

Staff news



ProBono.Org Cape Town : **Fully vaccinated**

By Uzair Adams, Regional Director

Having navigated the COVID-19 pandemic together - from office closure to remote working during the nation's hard lockdown, from staff members testing positive to the loss of dear loved ones, from an abrupt halt of all planned access to justice initiatives to exploring more creative ways in which we serve our constituents; it was rather fitting that on Friday, 27 August 2021, the Cape Town office team attended the Cape Town International Convention Centre to receive their first jabs of the Pfizer vaccine. This encouraged an exuberant sense of camaraderie, and being able to share in the overall experience made it that much more meaningful. The Cape Town office team members have since all received their second jabs and are relieved to be fully vaccinated as we look forward to navigating an even "newer normal" with just as much resilience and opportunities for continued growth, learning and development. ●

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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 February 2022

Uzair graduates with distinction



In 2018, Uzair Adams, Regional Director of our Cape Town office received the Ashley Kriel Scholarship for Leadership in Community Development which enabled him to enrol for a Bachelor of Arts Honours in Community Development via the Cornerstone Institute.

The Community Chest and Cornerstone Institute, founding partners of this scholarship, believe that leadership in community development is fundamentally rooted in the identity of the countless South Africans who have made the ultimate sacrifice towards the establishment of a non-racial, non-sexist democratic South Africa. It is against this backdrop that the Ashley Kriel Scholarship for Leadership in Community Development was launched.

The Ashley Kriel Scholarship for Leadership in Community Development has the following strategic objectives:

- Build a cadre of engaging and critical leadership within the emerging structures of organised civil society.
- Improve the governance and accountability mechanisms within organised civil society.

- Strengthen the organisational capacity of organised civil society to coordinate social development programmes within a human rights framework as set out in the South African Constitution and Bill of Rights.
- Strengthen the organisational capacity of civil society leadership and management structures to respond to the challenges inherent in contemporary resource mobilisation demands.
- Build an active, responsive and applied research programme that advances collective understanding of the sector and facilitates programme innovation, scale and replicability.

On 5 December 2020, after what was a tumultuous year navigating the COVID-19 pandemic with the shift to both remote and online working and learning platforms, Uzair graduated with distinction and at the top of his class. He is grateful for both the opportunity and the experience gained and looks forward to making a positive contribution to society at large. ●

COVID-19 mandatory vaccinations, liquor industry shutdowns and COVID protests – potential litigious issues



By Sashin Rajah, Lomas-Walker Attorneys, Westville, Durban

During these unprecedented times, there have been many legal issues surrounding COVID-19. These extend from mandatory vaccination in the workplace, to lockdowns affecting whole industries such as the liquor industry. Furthermore, some countries have recently introduced laws which are prejudicial to those who have failed and/or refused to take the vaccine. There have also been some protests worldwide relating to COVID-19 infringing upon people’s rights which seem to be on the rise.

Of keen interest to the liquor industry in past weeks and months are the alcohol restrictions which have intermittently affected their businesses. What is of interest in my view is the government’s use of curfews, full alcohol bans at times, and restrictions on times in which alcohol stores can operate.

The rationale behind such restrictions generally (with similar restrictions having occurred internationally), is that hospitals are over-burdened with patients who have consumed too much alcohol and ended up in hospital due to events relating to such consumption, which in turn fills up capacity for patients affected with COVID-19. This has largely been accepted as a justifiable reason for the government to limit the rights of the liquor industry, with the matter being tested in court previously.

The case of South African Breweries (Pty) Ltd v Minister of Foreign Affairs, Minister of Cooperative Governance and Traditional Affairs and Another and Minister of Trade and Industry was a recent Western Cape High Court case decided in July 2021, in which the liquor industry went against the government’s decision to restrict rights relating to the industry, such as rights relating to the distribution and sale of liquor. The court stated that a lack of inhibition resulting from liquor consumption could cause dangerous behaviour associated with



neglect of mask-wearing, distancing and general following of the rules associated with preventing the spread of COVID-19. The Respondents’ arguments were that the regulations were in place to lessen the effects of COVID-19 throughout society. The court viewed the application brought by SAB as urgent, given the effects on the industry and those within it. The court discussed the process of public engagement prior to passing the regulations, which was reduced from normal time periods, and concluded that given the surrounding circumstances of the matter, the regulations that were

passed restricting numerous aspects of the liquor industry's performance was seen as just by the court and procedurally fair. The Minister was awarded costs of the application due to the success of the application, the size of the Applicant, and seemingly to ward off similar challenges in future.

Despite the liquor industry's pleas, it will be interesting to see what the December festive season will bring in terms of whether the government will limit alcohol consumption, purchases and general access to alcohol once again in light of the fourth wave and the identification of yet another COVID-19 variant.

With regard to mandatory vaccinations in the workplace, this has been a contentious issue both locally and worldwide. Certain companies in the USA have insisted upon mandatory vaccination for those who work within the office. Certain companies in South Africa have also strongly encouraged employees to be vaccinated and to set a strong example to other companies within the industry.

At Discovery Health for example, employees can object to the mandatory vaccination policy on religious or other grounds, and there is a process which will be followed internally to reach a conclusion with regard to their objection. It will be interesting from a legal standpoint to assess a case of an employee objecting to taking the vaccine, having their objection dismissed, and subsequently being dismissed themselves. In this regard one would have to take into account the right to freedom of religion espoused in our Constitution, but this can ultimately be balanced against other employees' rights to be free from bodily harm and their rights to bodily integrity, as espoused in the Constitution. This balance is particularly interesting given that there is evidence from some medical professionals that people are safer if everyone takes a vaccine (provided that a particular illness is serious enough that a vaccine is warranted), whereas there is a counter-argument in certain circles which states that the vaccine itself ought to provide enough protection to an individual, which should remain effective regardless of whether others are vaccinated or not.

There have been some widely-publicised protests worldwide from people who are against COVID-19



lockdowns and vaccinations in countries such as Australia, France and the UK. Protests have also occurred in smaller countries such as Austria and the Netherlands, the latter having an extremely liberal reputation. This has stoked responses and condemnation from governments. However, there are several people, groups and businesses who have been affected due to COVID lockdowns and feel that their liberties have been unfairly impacted. Local and international governments will keep having to juggle the considerations of businesses and those impacted financially and otherwise by COVID-19 lockdowns with the lives saved due to such lockdowns. ●

International Children's Day partnership

By Zama Mbatha (OCAY paralegal)
and Elsabe Steenhuisen (OCAY project manager)

South Africa celebrates International Children's Day on the first Saturday of November every year which aims to create a platform for dialogue. This year it focused on problems experienced by women and children, in particular violence perpetrated against them. The Friday night dialogue envisaged discussing the causes and appropriate solutions. As the festival's main focus is always on children, the festival aimed especially at promoting the protection of children and their rights.

ProBono.Org, Constitution Hill, Skilful Spaces and Play Africa partnered to celebrate International Children's Day on 5 and 6 November 2021. Numbers of participants in the festival were limited according to COVID-19 regulations. On 5 November there was a webinar under the topic "The voice of the child" (what it means, how to listen to one's child, how to give children the opportunity to speak out). It was a hybrid webinar dialogue as it had a live audience and a panel, with non-attending people sending in e-questions. The dialogue was streamed live on the Facebook pages of Constitution Hill and ProBono.Org where people engaged with the panel. Around 800 people accessed the Facebook Live event. On the panel were:

- Bongani Dlamini - Children's Rights Advocate (The Council SA)
- Zviko Kanyoko - Architect, Researcher (Play Africa)
- Nthabiseng Sekhabela - Founder and CEO of Skilful Spaces
- Bev Loubser - Attorney, Conveyancer, Notary and Mediator (ProBono.Org)

On 6 November, the programme of the day focused on celebrating children by educating them about their rights through fun



and interactive activities. The children participated in a mock trial in a real court with real robes designed for them. There was also storytelling and a puppet show - all teaching them about their rights.

ProBono.Org had a beautiful table set up where children had a scavenger hunt for their "rights". Appropriate rights, taken from the Bill of Rights, were printed, laminated and cut into small strips. These strips were placed in sawdust for each child to dig out as many as they could in 30 seconds. The children gathered

around the table counted down the seconds. The child hunting would read out one of the rights he or she had chosen. Each child received a bracelet reminding them every day of the year of their right to say no to abuse and a pamphlet explaining their rights and where to look for help. As the children got prizes and sweets after reading out their rights, our table was big hit and they had a whale of a time.

Over 80 children participated on the day and were very well attended to and catered for with a healthy breakfast and lunch. ●

Time to accommodate the “adequate” in alternative accommodation

By Masi Ncube, Staff Attorney, Cape Town

Residential evictions continue to be a traumatic experience for vulnerable people facing financial difficulties across the country. Exacerbated by the COVID-19 pandemic, we have noticed an increased number of residential evictions being granted by magistrates and judges alike despite the exceptional circumstances we are facing. It is notable that municipalities have a constitutional duty to engage with evictees meaningfully and provide adequate alternative accommodation in instances where they face a real possibility of homelessness.

Legislation protecting evictees

The abovementioned constitutional duty is a response to the common law residential eviction procedure followed during apartheid. To rectify this approach, section 26 of the Constitution of South Africa, 1996 (the Constitution) was enacted to enshrine the right to adequate housing. Section 26(3) of the Constitution provides that no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances.

Flowing from section 26(3) of the Constitution, the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998 (the PIE Act) was enacted to consider the personal circumstances of evictees in order to ensure that evictions are just and equitable.

Section 4(7) of the PIE Act states that if an unlawful occupier has



occupied land for more than six months at the time of the court proceedings, a court may grant the eviction order if it is just and equitable to do so. The content of the concept “just and equitable” includes considering whether land has been made available or can reasonably be made available for the evictee by a municipality.

Section 4(7) of the PIE Act is amplified by the recent adjusted Alert Level 1 COVID-19 regulations (Gazette 45253 of 30 September 2021 read with Gazette 45297 of 11 October 2021) which state that a court may request (in addition to any other report that is required by law) a report from the municipality regarding the availability of emergency accommodation, quarantine or isolation facilities.

Disappointingly, the unfortunate reality is that due to an exhaustive waiting list for State housing and limited State resources, oftentimes municipalities can only provide emergency housing kits comprising corrugated iron. Alternatively,

municipalities offer to relocate evictees to crime-ridden, under-resourced Temporary Relocation Areas (TRAs) such as Blikkiesdorp and Wolwerivier in Cape Town, for instance. Can it then be said that the alternative accommodation provided by municipalities is adequate?

What is adequate alternative accommodation?

In *Baron and Others v Claytile (Pty) Ltd and Another* 2017 (5) SA 329 (CC) (Baron), a group of unlawful occupiers (the group) who were being evicted refused to accept the offer from the City of Cape Town to reside in the Delft Temporary Relocation Area because the structures are built from corrugated iron. The group also refused to relocate to Wolwerivier because the area was far from their children’s schools. Additionally, the group rejected the offer to relocate to Blikkiesdorp because the structures were built from corrugated iron and they did not have access to basic services.

The Constitutional Court emphasised that the right to adequate housing should be progressively realised. This means that the municipality can only provide alternative accommodation within its available resources. When considering the refusal of the group to accept the options for alternative accommodation, the Court made reference to *The City of Johannesburg v Changing Tides 2012 (6) SA 29 (SCA)* where it was held that an eviction is just and equitable if alternative accommodation is made available.

Perhaps it was the particular circumstances in the Baron case where the group resided on private property for five years (prejudicing the property rights of the landowner) that led to the decision of the Court, but the approach taken by the Court in the above case can be contrasted to the approach in *Occupiers of Erven 87 & 88 Berea v De Wet NO and Another 2017 (5) SA 346 (CC) (Occupiers)*.

In this matter, the Court highlighted that the judicial officer presiding over eviction proceedings must apply his/her independent judicial mind and take an active role to understand the personal circumstances of the evictees, protect their human rights and balance the housing rights of the evictees with the property rights of the landowner. The Court further clarified that judicial officers in lower courts must adhere to constitutional imperatives and precedent set by the superior courts when determining whether an eviction is just and equitable. It can be argued

that adequate housing would be one of these constitutional imperatives.

What is adequate housing?

South Africa ratified the 1966 United Nations International Covenant on Economic, Social and Cultural Rights (the Covenant) on 12 January 2015. Article 11.1 of the Covenant states that the States Parties to the Covenant recognise the right of everyone to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions. It further provides that States Parties will take appropriate steps to ensure the realisation of this right.

As such, the Covenant recognises that conditions such as availability of basic services and infrastructure (e.g. durable building structures, safe drinking water, adequate sanitation and adequate refuse disposal), habitability (e.g. physical safety and adequate space) and location (e.g. housing in close proximity to employment opportunities, educational institutions, healthcare institutions) must be fulfilled in order for the housing to be deemed as "adequate". It can be argued that these conditions are as significant

as the basic supply and availability of housing. South Africa's TRAs have faced constant criticism for failing to adhere to some of the abovementioned conditions.

Conclusion

Although the provision of alternative accommodation by municipalities is commonplace during eviction proceedings, it may be time to examine the adequacy of the alternative housing provided. South African courts have not expressly defined "adequate housing" but it is clear from *Occupiers* that judicial officers must take an active role when considering constitutional imperatives and precedent set by superior courts. Section 26 of the Constitution and the Covenant emphasise the significance of "adequate" housing. It is understandable that the right to adequate housing is to be progressively realised (especially in light of limited State resources), but considering the inextricable link between the right to adequate housing and the right to human dignity one can acknowledge that the pace of this progressive realisation is too slow for many vulnerable people in South Africa. ●

