

FINALISTS

17 SEPTEMBER

HUMAN RIGHTS CHAMPION

THE SOUTHERN AFRICA LITIGATION CENTRE (SALC)

The Southern Africa Litigation Centre (SALC) aims, among other things, to use public interest litigation in domestic courts in Southern Africa to realise and advance the rights of marginalised and vulnerable groups and to strengthen the rule of law.

Four important cases form part of this nomination:

In the case of **SALC and Another v the National Director of Public Prosecutions and Others (Zimbabwe Torture Case)** SALC sought to compel the South African authorities to investigate crimes against humanity committed in Zimbabwe, by Zimbabweans and against Zimbabweans.

In March 2007 the Zimbabwean police raided the headquarters of the opposition political party, and arrested and detained suspected and actual opposition supporters. During their detention many of these individuals were subjected to torture under the instruction of high-ranking police officers and government officials.

SALC submitted a detailed dossier to the South African Priority Crimes Litigation Unit (PCLU), and requested that the PCLU investigate the acts of torture committed in Zimbabwe. SALC argued that because the raid and the subsequent acts of torture were not isolated and formed part of a larger campaign of state sanctioned torture they therefore constituted crimes against humanity. The Rome Statute of the International Criminal Court Act (the ICC Act) gives South African authorities jurisdiction to investigate and prosecute international crimes as defined by the International Criminal Court.

After more than a year, the National Prosecuting Authority (NPA) and the South African Police Service (SAPS) notified SALC that they would not initiate an investigation into the allegations of torture. Considering this decision unlawful and unconstitutional, SALC and the Zimbabwe Exiles Forum (ZEF), with the assistance of Lawyers for Human Rights, approached the North Gauteng High Court to review and set aside the decision not to investigate.

The High Court ruled that the NPA and SAPS did not act in accordance with their obligations and declared that the decision not to investigate the crimes included in the dossier was unlawful, unconstitutional and invalid.

The matter was taken on appeal by the NPA and SAPS and the Supreme Court of Appeal ruled in SALC's favour indicating that investigations must begin without delay. The matter did not end there as the SAPS alone took the matter to the Constitutional Court where once again a judgement in SALC's favour was delivered in October 2014. The case sets an important precedent, which is the principle that permits domestic courts to try and punish perpetrators of crimes against humanity, regardless of where they occurred or the nationality of the victim or perpetrator.

The case of **Rammoge and Others v Attorney General of Botswana** relates to the refusal of the Botswana Government to register an NGO set up to promote the rights of lesbian, gay and bisexual people. Their registration application was denied based on the fact that same-sex sexual acts are illegal in Botswana.

Nineteen people joined the NGO, Lesbians, Gays and Bisexuals of Botswana (LEGABIBO) and launched proceedings in the Gaborone High Court seeking to review the refusal of the Department of Civil and National Registration and the Minister of Labour and Home Affairs to register the organisation.

On 14 November 2014, the High Court found that LEGABIBO's constitutional objectives were harmless and even beneficial as they promoted human rights, public health, and a culture of self-reliance.

Consequently, the Court held that the objectives of LEGABIBO did not offend the Societies Act.

The Court concluded that the decision to refuse to register LEGABIBO was wrong as it was based on the misconception that the organisation's aim was to engage in unlawful conduct, rather than to, inter alia, advocate for the decriminalisation of consensual same-sex sexual acts. The Court also made it clear that gay and bisexual individuals were protected by the Constitution, and held that denying them the opportunity to lobby for decriminalisation of homosexuality was a clear violation of their rights to equal protection before the law.

The Attorney General has appealed the judgement, and the appeal is likely to be heard in the Court of Appeal in the last part of 2015.

In the matter of **LM and Others v Government of Republic of Namibia** three women sued the Namibian government after learning that they had been sterilised immediately after giving birth via Caesarean section, arguing that the sterilisations took place without their informed consent and as a result of their HIV status. SALC partnered with the Namibian Women's Health Network (NWHN) and the Legal Assistance Centre.

The women, all living with HIV, claimed that they had been sterilised at public hospitals in Namibia without their informed consent when they were admitted for Caesarean sections. They argued that any supposed consent to the sterilisation procedures was coerced as they had not understood the language in which the procedure was explained, were misled about the procedure they were consenting to, and because they had been told by doctors that they could only receive a Caesarean section if they were sterilised at the same time.

The women sued the government for negligent harm and submitted that they were discriminated against because of their HIV status. They argued that their constitutionally protected rights to life, liberty, dignity and to found a family had been infringed. The High Court was faced with two issues: whether the women had given informed consent to the sterilisation procedures; and whether they were discriminated against due to their HIV status.

The High Court found that the state was not able to demonstrate that it had provided the women with sufficient information to enable them to make an informed choice on sterilisation. The sterilisations had therefore occurred without the women's informed consent.

The State appealed the judgement, and it was heard by the Supreme Court on 17 March 2014.

In a decision handed down on 3 November 2014, the Court held that a woman must be in a position to understand the nature and the consequences of a sterilisation and have the capacity to consent. The Court found that it could not accept that sufficient information had been provided to the women and referred the matter back to the High Court to determine the quantum of damages to be paid to the three women.

In the matter of **Tapela and Others v Attorney General and Others** two HIV-positive prisoners and the Botswana Network on Ethics Law and HIV/AIDS (BONELA) challenged a government policy that selectively denies



antiretroviral (ARV) treatment to non-citizen prisoners.

Two HIV-positive foreign prisoners together with BONELA launched a legal challenge against this policy in an effort to compel the provision of ARV treatment to all HIV-positive foreign prisoners who meet the treatment criteria.

In August 2014, the Gaborone High Court held in the applicants' favour that the policy was unlawful and unconstitutional and unjustifiably infringed the prisoners' rights to life, freedom from inhuman and degrading treatment, equality and non-discrimination. The Court ordered that all foreign prisoners meeting the treatment criteria be immediately provided with ARV treatment. The State parties appealed the High Court decision to the Court of Appeal. Oral arguments were heard on 23 July 2015 and judgement was reserved.

The case is important in that it deals with the right of non-discriminatory access to HIV treatment for a key population which is particularly vulnerable to infection with and the effects of HIV.

SOUTHERN AFRICA LITIGATION CENTRE



Based on the patterns of abuse demonstrated by the 15 applicants, Desai J assumed that thousands if not tens of thousands of the Flemix & Associates EAO practice may be unlawfully obtained EAOs and therefore instructed the state parties, the South African Human Rights Commission and the Law Society to endeavour to put in place appropriate measures to monitor the situation.

Finally Desai J ruled that the Law Society of the Northern Provinces, on the basis of the judgement, must determine whether Flemix & Associates as well as one of its partners have breached their ethical duties.

Without Webber Wentzel's resources and the firm's commitment to the Pro Bono Practice, the University of Stellenbosch Legal Aid Clinic and the 15 applicants (Vusumzi George Xekethwana, Monia Lydia Adams, Angeline Arrison, Lisinda Dorell Bailey, Fundiswa Virginia Bikitsha, Merle Bruintjies, Johannes Petrus de Klerk, Shirley Fortuin, Jeffrey Haarhoff, Johannes Hendricks, Doreen Elaine Jonker, Bulelani Mhlohlakhu, Siphokazi Siwayi, Ntombuzuko Tomyela and Dawid van Wyk) would not have been able to take their case to court and establish a positive rule change for all.

This is one of those public interest matters where it is apt to quote Tom Hanks' character, Andrew Beckett, a lawyer, in the film Philadelphia:

Joe Miller: What do you love about the law, Andrew?

Andrew Beckett: I... many things... uh... uh... What I love the most about the law?

Joe Miller: Yeah.

Andrew Beckett: It's that every now and again, not often but occasionally, you get to be a part of justice being done. That really is quite a thrill when that happens.

The Webber Wentzel team included: Odette Geldenhuys, Brigitta Mangale, Aphwe Nkosimbini, Kameshrie Govender, Melanie Peters, Katiho Maeko, Maxine Gunzenhauser and Tamsyn Harrison; two vacation volunteers: Katherine McClean and Liesl Olivier; as well as two counsel: Anton Katz SC and Sheldon Magardie.

MOST IMPACTFUL CASE

WEBBER WENTZEL

in alliance with **Linklaters**

UNIVERSITY OF STELLENBOSCH LEGAL AID CLINIC AND 15 OTHERS V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND 18 OTHERS (WCHC 16703/14)

The recent judgement in University of Stellenbosch Legal Aid Clinic and 15 others / Minister of Justice and Correctional Services and 18 others (WCHC 16703/14) (the EAO case) is a victory for justice.

Emolument attachment orders (EAOs) or 'garnishee orders' are widely used debt-collecting instruments in terms of which a monthly portion of a debtor's salary or wage is attached until the outstanding debt has been paid off.

Prior to the landmark ruling in the EAO case, two routes were available in the Magistrates' Court Act, No. 32 of 1944 (Magistrates' Court Act) for creditors to obtain EAOs against debtors.

The EAO case dealt with the second route, the consent route. This 'fast track' route allowed for debtors to consent to judgements and EAOs. Based on this consent, clerks of the court rather than magistrates issued the EAOs.

The approach became open to abuse and clerks of the courts granted EAOs on the strength of one 'consent' form in terms of which the debtor had consented to an unsubstantiated take-on debt, illegal terms such as 60% interest rate, legal costs which bore no resemblance to tariffs, the jurisdiction of an inaccessible court, and/ or unaffordable EAO deductions.



Based on the evidence of the manner in which the EAOs against the 15 applicants had been obtained and extensive constitutional arguments, Desai J ruled that the 'fast track' route is unconstitutional in its current form as it denies debtors access to justice.

The court accepted that there are widespread practices of abuse of EAOs much beyond the footprint of the EAOs of the 15 individual applicants.

Katz SC described the behaviour of the debt collection respondents by quoting from Bob Marley's Redemption Song: 'Old pirates, yes they rob I, Sold I to the merchant ships, Minutes after they took I, From the bottomless pit'.

The judgement declared that the only courts with jurisdiction to issue EAOs in respect of matters under the National Credit Agreement are those courts closest to where the debtor lives or works.

The primary significance of the judgement is in clarifying the manner in which EAOs must be obtained. Not only were the EAOs against the individual applicants found to be unlawful, invalid and of no force and effect, but the court hinted that all EAOs which have been obtained in the wrong jurisdictions may be invalid.

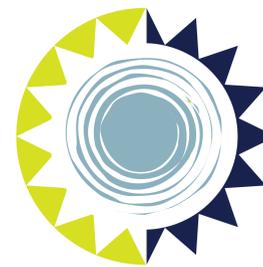
The further ruling that section 65(2)(a) and (b)(i) and (ii) of the Magistrates' Court Act are unconstitutional to the extent that they do not allow for judicial oversight will change the manner in which EAOs will be processed and granted after legislation that allows for judicial oversight is passed.

The ruling is therefore not only a victory for poverty-stricken people who in the future will have a judicial officer decide the terms of the EAO, but it is also of great assistance to credit providers who will welcome the certainty as to correct jurisdictions and the greater rigour of judicial oversight.

The other significance of the judgement is the emphasis on ethical behaviour of the legal profession. In finding a patent case of forum shopping on the part of the credit providers and their legal representatives, Desai J took a grim view of the attempts of the respondents' legal teams to argue otherwise, and held that it reflects badly on them.

2nd ANNUAL PRO BONO AWARDS CEREMONY

2015 ProBono.Org



National Director's Special Award

PROF PETER JORDI

In 2013 the Wits Law Clinic, University of the Witwatersrand celebrated 40 years of providing quality legal services to the poor free of charge, and producing ethical law graduates to serve the people of South Africa.

Specialising in delictual claims Peter has made a name for himself litigating against the Minister of Police in actions for damages for unlawful arrest, detention, assault and torture by members of the South African Police Services. He has pioneered specialised techniques in litigation against the Minister for actions for damages arising out of the torture of victims by police with electric shocks and suffocation.

He has settled over R22 million in damages for his clients over the last 3 years. Peter works tirelessly in the Law Clinic after hours and on weekends with a case load of over 150 files.

Peter's modus operandi is vigorous and uncompromising. When a client walks into the clinic with a new instruction alleging an assault and torture by the police, he picks up a dictaphone and immediately dictates a detailed statement – the client hardly has time to catch his breath! He then dictates a statutory Notice of Demand to the Minister while the client is still in his office – (he can dictate most documents out of his head without the use of precedents) bearing in mind that prescription is running against the client. He often then jumps into his motor vehicle with the client and travels to the scene of the incident and takes pictures for use in any subsequent trial. There is no time like the present, which could be one of Peter's mottos.

If the client has any visible injuries or scars, he takes pictures of the client to preserve this evidence and for use at trial. He makes appointments with medical experts to examine the client for the provision of medico-legal reports. He picks the clients up from their homes and takes them to the doctor's rooms and takes them home again. On one occasion while assisting his disabled client exit from his motor vehicle by taking the client's wheel chair out of the boot, the client stole his GPS tracking device from the glove compartment! He travels to police stations all over the Witwatersrand gathering crucial documentation from the police stations where his clients were assaulted and detained.



Peter has made use of innovative techniques for the use of forensic evidence at trial to help in proving that members of the SAPS subjected his clients to electric shock torture. He has learnt that it is possible to prove that a victim has been subjected to police torture by electric shock by taking biopsies from the skin of victims at the site where electrical wires were applied to the victim's skin. Blood samples taken as soon as possible after the electric shock torture can prove that the victim was subjected to electric shock (the conclusion is that the victim was either tortured, or he had just run the equivalent of the Comrades Marathon, because his blood would look the same!). When presented with this evidence in conjunction with the testimony of the victim, the State attorney often concedes the merits of the matter and the parties then settle on the quantum of the claim.

In any given week, Peter has 2 or 3 trial matters running in various courts. He is like a maestro conducting a symphony in the law clinic reception, calling out instructions to his candidate attorneys, witnesses, counsel and clients. His meticulous pre-trial preparation ensures that his counsel is well prepared and lack nothing when on trial.

In just 2 matters where judgement was handed down in favour of his clients in May 2014 and November 2014, his clients were awarded R220 000 and R260 000 in damages by the Gauteng Local Division High Court for assault and wrongful detention. There are many other matters like these. The costs awarded in these matter help fund future matters.

Peter has made a difference to the lives of many people who have suffered at the hands of rogue police officers. His commitment to do what is necessary, immediately, has lifted many a case with so-so merits to a case with unassailable merits, with large awards for damages. R22 million in damages has found its way into the pockets of deserving clients over the last three years, and this figure keeps growing. Peter has shown individual drive and imagination to make sure that his clients' cases have the best possibility of success. He has become a master of his craft, and this has directly benefitted his many grateful clients.

INDIVIDUAL ADVOCATE Steven Budlender

Advocate Budlender has long exemplified the highest level of commitment to offering pro bono legal services and the year 2014 was no exception. He clearly recognises the need to improve access to justice by increasing the scope and availability of pro bono legal services of the highest calibre to organisations of limited means, organisations such as Corruption Watch.

Corruption Watch is a non-profit, civil society organisation with a vision of a corruption free South Africa, one in which educated and informed citizens are able to recognise and report corruption without fear, in which incidents of corruption and maladministration are addressed without favour or prejudice and importantly where public and private individuals are held accountable for the abuse of public power and resources. One of the ways in which Corruption Watch achieves its broad objectives is by devising approaches to strategic impact public interest litigation. Advocate Budlender has played a central role in assisting Corruption Watch in this regard, offering his service and expertise on a number of precedent setting cases such as the Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others, to which Corruption Watch was party.

Advocate Budlender's dedication and commitment to



pro bono work proved to be vital to Corruption Watch and public interest law in 2014 when he assisted in litigation challenging the legality and rationality of public procurement processes and decisions in an application for the review of the decision of the CEO of the South African Security Agency to make an alleged irregular payment to a supplier, in terms of a tender that was found to be irregular by the Constitutional Court.

In 2014, Advocate Budlender further offered his pro bono services to

Corruption Watch in a case involving accessing information from the Department of Mineral Resources, in a project Corruption Watch is working on with the Centre for Law and Society at the University of Cape Town. The project aims to access information relating to platinum mines in the North West Province, with the ultimate aim of assisting vulnerable and disadvantaged communities in their entitlement to mining royalties.

Advocate Budlender is an outstanding professional, mentor, teacher, colleague and an exemplary leader for those in the legal profession and the profession itself. Because of his efforts, Advocate Budlender has earned the respect and gratitude of those for whom, and with whom he serves. South Africa's legal fraternity can rest assured that Advocate Budlender's unwavering commitment and dedication to excellent pro bono legal assistance will extend to many more well into the future.