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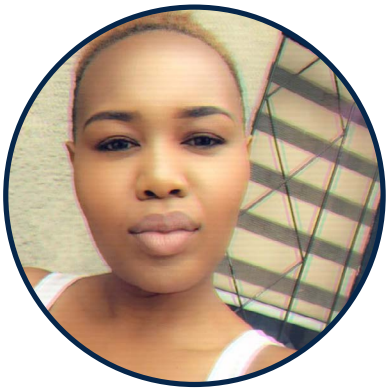
Staff news

Welcome to our new Family Law intern

Sibusiso Makhakhule was born and raised in the small village of Nkanini in Mpumalanga. He moved to Johannesburg after matric to pursue an LLB degree at the University of Johannesburg, which he completed in 2020. It was a dream come true as he realised he wanted to study law when he participated in a moot court competition in high school. In his final LLB year he worked at the Soweto Law Clinic and realised that as an aspiring human rights lawyer he had to seek a remedy for the many barriers to accessing justice.

Sibusiso wanted to kick start his career at ProBono.Org because when he read about it he knew it was an environment that appreciates hard work and would allow him to help people access high quality legal services at no cost. He looks forward to helping clients in the family law clinic with care and dedication.

Paralegal news



Zamashandu Mbatha
Zamashandu has been appointed as the paralegal working on the undocumented minors and refugee project. She grew up in Soweto and studied bookkeeping after passing matric. She later worked as a bank teller and then got an opportunity to work at the Legal Resources Centre as a Finance Intern. She started taking an interest in the cases at the LRC once she moved to the Human Resources Department as an assistant. This led to paralegal studies and she began to assist the attorneys and senior paralegals with running of workshops. Zama looks forward to working at ProBono.Org, learning more about the clients and finding the correct legal remedies to assist them.

Welcome Zama.

15 Years of community service

In celebration of 15 years in existence, we have redesigned our website, which we hope you will find interactive and easy to navigate.
See **www.probono.org.za**

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 August 2021

The Prevention and Combating of Hate Crimes and Hate Speech Bill

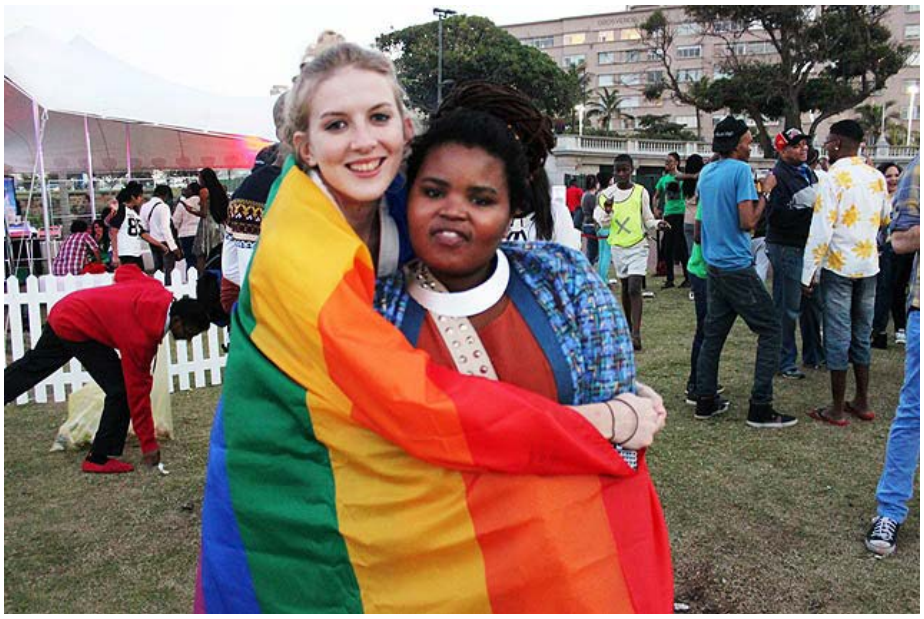
By Ntandoyenkosi Mkize, Durban intern

Before 1994, the focus of violence in South Africa was largely based on politics. Upon the dispensation of democracy and the promotion of equality, studying and understanding violence shifted towards preventing violence between individuals and remedying its social, economic and psychological effects. South Africa has seen an alarming rate of crimes relating to xenophobia, homophobia, racism and sexism. These crimes are differentiated from acts considered as crimes under existing South African law because they are motivated, partially or wholly, by hatred towards the victim's identity. Hate crime may therefore be described as a criminal act that is driven by prejudice or bias relating to the victim's race, gender, sexual orientation, religion or other grounds.

Section 9 of the Constitution of the Republic of South Africa, Act 108 of 1996, makes provision for equality. Section 9 further provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. Since 2000, The Promotion of Equality and Prevention Of Unfair Discrimination Act (PEPUDA) is the legislation referred to in instances where a victim is subjected to hate speech or unfair discrimination based on race, sex and gender.

The Prevention and Combating of Hate Crimes and Hate Speech Bill (the Bill) seeks to address the rising incidents of hate crimes and hate speech in South Africa. It also seeks to address the increasing number of events motivated by prejudice and to help victims of hate crimes and hate speech. The Bill created the offences of hate crimes and hate speech and puts in place measures to prevent and combat those offences.

Section 3 of the Bill states that a person commits a hate crime where the crime is based on that person's "prejudice, bias or intolerance" towards the victim because of one or more of the prohibited grounds of the victim. Section 4 of the Bill states that a person is guilty of hate speech where they



intentionally communicate in a way that promotes hatred, is threatening, abusive or insulting, and shows a clear intention to encourage others to harm an individual or group of people, based on one or more of the prohibited grounds of the individual or group of people. The distinct difference between the Bill and PEPUDA, which both seek to address hate speech and hate crime, is that the former criminalises these offences while the latter recognises these offences as civil offences.

Currently, a hate crime motivated by a person's race or sexual orientation, or the looting of foreign nationals' shops may only be treated as an assault or public violence. The penalties are thus set out following the legislation that governs those specific offences. This would mean that the crimes are not responded to appropriately by the criminal justice system. Therefore the specific inclusion of hate crimes in legislation could assist law enforcement bodies with dealing with these crimes appropriately.

The penalties for a hate speech or hate crime offence, in terms of the Bill, follow the Criminal Procedure Act. The penalties include imprisonment, periodical imprisonment, declaration as a habitual criminal, committal to

any institution established by law, a fine, correctional supervision, postponement or suspension of the sentence, or a warning or reprimand.

It can be argued that the penalty of imprisonment for up to five years is not appropriate for this crime. It can further be argued that penalties for hate speech in PEPUDA, which regards the offence as a civil law offence, are more appropriate. These penalties are restorative and encourage the offender to examine the basis of their prejudice and make amends. Hate speech matters that have been heard before an Equality Court have followed this recourse.

The Equality Court often hands down orders that include payment for the impairment of dignity, pain and suffering. Orders may also include a referral of the matter to the Director of Public Prosecutions for the institution of criminal proceedings against the perpetrator of hate speech. Hate speech matters that have been heard before Equality Courts include the Velaphi Khumalo and the Vicki Momberg matters.

In the Velaphi Khumalo matter, Khumalo posted two social media posts stating "that the country be cleansed of all white people and act as Hitler did to the Jews". The Equality Court ruled the posts to be hate speech in terms of PEPUDA; ordered that Mr Khumalo write a letter of apology directed to all South Africans; interdicted him from repeating similar utterances and that the National Prosecuting Authority investigate whether he should be criminally charged.

In the Vicki Momberg matter, Momberg called a black police officer the k-word 48 times after he came to her aid in a smash and grab incident. The Equality Court ordered Momberg to pay a R100,000 fine, make a public apology and commit to sensitivity training and community service. Momberg did not comply with this order. The police officer instituted criminal proceedings against Momberg. She was found guilty on four charges of crimen injuria and sentenced to an effective

three-year imprisonment term, a year of which was suspended.

The main criticism of existing criminal legislation is that it does not specifically create a charge for hate crimes. Where a person from the LGBTQI+ community is targeted, the crime is charged under existing criminal laws, such as assault or culpable homicide. However, many argue that the purpose of hate crime legislation is to investigate and prosecute crimes committed with bias against LGBTQI+ people and these crimes should rightfully be dealt with under this Act.

Governments across the world often tend to focus their attention on combating hate-based criminality by enacting new laws that enhance the penalties for hate crime offenders. This could possibly be justified by the belief that enhanced penal measures are a form of recognition of the increased levels of hate-based crimes. Another justification that can be argued is that the stricter penalties will send a strong message of non-tolerance of hate-based crimes to society. Finally, hate crime legislation helps to ensure that criminal justice bodies can officially record and monitor data relating to hate-based offences, allowing them to specifically attend to these offences. This is the case with the Bill.

To appropriately address hate-based offences with appropriate measures and interventions, the underlying causes of prejudice that drive perpetrators to commit hate-based crimes need to be understood. Increasing penalties, especially in the context of correctional imprisonment, also does not challenge the vulnerability of groups that are often subjected to hate crimes. Restorative justice would be more appropriate in the context of hate speech and crime in South Africa as it focuses on equal participation between the victim and the perpetrator. Currently, financial, emotional and community reparations are often ordered in South Africa, as seen in hate speech matters that have been heard in Equality Courts. Other forms of reparation that should be considered are moral learning and multi-agency support.

Moral learning could include conducting research, under the supervision of a restorative justice official, providing a short report based on the harm the perpetrator caused or a reflective report presented to the affected community on the new understandings that have been learned. Multi-agency support includes social services support, medical support and educational support. In conclusion, the sole implementation of hate crime legislation in South Africa is not enough to address the issue of prevalent hate crimes. Instead, a multi-sectoral and inclusive approach needs to be adopted by the criminal justice system to effectively address hate crimes and the increased vulnerability of the victims of these crimes.●

The importance of adhering to time frames when intending to institute legal proceedings against organs of state

By Naeelah Williams - Staff Attorney, Cape Town

A letter of demand or notice is always necessary where legislation requires that notice be given, and if demand or notice is a prerequisite to complete a cause of action.

Legislation such as the National Credit Act 34 of 2005, the Customs and Excise Act 91 of 1964 and the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 are examples of legislation requiring such notice to be given.

Many clients approach ProBono.Org's offices with reasonable or good prospects of success in suing an organ of state. However, these clients often approach us for assistance long after their respective claims have prescribed and are rather disgruntled when they are advised of the prescription and its consequences.

For the purposes of this article, we will highlight the rules around notice in terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 (the Act) and stress the importance of prescription when intending to institute legal proceedings against an organ of state.

Prior to the promulgation of the Act in 2002, different statutes were applicable to different organs of state and each statute had its own unique prescription periods and its own specific requirements to commence litigation. Owing to these various prerequisites, it became clear that there was a breach of section 34 of the Constitution which provides that:

> *Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.*

Subsequently, the Act was passed with the purpose of regulating and harmoniing the prescription periods of claims against organs of state.

Consequently, civil action brought against any national, provincial or local governmental department, amongst others, must comply with the provisions of the Act.

Furthermore, the Act stipulates that no legal proceedings may be instituted against an organ of state unless the claimant has provided written notice of its intended litigation. The only instance where this written notice is not a prerequisite is when the applicable organ of state has given consent in writing to the institution of impending litigation.

Such notice, generally termed as a section 3 notice, should contain the particulars of the claims, such as parties involved, date the debt became due and amounts to be claimed. In other words, the notice should include sufficient details as to the facts giving rise to the debt.

Perhaps the greatest harmonisation created by the Act is that a creditor has six (6) months from the date the debt became due to serve a section 3 notice on the relevant organ of state. It is further important for creditors to note that litigation may not commence against an organ of state before the expiry of 30 days after the section 3 notice was served.

The question then arises - what recourse, if any, is available to a creditor should s/he fail to comply with the above requirements?

Section 3(4) of the Act states that a creditor may apply for condonation of the late filing of the notice and the court may grant such condonation if; (1) the debt has not been extinguished by prescription, (2) good cause exists for the failure by the creditor to comply with the notice requirements, and (3) the organ of state was not unreasonably prejudiced by that failure. Moreover, when applying for condonation, the creditor must provide a full explanation for the late filing and non-compliance. The court is only required to grant condonation if it is satisfied that all requirements have been met.

Unfortunately, many clients come in and mention condonation as if it is an ordinary part of litigation. Although the purpose of condonation is to forgive non-compliance provided the above prerequisites in terms of s 3(4) are met, one has to take cognisance of the fact that condonation is not a right and therefore cannot be guaranteed.

In conclusion, if the court is not satisfied that a creditor has met the requirements for condonation, the claim will not stand, and a valid and real defence of prescription will be raised by the relevant organ of state. When a cause of action arises or a debt becomes due against an organ of state, it is advisable to consult a legal practitioner as soon as possible in order to ensure compliance.●

Uber Drivers in South Africa: Employees or not?

By Mayenziwe Khoza, Durban intern

The issue of Uber drivers' status as employees is not a new one. Countries such as California, Hong Kong and the UK have also considered the issue in various forms. To begin with, in South Africa, Section 213 of the Labour Relations Act (LRA) provides that an employee is anyone, other than an independent contractor, who works for another person or assists in conducting an employer's business. An independent contractor has no protection under the provisions of the Labour Relations Act. It is for this reason that many employers prefer to employ someone as an independent contractor.

The main difference between an employee and an independent contractor is the nature of the contract itself and the nature of their work. A full time employee works for a single employer and the employer dictates and controls the work performed, hours, and location of work. An independent contractor operates an independent business and may perform work for multiple clients. Typically, the contractor submits an invoice for completed work and provides their own tools and equipment.

There are some benefits of being an employee that Uber drivers are not afforded. This means that Uber drivers are typically not entitled to the statutory protections afforded to employees in the various countries in which Uber operates. In South Africa, this means drivers can be fired at will, are not entitled to paid leave and are not subject to restrictions on their hours of work. Independent contractors make no contribution to UIF and therefore cannot claim from the Fund.

In the US State of California, Uber drivers are not afforded the same recognition as employees. In 2019, the California state legislature passed Assembly Bill 5, which would have required ride-sharing companies to classify their drivers as employees rather than independent contractors. In October 2020, the court of appeal

of the state of California in *The People v Uber Technologies Inc.*, et al had to decide whether to uphold interdictory relief restraining Uber from classifying their drivers as independent contractors and requiring them to be reclassified as employees, pending a trial.

The court of appeal found that the Uber drivers in fact performed services for Uber in the usual course of business which were necessary for the business of Uber to prosper. The appeals court found that there was a reasonable probability that the employees would prove in a trial that they were employees. It accepted the trial court's interdict to restrain Uber from classifying their drivers as independent contractors, in violation of the bill, pending the finalisation of the trial. In November 2020, however, California residents voted in favour of Proposition 22, a ballot initiative which exempted ride-sharing and delivery platforms from having to classify their drivers as employees.

Uber has repeatedly faced obstacles in its business in Hong Kong. The government has continued to express that it has no intention of legalising Uber. Officially, the Uber service is illegal in Hong Kong, as the government explicitly clarified that Uber drivers broke the law by offering car hiring services without any licence or third-party insurance. Because Uber is still not legal, most Uber drivers carry passengers without a licence.

The Transport Department in Hong Kong did not respond positively to whether Uber Taxi is legal, but stated that no one is allowed to drive or allow others to drive or use a private car to charge passengers for a ride. Unless the vehicle has a valid taxi permit, it is still considered

illegal. The department said that the government encourages the use of different application technologies, including the Internet or mobile phone platforms to call taxis, but the use of new technologies or new platforms must be legal.

Over the years, the classification of Uber drivers as independent contractors has been challenged by the drivers as they seek protection, and the classification as employees could afford them this protection. In South Africa, there was a 2017 case where the CCMA found Uber drivers to be employees. In this case, the CCMA found that Uber drivers who had referred an unfair dismissal case to the CCMA were employees, according to s213 of the Labour Relations Act (LRA). The Labour Court overturned this decision in the *Uber South Africa Technology Services vs National Union of Public Service and Allied Workers and others (2018) 39 ILJ 903 (LC)*. The labour court held that the drivers were not employees of Uber South Africa as they had failed to prove that they had an employment relationship with the company. However, the court explicitly stated that it was not answering the question whether or not drivers were employees of Uber BV, Uber South Africa's parent company in the Netherlands.

The most recent decision by the UK Supreme Court in *Uber v Aslam and others* in 2021 has given hope to Uber drivers however. In this decision, the court held that the claimant Uber drivers should be considered "workers" for purposes of UK labour legislation, as workers represent a type of hybrid between

an employee and an independent contractor. The classification as 'workers' will afford them more rights. The Supreme Court based their decision on the fact that Uber drivers did not enjoy the full rights of independent contractors. Most of their work had a standard term contract that did not allow for the negotiation of terms. This provides an inequality of bargaining power between Uber and the drivers. Examples of this are that Uber drivers are not allowed to change the travel fare that Uber determines.

The decision of the UK Supreme Court does not mean that the CCMA or Labour Court in South Africa should do the same. Section 83(1) of the Basic Conditions of Employment Act (BCEA) gives the Minister the power to deem any category of persons to be employees for any part of any employment legislation, except for the Unemployment Insurance Act. The Minister could accordingly declare Uber drivers as employees for selected sections of the BCEA and the LRA.

After the UK Supreme Court decision, the UK Firm Leigh Day approached Mbuyisa Moleele Attorneys in South Africa for collaboration. They announced plans to institute a class action against Uber on behalf of South African Uber drivers. The law firms have announced that they will argue for overtime pay, membership of the Unemployment Insurance Fund, and paid leave. If this is successful, Uber drivers will be classified as Employees and will be conferred several key rights in terms of the BCEA and the LRA. However, Uber South Africa maintains that the drivers want to work independently and use the existing operating model.

Uber has already provided thousands of sustainable economic opportunities through its current business model. However, in a time where employment is of vital importance, the outcome of this class action will change the lives of the Uber drivers. The rights conferred will ensure more stable and regulated terms for the Uber drivers and those who wish to join the Uber platform.●