African Law Review

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The Role of Black Legal Practitioners During the Sixth Parliament

The dramatic increase of mergers and acquisitions since the dawn of democracy

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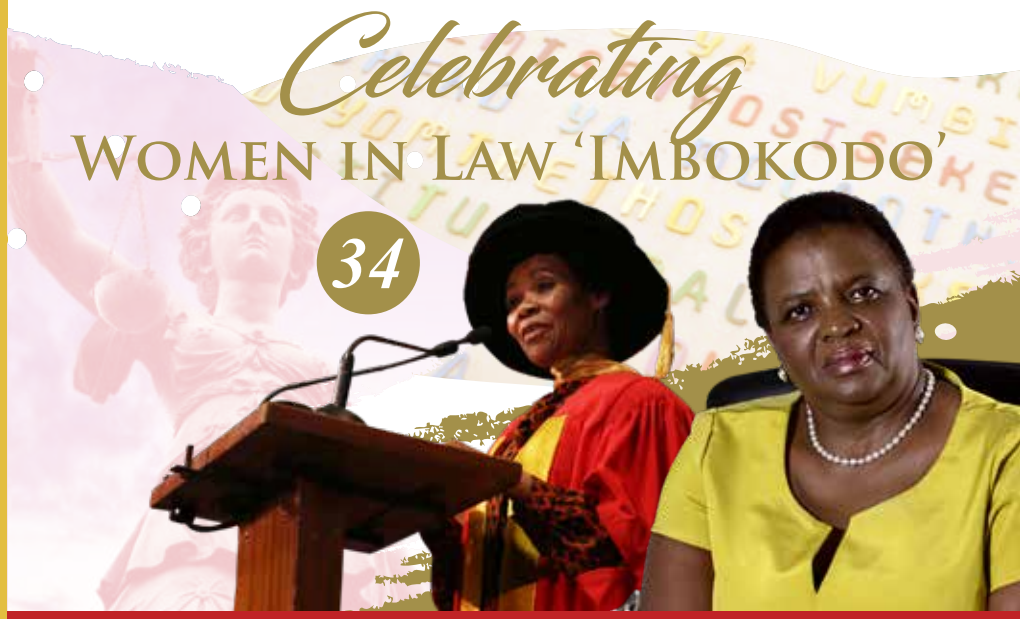

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Hope for legal practitioners during the sixth parliament

Photo credit: Michel Bega Source: www.citizen.co.za

Our country has once again witnessed the triumph and vibrancy of our maturing democracy. South Africans have just exercised their hard-earned franchise in the 8 May elections. The heavily contested polls and virtually calm and peaceful campaigns demonstrated the extent of political tolerance, respect for the rule of law and our common humanity as South Africans across the political spectrum.

The maturity and vibrancy of our democracy forced out bold admissions from politics watchers with the longest memories as many stated: "I have never known an election as difficult to predict as this". Despite sporadic glitches reported across the country, they clearly had no effect on the election process. The elections were declared free and fair by revered international observers despite some outcries relating to allegations of double-voting and other occurrences that may constitute electoral fraud or violation of our electoral code and norms. However, no legal challenges were mounted against the outcome and those who were elected were subsequently declared duly elected. Most importantly, no reports of barbaric or inhumane occurrences were reported post-elections.
The electoral tournament is now over and our elected representatives must commence championing our collective interests in earnest!

South Africa is commended by the international community for its comprehensive and progressive Constitution, which serves as a beacon of hope to nations in strife, conflict and appalling human rights catastrophes. However, the country is also infamous for being one of the most unequal societies in the world. Although, some commendable strides have been made, inequality still prevails, the unemployment rate is still on an upward trajectory and devastating crimes of dishonesty

in vogue. The alleged perpetrators of the latter crimes are unfortunately almost always the "elected representatives". It bears emphasis that the essence of regular elections and a multi-party system of democratic government is to ensure accountability, responsiveness and openness. All political parties represented in the sixth parliament must work tirelessly to curb the scourge of crime, poverty, unemployment and inequality. They must discharge their constitutional function with expected degree of diligence, integrity, tenacity and purpose.

The *African Law Review* will continue to offer legal perspectives on issues affecting the nation and the well-being of its citizenry. Our previous editions have offered varied and illuminating perspectives on how best the country can resolve the land question, and how to combat the stubborn scourge of organized crimes. We have also published articles on issues affecting indigenous people and African Customary Law.

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The current special edition is also devoted to problems and challenges affecting the legal profession and the country in general. This edition demystifies the accountability-enforcing role of the National Assembly. It also deals with the principle of separation of powers, checks and balances and the notion of judicial overreach. It also delves into arguably, the least explored area of our law, Competition or Anti-trust law! In this edition, we focus squarely on mergers and acquisition, its various forms and its socio-economic significance. Just like any other justice-centered legal system, ours also recognises the right to appeal judicial decisions or pronouncements. In this issue, Justice Seriti JA deconstructs the concept of appeal.

Although South Africa has made significant strides in areas of human rights post-1994, indigent members of our communities continues to face challenges when it comes to the accessibility of justice. These are people who reside in communities in which African Customary Law is revered and applied. Although these communities have traditional forums to deal with disputes, there is an indispensable need to modernize these forums (*Khoro, Kgoro*) and to align them to the Constitution and other laws of the Republic.

The Traditional Courts Bill is now in the pipeline. This Bill seeks to regulate the affairs of these Courts/Forums in accordance with the Constitution. It goes without saying that the envisaged Traditional Courts will help bring justice closer to the downtrodden who believes in justice through African Customary Law. Judge Phathudi in his thought-provoking article *"Law and Indigent Communities"*, demonstrates how this Bill, when passed into law, will increase access to justice services by enhancing effectiveness, efficiency and integrity of Traditional Courts in resolving disputes emanating from our traditional communities. Those who resides in these communities are more often than not, indigent people who cannot bear the high costs of protracted civil litigation in the conventional courts and whose legal principles are, worst still, foreign to ordinary citizens. The article also dispels concerns that these courts will inevitably violates the Bill of Rights and undermine our Constitution and the values that perfuse it.

This article tersely shows how the Bill, when ordained as legislation, will affirm the values of customary law and customs in the resolution of disputes based on restorative justice and reconciliation, which are the cornerstones of African Customary Law.

It is, therefore, the collective hope of the editors of this edition that these articles will both contribute immensely to the state of knowledge and stimulate further research and writing into various and important facets of our law, which remains increasingly unexplored.

Note from Editorial Team

The *African Law Review* is still the well-loved and revered journal, which the legal profession has become accustomed to. In 2018, the journal was relaunched to continue giving the legal profession relevant information with its well-researched and thought-provoking articles. In the past, the journal was published up to volume 6 and could not continue being published due to lack of funding. The first issue, after the relaunch of the journal in 2018, was supposed to be volume 7. The current volume 2 you are reading, was supposed to be volume 8 as we are continuing from where we left off.

The *African Law Review* will continue in its relaunched form, keep a look out for our upcoming issues.

Acccountability - The enhancing role of the national assembly

By Adv. Mc Caps Motimele SC: BLA-LEC Chairperson

Freedom and democracy was achieved at a cost of high human sacrifice. The fierce pursuit of constitutionalism, liberty and the reign of a democratic order inevitably led to banishments, judicial executions, torture and political elimination. These were some of the measures imposed to quell dissent, but the resilience and endurance of the human spirit prevailed. Freedom, democracy and constitutionalism was achieved through the relentless efforts of the masses of the people. Their abiding faith in democratic ideals kept their hopes for a democratic, non-racial and non-sexist South Africa alive. During the emancipation struggle, many perished without experiencing the freedom and democracy, they longed for.

The democratic Constitution now enjoins us to honour those who suffered and perished for justice and freedom in our land, and also to recognise the injustices of the past. It calls upon us to pursue justice, to foster socio-economic reform and to promote a functional democracy with accountable office-bearers. All these should be done without seeking vengeance, but sustainable peace, equity and substantive justice.

Ours is a representative democracy and those elected must champion the interests of the electorates. Post-elections, those elected to the National Assembly and the National executive will assume enormous responsibilities that must be discharged diligently and within our constitutional framework. They must pass laws on our behalf that advances socio-economic reforms, eradicate gender-based violence, and youth unemployment, among others. Those in the Assembly must also ensure that the National Executive is accountable. It bears emphasis that those elected to exercise executive authority are the custodians of our resources and same shall only be unleashed for the advancement of our common good. The very nature of a representative democracy dictates that state power and resources shall never be dispersed for narrow, nefarious and self-enrichment purposes.

Two decades into our democracy, the country continues to witness unprecedented levels of corruption, malfeasance and looting at an industrial scale of State resources with impunity. Veritably: "Our constitutional democracy can only be truly strengthened when: there is zero tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real" [1]

To characterise what is happening at our State owned enterprises (SOEs) as mere corruption is a blatant understatement. I would call it pilfering as "corruption" presupposes some human intelligence or sense of morality in theft/thieving. What is happening at our SOEs demonstrate we have lost our moral compass and allegiance to our Ubuntu-based value system, which perfuse our constitutional project. It is the time, for the Assembly in the sixth democratic parliament to sharpen its accountability-enhancing tools to rid our nation of corruption. The Assembly must also play its oversight role without any fear, favour or prejudice. They will do well to resist party-political interest when the need to give practical expression to their constitutional mandate arises.

In line with the principles and standard norms in a representative democracy, the electorate elect representatives to champion their interests. But in most cases, the trappings and prestige of power and high office to some is tantamount to master key to the wealth of the nation. These representatives tend to open the public purse anytime, anyhow and for themselves. With these realities in mind, what now should the members of the sixth democratic parliament do to advance the common interest of the "we, the people of South Africa"? The expectations inspired by the Constitution is that the executive must discharge their constitutional responsibilities diligently and must stay true to their oath or affirmation of office. Members of the Assembly must discharge their obligations to the best of their abilities in line with the oath or affirmation they would have taken. This entails ensuring a culture of executive accountability and also playing a critical oversight roles as warranted by the Constitution.

The country now faces a virtually resilient scourge of crass racism, inequality, unemployment and poverty. Other realities inherited from the past such as racially skewed land ownership

1 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para 54

patterns continues to frustrate strides towards meaningful socio-economic emancipation. The sixth democratic parliament must expedite land reform and craft legislations that seeks to open doors for black South Africans to play a meaningful role in the mainstream economy. The Assembly and the National Executive must underestimate the mighty sword in the hands of the electorates at their own peril, for it is their only direct accountability enforcing tool available to them come the election time. Moreover, the state of our economy is profoundly dismaying, it has stagnated, inequality and youth unemployment numbers soaring high with eagles, and allegations of illicit financial flows abound. These and many other harmful practises must be curbed through legislative enactments, and the strengthening of law enforcement agencies.

> "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men."
>
> - LORD ACTON

The state of our SOEs and other institutions is disconcerting and some of the key appointments in the past have proven irrational if not apparently bordered on the ridiculous. Demonstrably, some peculiar interests or considerations have successfully militated in favour of appointing incompetent and malleable persons to key portfolios and institutions. Faithfulness to the Republic and the Constitution demands the appointment of competent, ethical leaders who are ready to serve and not to self-enrich. Furthermore, faithfulness to the Republic and the Constitution requires Members of the Assembly to create effective mechanisms necessary to ensure that all executive organs of State in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including the implementation of legislation; and any organ of State. This is what the Constitution requires of the National Assembly, and not to "toe the line" in the protection of those who demonstrate incompetence and the unadulterated zeal to violate the Constitution and the law.

Entrenching a culture of accountability is crucial for the health of our democracy. Members of the Assembly would do well to heed the words of Lord Acton. "Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men." They must hold the executive accountable, and must discharge their oversight role to preserve and restore public trust in SOEs and other strategic state institutions.

In the past, the Assembly has been taken to court on allegations that it has failed to discharge its constitutional obligations. The courts have made damning findings and pronouncements against the Assembly and other Members of the Executive. The Assembly has been embarrassingly held to have failed to hold members of the Executive accountable almost each time it has been dragged to court. This raises serious questions whether members of the Assembly fully appreciate their constitutional duties and responsibilities and their democratic and constitutional significance.

The courts have also criticised the Assembly for their constitutional transgressions. This has led many to believe the relationship between the Judiciary and the Assembly has become acrimonious. Indeed, the principles of separation of powers is part of our constitutional design, and organs of the State must accordingly respect the operational realms of another. But the vibrancy of our democracy can only be strengthened and preserved through a proper observance of necessary checks and balances to curb a possible abuse of State power.

Members of Assembly tend to forget their critical role(s). the Constitutional Court aptly summarised the relevance, significance and the role of the Assembly in the following terms:

> " . . . the National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office. Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa."[2]

By design, South Africa is founded on values such as Universal adult suffrage, national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. It is the responsibility of the National Assembly to hold the executive accountable for its conduct, actions and inactions. This is something the electorate would ordinarily want to see without any form of judicial intervention or injunction. The sixth parliament ought to learn from the missteps of its predecessors and promote accountability relentlessly. It must also exercise its oversight role sufficiently without any fear, favour and prejudice.

2 Id fn 1 at para 22.

Training during the Legal Practice Act era

By Andisiwe Sigonyela, Acting Director-BLA-LEC

The Legal Education Centre continues to carry out its mandate of educating legal practitioners during the Legal Practice Act 28 of 2014 (LPA) era. Legal education is more important now while the legal profession grapples with changes that are brought about by the LPA.

Below is information from our well-designed programmes that were attended in the second quarter of 2019.

TRIAL ADVOCACY TRAINING (TAT)

PLT School (s)

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Polokwane PLT School(day class)	01, 02 & 03 April 2019	Polokwane	**57** delegates attended
Unisa Durban PLT School (night class)	08, 09 & 10 April 2019	Durban	**20** delegates attended
Unisa Johannesburg PLT School (night class)	08, 09 & 10 April 2019	Johannesburg	**35** delegates attended
Unisa Pretoria PLT School(night class)	08, 09 & 10 April 2019	Pretoria	**41** delegates attended
Unisa Cape Town PLT School (night class)	15, 16 & 17 April 2019	Cape Town	**22** delegates attended
Unisa Mthatha PLT School(night class)	15, 16 & 17 April 2019	Mthatha	**09** delegates attended
Potchefstroom PLT School(night class)	07, 08 & 09 May 2019	Potchefstroom	**22** delegates attended
Cape Town PLT School (day class)	20, 21 & 22 May 2019	Cape Town	**50** delegates attended
Johannesburg PLT School (day class)	20, 21 & 22 May 2019	Johannesburg	**59** delegates attended
Bloemfontein PLT School(night class)	21, 22 & 23 May 2019	Bloemfontein	**24** delegates attended
Port Elizabeth PLT School (night class)	27, 28 & 29 May 2019	Port Elizabeth	**29** delegates attended
Johannesburg PLT School(night class)	27, 28 & 29 May 2019	Johannesburg	**52** delegates attended
East London PLT School (day class)	03, 04 & 05 June 2019	East London	**42** delegates attended

Universities

PROGRAMME	DATE	NUMBER OF DELRGATES
University of Fort Hare	11, 12 & 13 April 2019	**160** delegates attended
Walter Sisulu University	16, 17 & 18 May 2019	**68** delegates attended

Legal Practitioners

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Basic Intensive Trial Advocacy	13, 14 & 15 June 2019	Polokwane	**22** delegates attended

Commercial Law Programme (CLP)

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Corporate Governance	06 April 2019	Middelburg	**13** delegates attended
Risk and Compliance – Due diligence	18 May 2019	Johannesburg	**24** delegates attended

Continuing Legal Education (CLE)

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Bills of Costs	22 June 2019	Polokwane	**35** delegates attended
Medical Negligence	29 June 2019	Mthatha	**19** delegates attended

Bills of Courts Seminar in Polokwane

4th series: The History of the Black Lawyers Association

By Deputy Judge President Phineas Mojapelo, South Gauteng High Court

This is the fourth in a series of articles that seeks to trace the formation and history of the Black Lawyers Association (BLA). The writer shall welcome any comments, particularly by lawyers who were part of the process.

Beyond Johannesburg and Pretoria

Since the BLA was formed initially around only Johannesburg and Pretoria, which together formed the hub of where most of them found themselves, more and more lawyers started to take interest in opening practices further from the reef and thereby took black lawyering and the hope of justice for their people to those areas.

It was in that same year, that Bernard Makgabo Ngoepe, Donald Kgalaka Nkadimeng and Petros Mathethebala Machaka opened the first ever black law firm in Polokwane under the name Ngoepe, Nkadimeng & Machaka. The three had come from that area. Pat Machaka had done his articles of clerkship with G M Pitje in Johannesburg, while Bernard Ngoepe qualified with a B Iuris degree from the University of the North and an LLB degree from UNISA before he did his articles of clerkship in a white law firm in Johannesburg. The two joined forces with Don Nkadimeng who had qualified with a BIuris and LLB from the University of Limpopo followed by articles of clerkship with a white firm in Polokwane. Don Nkadimeng was probably the first ever black lawyer to be trained under articles of clerkship in Polokwane and the first also to form a law firm there. Although he no longer practises law, he is the stalwart of black lawyering in that town.

The opening of law practices outside Johannesburg and Pretoria made it possible for the BLA to extend its membership and to start holding its meetings outside the initial cities wherever their members had practices. It was Pontius Matjila, who took the first move to the west to open a practice in Rustenburg and thereby made possible the expansion of BLA activities in that direction around the same time.

At the close of 1980, three other black lawyers opened the first ever black law firm in Nelspruit (now Mbombela), Mpumalanga – then Eastern Transvaal. The first practice there was opened under the name Phosa, Mojapelo & Makgoba. The formation of that practice facilitated the spread of the BLA movement to the east of the then Transvaal province of South Africa, which was the mother province of the BLA. The three lawyers were mid 1970's graduates of the University of the North (now Limpopo) near Polokwane. The independence of Mozambique from Portugal, the formation of Black Conscience movement and the Soweto uprisings, which all reverberated through students' lives, impacted on the social and political consciousness. These events impacted in different ways and different measures on black university graduates of those years. Two of these lawyers, Nakedi Mathews Phosa and Phineas Mathale Mojapelo, had obtained their BProc and LLB degrees and then did their articles of clerkship in white law firms in Johannesburg while the other, Ephraim Mampuru Makgoba, had qualified in a law firm in Polokwane. With the warmth and hospitality of the east, Mbombela/Nelspruit became a popular venue for BLA meetings and often drew large groups from all other areas when the time came for the local lawyers to host BLA general meetings. Lekgolo Richard Ramodipa, also a BProc graduate of Turf, later opened the

> "The opening of law practices outside Johannesburg and Pretoria made it possible for the BLA to extend its membership and to start holding its meetings outside the initial cities wherever their members had practices."

first ever black law firm in Potgietersrus (now Mokopane), Limpopo, and that town also soon became a venue for meetings of the BLA in those early days.

Soon there were black lawyers in the Free State and the Black Lawyers Association extended its growing tentacles to that province as well. The first local point in that province was created by Jake Moloi in Welkom with the support of Peete in Bloemfontein. The BLA grew to cover the four provinces by the mid 1980's.

In the meantime, black law practices had emerged also in parts of South Africa, which had become independent homelands. The parts of South Africa that had become independent were the Transkei (part of present-day Easter Cape province) under Chief Minister Matanzima, Bophuthatswana (part of present-day North-West province) under Chief Lucas Mangope and Ciskei (also part of Eastern Cape) under Chief Minister Lenox Sebe.

In some paradoxical way the development of the Apartheid style homelands closer to independent status increased the number of black lawyers in the broader South Africa. In preparation for possible independence, the Apartheid government trained lawyers in the targeted areas to become Magistrates, Public Prosecutors and State Law Advisors. So determined was the government to give independence to homelands that it was prepared to assist in developing professionals to serve in those areas. The thinking of the Apartheid government was that once as many areas inhabited by black people as possible had been granted independence, the white minority would have a chance of becoming majority in the remaining parts of South Africa. The government was prepared to skill black people as long as that was for the purpose of making the independence of homelands appear viable. They would, so the idea went, serve their own black people in their own areas and so never compete for turf with their white counterparts. What a miscalculation!

"The government was prepared to skill black people as long as that was for the purpose of making the independence of homelands appear viable. They would, so the idea went, serve their own black people in their own areas and so never compete for turf with their white counterparts. What a miscalculation!"

The increase in the number of black lawyers in those areas widened the hunting areas for the BLA, which was keen to increase its membership. Each black law firm that was opened created an opportunity for more black law graduates to be employed as article clerks and thus increase the number of qualified black lawyers in the area. Furthermore, any person who was a black lawyer, whether employed in the public sector, corporate sector or independent practice could join the BLA. In fact, any lawyer who aligned herself or himself to the objectives of the association could be accepted as a member. Race was never a requirement for membership. It was in fact members of council of the white controlled statutory law society who were the first to point out that the word "black" appeared only once in the original and the then constitution of the BLA, that is in its name. To BLA members themselves this was never an issue. The association was never a racist organization and was never going to be racist, despite its name.

It is interesting to note how the Apartheid government almost always worked against its eventual goals by focusing on short term goals. Right from onset, by excluding black people from the formation of the Union of South Africa in 1910, it created fertile grounds for the formation of its strong opposition, which was eventually to take it completely out of power seven decades later. Similarly, this time around, by seeking to exclude the growth of professionals from main stream South Africa, it in fact eventually led to a situation where the number of black professionals was increasing, and each one of them was aware of the nefarious motives of the white government and therefore prepared to work for the opposite. The moral of the story is this: every time one works deliberately to the detriment of others one eventually works to one's own detriment. Someone, take notes there. The only way to work for humanity is to work for the common good.

The number of BLA members and of black lawyers generally has been increasing steadily since its formation. They are now, for the first time ever in the majority in Limpopo province and there is every reason to believe that their numbers will continue to rise in other provinces as well as a percentage of the national total. The lie created in Apartheid South Africa that the minority is the majority will turn on its head. And to sustain its own position the majority, and in fact all leaders, must work for the common good, including the protection and advancement of the interest of the minority. In matters affecting races only blind justice is true justice.

As will be shown in later parts of this work, by the late 1980's, the BLA had expanded quickly towards Durban in Natal and Cape Town in the Cape, whilst its growth in homeland areas was exponential. The BLA was always opposed to the homeland policy but never to black people in those areas. By the mid 1980's, there were strong sentiments within BLA to formalize the association or associations of black lawyers into a national organization. The formation of the National Association of Democratic Lawyers (NADEL), in which the BLA played a significant role, came out of those sentiments. This explains the strong bonds between these organisations. But more about that in the next issues (and chapters).

The not so intoxicated merger: the acquisition of SABMIller by Anheuser-Busch InBev

By Molopyane Sofonia Lethuba (Attorney practising in Polokwane)

In South Africa, mergers and acquisitions have dramatically increased since the dawn of democracy, especially from 1995 after the removal of sanctions and the reintegration of South Africa into the global financial markets.[1] Mergers and Acquisitions are regulated by statutory public entities, or rather competition authorities established in terms of the Competition Act.[2] Private persons, whether it is individuals, class of persons or juristic persons, also have a role to play in the consideration of mergers by the Competition Commission and the Competition Tribunal.

This article discusses the merger between Anheuser-Busch Inbev SA/NV (AB InBev) and SABMiller. This merger can be classified as a cross boarder acquisition of a local firm by a foreign firm in the fast moving consumer goods industry (specifically alcoholic beverages) for various reasons.

I will further discuss the threshold of the AB InBev-SABMiller merger, cross border mergers and the jurisdiction of South African authorities to consider mergers wherein the acquiring firm is a foreign company, the role of South African competition authorities (being the Competition Commission, Competition Tribunal and the Competition Appeal Court (CAC)) in effecting mergers and acquisitions, the role of other parties that had an interest in the AB InBev-SABMiller merger, and the inclusion of socio economic factors in competition laws, especially public interest considerations.

The approach of the South African competition authorities in dealing with mergers is analysed with regards to the acquisition of SABMiller by AB InBev and I also consider whether the macro economic and social objectives of mergers as contained in the Competition Act were taken into cognisance.

The merger between Anheuser-Busch InBev SA/NV (AB INBEV) and SABMiller

Section 12(1)(a) of the Competition Act stipulates that a merger occurs when a company (acquiring firm) purchases another company. A merger can be defined as the acquisition of another firm by one or more firms over the whole or part of that firm.[3] For purposes of this article, I look at the merger of AB InBev and SABMiller, wherein Ab InBev is the acquiring firm.

1 W.K. Osae, C.J. Fauconnier†, and R.C.W. Webber, 'A value Assessment of Mergers and Acquisitions in the South African Mining Industry–the Harmony ARM Gold example', *The Journal of The Southern African Institute of Mining and Metallurgy*, Volume 111 (2014), Page At 859

2 Competition Act, 89 of 1998

3 Bothwell Deka, 'Implications of Non-notification of notifiable mergers in South African Competition Law', (Unpublished LLM Thesis, UP, 2015), At Page 11; Section 12 (1)(a) of the Competition Act

An acquiring firm is defined as follows:
"A firm –
(a) that, as a result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;
(b) that has direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or
(c) the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b);"[4]

The AB InBev-SABMiller merger was subjected to the competition laws of South Africa. The Competition Act applies to all mergers being facilitated within South Africa irrespective of the fact that one of the merging firms might be a foreign company, such in the Ab InBev-SABMiller merger. Section 3(1) of the Competition Act provides that the Competition Act applies to all economic activity within, or having an effect within, the Republic.

AB InBev is a multinational corporation having its primary place of business or headquarters in Leuven, Belgium. The company was founded in 1977. It has operations in North America, Europe, Asia and some parts of Africa.[5] SABMiller has been primarily listed on the London Stock Exchange in 1999.

4 Section 1(1)(i)(a), Ipid note 2
5 www.Forbes.com/companies/anheuser-busch-inbev/#779b6ea93325

Both AB InBev and SABMiller operate in the 'fast moving consumer goods' industry globally. Both firms hold a range of alcoholic brands, which include – Beck's, Budweiser, Corona, Castle Lite, Hansa, Carling Black Label, Peroni Nastro Azzurro, Miller Genuine Draft, amongst others.[6] The industry contributed more than R27 Billion to the country's gross domestic product in 2005.[7]

Mergers usually involve large amounts of money, and in 2007 mergers in South Africa amounted to R514 million.[8] Be that as it may, mergers are not a recent phenomenon.[9] Mergers are differentiated from takeovers in that mergers are said to be a "marriage" between firms of almost equal size.[10]

In the merger between AB InBev and SABMiller, AB InBev is the primary acquiring firm and SABMiller is the Primary target firm. The merger was approved subject to certain conditions.

Section 12(1)(a) of the Competition Act (89 of 1998) provides

6 www. Ab-inbev.com/ou-brands/html, Ab-inbev Brands
7 SABMiller has been primarily listed on the London Stock Exchange during Trevor Manuel's tenure as Finance Minister in 1999
8 Ipid note 1, At Page 857
9 Bridget Aves, 'Mergers And Acquisitions - Do They Create Shareholder Value?' (Unpublished MBA, University Of Natal, 2001), At Page 7
10 Cornelius Christiaan Oberholzer, 'Legal Aspects Of The Regulation Of Mergers And Acquisitions' (Unpublished LLM, University of South Africa, 1997), At Page 2

"The merger between AB InBev and SABMiller is horizontal in nature. Both firms are beverage selling firms and they are competitors in that market. A horizontal relationship simply refers to the relationship between competitors engaged in "similar lines of trade" in the same market."

Source: www.rawpixel.com

that "a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm."

An acquisition is defined as taking control of another firm and it correlates with takeovers. The purpose of an acquisition or a takeover is therefore control over the net assets of a company.[11] Section 12(1)(b) goes on to stipulate on how a merger is achieved.[12] The AB InBev merger was effected by the acquisition of SABMiller by AB InBev.

Categories of mergers

The categories of mergers are Horizontal, Vertical and Conglomerate mergers.[13] They can further be classified as small, intermediate and large mergers.[14] The AB InBev and SABMiller merger can be classified as a large and horizontal merger considering that their combined value is R 1 Trillion and are both operating in the alcoholic beverage market.[15]

Mergers are distinguished into small, intermediate and large mergers only for notification and adjudication purposes. The thresholds are determined by the Minister of Trade and Industry after consultations with the Competition Commission. In case of specific mergers, the assets and turnover of each participating firm is taken into cognisance to determine the threshold of the merger.[16]

The merger between AB InBev and SABMiller is horizontal in nature. Both firms are beverage selling firms and they are competitors in that market.[17] A horizontal relationship simply refers to the relationship between competitors engaged in "similar lines of trade" in the same market.[18]

Horizontal mergers can be toxic in that they pertain to the removal of one competitor by another (in this case SABMiller by AB InBev), which reduces consumer choice.[19] Horizontal mergers are also a means for one company to expand into other geographic areas or markets.[20] The presence of AB InBev in South Africa before the merger was minimal.

The toxic nature of horizontal mergers attract attention from competition authorities as they have the effect of reducing consumer choice, eliminating competitors and increasing the market power of the post-merged firm.[21] Vertical mergers are mergers between two companies in the value chain of production.[22] A conglomerate is a merger between firms in different industries.[23]The merged entities have no direct economic relationship and such mergers do not necessarily attract competition authorities as they "do not lead to an integration of suppliers and customers.[24]

The competition laws in South Africa are made to protect consumer welfare and competition, which encompasses, amongst other things, the regulation of mergers and acquisitions, agencies to enforce competition laws and the prohibition of cartel behaviour.

> **"An acquisition is defined as taking control of another firm and it correlates with takeovers. The purpose of an acquisition or a takeover is therefore control over the net assets of a company."**

The rationale behind US competition (or anti-trust) laws is ensuring that consumers have a choice as to whether to do business with a particular firm or not.[25] However, in South Africa, the Competition Act[26] gives cognisance to various economic and social factors that include but are not limited to:

1. Eradicating barriers to entry for small to medium enterprises.[27]
2. And promoting the ownership of firms to reflect the demographics of the country.[28]

The AB InBev-SABMiller was approved by the Competition Tribunal subject to certain conditions. One of the conditions was that SABMiller divest itself from Distell. The diversification process should have provided that it divest to a BEE corporation.

The announcement of a merger between AB InBev and SABMiller was made in November 2015 after the board of directors of both firms had agreed on the specifics.[29] The Competition Commission was notified on 14 December 2015. The merger was approved by the Competition Tribunal subject to conditions on 30 June 2016.

11 Ipid, At Page 2
12 A merger contemplated in paragraph (a) may be achieved in any manner, including through –(i) purchase or lease of the shares, an interest or assets of the other *firm* in question; or (ii) amalgamation or other combination with the other firm in question.
13 Ipid note 9, At Page 10
14 Ipid note 3, At Page 12
15 Thomas Buckley, Anheuser-Busch InBev clinches R1.4trn SABMiller deal, www.fin24.com/companies/industrial/anheuser-busch-inbev-clinches-r14trn-sabmiller-deal-20160928, accessed: 26/11/2018
16 Collen Evans Kgapane, 'A Comparison of Merger Regulation in South Africa and Comesa' (Unpublished LLM Thesis, UP, 2015), At Page 26
17 Bradley Middleton, Melanie Hudson Smith, 'The Inheuser-Busch-InBev-SABMiller Merger: An Analysis of Motives and the Internal and External Impacts of the Merger', JRSBM, Volume 2, Page 2
18 Section 1(1)(XIII); Ipid note 9, At Page 10
19 Ipid note 3, At Page 11
20 Ipid note 17, Page 2
21 Ipid note 16, At Page 15
22 Ipid note 9, At Page 10
23 Ipid
24 Ipid note 16, At Page 16
25 Nicola Theron, 'The Economics Of Competition Policy: Merger Analysis In South Africa', Page 2
26 Section 2(a) - (e) of the Competition Act provides that "the purpose of *this Act* is to promote and maintain competition in the Republic in order –
(a) to promote the efficiency, adaptability and development of the economy;
(b) to provide consumers with competitive prices and product choices;
(c) to promote employment and advance the social and economic welfare of South Africans;
(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic; (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.
27 Section 2 (e), Ipid note 2
28 Section 2 (f), Ipid
29 www.jse.co.za/articles/ab-inbev-lists-on-the-jse, AB InBev lists on the JSE

The Competition Commission had to be notified of the merger because of its nature as a large merger.[30]
Merger notification fees may be up to R350 000 for large mergers.[31]

Announcements of mergers and acquisitions have an impact on the movement of share prices on the stock exchange. Mergers and acquisition affect the stocks of both the acquiring firm and the target firm.[32]

It is difficult to ascertain the reason why share prices rise and fall on the stock exchange. Share prices are primarily influenced by information and news, including but not limited to, analytical reports, the economy, political upheavals, government announcements and/or even the weather.[33]

Cross border mergers account for about 45% of all the mergers globally.[34] Various factors play a role in the successful conclusion of mergers between firms in different countries, this include, *inter alia*, "national cultural dimensions", "business styles", "managerial styles", "cultural differences", "geographic differences", "international tax effects" and "openness to foreign cultures".[35] Besides finances and human resources and the like, firms merge cultures, which could take time to integrate.[36]

Reasons for mergers

Mergers primarily occur because firms want to derive some kind of economic benefit. The reason or motive behind mergers and acquisitions is important as it provides a guide as to the direction that the new firm has to follow in the post-merger integration process.[37] Not all mergers are successful though as around 70 percent of mergers fail to produce the intended results.[38] Accordingly, mergers occur for the following reasons:

- "Synergy (operational and financial)
- Diversification
- Strategic re-alignment
- Market power
- Hubris and managerialism
- Buying undervalued assets (Q-ratio)
- Tax considerations
- Legal and regulatory framework
- Mis-evaluation
- Mismanagement (agency problems)
- Stakeholder expropriation".[39]

30 Section 13A (1), Ipid note 2
31 Ipid note 16, At Page 58
32 Mthabisi Ndlovu, 'The Impact Of Mergers And Acquisitions Announcements On The Share Price Performance Of Acquiring Companies: South African Listed Companies', (Unpublished Master Of Management In Finance & Investment, Wits University, 2017), At 10
33 Wiseman Bellingham Wanda Myeni, 'The Impact Of Food And Beverage Mergers On The Shareholder Value With The Specific Reference To South Africa', (Unpublished Master Of Business Leadership (MBL), 2007), At 17
34 Isil Erel, Rose C. Liao And Michael S. Weisbach, 'Determinants of Cross-Border Mergers and Acquisitions', *The Journal Of Finance*, Vol. Lxvii, No. 3, June 2012, At Page 1045
35 Ruth V. Aguilera and John C. Dencker, 'The role of human resource management in cross-border mergers and acquisitions', *International Journal of Human Resource Management* 15:8 December 2004, At Page 1360; Isil Erel, Rose C. Liao And Michael S. Weisbach, 'Determinants of Cross-Border Mergers and Acquisitions', *The Journal Of Finance*, Vol. Lxvii, No. 3, June 2012, At Page1045
36 Ipid note 1, At Page 858
37 Ipid
38 Ipid note, At Page 1355
39 Ipid note 1, At Page 857

- Other reasons include "entry into new markets", and "diversification".[40] Some firms want opportunities for growth, access to new technologies, and to simply acquire a competitor.[41] The ABInBev-SABMiller merger is horizontal in nature and such mergers are accordingly facilitated due to technology and patent acquisition, and the desire to increase market power.[42]

According to Ruth V. Aguilera and John C. Dencker (2004), "difficulties in M&As trace to a lack of a compelling strategic rationale, unrealistic expectations of possible synergies and paying too much for acquired firms".[43]

A merger should ideally occur only if the value (or utility) of the combined resultant firm is greater than the value of the acquiring firm and acquired firm added together.[44] Synergy can be described as the 2+2=5 effect.[45]
Same is applicable for both domestic and cross border mergers.[46] According to Mthabisi Ndlovu (2017) synergies are considered to be important determinants of shareholder value.[47]

In measuring whether a particular merger is successful we consider whether the current value of the shareholders interest in the firm has increased.[48]

Firms primarily merge to take advantage of operational and financial synergies. Operating synergies provides for the increase in profits, reduction of operating expenses and cost of goods sold, and on the other hand, financial synergies provide for an enhancement of the capital structure of the newly formed firm in that it may benefit from accessing new capital markets or obtaining financing on favorable terms.[49]

Market power as an important driver of the merger

The increase of market power is "one of the most important forces driving mergers".[50] In considering mergers it is important to consider whether the new firm formed will be able to increase the prices of its products.[51]

Market power is defined as "the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers."[52] One of the reasons for mergers is that entities merge horizontally to enhance their market power. A concentration of market power could lead to monopolization.

Cartel behavior in South Africa is prohibited in terms of Section 4 (1) (b) of the Competition Act, which provides that: "An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it involves any of the following restrictive horizontal practices:

40 Ipid note 9, At Page 13
41 Ipid note 33, At Page 16
42 Ipid note 17, At Page 2
43 Ipid note 35, At Page 1355
44 Ipid note 9, At Page 11; Ipid note 35, At Page 1045
45 Albert De Graaf, Quantifying Synergy Value In Mergers And Acquisitions, (Unpublished Master of Commerce Thesis, UNISA, 2010), At Page 2
46 Ipid note 35, At Page 1045
47 Ipid note 32, At Page 9
48 Ipid note 9, At Page 8
49 Ipid note 33, At Page 15
50 Ipid note 9, At Page 13
51 Ipid note 25, At Page 1
52 Section 1(1)(XIV), Ipid note 2

(i) Directly or indirectly fixing a purchase or selling price or any other trading condition;
(ii) Dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or
(iii) Collusive tendering."

In the United States cartel behavior is prohibited in terms of the Sherman Act, which is enforced by the US Department of Justice (DOJ).[53] Prohibited conduct includes interstate commerce and conduct involving monopolization or attempted monopolization.[54]

Section 2 of the Sherman Act makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.

The ideal situation in economics is that no firm should have market power in order to ensure that firms charge lower prices for quality products.[55] This is realized in a situation wherein the consumer has the option to do business with various firms offering the same products or services.

Mergers are regulated in terms of the Competition Act. One of the purposes of the Competition Act is to establish the competition commission and competition tribunal which is responsible for mergers.[56]

The competition authorities play an important role in mergers. The Competition Commission is established in terms of Section 19(1) of the Competition Act. One of the functions of the competition commission is to regulate mergers.[57] Intermediate and large mergers must be reported to the Competition Commission and such mergers cannot be concluded without the blessing of the Competition Commission and Competition Tribunal.[58]

The Competition Amendment Bill also aims to bring the executive into the fold as in the United States.[59] Amongst other things, the Bill seeks to involve the National Executive in matters affecting competition laws, including mergers and acquisitions that may affect national interests or security.

Conditions set for the AB InBev and SABMiller merger

Taking into consideration the size of both AB Inbev and SABMiller, the merger can be classified as a large merger, and Section 13A(3) of the Competition Act provides that such mergers can only be facilitated once the merger has been approved with or without conditions by the Competition Commission, Competition Tribunal, or the Competition Appeal Court.[60]

Conditions are imposed to address public interest considerations and to promote some of the objectives of the Competition Act.[61] There is a concern that the inclusion of public interest goals and macro-economic goals impact the predictability of merger cases.[62]

Bothwell Deka (37: 2015) describes various types of conditions imposed in mergers as 'structural' and 'behavioural'. He goes on to state that "structural conditions are meant to prevent anti-competitive post-merger structures and include the divestiture of businesses and or limitations on cross shareholding or directorships in competitors while behavioural remedies are designed to prevent harmful behaviour".[63]

Section 60 (1) of the Competition Act provides as follows:

(1) If a merger is implemented in contravention of Chapter 3, the Competition Tribunal may –
(a) order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger; or
(b) Declare void any provision of an agreement to which the merger was subject.

The question as to whether the Competition Commission or Tribunal may amend conditions it has imposed arose in *Amec Foster Wheeler SA (Pty) Ltd v Competition Commission*.[64]

The Competition Commission agreed to the SABMiller and AB Inbev merger on certain specified conditions. The Competition Commission particularly considered the effect the merger would have on the cider market in South Africa. SABMiller agreed to divest some of its assets in order to facilitate the merger, thereby making the post-merger SABMiller smaller.[65]

In particular, the post-merger entity will have to divest of its stake in Distell within a period of three years. Conditions that serve the public interest have also been imposed, that is, the post-merger entity is not allowed to retrench any employee in South Africa.

Conclusion

The AB InBev-SABMiller merger is one of the largest mergers to ever be concluded historically. Both firms had a considerable chunk of market power before the merger was implemented and they operate in the same industry.

The effect of this is that South African consumers now have 'less choice' in as far as alcoholic beverage suppliers are concerned but nevertheless, it can be argued that SABMiller had 'market power' before the merger was considered.

In deciding the matter, public interest considerations such as employment and employee benefit schemes were taken into account. Not even a single job will be lost as a result of this merger.

The AB InBev-SABMiller merger is not so toxic considering the conditions imposed by South African competition authorities. ■

53 Sherman Antitrust Act of 1890
54 Alden F. Abbott, 'A Brief Overview Of American Antitrust Law, The Competition Law & Policy Guest Lecture Programme' - Paper (L) 01/05, The University Of Oxford Centre For Competition Law And Policy, At 3
55 Ipid note 25 ,At Page 2
56 Ipid note 2, Purpose
57 Section 21(1)(e) provides that the competition commission is responsible to "authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3"
58 Ipid note 3, At Page 11
59 Competition Amendment Bill [B 23—2018]
60 Section 13A, Ipid note 2
61 Ipid note 3, At Page 36
62 Ipid note 25 , At Page 4
63 Ipid note 3, At Page 36
64 Par.12, *Amec Foster Wheeler SA (Pty) Ltd v Competition Commission* (VAR252MAR16) [2016]ZACT 59 (13 July 2016)
65 Anheuser-BuschInBev SA/NV and SABMiller plc , Competition Tribunal of South Africa, Case no: LM211Jan16, Paragraph 2

The need for judicial oversight in all cases of execution against immovable property

By Celinhlanhla Magubane (Chairperson - Black Lawyers Association Student Chapter, Unisa, Durban)

Source: Stock photo

The South Gauteng High Court (Johannesburg) delivered a ground breaking judgment which deals with the repossessions of homes without reserve prices. A reserve price at an auction is the minimum price that something may be sold for at that auction. This would mean, if no one bids at or above the reserve price, the property remains unsold and further it prevents the auction from being won by a bidder who offers a price lower than what the item's owner will accept.[1]

It is an economic reality that most citizens who acquire immovable properties are unable to afford to pay the cash price for such property due to the market difference in property prices and wealth, or lack thereof, of ordinary citizens.[2] The mechanism, developed over many centuries, to assist the man in the street to acquire property is by way of a home loan from lenders, usually banks, who grant a loan to the home owner and then register a bond over the property purchased by the home owner.[3]

1 www.investopedia.com
2 *Absa Bank v Mokebe and related matters (Investec Bank Limited and others as amici curiae)* [2018] JOL 40390 (GJ)
3 *Absa Bank v Mokebe* id fn 1

Mortgage bond and the right to execution

In the matter between *Standard Bank v Sauderson and others* 2006 (2) SA 264 (SCA), the court defined Mortgage bond as an agreement between the borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. It so happen in most cases that due to the economic climate at any given time or due to financial hardship, a home owner may encounter financial difficulties and as a result he/she will default on repayment of the loan. When the home owner defaults on such repayments then the bank in terms of the law may choose to exercise its rights as stipulated in the loan agreement, the terms of which are also contained in the mortgage bond and forecloses, by seeking to execute against the property.

Principle of proportionality in matters of low arrears

It is common cause that courts are faced with a vast number of foreclosure applications where people stand to lose their properties and to some it is their primary residence. It is not appropriate that banks do not open the door of meaningful negotiations unless the lender is willing to settle the arrears in full. In the matter between *FirstRand Bank Limited v Gazu* 2011 (1) SA 45 (KZP), Lopes J stated that "it is notorious that, in dealing with banks, mortgage bonds and other formal documents are presented to the clients on a take it or leave it basis, and the ability of the other contracting party to balance out the unequal bargaining power on the mortgage bond is

Source: www.kayafm.co.za

extremely limited, if not entirely excluded". It is imperative to state that the "take it or leave it" 'basis is evident even in the case of settlement of arrears. In most cases the banks are not willing to negotiate with the lender unless if the lender is prepared to settle the arrears regardless of the arrear amount.

In the matter between *Absa Bank Limited v Lekuku* [2015] Jol 32434 (GJ), the court had to determine low arrears, proportionality and foreclosure. The court stated that in most cases courts have a discretion based on the facts before it as to what amount is proportional to the final effect and consequence of foreclosure. In *Absa Bank Limited v Ntsane* 2007 (3) SA 554 (T), Bertelsmann J declined to authorise execution against a debtor when the arrears at the time the case came before him were R18,46. It is imperative to state that in matters such as the *Ntsane* case, the court must exercise care and diligence because people stand to lose their homes. Even though, it would be inappropriate to define when arrears are low for the purpose of declining to authorise execution, however, it is imperative that in each and every case, courts must carry out a unique enquiry into the facts of each case when exercising its judicial oversight.

> **"The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality."**
>
> -Moseneke DCJ

In the aforementioned *Lekuku* case, the court stated that in seeking foreclosure in respect of low arrears, the banks must examine each case on its own merits and advise the court on what they have done to avoid foreclosure of a primary residence in particular with reference to engagement with the debtor at a 'with prejudice level' to avoid foreclosure[4] The court further stated that when determining proportionality the affidavit accompanying the foreclosure application must deal with the debtor and attempts made to avoid foreclosure.[5] Moreover, the court directed that in matters of low arrears a postponement of the matter for a period of six months be made in order for the mortgagors to report back on steps taken by them to avoid foreclosure.[6]

Settlement of the arrears automatically reinstate the agreement

Once the arrears are settled, the power has now shifted from the banks to the consumer. In terms of section 129(3) of the National Credit Act 35 of 2005 (the Act), the debtor even after judgment is entitled to remedy any default by paying the arrear amounts together with default charges and reasonable costs of enforcing the credit agreement.[7] The purpose of the said section is to allow for a reinstatement of the agreement at any time up to cancellation provided it has not in the interim become legally impossible.

In the matter between *Nkata v FirstRand Bank Ltd* 2016 (6) BCLR (CC), Moseneke DCJ stated that:

> " The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner factors in the credit market relate. Unlike in the past, the sheer raw financial power difference the credit giver and its much needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honesty meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible, particularly so when a credit consumer honestly runs into financial distress that precipitates repayment and defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution."

This is the assertion of Moseneke DCJ in relation to the new dispensation created by the Act. The right to reinstate the agreement is essential to the preservation of the mortgaged property.

Section 129(4) of the Act provides that a creditor may not reinstate or revive the credit agreement once:-

a. The sale of any property pursuant to: -
   i. An attachment order or
   ii. Surrender of property in terms of section 127;
   iii. The execution of any other court order enforcing that agreement; or
   iv. The termination thereof in accordance with section 123.

The Johannesburg High Court in the matter between *Absa Bank v Mokebe* and related matters (*Investec Bank Limited and others as amici curiae*) [2018] JOL 40390 (GJ), stated that the interpretation of section 129(3) and (4) must evidently be the promotion of the principles of the National Credit Act. The purpose of this Act, in the main is to balance the rights and obligations of consumers and credit providers. This balancing exercise is difficult as the rights of the credit providers are driven by profit, while that of consumers are driven by the ability to access the market. The courts are enjoined by the provisions of section 2 of the Act to promote its clearly stated purpose as spelled out in section 3, which is to level the playing field in the credit market and to advance the social and economic welfare of all South Africans.

It is evident from subsection (3) that a consumer, who is in financial distress and arrears with his/her mortgage obligations,

4 *Absa Bank Limited v Lekuku* [2015] Jol 32434 (GJ)
5 *Absa Bank Limited v Lekuku* [2015] Jol 32434 (GJ)
6 *Absa Bank Limited v Lekuku* [2015] Jol 32434 (GJ)
7 Section 129(3) of the National Credit Act 35 of 2005

may reinstate a credit agreement. However, the reinstatement is subject to certain conditions, which are listed as follows: -
The reinstatement must not be a victim of the provisions of subsection 4;
All amounts that are overdue, together with the credit provider's default charges and the reasonable costs incurred in the enforcement of the agreement up to the time of reinstatement, must be paid.[8]

The mortgage bond repayments must be up to date with the arrears and costs, and the credit provider must not be owed any monies at the time of reinstatement. The parties must be in the same position they would have been had it not been for the default.

> **"It is evident from subsection (3) that a consumer, who is in financial distress and arrears with his/her mortgage obligations, may reinstate a credit agreement."**

Legal costs

Home owners also face the predicament of banks conduct whereby they debit legal fees from the home owners account without consent, or the costs being taxed as required by the law. This issue has been raised by many judges where legal fees have been debited without same being taxed or consent sought.

In certain instances, the arrears owed by the consumer are high, but this is not solely due to non-payment of the instalments towards the loan but it is due to the unlawful conduct of the banks. In other words the home owners are burdened with charges and legal costs which they are unaware of and did not consent to, being debited from their account. In the matter between *Nkata v FirstRand Bank* and others 2016 (4) SA 257 (CC), the majority judgment observed that the credit provider's legal and reasonable costs of enforcement would become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumers.

Reserves price to bring an end to cheap auctioning of bank repossessed houses

Rule 46A of the Uniform Rules of Court deals with execution against residential immovable properties. Rule 46A(1) applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor. Rule 46A(8)(e) provides that a reserve price shall be set before the court could grant an execution order.

A number of properties have been sold with no reserve price. Properties were sold for an amount that is far lower than even the municipal value and the banks would then still demand outstanding amounts from the debtor. In *Nxazonke and Another v ABSA Bank Ltd Ltd and Others* (18100/2012) [2012] ZAWCHC 184 (4 October 2012), the applicant borrowed R30 000.00 from Nedcor Bank, secured by a way of a mortgage bond in order to build extra rooms and a bathroom to the matrimonial home. The repayments of the mortgage bond were last made in 2001 when the first applicant retired and thereafter, the bank obtained default judgment against the applicants in the same year for an outstanding amount of R27 959, 49 which included interest. However, despite the outstanding amount being R27 959, 49 as aforesaid and the value of the property being R81 000.00, the property was subsequently sold for R10.00.

In the Pretoria High Court matter between *Given j. Nkwane v Kelebogile Y. Nkwane and 6 others*, case number 36700/2016 (unreported), in this matter the applicant approached the court in a bid to set aside the sale in execution of his house. In the said matter the Applicant obtained a home loan from standard bank in the amount of R380 000.00 pursuant to him and his wife purchasing the property jointly and severally. In 2013, the applicant on many occasions defaulted in repayments and further informed the bank on his wishes to sell the property since he had separated from his wife. He could no longer service the bond. It should, however, be stated that the bank also on many occasions tried to assist the applicant despite his former wife refusing to sign the mandate to sell the property privately. In recovering the debt, Standard Bank went out of their way to assist the applicant by, *inter alia*, more than halving the instalments payable and offering to assist in marketing and selling the property through engaging 'easy sell' that would assist him in marketing and selling the property and also not by means of an auction. At the sale in execution the insurable value of the property was R492 470.00 and was subsequently sold for R40 000.00.

It is trite that each case must be dealt with on its own specific and peculiar facts and merits. It must also be stressed that the aforementioned cases are not cited to paint the relevant banks as bad or unscrupulous financial institutions. However, it is imperative to state that the conduct appears to be improper and should not be accommodated as they constitute abuse of justice insofar as the home owners are deprived of any rights that they may have enjoyed to any surplus.

It is improper that in the aforementioned matter of *Goyi Godfrey Nxazonke v Absa Bank Limited*, a house that was valued at R81 000.00 was sold for R10.00. In considering the following consequences, the applicants owed approximately R28 000.00 to the bank. Had there been a reserve price and the property was sold for R50 000.00, the applicants would have been able to recover R22 000.00, which would assist them in securing alternative accommodation. It is clear that when the property is being sold through a transaction, which is not just and fair, the rights which the applicant may have enjoyed to any surplus were destroyed. In the matter between *Jaftha v Schoeman & others, Van Rooyen v Stoltz and others* 2005 (2) SA 140 (CC), Mokgoro J stated that :

"it is clear that there will be circumstances, which will be unjustifiable to allow execution. The severe impact that the

8 *Absa Bank v Mokebe* and related matters (*Investec Bank Limited and others as amici curiae*) [2018] JOL 40390 (GJ

execution process can have on indigent debtors, has already been described. There will be many cases where execution will be unjustifiable, because the advantage that attracts to the creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor. Besides the facts of the case, it also demonstrates the potential of the Section 66 (1) (a) process to be abused by unscrupulous people, who take advantage of the lack of knowledge and information of debtors similarly situated to the appellants. Execution in these circumstances will also be unjustifiable."

It is therefore imperative that courts, when dealing with matters of this nature, must weigh the immense prejudice, hardship and indignity of homelessness to a debtor against the rights of the creditor.

It is crucial that when our courts grant orders of execution, same should be granted on the principles of substantive justice and equity and the application of the law. In the matter between *FirstRand Bank v Folscher and another* 2011 (4) SA 314 (GNP), the full court observed that bond finance is an important socio-economic tool, enabling individuals to acquire their own home, to make the most important investments of their lives, to build up a nest egg, and to eventually enjoy the fruits of capital growth, quite apart from acquiring an asset that may provide security for further access to capital.

The Uniform Rules now empower courts to set a reserve price for the property at the sale in execution, therefore it would be expedient and appropriate that courts must generally order a reserve price in all matters depending on the facts of each case. In the aforementioned matter between *Absa Bank v Mokebe and related matters (Investec Bank Limited and others as amici curiae)* [2018] JOL 40390 (GJ), it was held that a court is obliged to consider whether to set a reserve price, and it can only do so if all the facts are fully disclosed. The court further stated that, a reserve price will balance the misalignment between the banks and the debtors where execution orders are granted, it ensures that the debtor is not worse off due to unrealistically low prices being obtained and accepted at sales in execution.

It is also important to note that special circumstances may occur whereby the sale of the property for nominal amounts of money may occur to be to the detriment of the defaulting owner of the property, whereby the owner loses his/her home and still remains indebted to a mortgagee for a substantial amount.

In the case of *Absa Bank v Mokebe and related matters*, the banks argued that by setting a reserve price the interest of prospective purchasers would be reduced and therefore make it less likely for them to find a buyer. The court stated that the allegations appears to be without a foundation, but even if it so, we can see no reason why the court cannot be approached for a variation of an existing court order making it more likely to find a buyer, should the perceived difficulties arise.

"The Uniform Rules now empower courts to set a reserve price for the property at the sale in execution, therefore it would be expedient and appropriate that courts must generally order a reserve price in all matters depending on the facts of each case."

Courts now in line with the provisions of Section 26 of the Constitution

The matter of *Absa Bank v Mokebe* also seeks to bring the court practice in line with section 26 of the Constitution, the right to adequate housing. Section 25 and 26 of the Constitution has to be invoked on the basis that execution without a reserve price results in a deprivation of the debtor's property and it further limit the right to access adequate housing unjustifiably. In this era of high unemployment, consumer over indebtedness and acute housing shortages together with the incremental constitutional jurisprudence in relation to the housing rights contained in Section 26 of the Constitution, different approaches by the Bench on the question of executability of a primary residence emerged.

In *FirstRand Bank Limited v Folscher* 2011 (4) SA 314 (GNP), the Court provided the list of issues /factors to be considered by Court when deciding whether a writ should be issued or not, this include inter, alia : -

a. whether the mortgage property is the debtor's primary residence;
b. the arrears outstanding under the bond when the letter was called up;
c. the arrears on the date default judgment is sought;
d. the total amount owing in respect of which is sought;
e. the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
f. whether any notice of section 129 of the National Credit Act of 34 of 2005 was sent to the debtor prior to the institution of action, if any, the period of time that lapse between delivery of such notice and the institution of action;
g. whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy;
h. whether the property is occupied or not;
i. whether the property is in fact occupied by the debtor; and
j. the position of the debtor's departments and other occupants of the house although in each case these facts will have to be established as being legally relevant of the execution process against property especially hypothecated, which is the primary residence of the judgment debtor and whether the protection of Section 26 (1) of the Constitution is extended to the debtor who may lose what is usually his only home.

The process undoubtedly involves a painful inroad into their right to dignity, thus making it necessary for the court to carefully examine the facts and circumstances before granting the order allowing the property to be sold in execution.[9]

In *Nedbank Ltd & Jessa & another; Absa Bank Ltd v Morulane; FirstRand Bank Ltd v Hendricks & another* [2012] Jol 28469 (WCC), the bank sought an order declaring certain immovable properties of the defendant executable and in each case the property in question was used for residential purposes and it was encumbered by a mortgage bond in favour of the bank. The court confirmed that when the plaintiff seek an order declaring the immovable property executable, such plaintiff shall inform the defendant as follows:

> "*The defendant's attention is drawn to section 26 (1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing, should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court*."

In the matter between *Standard bank Ltd v Dawood* 2012 (6) SA 151 (WCC), a practice directive for the Western Cape High Court was issued in the following terms, it is further directed, as a rule of practice in this division in all matters issued subsequent to the date of this judgment, that the summons should contain a notice to the following effect, as suggested in Erasmus: --

Take notice that

a. Your attention is drawn to section 26(1) of the Constitution, which accords to everyone the right to have access to adequate housing. Should you claim that the order for execution will infringe that right it is incumbent on you to place information supporting that claim before court.
b. In terms of section 26(3) of the Constitution you may not be evicted from your home or your home may not be declared executable and sold in execution without an order of court made after considering all the relevant circumstances.
c. In terms of rule 46(1)(a)(ii) of the Rules of the High Courts of South Africa, no writ of execution shall issue against your primary residence (i.e. your home), unless the court, having considered all the relevant circumstances, orders execution against such property.
d. If you object to your home being declared executable, you are hereby called upon to place facts and submissions before the court to enable the court to consider them in terms of rule 46(1)(a)(ii) of the Rules of Court. Your failure to do so may results in an order declaring your home especially executable being granted, consequent upon which your home may be sold in execution.

In the matter between *Mkhize v Umvoti Municipality and others* [2011] 1 All SA 144 (KZP), the court stated that in all cases of execution against immovable property, judicial oversight is required. Judicial oversight is necessary to ensure fairness and substantive justice and it will also give practical expression to constitutional rights, values and ideals. Section 1 of the Constitution places an obligation on all to promote the value of human dignity, the achievement of equality and the advancement of human rights and freedom[10], which include the application of section 26 of the Constitution by having regard to all the relevant circumstances before granting an order that may lead to the ultimate execution of someone's home.

Conclusion

The above analysis confirms the unfortunate reality that majority of South Africans who wishes to acquire immovable properties are unable to afford to pay cash price for such properties due to their socio-economic status and other related hindrances. It is therefore imperative that since the right to adequate housing is a fundamental right entrenched in our constitutionalised Bill of Rights, it is of paramount importance that when orders declaring a property, which is a primary residence executable, the court must exercise its judicial oversight powers and its discretion. Further the court must take also into consideration the economic reality of the poor, the vulnerable and the marginalised. ■

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4. *Absa Bank Limited v Lekuku* [2015] Jol 32434 (GJ)
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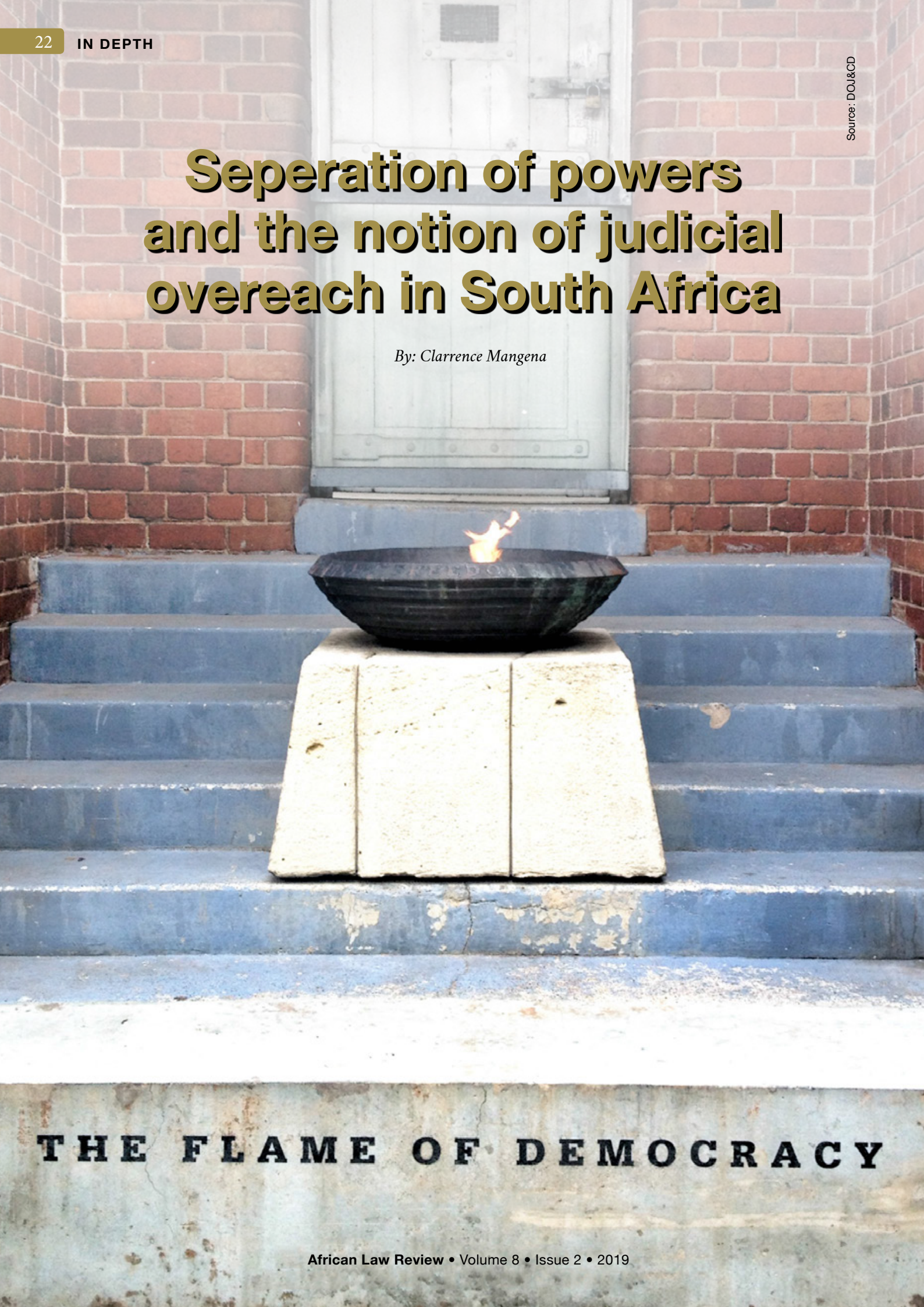
9 *Absa Bank Limited v Lekuku* [2015] Jol 32434 (GJ)

10 The Constitution of the Republic of South Africa, 1996

Seperation of powers and the notion of judicial overeach in South Africa

By: Clarrence Mangena



Source: DOJ&CD

In a constitutional democracy, the most effective measure which may be employed to restrict the exercise of public power is the doctrine of separation of powers.[1] The purpose for which the said principle was introduced is to uphold and safeguard important democratic values and norms, precisely 'accountability, openness, responsiveness and transparency'.[2] In *South African Association of Personal Injury Lawyers v Heath and Others*[3], it was held that the separation of powers is implicit in our Constitution and it is of equal force as an express constitutional provision even though there is no explicit reference of same in our Constitution.[4]

The inference of the implicitness of the separation of powers in the Constitution is drawn from the manner in which governmental power is actually distributed amongst the three arms of government. The legislature enacts laws and holds the executive accountable and consists of members of parliament. The executive make policies, implements, administers laws through state departments and make crucial appointments with the President and his cabinet as the personnel. The judiciary's function is to interpret, adjudicate legal disputes and declare the unconstitutionality of Acts contravening the Constitution, with the judges and magistrates as the personnel. This article shall precisely focus on the role of the judiciary especially when it is overseeing the checks and balances and guarding against the contravention of the Constitution.

> "The judiciary's function is to interpret, adjudicate legal disputes and declare the unconstitutionality of Acts contravening the Constitution, with the judges and magistrates as the personnel."

The role of the Judiciary

Chapter 8 of the Constitution establishes a hierarchy of courts consisting of the Constitutional Court, the Supreme Court of Appeal (SCA), the High Courts and the Magistrates' Courts, with the Constitutional Court as the apex court in the Republic. Section 34 of the Constitution states that everyone has the right to have any legal dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. The primary function of the judiciary is to provide for the adjudication of legal disputes, with the Constitutional Court having a final word especially on those issues that involve the interpretation, application and enforcement or development of the Constitution. The courts have a duty to ensure that the limits to the exercise of public power are not transgressed and it is therefore of utmost importance that the courts be independent in order to discharge their aforesaid duty.

Brief overview on the checks and balances by each arm of the State

Prior to the discussion on the determination of whether the judiciary's duty to guard against the transgression of the Constitution can be construed as judicial overreach, it is vitally imperative to lay out the manner in which checks and balances are effected by each arm of the state. The executive checks the legislature by developing and implementing policy, preparing and initiating legislation. It further does so by making subordinate legislation and assenting to Bills passed by the legislature. The judiciary checks the legislature by invalidating laws enacted by the legislature that are inconsistent with the Constitution. The judiciary also checks on the legislature by ensuring that the legislature complies with the procedural requirements set out in the Constitution.

The judiciary checks the executive by invalidating Acts by members of the executive that are inconsistent with the Constitution. The judiciary ensures that the executive fulfils its constitutional obligations diligently and without delay.[5] The executive checks on the judiciary by participating in the appointment of judges, with its members having to sit on the programmes by the Judicial Service Commission for the appointment of judicial officers. Further, the executive formulates legislation in order to give effect to judicial decisions. The legislature checks on the executive by requiring its members to provide report on matters that are within their control (parliament matters), by appointing the President, removing or recalling the national executive and approving the extension of state of emergency. The checks are more or less similar depending on the role of the arm upon which such check is made.

It is important to note that it is not only in South Africa that the courts are seen to be encroaching mostly on the executive functions of governance. The German Constitutional Court, within its constitutional structure, performs a similar function

1 Woolman, S and Bishop M (2013) 5 *Constitutional Law of South Africa* 2nd edition rev service Juta: Cape Town.

2 the Constitution for the Republic of South Africa Act 108 of 1996, section 1(d).

3 *South African Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77

4 2001 (1) SA 883 at paras 18-22.

5 *Minister for Justice and Constitutional Development v Chonco* 2010 (4) SA 82 (CC).

to that of our Constitutional Court. The German Constitutional Court was established in 1951 and since then, there have been various controversies since its inception as to whether it was getting too involved in political issues or perhaps interfering with the functions of the legislature.[6] I shall, therefore, discuss the role of the Constitutional Court to adjudicate constitutional matters and the concept of judicial overreach.

The role of the Constitutional Court to adjudicate constitutional matters and the concept of judicial overreach.

Although in our democracy, each arm of the state has a clearly defined role, there are bound to be conflicts especially when dealing with constitutional matters and consequently the judiciary will be seen to be treading on the toes of other arms of the state. This is the most common reality in a functioning democracy and may not be construed to be the usurping of another arm's power. Section 167 provides that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution. According to O`Regan, the role of the Constitutional Court is not to thwart or frustrate the democratic arms of government, but is rather to hold them accountable for the manner in which they exercise public power.[7]

> **"In *Government of RSA and Others v Grootboom and Others* it was stated that the State must also foster conditions that enable citizens to gain access to land on equitable basis, but this does not oblige the State to go beyond its available resources or to realise the right to adequate housing immediately."**

Just as the former Deputy Chief Justice, Dikgang Moseneke puts it that;

> "Parliament must be in the forefront of making laws and making … budgetary allocations that help change our divided and unequal past. The executive is entrusted with vital roles of policy formulation, management of the budget and … key executive functions. It is self-evident that courts are relevant only in the event of a system failure. Our role is not proactive, but reactive. It arises only when a breach of a vital right or interest is alleged … Courts must bolster rather than diminish democratic control. They must be wary not to intrude into the terrain of the legislature, the executive and other state institutions".[8]

In terms of the above, it does not amount to judicial overreach for the Constitutional Court to address issues emanating from the failure of parliament to hold its members accountable upon transgression of a governing law or legal rules. However, a distinction should be drawn between declaring the law and imposing what is ought to be done in the absence of authority. In the *Doctors for Life* case, the court drew the boundary of judicial power at the "*whether*," rather than the "*how*" question by stating as follows:

> 'It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinize executive action, what mechanisms to establish ... for the purpose of holding the executive accountable and fulfilling its oversight role...Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the Constitutionally permissible judicial enquiry to be embarked upon. And these are some of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government.'[9]

In some cases that have been brought before the Constitutional Court, the said court has looked into the decisions of the executive to ascertain rationality and whether they comply with the Constitutional guarantees. In the *Mazibuko and Others v City of Johannesburg and Others* case the court *a quo* had ordered the decision of the City to be inconsistent with the Constitution and directed the latter to supply a minimum of 50 litres of water per day to the residents.[10] Upon appeal, the Supreme Court of Appeal held that the City was obligated to supply a minimum of 42 litres per day to the residents.

When the case weaved its way to the Constitutional Court, it refused to prescribe the manner in which the City was obliged to supply water to its residents. After the experts' reports on what constituted sufficient water, the court held that it was ill-equipped to decide on what could be sufficient water. the Constitutional Court set aside the orders by the court *a quo* and the Supreme Court of Appeal in that it could not be said that it was unreasonable for the City not to have supplied more, particularly given that, even on the applicants' case, 80% of the households in the City would receive adequate water under the policy.

In *Government of RSA and Others v Grootboom and Others*[11] it was stated that the State must also foster conditions that enable citizens to gain access to land on equitable

6 A Van Dalsen 'Judicial overreach: a purely South African phenomenon?' (2017) 1, Helen Suzman Foundation.

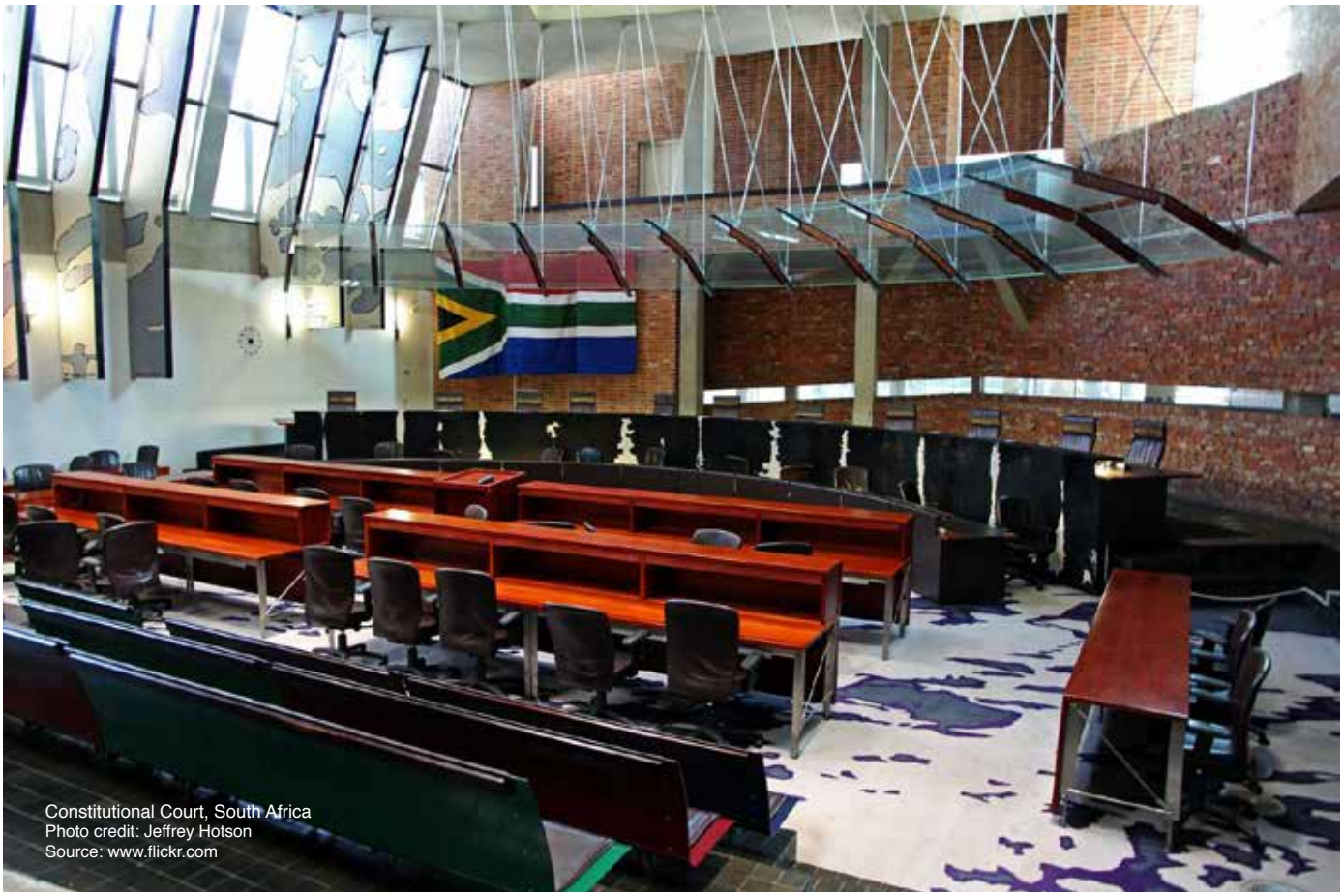
7 K O' Regan 'A forum for Reason: reflections on the Role and work of the Constitutional Court' (2012) 129 (28) South African Journal on Human Rights at 129- 130.

8 Address by Dikgang Moseneke to mark the 30th anniversary of the assassination of Ruth First, 17 August 2012, 4, accessed at http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=320118&sn=Detail (accessed on 30 January 2019).

9 *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11 at para 37.

10 2010 (3) BCLR 239 (CC) at para 82.

11 2001 (1) SA 46 (CC).



Constitutional Court, South Africa
Photo credit: Jeffrey Hotson
Source: www.flickr.com

basis, but this does not oblige the State to go beyond its available resources or to realise the right to adequate housing immediately. It was further stated that the State must give effect to the rights to adequate housing when appropriate and the courts can and must enforce the said obligations. The court issued a declaratory order requiring the State to devise and implement a programme that included measures to provide relief for desperate people who had not been catered for.

The first case shows the attitude of the judiciary to desist from interfering with the functions of the executive in that it could not be established what constituted sufficient water supply hence the society was sceptical about its decision. However, in the second case a different attitude is displayed due to the need to afford the vulnerable citizens protection under the Constitution. Of importance, is that in the *Mazibuko* case the residents were receiving water, the issue was whether same was sufficient. The position differs from that of the *Grootboom* case in that some citizens were left without alternative shelter. It must be noted that our courts have a constitutional mandate to adjudicate matters that fall within its scope. It is baseless to hold that the court may not interrogate the Constitutionality of decisions of the executive or of State institutions or officials.

Critical analysis of the concept of judicial overreach.
Save to state that the Constitutional Court is empowered to hear constitutional matters, it must be noted that since 2013, the jurisdiction of the Constitutional Court is no longer confined to the hearing of constitutional matters only. The said court may now decide constitutional matters and any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance, which ought to be considered by that court.

According to the statement by Chief Justice Mogoeng Mogoeng, judicial overreach may be defined as a constitutionally impermissible intrusion by the judiciary into the exclusive domain of the parliament. In amplification thereof, he untangled that "an order by the majority prescribing the procedural steps to be taken in Parliament in the event of a motion to impeach the President of South Africa as an unprecedented and unconstitutional encroachment into the operational space of Parliament by Judges". In the United States case of *Obergefell v Hodges* the Chief Justice Roberts in his dissenting judgment held that:

> '… for those who believe in a government of laws, not of men, the majority's approach is deeply disheartening. … Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law.'[12]

From the above it is clear that the courts should not enact laws in the absence of any authority as this will amount to intrusion into the other arms of the State. Of importance, is

12 *Obergefell v Hodges* 576 US__ (2015) at 2.


Houses of Parliament, South Africa
Photo credit: Daniel Newcombe
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that the courts should exercise its task while being conscious of its limits and other matters having to be dealt with by other arms. The difficultly arises when one arm of government is not discharging its constitutional obligations or rather discharges same in a way that is unconstitutional or harsh, having due regard to the citizens' interests and the function of the courts. In the *Doctors for Life* case the Constitutional Court stated that:

> "The supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required to, by the Constitution, 'ensure that all branches of government act within the law' and honour their constitutional obligations. This court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4)*(e),* in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by the Constitution must be fulfilled. It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution".[13]

Section 172(1) of the Constitution provides that:

> "(1) when deciding a constitutional matter within its power, a court—
>
> a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> b. may make any order that is just and equitable, including—
>
> iii. an order limiting the retrospective effect of the declaration of invalidity; and
>
> iv. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".

In the *Economic Freedom Fighters* matter, and in the judgment of Jafta J and with Cameron J, Froneman J, Kathree-Setiloane AJ, Kollapen AJ, Mhlantla J, Theron J concurring, it was ordered, *inter alia* that:

a. The failure by the National Assembly to make rules regulating the removal of a President in terms of section 89(1) of the Constitution constitutes a violation of this section and is invalid.
b. The National Assembly must comply with section 237 of the Constitution and make rules referred to in paragraph 2 without delay.
c. The failure by the National Assembly to determine whether the President has breached section 89 (1) (a) or (b) of the Constitution is inconsistent with this section and section 42(3) of the Constitution.
d. The National Assembly must comply with section 237 of the Constitution and fulfil the obligation referred to in paragraph 4, without delay.[14]

The court does not tell how parliament should comply as same is already set out under the Constitutional provisions which the

13 *Doctors for Life* at para 38.

14 *Economic Freedom Fighters* at para 222.

court ordered that they be complied with. This is more or less similar to the decision of the court in the well-known ground-breaking *Grootboom* case where the court issued a declaratory order requiring the state to devise and implement a programme that included measures to provide relief for desperate people who had not been catered for after considering what was reasonable in the circumstances. In this way, and based on consistency, I find no form of overreach on the part of the court having to declare the law. Chief Justice Mogoeng Mogoeng, held in the same case that the impartiality of the court must not be open to reasonable doubt.

The controversy that arises in this regard concerns itself with the trust of the society on our courts. It will otherwise appear as if the judiciary is not performing its watch-dog role when it fails to direct another arm of the State to discharge its constitutional obligation. The same role has been exercised also in the essential case of *South Africa Social Security Agency and Another v Minister of Social Development and Others* when the court ordered how the grants were to be distributed in the interests of citizens.[15] If the judiciary was to refrain from exercising its role, it will be caught between discharging its constitutional obligation for the retention of a continued trust on it by the society and refraining from exercising its role to the advantage of those who are failing to discharge their constitutional obligations.

> **"The doctrine of separation of powers is not absolute as sometimes the courts will be inclined to direct another arm of government to stretch its arm as expected by an empowering legislation."**

The Chief Justice has held in *Economic Freedom Fighters* matter that the Constitutional Court is the "guardian of our constitutional democracy and the final arbiter of all constitutional or legal disputes". It means the judiciary has an assumed responsibility to ensure that all the values underpinning governance in a functioning democracy, are adhered to. According to Froneman J, it does not amount to judicial overreach to direct the parliament to comply with constitutional provisions. This serves as guidance and it does not state how parliament should carry out its obligations but rather that it should comply. As pointed out earlier, our government is that of a trilateral-responsibility, however, each arm of must be left to enjoy its constitutional guaranteed functional independence without intrusion.

The doctrine of separation of powers is not absolute as sometimes the courts will be inclined to direct another arm of government to stretch its arm as expected by an empowering legislation. In *National Treasury v Opposition to Urban Tolling Alliance*[16] the Constitutional Court held that while the courts are mandated to ensure that "all branches of government act within the law", they must "refrain from entering the exclusive terrain of the executive and legislative branches of government unless the intrusion is mandated by the Constitution itself".[17] In other words, it will not constitute judicial overreach when the intrusion is in terms of the Constitutional provisions. There is no complete separation under a functioning democracy. The same was acknowledged in the *First Certification Judgment*[18] that:

> "There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute. . . . The principle of separation of powers, on the one hand, recognises the functional independent of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the Constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."

The court was impelled in the *Economic Freedom Fighters* case to direct the parliament to comply with its Constitutional obligations. This in turn, still boils down to the argument that the court plays a watch-dog role as the guardian of our constitutional democracy and thus it cannot be construed as judicial overreach in the event where the court does not prescribe nor instruct how a particular arm of government should carry out its mandate. The court should continue its watch-dog, guidance and overseeing role for a transparent democracy.

Conclusion

Although many people may be sceptical when the court directs a particular arm of government to act in a particular manner, it is an essential role that they are inclined to play in a country where governance is defined by a written Constitution. Judicial intrusion is ideally avoidable but pragmatically is not avoidable in that the court may not turn away people who seek relief from it as this may violate the right of access to courts. The courts may not hear all cases but may not dismiss cases merely because hearing them will amount to judicial overreach, they may rather declare what one is inclined to do as per an empowering legislation. Therefore, in our constitutional framework, there are some instances wherein intrusion will be outweighed by the interests of those the court ought to protect and accordingly judicial overreach should not be declared because the intrusion will have been justified.

15 2018 ZACC 26.
16 2012 (6) SA 233 (CC).
17 National Treasury (note 45 above) at para 44.
18 In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

Criminal procedure: Appealing a Magistrate Court judgment

By Justice Legoabe Willie Seriti
(Supreme Court of Appeal Judge)

Source: Stock photo

The Magistrate Court and the High Court are creatures of statute. The jurisdiction of these courts in criminal cases is strictly regulated by statute, more particularly by various provisions of the Criminal Procedure Act 51 of 1977 (CPA).

In *Sefatsa v Attorney General Transvaal* 1989 (1) SA 821 (A) at 834 E Rabie ACJ said "It is the settled view of this court that its jurisdiction in criminal matters is determined by statute i.e. the Criminal Procedure Act and such other relevant statutory provisions as there may be."

In *S v Absolom* 1989 (3) SA 154 (A) at 164 A, Grosskopf JA opined that a court does have a power within certain limits to modify its procedures but the question of its jurisdiction is regulated by substantive law.

Section 309 of the CPA provides that any person convicted of any offence by any lower court may appeal against the conviction and or sentence to the High Court having jurisdiction. Leave to appeal is required, which can be granted on application by the trial court and if the application for leave to appeal is unsuccessful, the accused can approach the higher court for necessary relief.

In terms of section 309(1)(a) of the CPA a person sentenced to life imprisonment by a Regional Court can file and serve

notice of appeal without first applying for leave to appeal. In this instance, leave to appeal is not a prerequisite to the lodging and filling of the notice of appeal.

Section 84 of the Child Justice Act 75 of 2008 provides that a child who was convicted and sentenced and who at the time of the commission of the alleged offence was under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, he or she may note an appeal without having to apply for leave to appeal.

Criminal appeals in the High Court are dealt with by two judges or full court. Generally, appeals may not be instituted after an accused's death unless the sentence imposed negatively affects his or her estate. In the latter case, any person with substantial interest in the deceased's estate, for an example, an executor or their heir may lodge the appeal. In general, an appeal can be noted only after the conviction and sentence of the accused. There are few exceptions where the interests of justice require that the appeal should be noted and prosecuted prior to the finalisation of the trial. See *R v Abrahams and Others* 1959 (3) SA 753 AD at 763 B-E and *Wahlhaus v Additional Magistrate*, Johannesburg 1959 (3) SA 113 AD at 120 A-C.

"Criminal appeals in the High Court are dealt with by two judges or full court. Generally, appeals may not be instituted after an accused's death unless the sentence imposed negatively affects his or her estate."

In *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA), at paragraph 26, the court stated that the general rule against piecemeal appeals in criminal proceedings could conflict with the interests of justice in certain cases. In paragraph 27 the court said the following "It is surely not in the interests of justice to submit an accused person to the strain, expense and restrictions of a lengthy criminal trial if that can be avoided, in appropriate circumstances, by allowing an appeal to be pursued out of ordinary sequence and so obviating the trial or substantially shortening it."

In the case of a plea bargain where the state and the accused had come to an agreement with regard to conviction and sentence the accused is not allowed to appeal, unless there are exceptional circumstances which call for the reinstatement of the accused's right to appeal.

In *S v Armugga* 2005 (2) SACR 259 N, the accused lodged and prosecuted an appeal against sentence, which sentence was imposed pursuant to a plea and sentence agreement. At p 264 of the judgment Msimang J held "It has always been contemplated that the right of appeal in those cases would be limited one and that the appellants in those cases would be granted relief only in exceptional cases". These views expressed by Msimang J were quoted with approval by *Moshidi J in S v Nel* (A352 / 07) [2008] ZA GPHC 43 at para 10.

Magistrates Courts rule 67 prescribes when and how the notice of appeal must be filled.

If the lower court refuses leave to appeal, the accused can lodge a petition with the Judge President of the High Court with jurisdiction. If the leave to appeal is granted, notice of appeal will be served and filled and thereafter the appeal will be heard by the relevant High Court,

In the case where leave to appeal was refused by the Magistrate and a petition addressed to the Judge President was not favourably considered, the accused can address a petition to the President of the Supreme Court of Appeal for special leave to appeal. If the special leave to appeal is granted, the accused can appeal to the Supreme Court of Appeal. The special leave to appeal will not be against the conviction or sentence by the trial court, but against the refusal of leave to appeal by the High Court. The appeal against the conviction and or sentence will be suspended pending the decision of the Supreme Court of Appeal.

In *S v Radebe* 2017 (1) SACR 619 SCA the matter concerned an appeal against the refusal by the High Court of leave to appeal against the judgment of the Magistrates Court. At paragraphs 3 and 4 Bosielo JA said the following:

> "[3] . . . If leave to appeal is refused by the trial court, the accused can direct a petition to the Judge President of the specific High Court having jurisdiction over that trial court in terms of s 309c(2) of the CPA, for leave to appeal against the decision of the trial court. Upon leave being granted, the accused is free to prosecute the appeal in the High Court having jurisdiction.
> [4] However, if leave to appeal is refused by the High Court, that refusal is a judgment or order of the High Court . . . However, for the accused to appeal against it, leave should be granted by the High Court which refused leave to appeal against the judgment of the trial court. Where the High Court refuses leave to appeal, such an accused may appeal to this Court but only with the special leave of this court .Such leave to appeal will not be against the conviction or sentence by the trial court , but against the refusal of leave to appeal by the High Court"

There were various divergent decisions of the High Courts on the issue mentioned in the previous paragraph, but now the Supreme Court of Appeal finally pronounced on the correct interpretation of the legal position.

In summary, the appeal against conviction and or sentence will be heard by the High Court only in cases where the trial court has granted leave to appeal or in cases where the leave to appeal was granted by the High Court or by the Supreme Court of Appeal or in cases which in terms of a legal provision it is not necessary for the accused to first obtain leave to appeal prior to lodging notice of appeal.

Law and Indigent Communities - (Law and Community Engagement)

By Judge M.G.Phatudi (Acting Deputy Judge President, Limpopo Provincial Division)

Image sources: www.cogta.gov.za, www.southafrica.net, www.haikudeck.com

One of the basic tenets of our constitutional democracy, in particular, our legal system is the recognition and equal treatment or placement of African Customary Law on an equal footing with our common law as it obtained prior to 1996.

One can, therefore, accept without further ado, that the Constitution[1], which is the Supreme law of the land, is designed to curb further penetration of imperial or colonial legacy bequeathed by the outlawed system of "Separate Development" and "Apartheid", where equality of access to justice and the courts within the context of pure customary law was subjugated. The consequence was that traditional law and custom and its principles as practised within our traditional communities, was not promoted or developed side by side with other legal systems that are applicable in our courts.

The advent of the Constitutional state and democracy in our country had for the first time since 1996, brought about constitutional recognition of the system of customary law as an independent source of traditional law which is, of course, subject to the Constitution. It therefore paved a clear path for new innovative ways in adjudication and resolution of disputes emanating from traditional law and custom.

It is upon a consideration of our understanding that the Bill of rights in the Constitution, apply to all law and binds the three (3) arms of the state and all Organs of State.[2]

1 Act 108/1996

2 Chapter 2, the Constitution Act.

It is accordingly necessary for courts when applying the Bill of Rights, to either natural or juristic person, if and to the extent that it is applicable, to give effect to that right, to apply or if necessary to develop the common law to the extent that legislation does not give effect to that fundamental right.[3]

Consistent with the foregoing view, is the inherent power which the Constitution bestows in courts of a higher status as the Constitutional Court, the Supreme Court of Appeal and the High Court, to protect their own process, and to develop the common law, taking into account the interests of justice[4]

Recognition of traditional leadership and customary law

Furthermore, and most importantly, in support of the recognition accorded to customary law that obtains within indigent traditional communities, the Constitution accords recognition to traditional leadership as an institution and confirms its status and its role according to customary law and subject to the Constitution and the Rule of law. The courts are engendered to apply customary law when it is applicable, subject to the Constitution and any legislation.[5]

In order to achieve this objective and for proper application and administration of African Law to our communities, it becomes imperative for the government to expedite adoption of national legislation that seeks to establish the Traditional Courts were communities would have access to such courts or any other court with competent jurisdiction.

I remark though orbiter that the Traditional Courts Bill 2017 (the Bill) has now been referred to the NCOP for consideration, with Parliament having passed the Bill recently on 12 March 2019. (*G/Gazette* No.40487-09.12.2016 date of introduction). This Bill has as one of its objectives to increase access to justice services by enhancing effectiveness, efficiency and integrity of Traditional Courts in resolving disputes emanating from our traditional communities who are more often than not, indigent and cannot even bear the high costs of protracted civil litigation in the conventional courts and whose legal principles are, worst still, foreign to ordinary citizens.

The introduction of Traditional Courts, even though their proposal was met with some resistance from certain quarters, will in my opinion, enable even indigent litigants to have free access to those courts, as no legal representation is permissible.

> **"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before *a court,* or where appropriate another independent and impartial tribunal or forum"**
>
> -SECTION 34, CONSTITUTION

The Bill repeals all the remnants of the Black Administration Act 1927[6] and all outlawed legislation of the former homelands, which continued to regulate traditional law.

With this Bill introduced and finally assented to by the President into law, it will certainly give credence to the very basic precept that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair hearing before *a court,* or where appropriate another *independent and impartial tribunal or forum".*[7] (my emphasis)

On a closer examination, section 34 of the Constitution in fact means that everyone has an inherent right to refer his/her dispute for resolution either before a court of law, or before "another independent and impartial tribunal or forum".

Traditional courts as envisaged by the Bill referred to, will in terms of the intended legislation, be functioning as yet "another independent, impartial tribunal or forum" within the meaning of the Bill to be an Act of Parliament.

Objects of the Traditional Courts Bill

The main object of the Bill, when ordained as legislation, will be to affirm the values of Customary Law and customs in the resolution of disputes based on restorative justice and reconciliation, and mainly to align them with ethos and dictates of the Constitution. The Preamble to the Bill is clearly set out as being to provide "a uniform legislative framework for the structure (rationalization) and functioning of traditional courts in line with the Constitutional imperatives and values."

Furthermore, the Bill is intended to affirm the role of traditional courts in terms of Customary Law, enhancing access to justice (section 34, Ibid) by providing a forum for dispute resolution in accordance with the principle of *voluntary participation by all parties,* and preserving and promoting those traditions, customs and cultural practices that are mutually beneficial to traditional communities in accordance with constitutional imperatives.

In applying the Bill (when adopted) the need to align Traditional Courts with the Constitution is required to underpin dispute resolution mechanisms so as to embrace the values enshrined in the Constitution as an instrument to reflect basic human rights and dignity.[8] Closely associated with this salutary approach, is the fundamental principle to the achievement of *equality* and advancement of human rights and freedoms. The application of human rights and dignity are, in the main, an indispensable prerequisite in the administration of justice by the Traditional Courts contemplated.

3 Section 8(1) and 8(3) (a) – (b), the Bill of Rights
4 Section 173
5 Chapter 12, Section 211(1) and (3) –See also *Mphephu v Mphephu Ramabulana & Others* (948/17) [2019] ZASCA 58 (12.04.2019)
6 Act 38 of 1927.(now Repealed)
7 Section 34, Constitution.
8 Section 3(1)(a) – The Bill.

How will the traditional courts function in practise and who should have access to such courts?
Section 4(1)(*a*) provides that:-

> *"Any person may subject to subsection (3), institute proceedings in respect of a dispute in any traditional court"* (own emphasis)

A Traditional Leader or any person designated by him/her may convene sessions of a Traditional Court (*Kgoro*) at any place other than where the cause had arisen.

Guiding principles:
Section 3(1)(*a*)-(*d*) provides guiding principles when a Traditional Court may entertain disputes before it.

Section 3(2)(*a*)-(*e*) ensures that Traditional courts when applying the Act, should recognise and take into account, basic constitutional imperatives as espoused both in the Act and the Constitutions' Bill of Rights. Subsection 3(2)(*b*), in particular, enjoins Traditional Courts to recognise and consider "the existence of systematic unfair discrimination and inequalities or attitudes which are contrary to constitutional values…" or has a propensity to undermine meaningful and voluntary participation in such courts.

That said, I find no merit in arguments advanced in the public discourse that seem to contend that the envisaged courts will be adverse to existing guaranteed human rights and liberties of individuals seeking recourse in courts. Such contentions are, in my view, speculative conjecture.

The foregoing observation finds refuge in the restrictive jurisdictional factors found in section 4(2)(i) – (ii) of the Act that curtail jurisdiction of a Traditional Court (TC) for example, where a dispute is a subject of SAPS' investigation or the matter is pending before another TC or court (*lis pendens*) or that the dispute is *res iudicata* (finalised by a court of law).

Composition of and participation in traditional courts: (section 5 of the Act)
The TC is convened by a Traditional Leader recognised as such by statute.9 A TC consist of men and women pursuant to the equality clause in Section 9 of the Bill of Rights attached to the Constitution. The Act, therefore guarantees equality on issues of gender balance.

Compliance with the equality clause and women representation is something that will be monitored and managed by The Commission for Gender Equality established in cchapter 9 of the Constitution.

TC are "courts of law" under customary law whose objects are intended *to "promote the equitable and fair resolution of certain disputes in a manner underpinned by the value system applicable in customary law and custom"*, and subject to the Constitution.

In doing so, TCs are obliged to promote access to justice and restorative justice (section 6(1)).

Procedure in traditional courts:
Although the right to legal representation is not always unfettered, for the purposes of this Act, legal representation by either attorney or advocate is excluded (section 7(4)(*b*) of the Act).

The TC is required to apply the rules of natural justice (*audi alteram partem*) and not seek to be a judge in own cause, thereby demonstrating impartiality.

The TC is also obliged to apply the system of traditional law that predominantly obtain in the area of jurisdiction of the court and the traditional community concerned, to the exclusion of foreign traditional law and custom not applicable to the parties.

The hearings of a TC must be open to the public and the parties to the dispute. Nothing precludes a TC to offer ADR in an attempt to resolve a dispute, subject to the consent of the disputants. Court hearing a dispute shall allow full participation of "all interested parties" without discrimination.

Hearings of a TC must apply the customary law of procedure and evidence, and the language of the record should be one most widely spoken in its area of jurisdiction. A TC's punitive jurisdiction is set out in the Act.[10]

An order of a TC not complied with may in terms of section 9 be referred to the Clerk of Court to inquire into the reasons for non-compliance, and if after intervention the contempt persists, the matter may be referred to the local Magistrate's Court for adjudication.

Some peculiar features of the proceedings of traditional courts:
Unlike in conventional so-called Western Courts, proceedings in Traditional Courts (*Kgoro/Kgotla*) have notable features as:-

- That, disputes/cases are heard normally in the open where senior members of the community (originally initiated elderly male members) who have vast experience in traditional law and custom participates. Females and children below the age of puberty and uninitiated were barred from attending such hearings or to participate.
- The original position has now been drastically altered by the new Act. (section 5(1) to 5(5) of which the latter impels the presiding officer to pledge the prescribed oral ritual that he/she will "promote the values enshrined in the Constitution and this Act."
- In contrast to the civil courts which are usually technical and full of formulae, Traditional Courts were "quiet casual" with no rules prescribed who could attend and who could address the Court".[11] They are inquisitorial in character.
- In the traditional *Kgoro* system women could only address the court on invitation, and where a woman was party to a dispute, she had to be assisted by a senior male relative (section 9 constitution r/w. section 5 of the Act, now abrogated this disparity).

9 Section 1 of Act 41/2003, Traditional Leadership & Governance Framework Act, - defines a TL as any person who in terms of customary law holds a TL position and is so recognised. Section 1 of the TC Act accords similar definition.

10 Section 8(1)(a) – (k) – mostly monetary compensation, damages, either Aquilian or compensatory, community service, interdictory, Reprimand and referral to NPA for criminal charges.

11 T.W Bennett. "Customary Law in South Africa". 2004, Edition P.166 et seq.


A traditional tribal court in Manhlaneni, Eastern Cape.
Photo credit: Jonathan Torgovnik for The New York Times
Source: www.nytimes.com

- The Plaintiff would present his/her case, and call witnesses, thereafter the defendant would follow suit with own version. Quiet interestingly, no cross-examination took place. Members of the public made no comment during the litigant's oral submissions, although occasionally might "interject with a question."[12]
- At the close of the parties' respective presentations the matter was thrown open to general debate for members of the public present at the hearing to express their views on the matter after questioning the parties and their respective witnesses in a procedure akin to formal civil cross-examination.
- Hearsay evidence, and character evidence seems quiet permissible in the *Kgoro* proceedings as the rationale was to go to the bottom of the inquiry and where feasible, to restore strained personal relations between the disputants and achieve restorative justice, after the presiding officer had summed up the issues and general sentiments.
- In these courts, the weight of opinion prevailing at the gathering carried substance and thus had a material influence on the discretion of the decision of the Senior Traditional Leader or his nominee.

The proceedings in the Headman's *Kgoro* was, however, regarded as a court of first instance, and if one of the parties is aggrieved by its decision, he/she could escalate the matter to a court of higher hierarchy (in civil parlance, appeal court *in casu* full *Kgoro* of a *Kgosi* (STL) where the matter was heard *de novo.*[13]

Conclusion

From the aforegoing, it can now be safely inferred that the TC as envisaged, will be operating within the prism of the Constitution and the Rule of law.

Contrary to misconceived popular view, the TC will have no room to violate basic human rights and the values enshrined in the Bill of Rights.

Unfair discrimination is outlawed and equality and equal protection of its participants and protagonists is secured by the Constitution and the Act.

On a conspectus of the general objectives of the Act and what it seeks to achieve in relation to the application of customary law that often obtains in our indigent communities, the TC as viewed in their wider structural and operational context will, in my view, be utilized much more efficiently to the benefit of our traditional communities to which they shall have easy and free access, and shall acquire, in the process, the right of audience.

Again, I must reiterate that courts or tribunals/forums are obliged to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[14] when called upon to interpret the Bill of Rights.

Finally, allow me to borrow with deference from the dictum echoed by the Constitutional Court in *Alexkor LTD v The richtersveld community*[15] to the effect that:-

> "[52] It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life."
>
> "[53] In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community. And, it will continue to evolve within the context of its values and norms consistently with the Constitution."

It is upon a consideration of these venerated principles, that courts of the land must promote the spirit, purport and objects of the Bill of Rights as this salutary legal instrument does not deny the existence of any other rights conferred by either the common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights. ■

12 Paragraphs 17.3 and 17.4, Ibid.
13 Bennett,(ibid p.167)
14 Section 39(1)(a) and 39(2), Constitution
15 2004(5)SA 460(CC) at 479 – 480, Para [52] and [53].

Justice Yvonne Mokgoro

Justice Yvonne Mokgoro was a judge of the Constitutional Court of South Africa from its inception in 1994 until the end of her 15 year term in 2009.

She was born in Galeshewe Township near Kimberley and matriculated at the local St Boniface High School in 1970. She studied mostly part-time, obtaining the Bachelor of Law (B.luris) degree at the University of Bophuthatswana, now North West University in 1982, the Bachelor of Law (LLB) two years later, and completed Master of Laws (LLM) in 1987. She also studied at the University of Pennsylvania in the USA, where she was awarded a second LLM degree in 1990.
She started her work-experience as a nursing assistant and later as a retail sales-person before her appointment as a clerk in the Department of Justice of the erstwhile Bophuthatswana. After completion of the LLB, she was appointed maintenance officer and public prosecutor in the then Mmabatho Magistrate's Court.

In 1984, she was appointed lecturer in law in the Department of Jurisprudence, University of Bophuthatswana, where she rose through the ranks to Associate Professor and served there until 1991. From 1992 to 1993 she served as Associate Professor at the University of the Western Cape, from where she moved to the Centre for Constitutional Analysis at the Human Science Research Council, serving as Specialist Researcher (Human Rights), and also lecturing on a part time basis at the University of Pretoria, until her appointment to the Constitutional Court in October 1994.

Throughout her legal career she has taught a number of courses, including, Constitutional Law, Human Rights Law Jurisprudence, History of Law, Comparative Law, Criminal Law, Private Law and Customary Law at a number of universities in South Africa, the United Kingdom, the United States and Netherlands. She has written and presented papers and participated in a myriad of national and international conferences, seminars and workshops in South Africa and internationally, mainly in sociological jurisprudence and particularly on human rights, customary law, focussing on the impact of law on society generally, and on women and children specifically. She has served extensively as a resource person in this regard for non-governmental and community-based organisations and other initiatives in South Africa and internationally.

During her academic career, she has participated in a number of research projects and held positions on the boards of a number of civil society organisations, including community-based organisations:

- She served on the Advisory Committee of the South African - Canadian Linkage Project, from its inception in 1994 until it ceased operations in 2004.
- From 1995-2005 she was President of Africa Legal Aid, (AFLA) a civil society organisation, which provides legal aid and human rights education throughout Africa and is based in Accra, Ghana, with satellite offices in Maastricht (Netherlands) and Pretoria (South Africa).

- She served as Chairperson of Venda University Council from 2002 to 2009.
- She currently serves on a number of boards, and Trusts, including the Nelson Mandela Children's Fund which she chairs, Mandela-Rhodes Trust, the South African Institute where she heads the Curriculum Development, the International Committee Institute of Judicial Education, the South African Police Services (children's) Education Trust (where she serves as Deputy Chairperson) and is a member of the African Centre for Justice Innovation (ACJI).
- She also served as Chairperson of the Selection Committee of the Press Council of South Africa which appoints the Press Ombudsperson and members of the Press Appeal Board.

She is an honorary (emeritus) Professor of Law at the University of the North, University of the Western Cape, University of Cape Town, University of Pretoria, and the University of South Africa. She has been conferred with the Doctor of Laws (Honoris Causa) by the University of North West, the University of KwaZulu-Natal, the University of Toledo (Ohio) USA, University of the Western Cape, University of Pretoria, University of the Witwatersrand (Wits), University of South Africa and the University of Pennsylvania (USA).

She is a recipient of a number of other honours and awards, including:

- The Educational Opportunities Council scholarship to study in the USA (1989-1990)
- The Women's Law and Public Law Fellowship, by Georgetown University Law Centre, Washington DC (1990)
- The Human Rights Award by the Black Lawyers Association, (1995)
- The Oude Molen Reserve Order of Merit (1995/1996)
- The Legal Profession's Woman Achiever Award by the Centre for Human Rights, and the University of Pretoria (2001)
- University of the North School of Law Excellence Award (2003)
- The Kate Stoneman Democracy Award (Albany Law School, New York, U.S.A (2003)
- The Tshwane Outstanding Service Award (TOSA) in 2006
- The James Wilson Award by the University of Pennsylvania Law School [(Philadelphia, Pennsylvania (2008).
- She has also been appointed to serve as Special Ambassador for the University of Venda (University Council, 2009), and has been selected by the President of South Africa as an official Advocate for Social Cohesion in South Africa (2013-2018).

She holds membership of the International Women's Association (Washington DC) and the International Association of Women Judges, the International Federation of Women Lawyers and the South African Women Lawyers Association, and in 2006 was selected as an icon of the history of Women Lawyers in South Africa.

She also served as Chairperson of the South African Law (Reform) Commission from 1995 until the end of a third term in 2011. She served as a Judge in the Office of the Chief Justice (OCJ) from 2011 to 2013 where her work entailed the exercise of oversight over the administration of the OCJ and the implementation of the OCJ mandate. In a nutshell the role of the OCJ entails the enhancement of the independence of the South African Judiciary as per Section 165 of the South African Constitution and supportive laws.

In January 2012, she was appointed as Chairperson of the Independent Panel of Experts to investigate the circumstance of the incident in (stampede) that occurred at the University of Johannesburg South Africa during the student's registration and which resulted in the death of a parent, she reported to the University Council.

She is also been appointed in 2013 to chair a Tribunal which will investigate the ethical conduct of the President of the Lesotho Court of Appeal.

She was also appointed to chair an Enquiry into fitness of Adv Nomgcobo Jiba and Adv Lawrence Sithembiso Mrwebi to hold the office of Deputy National Director of Public Prosecutions and Special Director of Public Prosecutions by President Ramaphosa. The enquiry recently concluded its work.

Justice Yvonne Mokgoro, the first woman appointed to the Constitutional Court, received an honorary degree from the Faculty of Law, at the University of Cape Town.
Source: www.news.uct.ac.za

National Chairperson

OF THE LEGAL PRACTICE COUNCIL

Hlaleleni Kathleen Dlepu

Hlaleleni Kathleen Dlepu (born Matolo), is a black female practicing attorney. She is the founder and Managing Director of Molefe-Dlepu Incorporated. Molefe-Dlepu Inc is a female owned firm, which started in 1994 and employs a staff of 29, permanent employees, 80% of which are women. Clients of the firm include, amongst others, Eskom, Johannesburg Property Company, Aviation Authority, Railway Safety Regulator, Sanral, Public Investment Corporation.

Ms Dlepu is involved extensively with community-based organizations that promote and advise on women's rights and gender related issues. She is also the member of Pro-BONO. ORG and participates in Law Society Pro-Bono initiatives. In 1984, she obtained the B.Proc Degree from the University of the North and an LLB Degree from the University of the North in 1985. She was admitted as an attorney of the High Court in 1989, admitted as a conveyancer in 1994 and admitted Notary 2018.

In 1993 she obtained the Arbitration; and the Mediation and Dispute Resolution certificates through the Independent Mediation Service of South Africa. She also obtained the Certificate in Commercial Law Transactions conducted by the Black Lawyers Association Legal Education Centre, LSSA LEAD and American Bar Association.

She attended the Judicial training in 2008; the advanced Course in Business Rescue with UNISA; the Health and Safety Training Course by Eskom; the Computer-based Adjudication Skills Course by L.E.A.D; the First Level Regulatory Examination FSP (Sole Proprietors) and the Key Individual Certificate by Financial Services Board in categories terms of the Root Cause Analysis Technique Certificate by IRCA Global; the Computer-based Adjudication Skills Course by L.E.A.D; the Certificate in Court Annexed Mediation by the Dispute Settlement Accreditation Council ; the Certificate of Appreciation on Legal Benchmarking on Land and Real Estate Law between Angola and South Africa.

Ms Dlepu has experience in the following fields:

- Litigation, High Court and Magistrates Court
- Conveyancing
- Notarial Deeds & Notarial Bonds
- Township openings

- Facilitating the Land Release Program on behalf of Gauteng Human Settlement Department Evaton Renewal Project, which aimed to consolidate and strengthen the process of creating sustainable Human Settlement in line with the National Department of Human Settlement Breaking New Grounds (BNG) and promoting the principle of Land Tenure. Facilitating, Community Participation in Land release program & IDP'S, communities
- Registration of Servitudes
- Insurance Law
- Commercial Litigation
- Gender and Women Empowerment Champion and Practitioner
- Liquidations
- Family Law
- Chairing of Occupational Health and Safety Investigations

Ms Dlepu has held the following positions:

- General Secretary of the Black Lawyers Association, 2002 – 2008
- Vice-President of the Law Society of Northern Provinces, 2010 – 2011 and Law Society of Northern Provinces Councilor 2000-2012
- Chairperson of Appeals of the Security Industry Regulators Board, 2003 – 2010
- Chairperson of the Gender Committee of the Law Society of South Africa and also the Chairperson of the Gender and Transformation Committee LSNP 2003-2011
- Vice-President of the Black Lawyers Association, 2012 – 2013
- Co-Chairperson of the Law Society of South Africa, 2013 – 2014
- National Chairperson of the Legal Practice Council (Current)

Ms Dlepu has held the following directorships:

- Member of the Enforcement Committee of the Financial Service Board Institution (Protection of Funds Act 28 of 2001) now Financial Sector Conduct Authority
- A Non-Executive Director of the Attorneys Indemnity Insurance Fund (AIIF)
- Chairperson of the Policy and Compliance Committee of the Attorneys Fidelity Fund (AFF)
- Non-Executive Director of Regulatory Body, the NHBRC
- Non-Executive Director on the Gauteng Legislature Services Board (LSB)
- Member of the National Forum on the Legal Practice Act and Chair of the Transitional Committee
- Member of the Black Conveyancer's Association
- Conveyancing Examiner of behalf of the Law Society of South Africa.

Ms Dlepu has received the following awards:

- Certificate of recognition from the Law Society of South Africa for commitment to the "Service of the Legal Profession"
- Recognition by the Black Lawyer's Association for Service to Black Lawyers
- Recognition as one of the Most Influential People of African Descent: Great Legal Minds Law and Justice Edition in support of the United Nations' International Decade for People of African Descent.

Ms Dlepu with staff at Molefe-Dlepu Incorporated. Source: www.molefedlepu.co.za

The Pretoria Society of Advocates honours Limpopo Judge President with bronze bust

By Endy Senyatsi

The bronze bust of Limpopo High Court Judge President Ephraim Makgoba. Photo credit: Endy Senyatsi

Members of the legal fraternity came out in their numbers to witness the unveiling of a bronze bust of Ephraim Makgoba, the first Judge President of the Limpopo High Court during a ceremony held on 4 June 2019.

Judge President Makgoba, who was described by all the speakers as a hard-working individual who does enormous, extraordinary and exceptional things, was honoured by the Pretoria Society of Advocates with a bust put up in the reception area of the Limpopo High Court. It was revealed that the bust was commissioned to recognise and honour legal practitioners who always strive for excellence in their fields and is anticipated to motivate employees at the court to reach for the stars and carry out their duties to the best of their abilities.

Polokwane Society of Advocates chairperson Advocate William Mokhari indicated that it could have been their responsibility to honour Judge President Makgoba and reiterated that the Pretoria Society of Advocates lifted the

burden from their shoulders. He further said the society had some shortcomings but Judge President Makgoba always made it a point that the hindrances get resolved. Judge President Makgoba started the Limpopo High Court administration from scratch and he is doing a great job, Advocate Mokhari explained and added that Judge President Makgoba has the interests of the people at heart.

Transport and Community Safety MEC Dickson Masemola stated: "This is one of the rare occasions in the province and I would like to congratulate Makgoba for earning such a magnificent prize. The sculpture was prepared carefully to depict your hard work and commitment in the legal fraternity and we wish you all the best in your work and future endeavours."

When responding to what has been said about him, Judge President Makgoba shed tears of joy and highlighted that the sculpture came as a surprise as he was not aware that his work and contribution to the law society was recognised to such extent. He further joked that he would be retiring in the next two or three years and requested to take the bust with him. "The bronze bust will push me to work even harder. This is a great gesture which I appreciate so much. I would like to thank the Pretoria Society of Advocates for this amazing artwork, it really means a lot to me. My colleagues and family have been supportive in the work I do and I would like to thank each and every one of you," Judge President Makgoba explained.

"This is one of the rare occasions in the province and I would like to congratulate Makgoba for earning such a magnificent prize. The sculpture was prepared carefully to depict your hard work and commitment in the legal fraternity and we wish you all the best in your work and future endeavours."

SOURCE: This article was first published by the *Polokwane Observer* on 11 July 2019 (see: https://www.observer.co.za/bronze-bust-in-honour-of-limpopo-judge-president/). The article is republished with the permission of the *Polokwane Observer*.

Photo credit: Endy Senyatsi

Judge President of the Limpopo High Court Ephraim Makgoba is congratulated by Pretoria Society of Advocates Chairperson Mc Caps Motimele SC as he is honoured with a bronze bust.

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