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Consultation with the Gauteng Community Advice Office Paralegals

The Johannesburg Office had our first meeting on Thursday 26 May 2022, with the Community Advice Offices (CAOs) we are working with. The purpose of the meeting was to discuss the projects for the year ahead, to determine the progress and challenges they experienced, while also engaging in powerful conversations on the justice system as well as its accessibility to victims of gender-based violence.

The CAOs also highlighted evident changes in the legal needs within their communities since the COVID-19 pandemic, stating that community members are in greater need of labour and housing-related legal assistance.

We have seven CAO partners in the Gauteng province. These are meant to be the first points of contact for community members in need of legal assistance:

1. Human Rights Centre (Dobsonville)
2. Kempton-Thembisa Advice Centre (Thembisa)
3. Musawamaswazi Community Organisation (Zola)
4. Ntsu Community Advice Office (Mabopane)
5. Human Rights Advice Centre (Orange Farm)
6. Thusang Morwalo Advice Centre (Kagiso)
7. Women And The Law Advice Centre-WATLA (Thokoza and Katlehong)

We would also like to congratulate the paralegals who received compliance certificates for report writing. These certificates are accredited by Imisimbi Training. Well done to Mrs Rita Tladi (WATLA) and Mr Jojo Mashaba (Kempton-Thembisa Advice Centre) on their achievements!

We would like to acknowledge the support of the C S Mott Foundation for this project.●

The Procedural Flaw in the Asylum Seeker Application Process

By Kgomotso Leshabane, Johannesburg intern

Although South Africa has one of the most progressive asylum laws and exceptional refugee protection frameworks in the world, the disunion between law and practice has allowed the blatant disregard of the law to thrive. The safety and security of the refugees who come to South Africa in the hopes of escaping the injustices of their homeland is internationally regulated by The Universal Declaration of Human Rights ("UDHR, 1948") which is the foundation of international human rights, and, more directly, by the 1951 Refugee Convention (1951 convention) and its 1967 Protocol. In South Africa, The Refugee Act 130 of 1998 ("The Refugee Act") was enacted to give effect to the 1951 convention, while some rights enshrined in our Bill of Rights, such as the right to equality, human dignity and just administrative action are afforded to all persons within South Africa.

Applying for Asylum

When refugees legally cross the border, they must seek asylum from Department of Home Affairs (DOH) officials at the border who will then issue them with an asylum transit visa that will allow them 14 days to report to the Refugee Reception Office (RRO). If a refugee enters the country illegally, they must immediately report to the RRO. Once at the RRO, the first step is for the refugee to apply for an asylum seeker permit (section 22 permit) which requires that the refugee applicant ("the applicant") must fill in the application form and be interviewed by the refugee reception officer before having their biodata and photos captured. Once this is done, the applicant will be issued with a section 22 permit (Asylum Seeker Temporary Visa) which is valid for six months.

Before the section 22 permit expires, the refugee is expected to return to the RRO for a second interview with the Refugee Status Determination Officer (RSDO). After this interview the RSDO must issue a written decision to either grant the applicant refugee status or reject the application as unfounded or manifestly unfounded, abusive or fraudulent.

The RSDO Rejection

The RSDO is obligated to provide the applicant with a written decision that sets out the reasons for rejecting the application. If the application is rejected as "unfounded" (section 24(3)(c) of The Refugee Act) it may be because the applicant's reason for leaving their country is in line with the Refugee Act and therefore affording them refugee status, but the RSDO needs further motivation. In such a case the applicant is afforded an opportunity to appeal the decision within 30 days. If the application is rejected as "manifestly unfounded, abusive or fraudulent" (Section 24(3)

(b) of The Refugee Act) it may be because the refugee mentioned a reason for applying for asylum that is not recognised in The Refugee Act. This rejection is automatically referred to the Standing Committee for Refugee Affairs (SCRA) within 10 working days to either confirm, set aside or refer it back to the RSDO for reassessment. Additionally, if the applicant's application is rejected as manifestly unfounded, the applicant is entitled to be furnished with written reasons within 5 working days from date of rejection by the RSDO or referral to the SCRA.

The "manifestly unfounded" procedural flaw

It is a common occurrence that applicants are not fully informed, if at all, about the asylum application procedure. They are unaware of the fact that even after the RSDO has formally rejected their application on the basis that it was manifestly unfounded, the RSDO is obligated to renew the applicant's temporary asylum seeker permit until the SCRA has reviewed the decision.

In some recent cases, clients have come into the refugee clinic at ProBono.Org seeking assistance after being furnished with a letter from both the RSDO and the SCRA that informs the clients of their decision to reject their application on the basis that it was manifestly unfounded. The letter does not set out the reasons for that decision and further expresses an expectation for the applicant to appear within 14 days for the purpose of deportation because they are now considered to be staying in the country illegally. The RRO does this with a blatant disregard of the fact that it has taken the SCRA years to review the decision by the RSDO and in some cases that the RSDO do not even furnish the applicants with the said decision and reasons before furnishing them with a letter for their deportation. They fail to consider that due to their delay, most of the applicants have already started building a life for themselves in the country with them securing jobs and their children having have started school. Furthermore, the RSDO and the SCRA neglect to inform the applicants of their right to apply to the High Court for a judicial review within 180 days after the date that they received such a rejection.

Conclusion

A refugee, like any citizen of South Africa, is acknowledged by the rights enshrined in the Bill of Rights. This therefore creates an expectation and an obligation on the Department of Home Affairs to ensure a procedural and substantial fairness in how they process each asylum application. This entails providing the applicant with the necessary information so that they can follow all the laws and rules that regulate their application and their stay in South Africa. Every applicant has a right to be furnished with the reasons why their application was rejected, to have the decision made by the RSDO over their application sent to the SCRA for review within 10 working days and the right to apply to the High Court within 180 days for a judicial review of their manifestly unfounded rejection on their application for refugee status..●

The role of a legal practitioner (LP) representing children

By Adv Elsabe Steenhuisen, Children's Project Manager

As we all know, in order to ensure legal representation for a child, in the past we mainly used the application procedure for the appointment of curators – either *ad litem*, and/or *ad persona* and/or *ad bonis*, depending on the type of case at hand. We used Uniform Court Rule 57 in the High Court, and section 33 of the Magistrates' Courts Act in the lower courts.

Since the commencement of the Constitution in 1996 and the Children's Act in 2010, apart from s6(4) of the Divorce Act, more and more cost-effective options have become available.

The Bill of Rights also recognises children's rights to legal representation in that section 28(1)(h) states that "every child has the right to have a legal practitioner assigned to the child by the state and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result". The first definitive judgment on the issue of separate legal representation for a child in a civil matter and the application of s 28(1)(h) of the Constitution was *Soller v G 2003 (5) SA 430 (W)*. The court distinguished between the role of the Family Advocate and a separate LP for a child, but it did not deal specifically with the practicalities of how a child would obtain separate legal representation.

The court in *Legal Aid Board v R 2009 (2) SA 262 (D)* dealt for the first time with the authority of the Legal Aid Board (LAB) to appoint an LP for a child. The court rejected for various reasons three approaches as not being in the best interest of children:

1. Only a presiding judge can order the appointment of the LAB to represent a child;
2. The LAB should obtain permission from a parent or guardian for its appointment;
3. Only a parent or guardian can appoint an LP for the child.

The Children's Act 38 of 2005 contains several sections supporting the view that anyone can approach an LP to decide if it would be in the best interest of the child to represent such a child. See s10 (child participation); s14 (the child's right to bring a matter to court and be assisted to do so); s15 (enforcement of rights); s29(6) (court proceedings; court may appoint an LP); s53 (who may approach the court); s55 (duty of LAB); s61 (participation of children; child expresses view and preference; child as witness); s233 (consent of child for adoption); s279 (LP to represent child in Hague Convention Abduction cases).

Our view at ProBono.Org is that as section 10 creates a valuable general principle that entrenches children's rights to participate in proceedings that will affect them, ProBono.Org, being an independent and non-governmental organisation, tasked to act as a clearing house for the legal profession, may appoint an LP for a child. It is in line with the child's right to participation as set out in the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child.

Trynie Boezaart points out why in Hague abduction applications it is said that in cases where very young children are involved, the role of the legal representative would be more akin to that of ***a curator ad litem***, while with older children, the legal representative would take instructions from the child, act in accordance with those instructions and represent the views of the child. Boezaart further discusses the international law by referring to the Convention on the Right of the Child and the African Charter that provides for children's participation in legal proceedings on the basis of their best interests. (*De Jure Online version ISSN 2225-7160 Print version ISSN 1466-3597 De Jure (Pretoria) vol.46 n.3 Pretoria Mar. 2013*)

The Centre for Child Law at the University of Pretoria supports two models of representation – the client-directed and the best interest models. Each model has to be selected based on the capacity of the child to give instructions and not the type of case. It may even occur that one has to apply both models in the same case because a child may be able to give instructions on some points (use the client directed model) but not on others, either because the child is unable or unwilling (follow the best interest model on those points).

Apart from explaining the difference between the models, the Centre also lists the general obligations of an LP in each instance. (Contact the Centre for a copy).

COMPARISON OF TWO MODELS

Client directed LP	Best interests LP
1. Child directs litigation	1. Child does not give instructions – child's interests are paramount
2. Suitable for children who are of sufficient age and maturity to express a view and give instructions	2. Child either too young or immature or unable due to an ongoing health (mental or physical or both) condition to give instructions, although may be able to express a view/wish. LP must elicit and take it into account
3. The child may participate directly in the proceedings if child wants to and is able to	3. LP stays independent and does not align to another party's position or does not appear to advance another party's position
4. Standard LP-client relationship exists as discussion and negotiation between client and LP take place	4. LP has more contact with parents and other role players
5. Parent's involvement to be limited as early as possible. The reason is that the LP is that of the child and not of the parent	5. Recommendations are based on legal considerations and examination of factual and expert evidence. NOT to make intuitive assumptions and decisions
6. Best interests determination is left for the court to make	6. Best interests determination is left for the court to make

In conclusion, consider following these next steps in dealing with a referral from ProBono.Org to represent a child by asking yourself:

1. What model should I follow? (Either of the two, depending on the child's capacity to give instructions, and sometimes both models as explained above).
2. When would it be a hybrid approach? (Determine if the child is able to give instructions on some points (use the client directed model) but not on others, either because child is unable or unwilling (follow the best interest model on those points)).
3. Is my role to determine the capacity of the child? (No, but to consider if a child is willing and developmentally able to express a view as to the direction of the litigation.)
4. If it is a matter of "care and contact", which court should I approach? (Generally, you have a choice – either the High Court or the Children's Court. If the Children's Act makes provision for a certain class of people, like the unmarried fathers or grandparents, the most appropriate court is the Children's Court).
5. If it is a matter of "care and protection", which court should I then approach? (Only the Children's Court).●

Canadian Law Students visit ProBono.Org

By Xoliswa Maaroganye, Communications Intern

From left to right:

Samantha Misner, Teresa Yates (ProBono.Org National Director), Mikaela Cheslock, Mpho Mogodi (ProBono.Org staff attorney), Serena Meghji and Calaeb Goff.

On 12 May we were visited by four Canadian law students who, through the SASLAW pro bono fellowship programme, were afforded an opportunity to visit South Africa for a period of three months. The purpose of the programme is for the Canadian fellows to learn about areas of law dealt with by organisations within the SASLAW umbrella. Three of the fellows are from the University of Toronto and the other from Western University. The University of Toronto has an International Human Rights programme through which the students were able to apply for this fellowship. Fasken Attorneys hosted them for the week they spent in Johannesburg and introduced them to ProBono.Org.

From our interaction with the students, we realised that Canada is also grappling with the same issue as South Africa – access to justice for all. Moreover, access to justice is not just a South African or Canadian problem; all over the world, people are striving for fair and equal access to justice.

During their visit to our office, the students were given a tour of Constitution Hill, the old prisons and the Constitutional Court.

We were very happy to have been able to host the students and tell them about our work. We wish them all the best with the rest of their tour around the country and hope that they also had a wonderful experience with us! ●

Staff News

Farewell to Sibusiso and Welcome Koketso

By Xoliswa Maaroganye, Communications Intern

Sibusiso Makhukhule

Koketso Masipa

At the end of May we said farewell to Johannesburg intern Sibusiso Makhukhule, whose one-year contract came to an end. He made an invaluable contribution to the deceased estates department and has expressed his gratitude for the experience gained. We wish him success in his next chapter and the very best moving forward.

Koketso Masipa joined us as Sibusiso's successor on 1 June 2022. Koketso was born in Tzaneen and raised in Soweto, Johannesburg.

He obtained his LLB degree at the University of South Africa and did Practical Legal Training at LEAD. He is presently preparing for the attorney board exams.

Koketso is ecstatic to have an opportunity to work for a public interest organisation as he hopes to aid in alleviating social injustice in the country post-apartheid and contribute to bringing positive change to people's lives through his knowledge and expertise as well as gaining exposure to the profession and broadening his knowledge.

In his spare time Koketso enjoys watching soccer and is an avid Barcelona fan. He is also passionate about marketing and branding as well as keeping up with the latest fashion trends!●

Guest Slot

By Percy Koketso Motiang, LLB (UNISA)

A proviso in an Act of Parliament is invalid if it is inconsistent with the Constitution

After a long period of unfair discrimination experienced by spouses who concluded their marriage after the commencement of the Matrimonial Property Act on 1 November 1984, the Pretoria High Court came to their rescue on 11 May 2022 and held that; the exclusionary time-bar found in s 7(3)(a) of the Divorce Act 70 of 1979 is inconsistent with the Constitution and invalid to the extent that it limits its application to marriages that were entered into before the Matrimonial Property Act came into operation. On careful scrutiny, in my opinion this judgment has made a positive turn with regard to exercising equality as envisaged in s 9(1) and (3) of the Constitution. Taking into consideration the complexity of the law, it is fair to acknowledge different views towards this judgment.

Even though it is understood that gender equality has been realised in South Africa, it is still an undisputed fact that many women enter into marriages on a weaker footing than men. Thus, women often find themselves under unfortunate financial strain when their marriage comes to an end. This being one of the initial reasons behind the insertion of s 7(3)(a) in the Divorce Act, the reality is that this inequality still persists, and turning a blind eye to it will only perpetuate this imbalance. In avoiding to be one sided, not only does this exclusionary time-bar have a negative impact mainly on women, but men can also find themselves in this unfortunate position.

As we are still waiting for the Constitutional Court's confirmation in terms of s 172(2)(a) of the Constitution, I will put forth the basis on which this judgment was extrapolated. It is unjustifiable to fail to extend the application of this provision (s 7(3)(a)) to marriages that were concluded after the commencement of the Matrimonial Property Act. As clearly emphasised in s 7(4) of the Divorce Act, each case will be judged on its own merit, taking into consideration the actual contribution by the party in whose favour the order was granted and whether that contribution directly or indirectly increased the estate of the other party during the subsistence of the marriage, either by saving of expenses which could have been incurred or rendering of services, or any other reasonable manner to be accepted by the court.

To say that the law was not made to protect foolish acts, whereby spouses who are at a disadvantage failed to take into account the consequences of their marriage together with concluded agreements, it is equally unreasonable to then condone unfairness fuelled by the time-bar in terms of s 7(3)(a). The disadvantaged spouses after the ending of their marriages find themselves financially marooned despite having contributed to the increased estate of the other spouse. In my conclusion, the High Court reached the correct decision and in my view it will only be reasonable for the Constitutional Court to concur with this finding.●

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 2022

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