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ProBono.Org celebrates 15 years

2021 marks the 15th anniversary since the founding of ProBono.Org. We will mark this occasion in a number of ways, one of these being a special publication featuring reflections by founding directors, our legal practitioners, clients, community advice offices and other stakeholders. If any of our readers would like to have a message included in the publication, please send this to margaret@probono.org.za

Another initiative is the redesign of our website. We will announce the launch in the next few weeks. ●

Staff news



Masi Ncube - Staff Attorney, Cape Town

Masi's interest in social justice and effecting transformative change through law prompted him to join the ProBono.Org team. He started his legal journey at Stellenbosch University where he was an active member of various human rights organisations. Thereafter, he completed his articles of clerkship and was admitted as an attorney in 2020. After being retained by his previous employer as an associate, he gained further experience in Magistrates' Court and High Court litigation. Motivated by the needs of marginalised and vulnerable groups, Masi seeks to uphold the spirit of the Constitution through his work at ProBono.Org. Welcome Masi!



Swazi Malinga - Regional Director, Johannesburg

We are very pleased to announce that the senior staff attorney in the Johannesburg office, Swazi Malinga, has been appointed Regional Director. We now have regional directors in all three of our offices. Congratulations Swazi!



Write for us



We would like to invite legal practitioners to contribute to our bi-monthly newsletters by writing an article of up to 400 words (one page) on a topical issue of law. Please indicate your interest to the editor at margaret@probono.org.za

The deadline for articles for the next issue will be:
1 June 2021

Staff news



Durban interns

Mayenziwe Khoza - Intern

Mayenziwe Khoza completed her Bachelor of Arts degree majoring in Legal Studies and History in 2018. She then enrolled for an LLB degree and completed it in 2021. She completed both degrees at the University of KwaZulu-Natal. Mayenziwe is interested in Black history and wants to pursue further studies in this area. Her future career goals are to work in the social justice sphere. She has hopes of helping the community achieve social justice through her education. She currently works with several community organisations, such as Touch iFuture, Constitution Network and Durban Youth Radio on a volunteer basis, which is bringing her closer to realising her goal of achieving positive change within communities.



Ntandoyenkosi Mkize - Intern

Ntandoyenkosi Mkize graduated with an LLB from the University of KwaZulu-Natal (UKZN) in 2019. She is currently registered at UKZN for the LLM (Environmental Law) programme and intends to specialise as she is committed to acting in the public interest. Her other legal interests include gender rights and legal research and writing. During her undergraduate studies she received a merit certificate for her mini dissertation titled "The Unconstitutionality of the Alteration of Sex Description and Sex Status Act 49 of 2003", in which she analysed and discussed the unconstitutionality of the Section 2 requirements of Act 49 of 2003 from a feminist legal perspective. She is confident that her time as a legal intern at the organisation will build her skills and foster her development on her journey to becoming an experienced and effective legal practitioner.



Josephine Mathebula

Josephine joined the Johannesburg office of ProBono.Org in March as a paralegal working with the AFSA/ Global Fund project. Born and raised in Tembisa, she completed a paralegal course at Rhodes University in 1993. From 1986 to 1993 she worked at the Kempton/Tembisa Advice Centre as a paralegal and then worked at the Legal Resources Centre until August 2019. Her time as a paralegal at the Legal Resources Centre involved providing legal advice, facilitating and conducting workshops, compiling narrative reports and referring and following up cases. Beyond consulting with clients, she worked directly with the communities in conducting and facilitating workshops around the country. She also collaborated with a number of community-based and faith-based organisations, among others.

Welcome baby Okuhle Athandwe

Congratulations to Ongezwa, the financial administrator for the AFSA programme, who gave birth to a baby girl on 10 April. Mother and baby are both doing well. We wish the family a lifetime of joy with their little girl. ●



Varsity College students at ProBono.Org

We have entered into an agreement with Varsity College to take 130 of their final year law students in each of our three centres so that they can get practical work experience. Each student will spend 40 hours with ProBono.Org over a five-day period.

The first intake of students took place on 20 April, four in Durban and five in Johannesburg. We look forward to a fruitful relationship with them and with Varsity College. ●



Will the electoral reform judgment handed down by the Concourt address the accountability elephant in the room?

By Wendy Andrew-Befeld - Member of the Cape Bar

Guest Slot



Wendy Andrew-Befeld

On 11 June 2020, Justice Mbuyiseli Madlanga handed down a defining judgment for the political landscape of South Africa. In *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [202] ZACC 11), the apex court ruled that the Electoral Act is unconstitutional on the grounds that it does not allow citizens to be elected to the national and provincial legislatures as independent candidates. Parliament was ordered to remedy the defect within 24 months and the media characterised the judgment as a game changer – a victory for all South Africans...but is it really?

There is no question that the ruling is a step in the right direction. What remains to be seen is whether the changes Parliament makes will lead to the comprehensive overhaul we need in order to ensure that our elected representatives are accountable to the people they are elected to serve.

It's a question not easily answered but it starts with a consideration of where we've been, where we are and where we're going. Prior to the advent of a constitutional democracy in South Africa, it is fair to say that our judiciary was effectively impotent. Constrained by the Westminster system of parliamentary sovereignty, our courts were bereft of any powers of judicial review. Confined to interpreting and enforcing legislation based on procedural issues alone, they were precluded from considering substantive legality, merit or morality. Their role was to rubber stamp the injustices perpetrated under the apartheid regime.

As we transformed from tyranny to democracy, we did so determined to avoid the injustices of the past. Fundamental to our constitutional vision was a decisive break from the unchecked abuse of state power and resources virtually institutionalised by the apartheid regime.

Guest Slot (continued...)

To this end, we adopted **accountability**, rule of law and supremacy of the Constitution as foundational values of our constitutional democracy. Unfortunately, neither those values, nor our revered Constitution, have proved a match for an electoral system that has neglected accountability, whilst nurturing human frailty and self-interest.

In recent years, it became clear that the state capture so roundly complained of included an element of "legislative capture", as we saw in the *Nkandla* matter and during the course of repeatedly unsuccessful attempts to oust a disgraced President Zuma from office. The citizenry have grown frustrated and angry as they have watched parliamentarians repeatedly side step their constitutional obligations in favour of political expediency. However, just as the Judiciary was once expected to quietly tow the legislative line, now our democratically elected legislative branch is expected to tow the party line.

Our current electoral system is based on proportional representation (PR), whereby the electorate vote for a party, rather than a person. The seats in the National Assembly and the provincial legislatures are then filled on the basis of a closed party list system. It is this closed party list system that has led to MPs currying favour with party elites, rather than voters, in order to ensure their political survival. As accountability deteriorated, an embattled judiciary was left to maintain and uphold the rule of law, often in the face of opposition from the executive and legislative arms of government, who have regularly accused the courts of judicial overreach.

Analysts have pointed out that the closed list PR system, that was originally designed to facilitate only our inaugural democratic election, has been in need

of electoral reform for years. In fact, Cabinet commissioned an Electoral Task Team (ETT) as early as 2003. They were asked to report on the matter and propose legislation for an electoral system in the years to come.

The ETT (also known as the Van Zyl Slabbert Commission) highlighted accountability as a concern and tendered its recommendations. Unfortunately the proposed changes were never made. So, where to from here?

The Constitutional Court did not pronounce on how Parliament should rectify the unconstitutionality of the Electoral Act, nor on a preferred model, expressly leaving this to Parliament to determine. Home Affairs Minister Aaron Motsoaledi recently indicated that South Africa's electoral system is set for a major overhaul, and that the changes would not be limited to the Constitutional Court's directive regarding independent candidates. The Electoral Commission of South Africa (IEC), has however expressed concern about the 24-month time frame mandated by the court. This is likely to be problematic given the potential scope of the work and necessary due processes to be followed in amending the electoral system.

This concern is echoed by a number of other organisations such as the Inclusive Society Institute (ISI). In their published response to the judgment, ISI therefore suggests effecting consequential improvements where possible, whilst implementing system changes to accommodate independent candidates. Broader reform will need to follow over time. In other words, we may be hungry for change but it's likely we will have to deal with that accountability elephant in the room, one bite at a time. ●



SOUTH AFRICA

A call for change in LGBTQI+ rights

By Sbusiso Khumalo, Durban Intern

It is pivotal to recognise the history of change brought about by the legal system in South Africa in legalising LGBTQI+ rights. The country that broke barriers for LGBTQI+ persons and was exemplary to neighbouring countries in Africa. This occurred through landmark decisions such as *Fourie v Minister of Home Affairs* which transformed the institution of marriage and recognised same sex marriages as valid unions. However, despite these positive strides, sufficient support and legal provisions ensuring the protection of LGBTQI+ people's rights are still lacking. Furthermore, amidst the outbreak of the COVID-19 pandemic, the question we must ask ourselves is whether this minority group has been recognised as worthy of receiving and accessing adequate emergency care?



The COVID-19 pandemic resulted in outbreak of domestic violence towards women and children, and, equally so, towards the LGBTQI+ community which is already subject to prejudice daily. Police protection services for victims of domestic violence has proven to be ineffective towards these vulnerable groups. If police services are still unable to prevent perpetrators of homophobic attacks, how can they be expected to protect and prevent abuse taking place in private dwellings of same sex couples? The recognition of civil marriages was a great step in ensuring fair and equal treatment of LGBTQI+ persons. However, it should be accompanied by an investigation into police services being held accountable for the lack of fair protection of same sex couples in abusive relationships as envisaged by section 1 of the Domestic Violence Act. This Act perfectly defined a "domestic relationship" to be inclusive of same sex couples who lived or are living together.

Various cases of abuse against the LGBTQI+ community continue to illustrate this lack of intervention

from authorities. For example, Eudy Simelane, a well renowned South African women's football player was gang raped and murdered in 2008 in her hometown of KwaThema because of her sexual orientation. Termed "correctional rape", there was a public outcry calling for better protection of LGBTQI+ members by the government. Silence however prevailed, with police services failing to better protect and prevent hate crimes against the LGBTQI+ community. As a result, a wave of "correctional rape" cases followed. On Human Rights Day in 2020, 16 year-old Liyabona Mabishi was stabbed numerous times, leading to his death. More recently, during the early stages of the COVID-19 pandemic, the LGBTQI+ community saw the killing of gay activist Lindokuhle Cele who was stabbed in Umlazi, also because of his sexuality. Elma Robyn Montsumi, a sex worker and another member of the LGBTQI+ community reportedly passed away in police custody in the midst of the COVID-19 pandemic.

Several LGBTQI+ persons have resorted to going back to their

families either because of job loss or closures of university residences due to the pandemic, which means, for many of them, exposure to homophobic attacks and disownment. This ultimately leads to some of these individuals living on the streets to evade such treatment. We need to look at what provisions have been made to protect such persons. Is there a lack of protection and is it in line with the entrenched "right to freedom and security" in section 12 of the Constitution? Pre-COVID-19, a high rate of discrimination prejudicing LGBTQI+ persons already existed, and the pandemic has only amplified these conditions further.

Lack of recognition of violence against the LGBTQI+ community also exists within the international regime. Concern for the lack of representation of LGBTQI+ persons in international law is as recent as 2016 when the UN Human Rights Commission adopted a resolution on protection against violence and discrimination based on sexual orientation. However, there is still no treaty that is as specific as the Convention on the Elimination of



all Forms of Discrimination Against Women, aimed at protecting LGBTQI+ persons. What protection does this leave for refugees seeking protection from countries that have passed anti-LGBTQI+ laws? A Ugandan LGBTQI+ person fleeing to South Africa from a country that has gone as far as passing the Anti Homosexuality Act faces no better treatment in a promised land that has no adequate measures in place to ensure the protection of LGBTQI+ persons. An LGBTQI+ individual faces insecurity in a country that has high rates of xenophobic and homophobic attacks.

S v Ferreira emphasised how the abuse of women goes to the core of their subordination in society which means having to note that

the men who kill women infringe upon their right to dignity. This case acknowledges the traumas of domestic violence that women often endure from their abusers and recognises the need for self-protection. Similarly, in the context of victimisation of LGBTQI+ survivors of homophobic attacks and violence, the lack of reporting and implementation of policies in response to trauma and internalised depression resulting from constantly living in fear is like the experiences of women who are survivors of domestic violence. Hence, the call for the enactment of the Hate Crimes Bill and more accountability from authorities and government to improve a sense of safety and protection for the LGBTQI+ community.

The implementation of the Hate Crimes Bill will allow for more protection. For example, section 3(1) of the Bill states that hate propaganda on gender identity or sexual orientation will be penalised by imprisonment as per section 6(1) of the Bill. This will offer protection and address the increasing homophobia, domestic violence and correctional rape against the LGBTQI+ community in South Africa, especially with combating gender-based violence during and post-COVID 19. This will be a better solution which can work hand in hand with the Domestic Violence Act to better address hate crimes towards the LGBTQI+ community. Further, this Act will offer protection to LGBTQI+ refugees in South Africa who are left without recourse. ●