper interpretation of the Act, Sutherland J dismissed the State's request for him to take a "judicial peek" of the records in issue before ordering

their disclosure and ordered that its refusal to grant access to the list was unlawful and unconstitutional. Importantly he found that the State had not attempted to justify the need for the Court to take a "judicial peek" and cautioned that the "judicial peek" remedy should not be used merely to get a court to perform the very exercise respondents were themselves obliged to undertake in terms of PAIA.

Having found that no case had been made out by the State for him to take a judicial peek, Sutherland J also went on to dismiss its contention that the Act prohibited disclosure of the identity of the places declared as Key Points. Had the Act intended for the identity of Key Points to be kept secret, so the learned judge held, it would have contained express provisions to this effect.

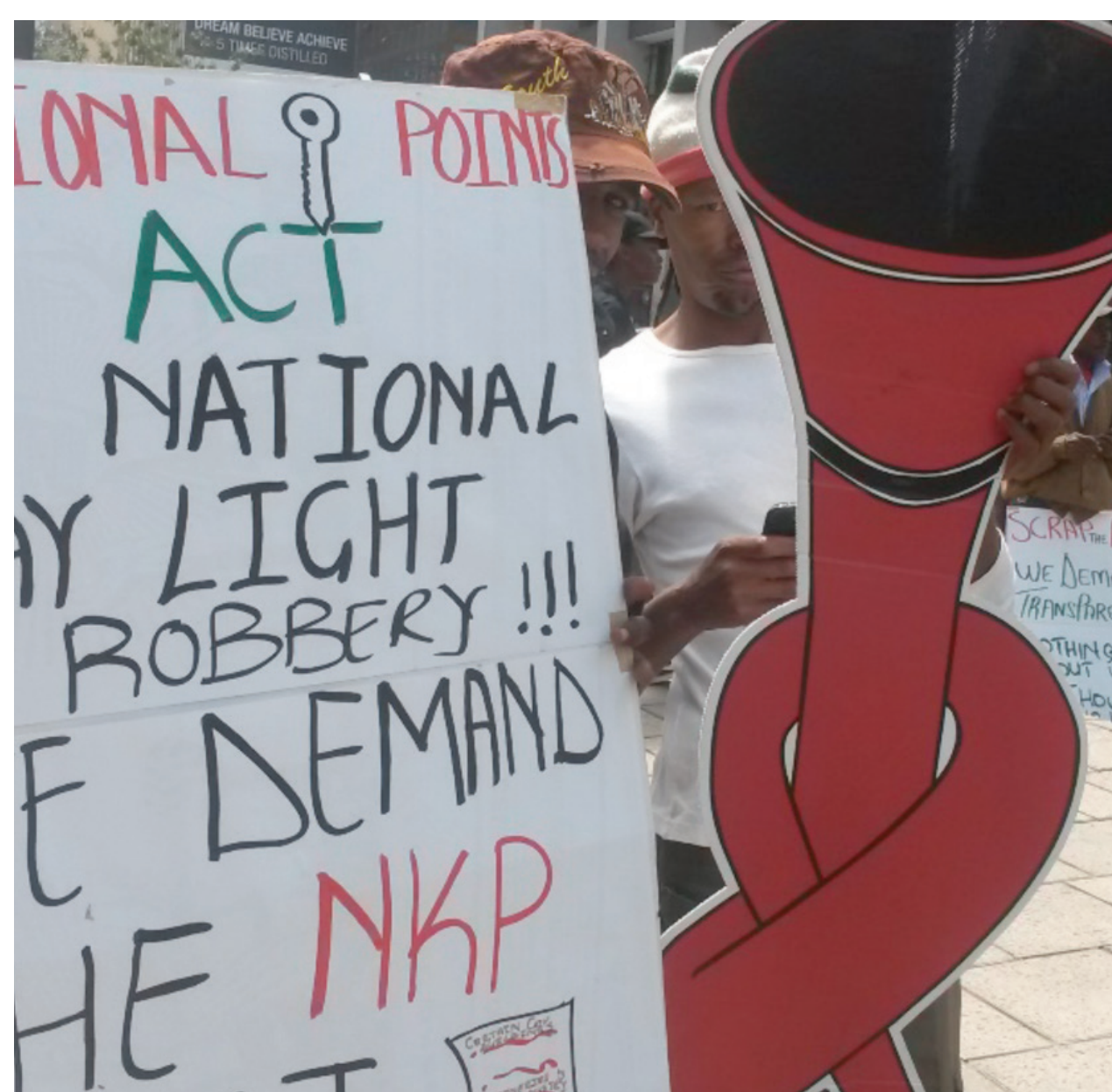
On the contrary he accepted the submission of the Mail & Guardian that any finding that the Act prohibited disclosure of the identity of Key Points would render section 10 of the Act, which makes it a criminal offence to perform various acts related to Key Points, unconstitutional. The principle of legality requires full disclosure of the identity of Key Points so that people can know what conduct may be unlawful.

Sutherland J also held that the State had not provided any evidence to support its bald allegations about national security and safety concerns as it had been required to do. According to Sutherland J the "rationale offered by the respondents [was] spoiled by the conduct of the Government itself, because evidence was adduced of Ministers having furnished details of key points to Parliament for the whole world to know..."

Sutherland J concluded that given the serious allegations concerning abuse of the Act and the failure to set up a special account for the recovery of public moneys expended on private property declared Key Points (in circumstances where there was an obligation to set up such an account) there was a need for transparency in order to repair public confidence. He accordingly ordered the State to supply all the names of places or areas that have been declared Key Points within 30 days of the judgement.

Although the State filed an application for leave to appeal Sutherland J's decision, it withdrew its application shortly before the application was to be heard and provided us with the list of Key Points on 22 January 2015.

Before our clients could even comment on the provided list, veteran journalist Phillip de Wet of the Mail & Guardian had released it to the public with extensive commentary on sites which were included and excluded.



CONSTITUTIONAL PROTECTION FOR THE VULNERABLE

The Stuurman Case

Children's Rights

With very little legal support available to one of the most vulnerable groups in our society – individuals with mental disabilities – the Webber Wentzel Pro Bono Practice Group has made this a focus area. Its first matter relating to the rights of people with intellectual and/or psychiatric disabilities has resulted in a major victory in the matter of L Stuurman v Minister of Justice and Constitutional Development & others.

On Friday, 5 September 2014, the Cape High Court declared unconstitutional section 77(6)(a) of the Criminal Procedure Act. In summary, the effect of this section challenged by Webber Wentzel on behalf of Cape Mental Health as amicus curiae, is that where an accused is found by virtue of his or her mental condition to be incapable of understanding the proceedings so as to make a proper defense; and on a balance of probabilities, to have committed the act of an offence involving serious violence, then the court is obliged, automatically and in every case, to order that the accused be detained in a psychiatric hospital or prison for an indefinite period. The court accepted that it is well-recognised that not every person with a mental illness or mental defect is a danger to society or requires to be detained in an institution. This is so because there are varying degrees of mental illness and various types of mental disability, and institutionalisation is not necessarily required or indeed appropriate. Yet, section 77(6)(a), before this declaration of unconstitutionality, dictated a pre-determined and mandatory outcome and deprived the presiding officer of his or her judicial discretion to consider the specific facts of each case.

The Cape High Court accepted that institutionalisation in a prison or a psychiatric hospital, without a consideration of

the specific facts of each case, infringed or threatened to infringe the rights of the accused persons to equality, dignity, freedom and security of the person, as well as the rights of children. The judgement specifically referred to the heads of argument on behalf of Cape Mental Health, which addressed the rights of children. The court concluded that, "the provisions of sections 77(6)(a)(i) and (ii) in their present form unfairly discriminate against children with a mental illness or mental defect when compared to child offenders who do not suffer from the same mental illness or defect and in respect of whom the courts are empowered to make a variety of diversionary orders based on their individual circumstances. Such discrimination occurs on the basis of their disability, which is impermissible..." The court went on, "The infringement of the rights of children, bad as it is, is aggravated by the fact (as it appears from the evidence placed before the court by Cape Mental Health) that both prisons and psychiatric hospitals have inadequate facilities for children."

We envisage the Webber Wentzel Pro Bono Practice Group playing an active role not only in the law reform ordered by the court to cure the unconstitutionality of the impugned provisions, but also, to quote the court, "a more thorough overhaul" of "the whole situation concerning persons with mental illnesses or mental defects".

The Webber Wentzel team involved in the case was made up of Odette Geldenhuys, Tshogo Phala, Chiara van Ingen, Kameshrie Pillay, Deborah Mutemwa and Anisah Parker.

Advocates Isabel Goodman of the Johannesburg Bar and Luke Kelly of the Cape Town Bar, represented Cape Mental Health on a pro bono basis.

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Some of the Webber Wentzel TEAM:



Odette Geldenhuys



Tshogo Phala



Chiara van Ingen



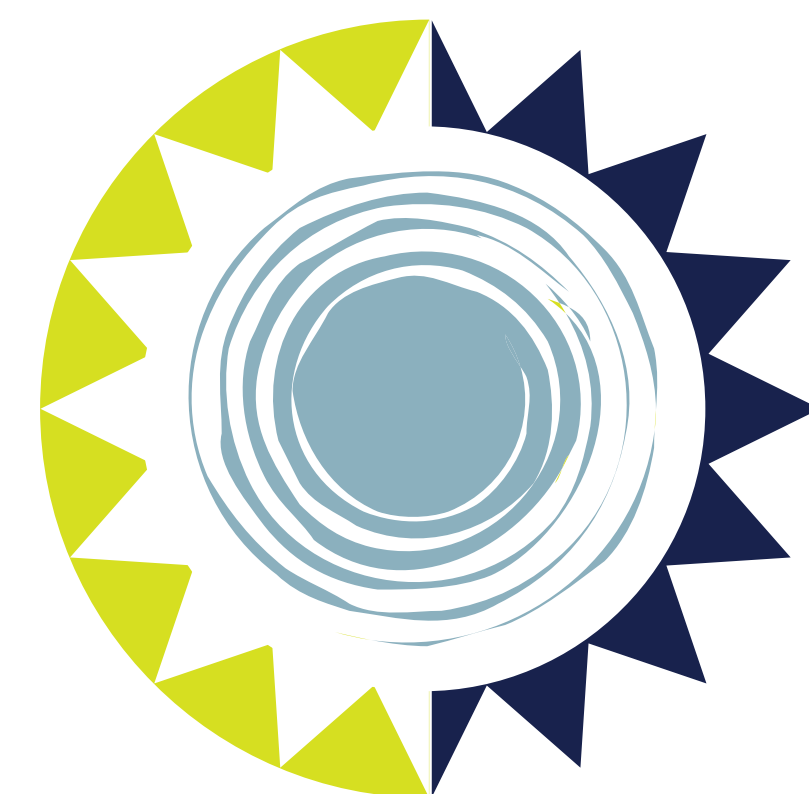
Kameshrie Pillay



Deborah Mutemwa

2nd ANNUAL PRO BONO AWARDS CEREMONY 2015

ProBono.Org



SUSHILA DHEVER

INDIVIDUAL ATTORNEY

FASKEN MARTINEAU



Sushila is a partner in the labour, employment and human rights department of the Johannesburg office of Fasken Martineau, and heads up the Pro Bono group. She has expertise in human rights and constitutional impact litigation, and extensive experience in children's rights, gender law, housing policy and rights, land rights, legal advocacy and law reform, as well as refugee law.

The Domestic Violence and Family law clinics at NISAA and FAMSAA were conceptualised by Sushila who played an instrumental role in setting up and staffing these clinics. Formerly from a township, Sushila identified that the biggest challenge to people accessing justice in the townships was their inability to afford to travel to the city to obtain legal assistance. By working with NGOs in the townships, close to where people live, Sushila identified a gap in the legal services that these NGOs were able to offer to people. Sushila paired up with NGOs that offer psychosocial support to individuals and provides supporting pro bono legal assistance. As a result individuals who were previously unable to obtain legal services from top law firms can now access such services.

Sushila has been providing legal support to the NISAA Domestic Violence Clinic. The NISAA Institute for Women's Development (NISAA) was started by a group of committed women activists in response to the growing problem of violence against women. The organisation focuses on the prevention of gender violence and the empowerment of women who have been abused at the hands of their partners and has offices in Lenasia, Soweto and Orange Farm.

In addition, Sushila has also arranged for legal support to be provided at two FAMSAA help desks, one in Soweto and the other in Lenasia.

Lawyers, under the watchful eye of Sushila, staff these legal advice helpdesks where they consult with clients who require advice and legal representation in domestic violence matters as well as divorce, custody,

parenting plans, maintenance, child support grants and other social assistance grants.

Sushila has worked on a few notable cases:

Selina Lekgetho had acid thrown in her face by her husband. He was charged with attempted murder, pleaded guilty and was sentenced to 30 months imprisonment despite him having two previous convictions, one being for assault with intent to do grievous bodily harm. During the sentencing, Selina was never given an opportunity to address the court on her injuries, the trauma she went through, the abuse she suffered and the numerous death threats she received from her husband. Selina was informed that her husband was about to be released from prison and placed under correctional supervision. Fearing for her life as he would come after her if he was to be placed under correctional supervision, Selina approached the NISAA Institute who requested Fasken Martineau, through its signature project with Pro Bono.Org, to assist her. Fasken Martineau contacted the Parole Board and filed written representations on behalf of Selina requesting that her husband not be placed under correctional supervision.

In the matter of Yvonne Ngwenya, Yvonne sought assistance with defending a protection order sought by her husband against her in terms of which he wanted to interdict her from their matrimonial home. He brought an eviction application against her and tried to sell the matrimonial home. Sushila defended the application against her and had it dismissed. The firm is also in the process of endorsing the title deed



so that she is not unlawfully evicted and is able to enjoy her share of the joint estate.

Nazlee Patel's former husband, a drug user, committed various acts of domestic violence against her and her children. The magistrate initially refused to grant an interim protection order to interdict him from entering the family residence. Fasken Martineau represented Nazlee and her children and made submissions particularly with regard to the magistrate's guidelines in respect of the Domestic Violence Act and on the duties of magistrates when implementing the Act. The firm also filed expert psychological reports to prove emotional abuse. A final protection order was granted in this matter interdicting Nazlee's husband from entering the family home. This eventually brought the matter to finality, as Nazlee had been trying to resolve it independently for approximately a year.

Elizabeth Monareng married her late husband in 2004 in terms of customary law but failed to have the marriage registered. Subsequent to their marriage, the parties moved into the matrimonial home of which her late husband was the owner. In 2010, Elizabeth's husband passed away. After his death, the deceased's sister brought an eviction application against Elizabeth to evict her from the matrimonial home. She approached Fasken Martineau at FAMSAA for assistance in defending this application. Sushila also assisted her in bringing a court application to register her customary marriage.

National Director's Special Award

LESLEY MAMAN



Lesley was employed as a paralegal attending to administration of estates at E.F.K. Tucker, D.E. Burns Attorney and subsequently Routledge Modise. She served articles at Eversheds (now Hogan Lovells), was admitted as an attorney in April 2013 and joined Friedland Hart Solomon Nicolson to head the specialist Estates Department in December 2014.

She has assisted at the ProBono.Org Master's Office Legal Clinic in Johannesburg since May 2011 and arranged the opening of the ProBono.Org Master's Office Legal Clinic in Pretoria in March 2015 at which she now also volunteers.

Her passion for pro bono work has been a driving factor in her desire to assist the most vulnerable and needy people in our society. In her words she has wanted to help, "since the first case I attended on where an elderly, disabled, illiterate and uneducated man who at 97, after living through three Constitutions in South Africa, signed a will which after his death at 100 years of age was declared to be invalid."

She prepared an application which was launched in the High Court requesting that the Master accept the will as valid. The beneficiary was a lady who at the age of 82 had been attending his needs for some 13 years.

She has attended at the Master's Office in Johannesburg since 2011 as regularly and as often as she could and built a relationship of respect and cooperation with the Master and his deputies and assistants as a result of her determination to assist the poor.

She has drafted wills and given advice to hundreds of people, in regard to their estates, conflicts over wills, transfers of property on death, disputes, and many other issues brought to the Legal Clinics at the Masters' Offices, and made a difference in their lives, albeit small, but enough to assist them settle their concerns.