

IN THIS ISSUE: APRIL 2016

- Pro Bono work and the Legal Practice Act
- Employment obstacles for refugees
- Durban and Pretoria office updates
- Save the dates for the 2016 Pro Bono Awards and the Public Interest Law Gathering (PILG)

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SAVE THE DATE: Tuesday 6 SEPTEMBER 2016

The Legal Practice Act and Community Service

Erica Emdon

ProBono.Org is involved in discussions with stakeholders on the Legal Practice Act, and we are developing our own position on what we think “community service” (dealt with in Section 29 of the Act) should constitute.

Section 29 of the Act covers people within the legal profession, more specifically candidate attorneys (CAs) and practising legal practitioners. In regard to CAs, community service must be “a component of practical vocational training” and in regard to legal practitioners “a minimum period of recurring community service by practising legal practitioners upon which continued enrolment as a legal practitioner is dependent”. The Act is not applicable to other persons, in particular LLB students. While many universities have community service programmes, if these are to be regulated it would be necessary to do so through other legislation or curriculum requirements of university degrees.

Regarding CAs, the position is tricky, and more questions arise than answers. The amount of time that should constitute community service during articles needs to be decided. Should it be thirty days, three months, six months or a year? What activity should constitute community service for CAs? The Act provides a list of possible activities that could constitute community service. This list is also applicable to legal professionals. It includes, but is not limited to:

- Service in the state

- Service at the SA Human Rights Commission (this could possibly be extended to other Chapter 9 institutions)
- Service as judicial officers, including in small claims courts
- The provision of legal education and training
- Other service approved of by the Minister

Which of these would be appropriate for CAs? Where should CAs undertake their community service? Within the law firm where they are working? What if that law firm is a small firm without any community service options? If it were a large firm with a pro bono department, would a compulsory period in that department constitute community service?

Perhaps a better option is that CAs should undertake a year long period of community service after they have completed articles in an institution given recognition by the state. This could be made a prerequisite for admission. If this form of community service provides a service to the state, albeit indirect, the state ought to pay for it. Examples that spring to mind are service in courts assisting the public, legal departments of different organs of state, parastatals, Legal Aid SA, community advice offices or legal NGOs. The advantage of this system is that CAs who have completed their articles would not require high levels of supervision.

The option of requiring CAs to undertake their community service within the period of their articles

could be implemented by requiring CAs to do some legal clinic work as part of their Practical Legal Training component. This would require Practical Legal Training courses to incorporate a community service component. Alternatively, what if a CA's community service were the same length of time as a legal professional's – that is 24 hours per annum – and could be performed while under the supervision of the CA's principal? Or perhaps for CAs the amount of hours could be higher? And the CA would be expected to do this work within the period of articles, to be signed off by his or her principal.

The latter option would be the cheapest and an option that could be implemented immediately. The former option of one year's community service would have to be phased in as it would require new job definitions and an assessment of appropriate institutions.

Regarding community service for professionals, ProBono.Org believes that the purpose of undertaking pro bono service is to make access to justice available to the most impoverished members of our society. For this reason we believe that the paltry 24 hours

required per annum should be skewed towards casework for impoverished clients, as this is where the need is greatest. We believe that while options, such as providing training, service to the state, acting as a commissioner at a small claims court and so forth are options to be considered, there should be an imperative in the regulations requiring that a substantial majority of the 24 hours should be devoted to case work and direct legal assistance to people unable to afford private legal fees. (A similar provision is provided for in Rule 6.1 of the American Bar Association's Model Rules of Professional Conduct, but requiring 50 hours per annum, not 24! See the research paper by Daniel Sive, "Pro Bono/Community Service", commissioned by NADEL).

In essence the entire reason for providing pro bono service as a recurring service should be to ensure that every person is enabled to realise his or her constitutional right, provided for in section 34 of the Constitution, to have a dispute resolved, "in a fair public hearing before a court of law...". Without legal representation, this right is rendered almost meaningless. ●

Empowerment disempowers marginalised refugees

Richard Chemaly



One often reads about the plethora of obstacles plaguing asylum seekers. Some believe that the system is as rigorous as it is because the benefits of acquiring refugee status place refugees on an equal footing with South African citizens. They would be wrong. Even naturalised African refugees get the short end of the stick in South Africa. The legal framework and resulting social effect has dire consequences for those attempting to establish a new life in the continent's southernmost state.

More specifically, the Broad-based Black Economic Empowerment Act, 53 of 2003, ("The Act") is effectively placing naturalised Africans at the bottom of the

employment food chain. When the Act first came in, "black people" (the ultimate beneficiaries of the Act) was a term defined as "a generic term which means Africans, Coloureds and Indians". In 2008, after discussions and consensus the High Court declared that Chinese people who were citizens prior to 1994 would be considered as "coloured" for the purposes of the Act. Incidentally, because there was consensus between the parties, there was no judgement delivered

but merely an order. This denied us the judicial analysis we may have required to avoid the situation African refugees find themselves in today.

The effective result of this Act was that when hiring employees, employers would have to take race into consideration in an effort to redress the inequalities caused by South Africa's history; a laudable effort which led to employers separating applicants according to race and attempting to develop and maintain a quota of "black people". As crude, rudimentary and perhaps artificial as this process may have become, it had the nominal desired effect of getting more "black people" employed. Whether it had any real effect of shifting

perceptions and racism stemming from the past is a matter for a different article. Ultimately, “black people” were being hired and more opportunities were opened to them.

In early 2014, the President assented to the Broad-based Black Economic Empowerment Amendment Act (“Amendment Act”) and this is when African refugees began to feel the sting. The Amendment Act altered the definition of “black people” to exclude citizens of South Africa who

were naturalised (or only entitled to naturalisation) after 27 April 1994. To the legislature and most others, this exclusion makes sense; if foreigners were not in South Africa during the oppression, they should not benefit from the laws enacted to redress said oppression, regardless of their citizenship.

When some of our refugee clients approached the Department of Trade and Industry, which regulates the Act, they were told that the

limitation is consistent with an open and democratic society based on human dignity, equality and freedom.

It is possible that the effect of the amended definition of “black people” unfairly discriminates against refugees naturalised after 1994 and ProBono.Org has briefed counsel to draft an opinion on the issue. ●

DURBAN

The work of the Durban staff attorneys



The Durban office of ProBono.Org has two staff attorneys who deal with our various help desks. They are Petrina Chetty, who joined in August 2014 and Trisha Dhoda, who joined in January 2016.

In addition to her other help desks, Petrina took over the refugee law portfolio in December 2015 as she wanted to learn more about this area of law. Refugee law is one of our core focus areas and one of our main challenges is recruiting attorneys to assist us with refugee law. In an effort to recruit attorneys, we have already held two seminars for attorneys on refugee law this year, presented by experts in the field. We will be holding other refugee training seminars to equip attorneys with the knowledge and skills required to assist us with our refugee work.

Petrina’s other area of speciality is family law, with the help desk being one of our consistently busy ones. We recently saw a rise in the number of elderly people who approached us for assistance with instituting divorce proceedings. To curb the increase in divorces, Petrina believes that mediation would assist and hopes that more

attorneys with mediation skills will contribute toward this endeavour.

Petrina has found that applications for protection orders at the Chatsworth Magistrate’s Court help desk are seemingly endless and we have a real demand for attorneys in Chatsworth who can assist us with these. Fortunately, ProBono.Org is becoming more popular amongst attorneys and the community in Chatsworth and we anticipate that more attorneys will be involved in our Chatsworth matters in the near future.

Trisha facilitates the deceased estates, consumer and housing law help desks as well as the general law help desk at the Ntuzuma Magistrate’s Court. The consumer law help desk is situated at the Durban Magistrate’s Court and assists clients by dealing with matters under the Consumer Protection Act, ranging from contracts to garnishee orders.

The deceased estates help desk is our busiest. It is strategically held at the Master’s Office where our attorneys generally consult with between 25 and 35 clients a week. We have fostered an excellent relationship with the Master’s Office

and their staff, who go out of their way to assist us with queries. The Deputy Master regularly commends ProBono.Org for the work that we do with them. We have found that most of our clients simply need legal advice and guidance on how to report a deceased estate. Many of our clients have low levels of education and are simply unaware of legal processes. Our attorneys are to be commended for their work in this field as they have shown themselves to be more than happy to assist clients and take their time explaining the details of the matter.

Our housing clinic sees many clients grappling with landlord/tenant disputes. It is here that we also see the prevalence of fraud matters. Many elderly clients approach us reporting that their properties have been fraudulently transferred to a third party without their knowledge and consent. Trisha has found that these cases can become quite emotional and the harsh plight of these clients is very apparent. Trisha therefore plans to hold more community seminars to educate communities and make them aware of these dangers, in the hope that this will reduce the number of people being swindled. ●

Pretoria office news

We were sorry to lose our intern Lehlogonolo Marota at the end of 2015. He left the organisation to pursue articles of clerkship at Legal Aid South Africa (LASA) in Pretoria where he now works in the civil department. He made a significant contribution to our office and we continue to keep in contact with him as our point person for case referrals at LASA.

We welcomed Refilwe Mmusi to our Pretoria team on 1 February 2016 as a legal intern. In addition to her work at the office, she is in charge of the Community Advice Office Support Project for the Pretoria area. Refilwe has aspirations to become a human rights lawyer and sees herself growing within the civil society space.

Our Pretoria office has entered into a partnership arrangement with the Commission for Conciliation, Mediation and Arbitration (CCMA) since the beginning of 2016. We held an Access to Justice Imbizo (outreach) for the community of Mabopane on 20 February with the CCMA and the Department of Labour. The presenters were commissioners of the CCMA, Joseph Maaga and Mohau Ntaopane, Elsie Joubert from the Department of Labour and Neo Chokoe from the Pretoria ProBono.Org



office. The presentations focused on labour law, employees' rights in terms of labour legislation and how employees can enforce their rights with the assistance of lawyers, the work of ProBono.Org and its projects.

On 31 March our office was invited to attend a Labour Law Amendments workshop convened by the CCMA. The workshop focused on the new amendments to the Labour Relations Act, the Basic Conditions of Employment Act and the Employment Equity Act, the enforcement of arbitration awards and how to stay execution pending review proceedings. The aim of these workshops is to equip and capacitate lawyers with skills to handle labour law cases. ●

SAVE THE DATE:

For the Sixth Annual Public Interest Law Gathering* (PILG)

29 – 31 August 2016

Venue: University of the Witwatersrand, School of Law

More Details to Follow!

www.publicinterestlawgathering.com

* PILG 2016 is organised by the Centre for Applied Legal Studies (CALS), Lawyers for Human Rights (LHR), the Legal Resources Centre (LRC), ProBono.Org, Section27, the Socio-economic Rights Institute of South Africa (SERI), the Southern Africa Litigation Centre (SALC), Students for Law and Social Justice (SLSJ) and the University of the Witwatersrand School of Law.