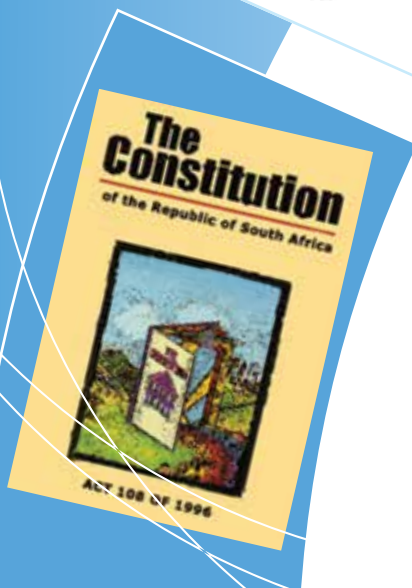
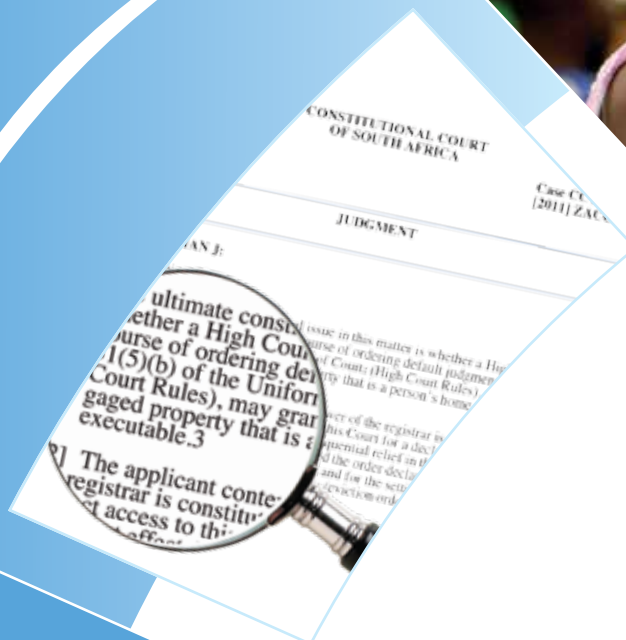


Impact Litigation

"Giving content to our rights"



Legal Aid
South Africa

Your voice. For justice.

Independent and within reach.

March 2014

VISION

- A South Africa in which the rights enshrined in the Constitution are realised and upheld and responsibilities are complied with to ensure equality, justice and quality of life for all.

MISSION

- To be a leader in the provision of accessible, sustainable, ethical, independent and quality legal services to the poor and vulnerable.

VALUES

- Passion for Justice
- Ubuntu
- Integrity
- Accountability
- Service Excellence
- People Centred Development



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1. CEO'S MESSAGE

Legal Aid South Africa, has through its Impact Litigation Booklet, once again demonstrated its continued commitment to ensuring that the rights enshrined in our Bill of Rights are realised. In so doing, the Impact Litigation Unit (ILU) has committed itself to working towards ensuring that the Constitutional promise of justice for all becomes a reality.

In order to realise the rights enshrined in the Constitution, the Impact Litigation Unit has continued to litigate and fund cases that impact on the lives of ordinary South Africans. Particular focus has been placed on ensuring that the grievances of the otherwise voiceless and vulnerable members of our society are heard and deliberated on by our courts. In this way, the Impact Litigation Unit has contributed to a society that respects the rule of law, which is essential in a functioning constitutional democracy such as ours.

The cases taken on by the Impact Litigation Unit have achieved an outstanding success rate of 97%, which is once again an indication of Legal Aid South Africa's commitment to creating a meaningful impact through litigation. The selection of cases undertaken by the Impact Litigation Unit is done in terms of the requirements contained in the impact policy, which is contained in the Legal Aid Guide (available on www.legal-aid.co.za). The Unit receives cases through the following channels:

- Cultivates its own cases, which, after careful research and analysis, it feels can address certain systemic issues, create a new precedent, clarify an uncertain area of the law or assist in alleviating the plight of a community or sector of a community;
- Receives cases from the Legal Aid South Africa Justice Centres throughout the country; and
- Collaborates with various outside stakeholders who have a proven track-record within the arena of public interest litigation.

The foresight of Legal Aid South Africa in establishing high court units to deal with civil matters has increased the capacity of the justice centres to identify and take on relevant impact cases. This is portrayed by the number of impact cases emanating from Justice Centres in both urban and rural areas. This has reversed the previous trend, whereby the Impact Litigation Unit sourced most of its cases from non-governmental organisations, specialist university law clinics and private law firms, to where most of the cases come from the offices of Legal Aid South Africa. This is most encouraging and will increase the total number of civil cases taken on by Legal Aid South Africa.

The Unit has reviewed its Strategic Impact Litigation Plan 2012/2017 for the period of 2014-2015, which has been accepted by the Board of Legal Aid South Africa. As a result hereof, the Unit is incrementally increasing its scope of work. In this regard, I have against the backdrop of rising levels of unemployment and increasing instances of service delivery protests steered the Unit in a direction whereby increasing emphasis is placed on litigating cases focusing on socio-economic rights, as well as protecting the rights of vulnerable women and children in need of care and those in conflict with the law. In addition, the Unit has continued to prioritise the best interest of the child and cases of this nature are depicted in this booklet.

The success of the Unit is further illustrated by the favourable responses received by members of the judiciary both at a High Court level and at a Constitutional Court level. This is evidenced by judges referring



Vidhu Vedalankar
**Chief Executive Officer –
Legal Aid South Africa**

matters to the Unit. The Unit is furthermore, receiving attention internationally by way of the various interns that have requested to spend time at the Unit in order to better understand the South African Constitution and jurisprudence.

In conclusion, Legal Aid South Africa is immensely proud of the work done by the Impact Litigation Unit, and remains committed to the advancement of the rights of all South Africans so as to ensure that the rights enshrined in our Constitution become a lived reality for all.

2. MESSAGE FROM THE CHAIRPERSON OF THE LEGAL AID SOUTH AFRICA LEGAL SERVICES COMMITTEE, PROFESSOR YOUSUF VAWDA

It gives me great pleasure and satisfaction to announce the fourth publication of the Impact Litigation Unit's booklet. Legal Aid South Africa introduced an Impact Services Policy in January 2004, and established the Impact Litigation Unit to address the needs of poor and marginalised communities - the discrimination faced by black women in particular as a result of their race and gender, and to give a voice to the basic needs of children in need of care and those who find themselves in conflict with the law.

Legal Aid South Africa has identified three broad categories through which it gives content to the provisions of the Impact Litigation Policy. These are:

- (i) to establish a legal precedent, jurisprudence or clarify aspects of the law that will be followed in dealing with indigent persons, when the opportunity exists;
- (ii) to undertake matters which have the potential to resolve a large number of disputes, either by class action or by litigation of a small number of strategically-selected cases ;and
- (iii) to materially improve the lives of a group or a significant segment of a group, where the potential exists, through strategic intervention and rendering of non-litigious services. These legal services may be rendered by salaried legal practitioners employed by Legal Aid South Africa, the Impact Litigation Unit, or practitioners in private practice or a co-operation partner of Legal Aid South Africa, a law clinic or any combination of the above.

This publication provides Legal Aid South Africa with the opportunity to share with the legal fraternity and the public at large how strategic litigation can be utilised as a tool to achieve meaningful changes in the lives of ordinary South Africans. In so doing, Legal Aid South Africa remains true to its own vision and mission. Our vision is to contribute to a just South Africa in which the rights enshrined in the Bill of Rights

are protected, promoted, respected and fulfilled to ensure justice for all. By offering the indigent and the marginalised the opportunity to have their "disputes resolved by the application of law in a fair and public hearing before a court, or where appropriate another independent and impartial tribunal or forum", Legal Aid South Africa is directly involved in making justice accessible to all. As a result of our concerted efforts to make justice accessible in both criminal and civil matters, we are contributing to restoring the public's confidence in the rule of law, a cornerstone of any functioning democracy.

The success of the Unit's work is borne out by case discussions on matters relating to the rights of children in conflict with the law not to be detained with adults. and to be treated in a manner and held in conditions that take into account the child's age. The cases also deal with, among others the rights of HIV positive prisoners to have access to antiretroviral medication in prison when convicted and sentenced, even under extradition conditions.

In keeping with the values and the spirit of the Constitution, the Impact Litigation Unit represented a young refugee in assisting a Court to determine his physical age, so that his rights could be protected under the Child Justice Act 75 of 2008. Furthermore, the "best interests" of the child have been upheld and protected in several cases dealing with the welfare of children. Strategic litigation has resulted in grandparents being included in the definition of "foster caregivers" and this has resulted in children living with their



Professor Yousuf Vawda
**Chairperson – Legal
Services Committee of
the Board**

2. MESSAGE FROM THE CHAIRPERSON OF THE LEGAL AID SOUTH AFRICA LEGAL SERVICES COMMITTEE, PROFESSOR YOUSUF VAWDA continued

grandparents now being eligible to receive foster care grants.

Most service delivery protests in South Africa are centred on the right of access to housing, potable drinking water and waterborne sewerage. The right not to be evicted without a court order was relied upon to oppose the eviction of single black women from houses they occupied for years. Their right to security of ownership was upheld by challenging an antiquated apartheid law, which deemed black women to be minors and therefore incapable of owning property.

These may not be headline-grabbing cases, but make a world of difference to those affected.

Legal Aid South Africa is well known for its representation of accused in criminal matters and for assigning legal representation to the accused at state expense if substantial injustice would otherwise result. However, not much is known about our intervention in class actions on behalf of poor and vulnerable members of our society. Legal Aid South Africa is extremely proud of the

settlement obtained on behalf of ex-gold miners in the long running Silicosis matter. Legal Aid South Africa, together with its co-operation partner, the Legal Resources Centre, with advice and support from Solicitors Leigh Day of the United Kingdom, finally extracted a settlement from Anglo America South Africa Limited, after nine years of litigation. The settlement came at a time when many of the claimants had already succumbed to the illness and died. The beneficiaries of those that have died have been included in the provisions of the settlement which, by agreement between the parties, will remain confidential.

The cases summarised in this booklet highlight the tangible advances of Legal Aid South Africa in making the Constitution a living reality in the lives of indigent and marginalised members of our society.

In recording these stories, we pay tribute to the women, men and children who courageously participated in, and to the dedicated lawyers and experts who helped prosecute, these important cases. Without them, there would be no story to tell.

3. MESSAGES OF SUPPORT

LAWYERS FOR HUMAN RIGHTS

National Office
Kutlwanoong Democracy Centre
357 Visagie Street, Pretoria 0002

Tel (012) 320 2943
Fax (012) 320 2949/7681.
Web www.lhr.org.za

7 March 2014

ATT: Ms Vidhu Vedalankar
Chief Executive Officer
Legal Aid South Africa
Braamfontein

Dear Ms Vedalankar,

This year, Lawyers for Human Rights will be celebrating its 35th anniversary as one of South Africa's leading human rights organisations devoted to social justice activism and public interest litigation. Throughout these years, Legal Aid South Africa has shared a common goal to secure greater access to justice for poor and marginalized communities in South Africa.

Public interest litigation plays a vital role in the development of South Africa's constitutional democracy and is an important part of LHR's advocacy strategy which includes social mobilisation, policy advocacy, public awareness and research. We are grateful for the ongoing financial assistance given by Legal Aid South Africa in support of LHR's strategic litigation programme, particularly in the areas of refugee and migrant rights, access to justice and the prevention of unlawful rural and urban evictions.

In 2013/14, Legal Aid South Africa has been providing financial support to LHR in pursuing the following human rights litigation:

Grootkraal evictions: LHR represents the Grootkraal farmworker community near Oudtshoorn in the Western Cape who have been living and working for almost 200 years in that region. Recently, the new landowner has sought to evict off the land the school and community centre which were established more than a century ago.

Securing access to justice for immigration detainees: Unlawful immigration detention remains one of the greatest concerns for access to adequate protection under the Refugees Act for asylum seekers and recognised refugees in South Africa. Legal Aid SA is collaborating with LHR to develop the law to secure the right of all detainees held in terms of the immigration and refugee laws to have their detentions reviewed by a court *in person* as soon as reasonably possible and within the confines of the Constitution.

Legal Aid SA's has proven instrumental in ensuring that, through its programmes and funding, communities are able to access all levels of courts in this country and are able to defend their rights and fully participate in society.

We are looking forward to continuing our relationship with Legal Aid SA.

Yours sincerely,



JACOB VAN GARDEREN
NATIONAL DIRECTOR

3. MESSAGES OF SUPPORT continued



Attention: Natasha Wagiet
Legal Aid South Africa
Impact Litigation Unit
By e-mail: NatashaW1@legal-aid.co.za

Dear Ms Wagiet

LETTER OF SUPPORT

4 December 2013

1. SECTION27 is a public interest law centre that seeks to influence, develop and use the law to protect, promote and advance human rights. Our activities include research, advocacy and legal action to change the socio-economic conditions that undermine human dignity and development, prevent poor people from reaching their full potential and lead to the spread of diseases that have a disproportionate impact on vulnerable and marginalised people.
2. We write to express our support for the work of Legal Aid South Africa. Our organisations share a common objective of ensuring that access to legal services and justice is available for all, including the marginalised members of society. Throughout 2013 we have collaborated on several cases that demonstrate our mutual commitment to realising this goal. We have established a positive working relationship that continues to grow.

S v Tsundzukani

3. In March, SECTION27 provided support Legal Aid South Africa on a matter which hinged on the laws around bullying. Tsundzukani Mthombeni, a grade 11 learner shot and killed a fellow learner with his mother's gun which he took without her permission. His actions were triggered after he was persistently bullied at school.
4. Legal Aid South Africa represented Mr Mthombeni and enlisted SECTION27's assistance in conducting research into the legal framework around bullying and the psychological effects on children who are victims-turned-bullies. This contributed to a stagnant area of law and seeks to protect and advance the law on bullying of children in schools.

De Vos v Minister of Justice and Constitutional Development

5. We were approached by Legal Aid South Africa for research support on a case of an intellectually disabled person accused of murder who was detained under section 77 of the Criminal Procedure Act 51 of 1977 due to lacking the capacity to appreciate the procedure of his trial.
6. Legal Aid represented Luwellyn Stuurman in the Western Cape High Court and challenged the constitutionality of the judge's discretion in detaining Luwellynb.

7. SECTION27 made an application, as an interested party, to intervene as *amicus curiae* in the Western Cape High Court. We challenged the constitutionality of this section as it infringed on the defendant's rights to freedom of safety and security, dignity and the right to equality in its failure to address the needs of people with mental illnesses or defects.

8. People with intellectual disabilities are a marginalised group and their rights are a largely unresearched area of the law. The work of Legal Aid South Africa's Impact Litigation Unit has brought the spotlight onto the constitutionality of detaining such a group and allowed room for engagement on the statutory understanding of intellectual disabilities and mental illness, and its differences.

Mphikeleli Lover Phiri

9. Since October we have also been in discussions with the Impact Litigation Unit regarding a possible *amicus curiae* intervention on the impact of the criminalisation of the transmission of HIV for persons who are aware of their HIV status. In the Lover Phiri case, the accused is convicted of attempted murder for infecting an HIV negative person whom insisted on using a condom which the accused refused to.

10. This matter will potentially examine the implications that such criminalisation could have on public health, HIV and its stigma, and would certainly contribute to the developing area of HIV discrimination law.

Conclusion

11. SECTION27 commends Legal Aid South Africa for the matters they have undertaken, especially in areas that impact on public healthcare.
12. We are keen to provide further support to Legal Aid South Africa on the work that they are doing as we recognise the important contribution such collaboration can have on the development of such public interest and human rights law.
13. We look forward to a continued relationship with Legal Aid South Africa's Impact Litigation Unit that is based on our shared values of ensuring access to justice and respect for the rule of law and the rights enshrined in our Constitution.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Heywood'.

Mark Heywood
Executive Director

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Income Tax Exemption Reference Number: PBO 930022549. Nonprofit Organisation Registration Number: 055-382-NPO
SECTION27, a section 21 company (2006/021659/08) and a registered law clinic, is formally associated with the School of Law at the University of the Witwatersrand, Johannesburg.
Board of Directors: Ms V. Dubula (Chairperson), Justice J. Kriegler (Deputy Chairperson), Mr N. Ndlovu (Treasurer), Prof. G. Abdoel-Karim, Dr B. Brink, Ms A.L. Brown, Prof. S. Fonn (ex-officio), Mr M. Heywood (Executive Director), Prof M. Pieterse (ex-officio), Ms T. Steel, Justice M.Z. Yacoob.



LEGAL RESOURCES CENTRE

NPO No. 023-004

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National Office

16th Floor Bram Fischer Towers • 20 Albert Street • Marshalltown • Johannesburg 2001 • South Africa • www.lrc.org.za

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Mr Achmed Mayet
Senior Litigation Attorney
Impact Litigation Unit
Legal Aid South Africa
29 De Beer Street
Braamfontein 2017

Dear Achmed

RE: IMPACT LITIGATION UNIT LETTER OF SUPPORT

For some years, the Legal Resources Centre (LRC) has developed a good working relationship with Legal Aid South Africa, in particular its impact litigation unit through which the fulfilment of the LRC's mission and vision is supported.

Legal Aid South Africa, (LASA) has provided funding for legal work which is undertaken and has the potential to positively affect the lives of a large number of indigent, poor and vulnerable persons. One clear example is their financial support of the LRC's Constitutional Litigation Unit's silicosis matter, *Blom & others v Anglo American SA Ltd*, where we represented miners whose health was compromised by exposure to gold-mine dust. This matter recently settled in September 2013. It had run for almost ten years. In terms of the settlement agreement, Anglo American undertook to pay a sum of money to our clients' without admission of liability by Anglo American. The remainder of the terms of settlement are confidential – based on the ten years of recognition by LASA of the plight of tens of thousands of workers – led to their continued support. The LRC would not have been in a position to litigate this case with the team that it had, for the period that it took, without this support.

In a closely related matter, LASA is also assisting with the class action that the LRC has recently undertaken, that is, *Bongani Nkala & others v Harmony Gold Mining Co & others*. This case is the first of its kind in South Africa, where a certification of a class is sought against 32 gold mining companies. The LRC, together with two other South African based law firms, Richard Spoor Attorneys and Abraham Kiewitz Inc, represent 56 representative plaintiffs who have all contracted either silicosis, silico-tuberculosis or tuberculosis.

29 November 2013

National Office: Cape Town: Durban: Grahamstown:

Johannesburg:

Constitutional Litigation Unit:

The recognition by LASA of the value of working together with various parties to serve the interests of poor and marginalised communities has extended the ability of us all to enable access to justice and to advance the rights enshrined in our Constitution.

We believe that LASA plays a vital role and appreciate its focus on service and are grateful for the cooperative and fruitful interaction that exists between us.

Yours faithfully,



Janet Love
National Director
Legal Resources Centre

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Raleneke (Finance Director)
S Magardie (Director), WR Kerfoot, A Andrews, S Kahanovitz, HJ Smith, C May, M Mudarikwa
MR Chetty (Director), W Holness, C Penn, T Duma
S Sephton (Director), C McConnachie
T Ngokaitobi (Acting Director), N Fakir, S Shirinda, N Wagiet
T Ngokaitobi (Head of CLU), G Bizos SC, B Sibya, J Brickhill, S Nindi, W Wicomb, Z Gumede.

4. INTERNATIONAL HUMAN RIGHTS DEBATE WITH JOHN MARSHALL LAW SCHOOL LLM STUDENTS

On Friday 31 May 2013 students from John Marshall Law School, in the United States of America, visited Legal Aid South Africa and attended a seminar where constitutional law issues were discussed. In particular, discussions focusing on the right to adequate housing and the death penalty were presented by the Impact Litigation Unit.

The students' visit to South Africa is a programme that forms part of one of their LLM course electives. In terms of this programme, they visit various non-governmental organisations, the Department of Justice and Constitutional Development, the Constitutional Court, as well as Legal Aid South Africa.

Whilst attending the seminar, the students were presented with information packs on Legal Aid South Africa. In addition, the role that Legal Aid South Africa plays in South Africa was explained to the students, and constitutional issues were discussed. The students were thereafter taken on a tour of the Legal Aid South Africa Call Centre by Dick Khubana.

The seminar proved insightful, and both the students and their lecturer indicated that they had learnt a great deal and enjoyed the seminar.



Natasha Wagiet and Tshepang Monare.



Students from John Marshall Law School, USA.

5. REFLECTIONS OF A GERMAN LAWYER WORKING AT THE IMPACT LITIGATION UNIT – BURKHARD HOFFMANN

During the last three months of our articles of clerkship in Germany we are able to apply for an internship at any law firm or organisation, both in Germany or abroad. The sole proviso is that the work must be related to legal issues. I decided to make use of the great opportunity to apply for an internship abroad. For me it was clear that I wanted to do something in the field of social justice, in order to learn more about people's needs and legal possibilities for practical improvements.

The dynamic and friendly team of the Impact Litigation Unit (ILU) made my start easy. I received a warm welcome from all sides and people always took time to give advice or other assistance. From the beginning I was involved in litigation and non-litigation matters in different fields of law. This gave me an impression of the conflicts and needs in current South Africa and – of course – also of the activities of the ILU. So, work here is not only about applying established laws. Trying to put social justice into practice often requires research on actual and political circumstances. Only a profound knowledge of the respective situation makes it possible to declare an unjust situation also as unlawful, perhaps in terms of the Constitution. Still, sometimes this seems to be a challenge; social justice does not always fit in the categories “right or wrong” in a legal understanding.

Working in another country was an amazing experience, but also caused some difficulties. Nevertheless, getting a better understanding of different cultures and the needs of each other makes it worth it. I am thankful that Legal Aid South Africa gave me the opportunity to be part of this powerful and active legal institution, of which there is no counterpart in Germany.



Burkhard Hoffmann – an intern from Germany.

6. IMPACT LITIGATION UNIT AND INTERNS



Juanluis Rodriguez
Intern

Juanluis Rodriguez

I have greatly enjoyed interning with Legal Aid South Africa for eight weeks. I started on June 3 2013, without much intimate knowledge of the nuances of the South African legal system. However, I was excited to be working within a new jurisprudence with such great appreciation for human rights. I am so thankful to have had the opportunity to explore my academic passion while helping promote the goals of the Impact Litigation Unit (ILU) and Legal Aid SA. I have worked closely with Natasha Wagiet and Achmed Mayet on impact matters ranging from mental health issues to prisoners' rights. Moreover, I have enjoyed connecting with some of the communities surrounding Johannesburg and attending legal conferences featuring prominent lawyers from throughout the country. Although I will now return to the United States to complete my legal education, I hope to do more work in South Africa in the future.

Hannah Akkerman

To be able to see first-hand how my legal internship at the Impact Litigation Unit (ILU) is benefiting South African residents is an experience I will never forget. My first day began at the Alexandra Township distributing blankets to young leaders caring for their families. To hear their stories and the hardships they suffered was heartbreaking, but to see the hope build in the children's eyes after receiving something as minimal as a blanket for the winter was heartwarming. Although I was nervous beginning an internship in a foreign country without any formal training in the legal system, the feeling of providing aid to the indigent South African community overcame my nervousness.

During my time at the ILU, I have worked on several matters and learned a lot about the South African legal system. I have seen how hard the team at ILU works to fight for justice, and was given the opportunity to be a part of that fight. Whether on a housing or criminal level, the team at ILU really cares about the South African community and the fight for providing justice to all.



Hannah Akkerman
Intern

7. UN PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS, A QUEST ON INCREASING GLOBAL ACCESS TO LEGAL AID: A SUMMARY

The right to legal aid in criminal cases is formally recognised in national legal systems throughout the continent. But, around the world, the right of criminal defendants to receive legal assistance in criminal cases is not always a part of the criminal justice system. Millions of poor people around the world who are accused of crimes are denied access to effective legal representation.

After recognising that criminal legal aid – or indigent defense – “is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law”, in December 2012 the United Nations Commission on Crime Prevention and Criminal Justice (UNODC) adopted the first international Principles and Guidelines on indigent defense at its 21st session. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (the UN Principles and Guidelines) broadly define legal aid to include “legal advice, assistance and representation for persons suspected, arrested, accused or charged with a criminal offence, detained and imprisoned and for victims and witnesses in the criminal justice process”.

They aim to provide a framework which guides member states on how legal aid systems in criminal justice systems should be incorporated into their domestic legal framework. They are drawn from international standards and recognised good practices, which are aimed at providing guidance to countries on the fundamental principles on which a legal aid system in criminal justice should be based. The UN Principles and Guidelines recognise that to bolster public trust in the criminal justice systems and fundamental fairness, all states should guarantee the right to legal aid in the national systems at the highest possible level, including where applicable, in the Constitution to establish the right to a fair trial. Furthermore, states should establish a comprehensive system that is accessible, effective, sustainable and credible. This system should guarantee non-discriminatory access to legal aid for anyone who faces a crime punishable by imprisonment or the death penalty

at all stages of the criminal justice process, throughout the country. In event of access to legal aid being denied, there should be effective remedies. Eventually, special measures should be taken to ensure women, children and groups with special needs have meaningful access to legal aid.

In order to ensure the effective roll out of legal aid, the UN Principles and Guidelines have been paired with Guidelines which are designed to educate the public, including isolated and marginalised groups, suspects, arrested and detained accused of their right to legal aid. Of vital importance is the education of police officers, prosecutors and judicial officers to inform unrepresented persons, whether imprisoned or detained of their right to legal aid and other procedural safeguards.



7. UN PRINCIPLES AND GUIDELINES ON ACCESS TO LEGAL AID IN CRIMINAL JUSTICE SYSTEMS, A QUEST ON INCREASING GLOBAL ACCESS TO LEGAL AID: A SUMMARY continued

This will guarantee the right to legal aid at an early stage of the criminal justice process. In addition, the Guidelines seek to extend the legal representation of unrepresented accused to legal assistance from university clinics, civil society organisations and lawyer's associations supported by accredited paralegals working under the supervision of qualified lawyers.

Subsequent to the adoption of the UN Principles and Guidelines, the UNODC committed itself to increasing awareness and knowledge of the UN Principles and Guidelines among member states and to further assist member states in implementing the UN Principles and Guidelines, thus assisting member states in providing legal aid on a global scale. In providing such assistance, the UNODC will strategically intervene in the implementation of the UN Principles and Guidelines by assisting member states with advisory services, conduct assessments and make recommendations to governments as well as instituting pilot testing using mentors for public defenders. Nevertheless, irrespective of whether the state is a developed state with an existing legal aid system or one that is in the process of establishing a legal aid system, all members states will be curtailed by the budget made available to them. However, the challenge of extending legal aid can make use of the opportunity to enter into co-operation partnerships with non-state legal aid providers such as universities, NGOs and professional associations to increase access to legal aid. The lack of access to legal representation in rural areas – existing in most developing countries – can be filled by trained paralegals that can provide legal aid services to rural communities under the supervision of a qualified lawyer.

Despite some open questions regarding the implementation, the adoption of the UN Principles and Guidelines is groundbreaking because it is the first international instrument on



The Hague, Netherlands.

legal aid and provides a significant milestone in the global development of fair and just systems of criminal justice. Though the UN Principles and Guidelines are not binding on member states, they may be used to set the international norm for criminal procedures. General principles, guidelines and draft international agreements provide a secondary evidence of human rights law, as they are drawn from international standards and good practices and give guidance on the fundamental principles on which a legal aid system should be based. The adoption of the UN Principles and Guidelines by member states should be welcomed as a step in the right direction and one that will affirm respect for the rule of law by taking into account the needs of people irrespective of their age, gender, race or class in the criminal justice system.

This paper was presented by Vidhu Vedalankar, Chief Executive Officer, of Legal Aid South Africa at the International Legal Aid Group (ILAG) Conference which was held during 12 to 15 June 2013 at The Hague in Holland.

8. CASE STUDIES ON GIVING CONTENT TO OUR CONSTITUTION

8.1 *Manana and Others v Presiding Officer of the Children's Court, District of Krugersdorp and Others* (A3075/2011) [2013]ZA GPJHC 64 (12 April 2013)

Children

Section 28(1)(b) of the Constitution: Every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

Section 150(1)(a) of the Children's Act: A child is in need of care and protection, if the child has been abandoned or orphaned and is without any visible means of support.

"When interpreting s 150(1)(a) of the Children's Act no discrimination should be made between those caregivers who owe the children a duty of support and those who do not. This interpretation would be in the best interests of the children and the children will be awarded equal protection before the law."

Legal Aid South Africa, in conjunction with its co-operation partner, The Black Sash, expressed concern that the foster care system failed to assist grandparents and siblings caring for orphaned children. As such, both parties became involved in the successful appeal against a judgment in the Krugersdorp Children's Court where the Court found that a family member who had a duty of care to the child could not be regarded as a foster care parent.

The appeal involved Ms Manana, a caregiver with a duty of support towards her orphaned grandchildren, who was denied appointment as a foster care parent. Ms Manana was thus barred from receiving the foster care grant to assist in caring for her grandchildren. The order was subsequently overturned by the South Gauteng High Court and has resulted in a victory for thousands of orphaned children in the country who were denied a foster care grant because they were in the care of a family member. The ruling has resulted in the spirit of the Children's Act 38 of 2005 being

realised, in that orphaned children will no longer have to be separated from their families in order to qualify for foster care grants.

This matter has clarified the principles of duty of support in terms of section 150(1)(a) of the Children's Act 38 of 2005 and entrenched into law that a caregiver that owes a legal duty of support may be appointed as a foster parent and is entitled to receive a foster care grant. The court furthermore provided guidelines for the enquiry. These included enquiring whether the children are firstly in need of care, and thereafter ascertaining whether the children have a visible means of support. It was stressed that when determining the "visible means of support" the focus needed to be on whether the children had a visible means of support and not on whether the caregiver has a visible means of support.

The confusion surrounding the eligibility of grandparents to receive foster care grants has also finally been clarified, with the result that orphaned children under the care of grandparents now qualify for foster care grants, subject to a financial inquiry being conducted on the caregivers having a common law duty of support.



GIVING CONTENT TO OUR CONSTITUTION *continued*

8.2 *State v Prince Mambewa* Case Number 41/2074/2011

Children

Section 28(1)(g)(i) and (ii) of the Constitution: Every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be kept separately from detained persons over the age of 18 years, and be treated in a manner, and be kept in conditions that take account of the child's age.

This matter surrounds the issue of appropriate age assessments for children, and specifically a child in custody who has been declared an adult by the Court. In this instance, the accused was declared an adult at a Court appearance based on a medical assessment, despite the existence of a birth certificate indicating that he was a minor. The Court's ruling resulted in the child being transferred from a BOSASA youth facility to Johannesburg Prison. This matter was brought to our attention by the Centre for Child Law, and was being handled by the Johannesburg Justice Centre. The Impact Litigation Unit assessed the matter and found that it would be able to provide clarity surrounding age assessments of children, and in particular how to properly weigh evidence in declaring age.

The accused in this instance is Prince Wurayayi Mambewa (Prince), a child and a Zimbabwean national who had been arrested and detained on charges of murder, along with four co-accused. Prince had been held in custody since October 2011 at a BOSASA youth facility awaiting trial. It appears that there was an incident at the facility, following which two age assessments were ordered. The first assessment was a visual examination, and the second was an X-ray of the wrist. In January 2013, it appears that there was a Court appearance where the magistrate made a ruling of age based on these two age assessments. The magistrate declared Prince was an adult. As a result, he was moved to the adult awaiting trial section of Johannesburg Prison.

The father was in attendance at Court on the day when the age assessment was made and advised that the validity of the child's birth certificate was not accepted. In addition, no oral testimony from the child pertaining to his age was allowed, nor was there any testimony from the child's father to this effect.

The Child Justice Act sets out provisions for the determination of age, should this arise as an issue in a matter. The Act, however, does not set out the prioritisation of factors in considering age. This matter thus presented an opportunity to address the issues of "best evidence", the importance of accurate age assessments and the credibility of medical testing. In this regard, the Impact Litigation Unit researched the topic of age assessments and ascertained that the X-ray testing used to assess Prince's age is based on an early 20th century study aimed to gauge skeletal maturity, rather than assessing chronological age. In addition, our research showed that the tests for determining age were race specific and did not take into account inter-racial differences and socio-economic factors.

The Impact Litigation Unit further obtained a signed letter from the Zimbabwean Consulate that indicated that Prince's birth certificate was valid and presented this letter to the magistrate along with representations that Prince was a child, and should thus be removed from the adult section of Johannesburg Prison in terms of the provisions of the Child Justice Act. The magistrate reviewed our submission and ruled that Prince be transferred to the juvenile section of Johannesburg Prison pending a placement at a Child and Youth Care Facility for the duration of the trial. The Impact Litigation Unit sourced a place for Prince at the Walter Sisulu Child and Youth Care Facility, and advised the Court of same. The Court then ruled that Prince be transferred to the youth facility.

This matter has resulted in the reviewing of a previous decision wherein a child was declared an adult. The decision to declare the child an adult was based solely on discredited medical tests despite the existence of documentary evidence, as well as oral testimony. When applying to review this decision, the Impact Litigation Unit relied solely on documentary evidence in the form of the child's Zimbabwean birth certificate,

as well as a letter from the Zimbabwean Consulate attesting to the authenticity of the certificate. The magistrate, when making a decision thus had to weigh medical evidence, with that of documentary evidence. His ruling indicates that there was a shift in the weight awarded to documentary evidence.

Hence, it indicates that when there is documentary evidence that contradicts the findings of a medical examination, the documentary evidence cannot be automatically dismissed, as it is vital when determining the age of an individual.

8.3 The State v Tsundzukani Sooth Mthombeni

Case Number JPV2013/2011

Bullying in Schools

The Schools Act 84 of 1996 in its Preamble commits itself to “uphold the rights of all learners”.

Freedom and Security of the Person

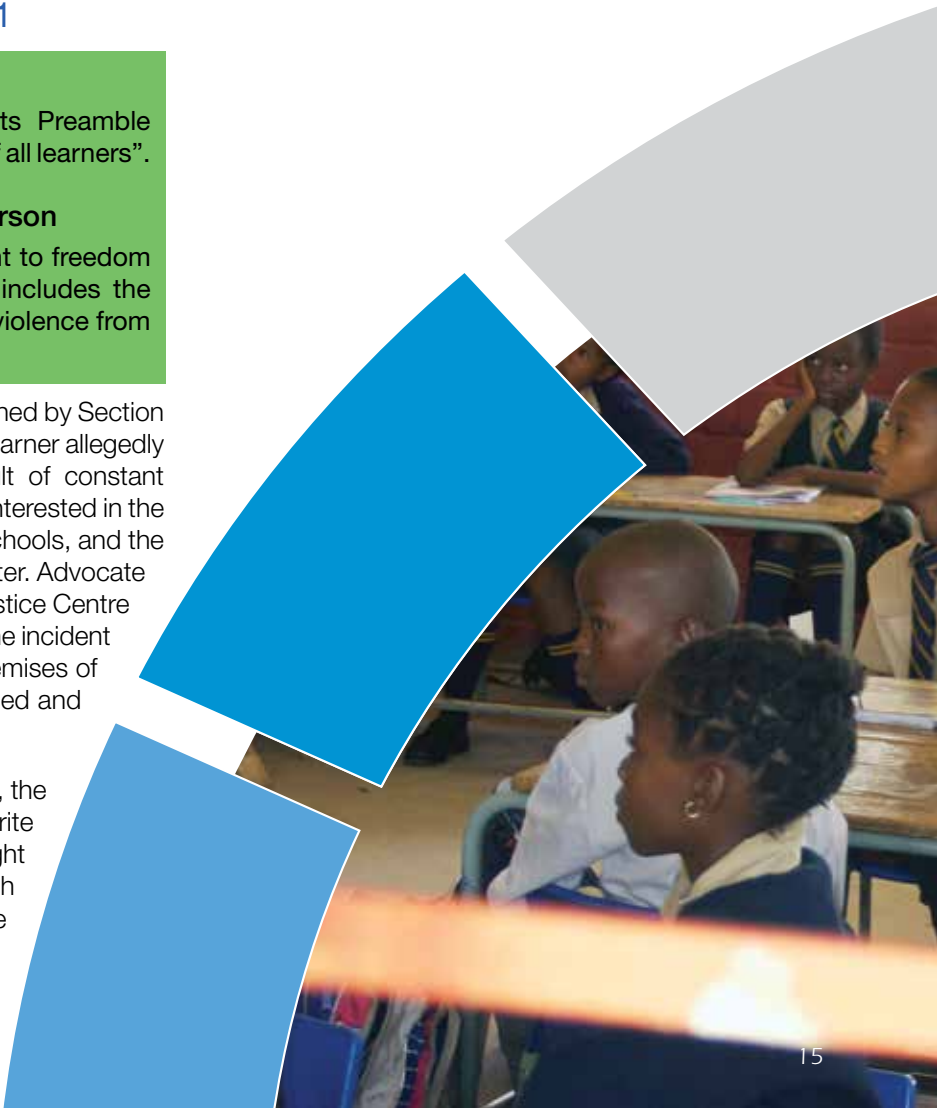
Section 12(1): Everyone has the right to freedom and security of the person, which includes the right: (c) to be free from all forms of violence from either public or private sources;

The Impact Litigation Unit was approached by Section 27 in order to litigate a matter where a learner allegedly shot dead another learner as a result of constant bullying. The ILU has been particularly interested in the issue of bullying that manifests in our schools, and the matter was approved as an impact matter. Advocate William Karam of the Johannesburg Justice Centre has been briefed to argue the matter. The incident occurred in November 2012 on the premises of the school attended by both the accused and the deceased.

It is alleged that on the day of the crime, the accused attended school in order to write his Life Sciences examination. He brought his mother's police-issued firearm with him, as he felt it would offer him some protection from his tormentors. His rationale for carrying the firearm was

to scare his tormentors away. The day prior to the shooting, the accused was attacked after school and this attack was but one incident that he had endured at the hands of his tormentors.

It is further alleged that on the day of the shooting, the accused went to his classroom and conversed with his friends when he was approached by the deceased and other bullies. The accused produced the firearm in order to scare away his tormentors, but they did not relent. The accused also fired a warning shot, but this did not stop his tormentors. On the contrary, the deceased continued to advance towards the accused and even assaulted him.



GIVING CONTENT TO OUR CONSTITUTION *continued*

8.4 The Road Traffic Inspectorate Recruitment Commission of Inquiry (RTI)

On 23 April 2013, the Premier of the province of KwaZulu-Natal appointed a commission of inquiry to investigate and report on the recruitment process of appointing metro police officers in the province, which culminated in prospective candidates participating in a fitness test conducted on 27 and 28 December 2012. The terms of reference included the following:

- (a) the direct and indirect causes and reasons for the deaths or the physical injuries to certain prospective candidates;
- (b) the appropriate and otherwise of all planning, co-ordination, management and administrative processes undertaken for the recruitment process in general and the fitness test, in particular;
- (c) whether or not sufficient medical resources were deployed;
- (d) whether or not sufficient refreshment and ablution facilities were provided; and
- (e) whether or not the act or omission of any person employed in any sphere of government either directly or indirectly, through negligence or otherwise, contributed to the death or injury of any person.

The Commission was entrusted to make the following recommendations:

- (a) towards reconciliation and possible disciplinary action or criminal prosecution with a view to assist in bringing closure to the families and friends of the prospective candidates who lost their lives during, and as a result of the fitness test conducted on 27 and 28 December 2012; and
- (b) on any other matter of whatsoever nature that the Commission deems necessary or appropriate.

The Chief Executive Officer of Legal Aid South Africa, in consultation with the Legal Aid South Africa Board, exercised her discretion to provide funding for the legal representation of the injured and the families of the deceased to protect their interests. Neither the 2012 Legal Aid Guide nor the Legal Aid Act 22 of 1969 make provision for the funding of legal representation



for commissions of inquiry. In exercising her discretion, the CEO took into account that while the Road Traffic Inspectorate had acquired the services of quality legal evidence leaders who were paid for by the Office of the Premier, the prospective candidates who participated in the ill-fated fitness test were not legally represented and could not afford to pay legal fees. However, they required legal representation on the same scale and quality as that of the Road Traffic Inspectorate to ensure a fair hearing.

At the time of publication the Commission of Inquiry was still in process.

8.5 Petrus Johannes Le Grange v Yolanda Le Grange Case number 984/2011

Legal Certainty in Divorce

Section 7(1) of the Divorce Act 70 of 1979: A Court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

This matter involves an appeal to a ruling made by the Port Elizabeth High Court, that a Court was not bound to make a settlement agreement in divorce proceedings an order of Court even if it reflected the wishes of the contracting parties and was not

in conflict with any law. It was decided to take this judgment on appeal because, if allowed to stand, it would have meant that parties divorcing in the Eastern Cape would be dealt with differently to divorcing couples in the rest of the country where the Courts make settlement agreements an order of Court. Such a situation would create legal uncertainty.

"When considering a request to incorporate a settlement agreement its order, the Court hearing the matter must bear in mind that it obtains its mandate to deal with the matter on an unopposed basis, and to exercise its authority in terms of section 7(1) to make an order as envisaged therein from the agreement itself. That being so, should the Court decide to decline to accede to the request of the parties to make their settlement agreement a consent order, the parties should be informed of its concerns and given the opportunity to adequately address them."

The matter was argued by Advocate Lilla Crouse of the Port Elizabeth Justice Centre. The settlement agreement incorporated the manner in which all immovable property would be distributed, as well as all access and custody arrangements pertaining to the minor children born of the subsistence of the marriage, which was agreed upon by the parties in collaboration with the Family Advocate. The Court *aquo* rejected the settlement agreement and went further by making its own ruling, which totally disregarded the terms of the settlement agreement that had been decided upon by the parties after a mediation process.

The Court on appeal found that it would not make sense to prohibit the parties from making the settlement agreement an order of Court, especially since none of the contents of the agreement contravened any existing legislation, and further, all provisions dealing with the minor children were in accordance with the Children's Act 38 of 2005.

It thus follows that in this case the Court enunciated a very important principle, namely, that parties should be able to enter into contractual relationships, such as this deed of settlement, provided that all provisions of these contracts were in accordance with the law.



GIVING CONTENT TO OUR CONSTITUTION continued

8.6 President Steyn Miners' claim against Anglo American for the Contraction of Silicosis

First Gold Miners' Settlement in South Africa

This matter has been a long standing battle waged against Anglo American by 23 miners who worked on the Free State mines, including President Steyn mines until 1998, and their widows and children.

"Epidemic rates of Silicosis and Tuberculosis have occurred in black South African gold mines. Medical experts have described a 'river of disease flowing out of South African gold mines'."

These miners contracted Silicosis and Silicosis-Tuberculosis as a result of Anglo American South Africa's negligent failure to ensure that dust levels in the mines were properly regulated. The claimants were represented by The Legal Resources Centre, Leigh Day (a London-based human rights firm), and Mbuyisa Neale. Funding for the matter was provided by Legal Aid South Africa. Compensation was sought for loss of earnings, pain and suffering, as well as for medical expenses.

It was proven that black miners were tasked with completing the dustiest jobs on the mines, but they were not provided with proper equipment, such as fully functional respirators, to prevent contracting Silicosis. Studies have proven that 20-30% of black miners employed for an extended time during the period up to 1998 tested positive for Silicosis. Furthermore, it has been proven that miners that have contracted Silicosis have a greater risk of contracting Tuberculosis, which is already endemic in rural areas.

The matter was already at an advanced stage when the settlement agreement was concluded, as the parties were due to embark on arbitration proceedings early in 2014.

It was, however, felt that the settlement agreement, which is confidential, was in the best interests of the claimants, as their health was becoming increasingly fragile, and furthermore seven claimants had already passed away during the lengthy proceedings.



8.7 S v LM, Western Cape High Court Case Number A390/2011

Interpretation of Child Justice Act 75 of 2008

Section 85 of the Child Justice Act: Automatic Review by Superior Court in certain instances

The accused in this matter was represented by Advocate Morne Calitz of the Cape Town Justice Centre. The matter dealt with the interpretation of section 85 of the Child Justice Act.

The facts of this matter are briefly that a 15 year old accused was convicted of the possession of one "stop" of dagga in contravention of the Drugs and Drug Trafficking Act 140 of 1992 in the Child Justice Court held at the Cape Town Magistrates Court. The accused was subsequently sentenced in the Magistrates Court and it was ruled that the passing of sentence was to be postponed for a period of one year on the following conditions, namely: That the accused firstly submit himself to the control of a probation officer, and secondly, that the accused in terms of section 297(1)(a)(i) of the Criminal Procedure Act 51 of 1977 appears before the Court, if called upon to do so, before the expiration of the period of postponement.

"It is clear...that the CJA creates a separate and distinct system of criminal justice for children, the legal mechanisms and processes which may be different from those set out in the CPA."

The matter was referred by the Cape Town Magistrate's Court for special review to the Western Cape High Court. In this regard, specific questions were posed. These included:

- Firstly, whether all children under the age of 16 years, who at the time of the commission of the offence were sentenced, whether the sentence imposed was subject to review even though the accused was legally represented;
- Secondly, whether if children of 16 years or older but under the age of 18 years at the time of the commission of the offence were sentenced to any form of imprisonment that was not completely suspended, or whether they were sentenced to an order of compulsory residence in a child or youth care facility, whether the sentence imposed was subject to review even though they were legally represented;
- Thirdly, whether the provisions of section 85 of the Child Justice Act were applicable to children convicted and sentenced in the Regional Court;
- Fourthly, what the effect of section 85 of the Child Justice Act was on a suspended sentence imposed on a child who was 16 years or older, but under the age of 18 at the time of the commission of the offence where otherwise that offence would have been reviewable in terms of the Criminal Procedure Act; and
- Lastly, whether the imposition of a fine for an offence committed by a child was subject to review. The central question that the Court had to answer was thus, under what circumstances the Criminal Procedure Act as opposed to the Child Justice Act would be the applicable piece of legislation to decide matters involving children in conflict with the law who have been accused of committing offences.

The Court considered the arguments presented and ruled that in all of the situations posed before the Court for consideration the sentences imposed would be subject to automatic review.

It was further ruled that the provisions of section 302 of the Criminal Procedure Act were not applicable to any child who was under the age of 16 years at the time of the commission of the offence, and further that the provisions of section 85(1)(b) of the Child Justice Act was not applicable to a child who at the time of the commission of the offence was 16 years or older, but not 18 years or older and on whom a sentence other than that contemplated in section 85(1)(b) is imposed, which includes both a fine and a suspended sentence.



GIVING CONTENT TO OUR CONSTITUTION *continued*

8.8 *CG Goosen NO v MEC, Basic Education Eastern Cape and Others*

Children

Section 28(g)(i) and (ii) of the Constitution: Every child has the right to be kept separately from detained persons over the age of 18 years; and treated in a manner and kept in conditions that take account of the child's age.

The Bisho Reform School opened its doors in January 2011 for children in conflict with the law. Since then and in spite of having 40 children in its custody, the centre has never been functional. As a result of concerns raised by a Port Elizabeth magistrate, one Cornelius Goosen, the Port Elizabeth Justice Centre intervened with an urgent application following an incident that occurred on 6 July 2013, when staff members were attacked, robbed and threatened with rape by the children. It was reported that the officials, including the security guards, were in fear of their lives because the children had become a law unto themselves.

Legal Aid South Africa intervened in this matter as it was best placed to protect the best interests of the children at the facility after having brought a successful application to prevent children in need of care being transferred to a high security facility to be placed amongst children in conflict with the law earlier.

Other management problems at the centre included sexual harassment of personnel, physical assault of personnel and community members, which are further aggravated by the children having access to various forms of drugs. In addition, the children had armed themselves with sharp kitchen knives stolen from the home economics section of the facility. The children had also vandalised the security cameras, lighting and swimming pool pump.

As a result of an urgent application launched by Advocate Lilla Crouse, Senior Litigator at the Port Elizabeth Justice Centre, Judge Mgoli of the Bisho High Court ordered that the children be removed from the Bisho facility and be placed in protective custody

for a period of two weeks pending reports by the Department of Social Development and Department of Education on how best to repair the facility after the serious damage caused by the children and how the rights of these children would be protected in future. In terms of the order granted by the Court, the facility will have to be fully functional by 1 April 2014. The situation is being monitored by Chris Nel of the King Williamstown Justice Centre, who has played an invaluable role in the litigation of the matter.

Legal Aid South Africa acknowledges the good work of certain stakeholders in government that assisted in bringing these serious infringements of the rights of children before the court.

8.9 *Pontsho Doreen Motswagae and 14 Others/ Rustenburg Local Municipality and Others CCT42/12*

Section 26(3): 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. No legislation may permit arbitrary evictions.

The applicants in this matter were in peaceful and undisturbed possession of their homes for a number of years. The applicants are all black women who did not acquire ownership of the properties because under apartheid black women were considered to be minors and could therefore not own property.

When the Rustenburg Municipality failed to evict the applicants from their homes, it decided to carry out renovations near the homes occupied by the applicants. The municipality carried out extensive excavations close to the homes and this resulted in structural damage to the homes. The High Court ruled that the municipality was within its rights to carry out the excavations. Both the High Court and the Supreme Court of Appeal refused leave to appeal. The applicants then filed an application for leave to appeal with the Constitutional Court.

“And the municipality knew that it was interfering with the rights of people to occupy their homes peacefully. This is demonstrated conclusively by the fact that the municipality has consistently (and even in the High Court) offered those people affected by the development, including the applicant, alternative accommodation. The municipalities would not have offered alternative accommodation unless it had concluded that the offer was reasonable necessary in the circumstances. And the offer would be reasonable if, and only if, the particular development would have affected the applicant’s peaceful and undisturbed occupation of their homes.”

It was decided to fund this matter because it raised interesting issues relating to the security of tenure of black women occupying homes in their own name and whether the municipality could circumvent the provisions of section 26(3) of the Constitution that no one may be evicted from their home without a Court order.

The Chief Justice of the Constitutional Court issued a directive in terms of which it required the parties to address the Court on whether section 26(3) of the Constitution or any other law conferred any rights on the occupiers not to be disturbed in the peaceful occupation and possession of their homes without a Court order.

The Court found that section 26(3) of the Constitution is sufficiently wide to ensure protection of the applicants in their occupation of the homes.

More importantly, the Court pronounced that “eviction does not have to consist solely in the expulsion of someone from their home, it can also consist of the attenuation or obliteration of the incident of occupation.”



9. IMPACT LITIGATION UNIT



Impact Litigation Unit

Patrick Hundermark, Natasha Wagiet, Achmed Mayet and Xolisiwe Nzimande.

The Impact Litigation Unit (ILU) based in Braamfontein Johannesburg is committed to working towards giving content to our rights, as well as striving towards the progressive realisation of the rights enshrined in the Constitution. Since its establishment the ILU has continuously sought to achieve maximum benefits for a group of people or a segment of society that may be marginalised and thus vulnerable. The dedication of the ILU in fulfilling its commitment to give content to our rights is highlighted in the case studies and matters that follow in this publication.



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