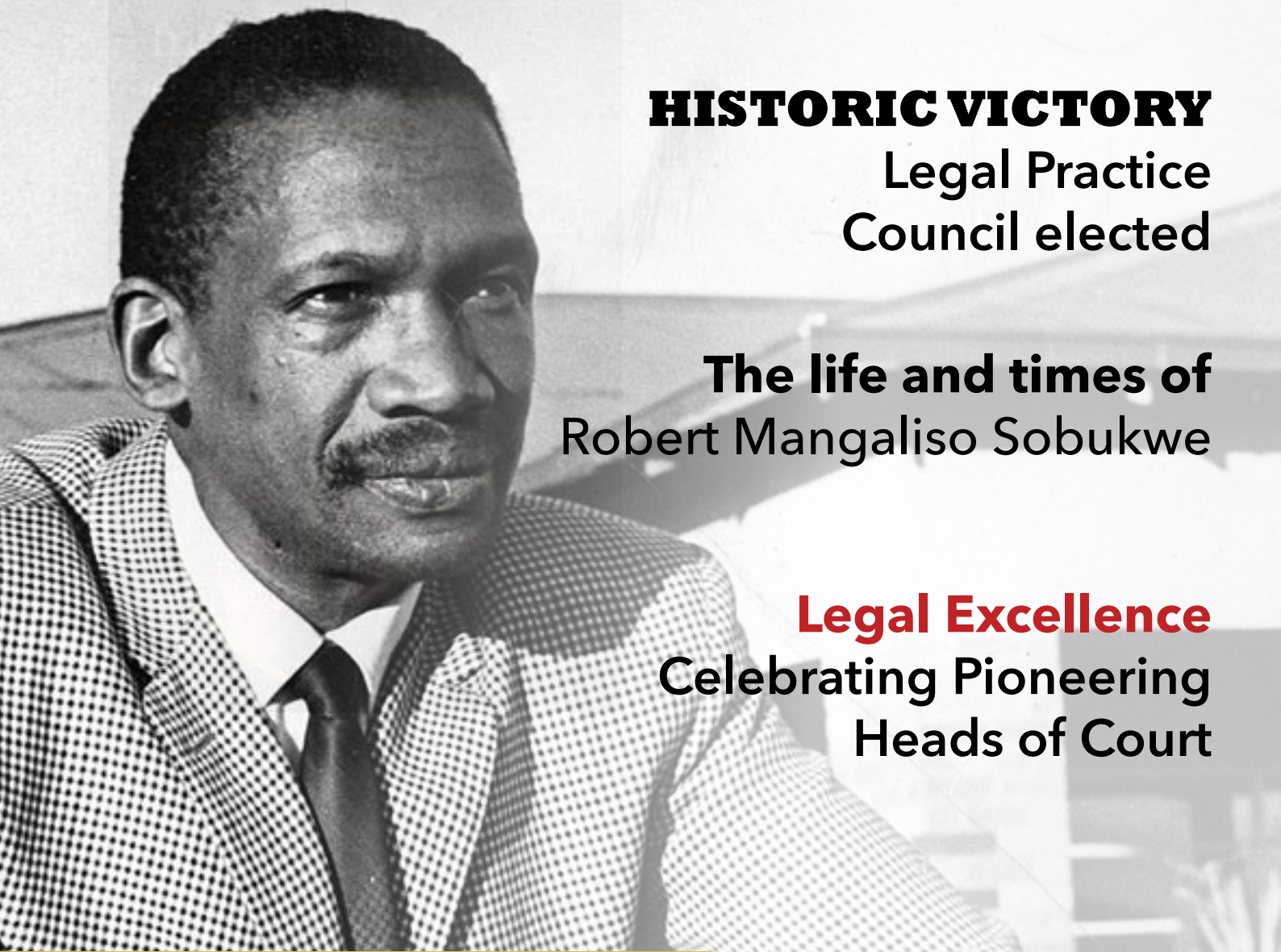




BROADENING THE LAND DEBATE: HOW BLACK PEOPLE WERE REMOVED



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Guest editorial note

By Justice Tati Makgoka, Supreme Court of Appeal Judge

We are delighted to welcome you to the second edition of the revived *African Law Review*. The older amongst you would remember it, as the flagship publication of the Black Lawyers' Association – Legal Education Centre in the 1980's.

In the last year or two, the idea of reviving the *African Law Review* gained momentum among former senior members of the BLA in conjunction with the BLA-LEC. In this regard we must mention and thank former BLA members – the late Justice Lebotsang Bosielo, Justice Legoabe Seriti, retired Judge President Thekiso Musi, the late George Maluleke and Judge Ntendeya Mavundla, together with the Chairperson of the BLA-LEC Board; Advocate Mc Caps Motimele SC and myself included. This leadership collective charged itself with facilitating the publication's revival. The discussion led to the formation of a Research and Publications Committee, which reports directly to the BLA-LEC Board. The committee, chaired by retired Judge President Thekiso Musi, initially comprised of the following members; Justice Tati Makgoka, Judge Ntendeya Mavundla, Nano Matlala (a senior attorney and former BLA President); Khangale Makhado (a veteran journalist). The BLA-LEC Board graciously seconded Thandi Bees (BLA-LEC Librarian) to take up the role of Secretary of the Committee.

The committee's commendable work, culminated in the rebirth of the *African Law Review*. The publication will appear quarterly. It comes at a crucial moment in our fledgling democracy, with the aim of contributing positively to the legal and constitutional discourse. It will articulate the views and aspirations of Black Lawyers and scholars, which have hitherto been missing.

The publication will be pan-Africanist in outlook, with emphasis on the advancement of black legal

practitioners. We highlight the phrase "with emphasis on", to make it clear that this publication is not exclusively black.

The first edition, issued in June 2018, already demonstrates its inclusive character. Black lawyers, judges, academics and other professionals involved in the practice of law are expected to play a leading role in contributing articles and other content. In short, they are the publication's primary constituency, their active participation and support will be crucial for its survival.

“ The rebirth of the *African Law Review* comes at a crucial moment in our fledgling democracy and is aimed at contributing positively to the legal and constitutional discourse...”

Although this second edition follows more or less the same format as the inaugural one, it was inevitable that there would be some modifications. The one notable change relates to the editorial team. In the inaugural edition members of the Research



and Publications Committee took the responsibility of editing the journal under the style 'Editorial Collective', as an interim measure. This role, will henceforth be played by an editorial board to be led by the newly appointed Editor Mpho Sithole, who has vast experience in the media environment.

We therefore invite you to enjoy this edition, there are exciting articles and touching tributes to look forward to. ■



Mpho Sithole, Editor

“Sikhalela Izwe Lakithi” (We're crying for our land)

Towards expropriation of land without compensation

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

Thina sizwe, thina sizwe esimnyama sikhalela izwe lethu elathathwa ngabamhlophe. Mabayeke umhlaba wethu, mabayeke umhlaba wethu. Abantwana be-Africa, bakhalela i-Afrika eyathathwa ngabamhlophe...

I begin with the beautiful words of a powerful struggle song, sung from the late 1970's titled *Thina Sizwe* or *Sikhalela Izwe Lakithi*. The words of this song sum up the spirit of the people calling for the return of the land, the land of their forefathers.

In fact the words “Land expropriation without compensation” have been so topical they were voted South Africa's Word of the Year (2018). That's according to an announcement by the *Pan South African Language Board* which found the words were used over 25 000 times across the country's media platforms.

Issue 2 of the *African Law Review* broadens the land debate. An article by Justice Legoabe Willie Seriti; *Broadening Forced Land Removals Under Apartheid*, touches on several policies and legislations introduced by the regime.

Land was central to the system which institutionalised racial segregation, it had as its sole objective; the advancement of the white minority interests at the expense of the black majority.

History reminds us that any policy not premised on the collective will of the people, will ultimately suffer one fate; rejection and demise.

The country's social and economic arrangement is the aftermath of a horrible history of dispossession, which enabled the white minority to thrive at the expense of the black majority. It created a vicious cycle of poverty and oppression.

The struggle against colonialism and apartheid was the struggle against political oppression, economic exploitation and social degradation. Land has always been *sine qua non* to equality, freedom and the pursuit of happiness (property).

“If the people want to change their constitution, to make a constitutional clause clearer, less obscure or less ambiguous and more understandable, democracy permits the will of the people to prevail.”

It is difficult to relegate human rights considerations to the periphery in the land question debate. Land ownership is foundational to the enjoyment of many fundamental human rights. In the South African context and history, dispossessed and now largely landless black people have been robbed of their dignity and identity.



To the dispossessed majority, the land is important for the enjoyment of cultural and socio-economic rights. It is for these reasons, and many others that the disputes over land ownership have caused serious and violent conflicts around the world.

As a nation, we have however, adopted and embraced the culture of peaceful dialogue for the resolution of many pressing issues.

The land issue therefore, though emotive and virtually divisive should never be an exception. Our conscious choice for constitutionalism and the respect for the rule of law must guide us towards a peaceful resolution.

This brings me to the debate on the desirability and appropriateness of land expropriation without compensation, which revolves around the construction of Section 25 of the Constitution. This section forms part of South Africa's land reform plan which advocates for its review, in order to expropriate land without compensation.

As these discussions on land rage on, the racial and socioeconomic divides that still exist in society become more evident.

Shrewdly put in an aphorism due to Poet, Percy Bysshe Shelley; *the rich get richer and the poor get poorer*.

The strong wave of opposition from those who benefitted from apartheid inspired land distribution has intensified. Much of the public debate on expropriation has been very linear, mostly considering the consequences that would follow expropriation yet overlooking the conditions that have sparked the fury.

The pain and suffering caused by colonial conquest and apartheid has not been acknowledged enough by white South Africa. Voices in opposition of land expropriation without compensation, through constitutional amendment have cited food security and economic concerns as compelling reasons to trump important considerations such as the pursuit of economic freedom, restoration of human dignity and the achievement of equality.

The preamble of our Constitution reads “*we the people of South Africa, recognise the injustices of our past*”. One of the injustices perpetrated in the past is land dispossession. The preamble also reminds us that our constitution was adopted so as to, “*heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*”.

SECTION 25 OF THE CONSTITUTION

Section 25(2) allows for the expropriation of land *subject to compensation* and the amount of which can be agreed by those involved or decided upon by the court. This is the first subsection dealing with expropriation and compensation. The payable compensation must be *just and equitable*, it must demonstrate an equitable balance between public interest and the interests of those affected as provided under sec. 25(3). The latter section makes it clear that the determination of what is *just and equitable* depends on a number of factors, including the history of the acquisition of property. Government policy inspired by this section have proved futile in recent years, that is the *willing seller-willing buyer* principle.

Under sec. 25, expropriation can only happen in terms of the law of

general application and for public purpose or in the public interest *subject to compensation* as sanctioned by subsection (2). Sec. 25(4) makes it clear that, public interest includes the nation’s commitment to land reform. This means that even if expropriation of land is premised on land reform considerations, which satisfy the first requirement under sec. 25 (2) (a), of being in the public interest or for public purpose, sec. 25 (2) (b) also places a hurdle on compensation.

“Voices in opposition of land expropriation without compensation through constitutional amendment have cited food security and economic concerns – as compelling reasons to trump important considerations such as the pursuit of economic freedom, restoration of human dignity and the achievement of equality.”

Although sec. 25(8) makes it clear that “*no provision under section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with section 36 of the Constitution*”. Properly understood and construed, the negation of sec. 25(2) (a) and (b), should satisfy the sec. 36 limitation threshold.

I am of a view that it will be extremely difficult, albeit possible, to persuade a court successfully that legislation envisaged under subsection

(8), regard being had to all, relevant sec. 36 requirements should be upheld.

A challenge to the constitutionality of the (possible expropriation) Act or Bill under sec. 25 (8), which negates the requirement of compensation, carries sufficient prospects of success. It may well be argued that the current structure of sec.25 allows for expropriation of land without compensation, I however have my reservations.

My view is that sec. 25 does not support expropriation without compensation and any argument based on its technicalities to support this proposition will enjoy very little prospects of success, (if any). Such an argument will likely collapse on the strength and weight of sec. 25(2).

South Africa is a democratic and open society, the country’s government is based on the will of the people. If the people want to change their constitution, to make a constitutional clause clearer, less obscure or less ambiguous and more understandable, democracy permits the will of the people to prevail.

Furthermore, section 74 provides for “*Bills amending the Constitution*”. This section is of paramount importance when we debate the land question and the need to amend sec. 25. Although many have warned against amending the constitution regularly, especially the Bill of rights (which jurisprudence, I agree with) . The question that then arises is; what then if the people want to exercise their sec. 74 rights? The answer is simple, it is constitutionally permissible!

The resolution of the land question is therefore important, for our democratic constitution could never have been intended to preserve privileges and perpetuate oppressive trends, injustices and inequalities.

It was adopted to facilitate healing and redress. It was adopted to enhance equal economic participation, to achieve equity and the enjoyment of human rights.

Whenever a constitutional clause is amenable to interpretations that seek to enhance narrow interests or in a manner that frustrates real and substantive justice through technicalities, such a clause ought to be amended.

In conclusion, “*grond is goud*” - land is priceless. ■

African Law Review media launch

By Andisiwe Sigonyela, Acting Director-BLA-LEC



The Black Lawyers-Association Legal Education Centre officially re-launched its quarterly publication; the *African Law Review Journal (ALR)* on 17 July, 2018. The launch came under the theme: *Rebirth of the African Law Review and reclaiming the legal and constitutional space.*

The theme summarised and conveyed a strong message about the BLA-LEC's rich history and noble intentions since its formation in 1987. It provides a glimpse of what the Centre stood for in its darkest times in history and what it seeks to achieve in today's democratic and constitutional dispensation.

When the BLA-LEC founded the publication 31 years ago, it served as a platform for black lawyers to write articles, notes, features and articulate their views on legal matters and other topical issues. It also recorded their activities and profiled many prominent black lawyers from pioneers

like; Pixley Isaka ka Seme, Oliver Tambo, Nelson Mandela to Godfrey Mokgonane Pitjje.

The ALR was a quarterly journal which stopped printing in 1995 following factors like; the inability to generate meaningful advertising revenue. The magazine had relied solely on sponsorship for sustainability.

Subsequently, another publication called *Uhuru* was launched under the editorship of Constitutional law expert, Professor Shadrack Gutto. It also ran into the same difficulty as the ALR.

The BLA-LEC has taken another bold move in the rebirth of the publication.

The official media launch was attended by distinguished members of the legal profession, government officials, members of the diplomatic corps and business leaders. During the launch, former BLA-LEC Director (from 1986 – 1992) and Former Judge of the International Criminal Tribunal for the former Yugoslavia, Bakone Moloto reminded those at the event of the reasons behind the formation of the Black Lawyers Association.

He recalled the associations' dark times of apartheid, a regime which legitimised the systematic exclusion and the suppression of black voices from all realms of national significance.

Judge Moloto emphasised that the BLA was formed to advance the interests of black lawyers, who found it extremely challenging to practice law in South Africa at the time, especially in Johannesburg. The obstacles were consciously created and sanctioned by apartheid policies, laws and institutions.

Judge Moloto said it was after the formation of the BLA that the association decided to form the BLA-LEC, drafting the following key objectives, with some still in place today:

To improve the skills of black lawyers through education

The BLA-LEC introduced the Trial advocacy training programme, to hone the skills of black lawyers and enhance their competency levels. This was also to bridge the gap between the theory of law and the practical world of trial advocacy. It was also a strategic response to perceptions that black lawyers were poor litigants in court.

To facilitate access to justice and increase the number of black lawyers

Through the BLA-LEC legal aid clinics, BLA members were able to take cases on a pro-bono basis for the indigent members of the community who were mostly black. The BLA-LEC played a pivotal role in training candidate attorney's by partnering with black-owned law firms. Through this partnership, each firm which hired a candidate attorney would pay a 50% salary, while the BLA-LEC paid the remainder.

Minister of Justice and Correctional Services, Michael Masutha delivered the keynote address. He enthusiastically commended the decision to re-launch the ALR, inviting all legal practitioners to support the publication and see it as a medium to impart knowledge and make a significant contribution to the current discourses. Masutha spoke at length about the legal profession which remains virtually untransformed, saying "legal practitioners must relentlessly confront the challenge of transformation in the legal profession and many others that continue to plague the country".

He expressed concern about the



Minister of Justice and Correctional Services, Michael Masutha

“ Legal practitioners must relentlessly confront the challenge of transformation in the legal profession and many others that continue to plague the country.”

limited number of silk applications from black practitioners in comparison to their white counterparts and the briefing patterns which limit black legal practitioners growth and developmental opportunities.

The Minister asked all stakeholders to identify and dismantle barriers of entry into the legal profession and create conducive conditions, especially allowing opportunities for women in the fraternity.

Masutha urged established top law firms to be the drivers of change and torch-bearers of transformation by recruiting more previously disadvantaged lawyers to lead the transformation project, which has become a national imperative.

Acting Chief Executive Officer of the Law Society of South Africa, Anthony Pillay took to the podium reiterating that the LSSA will support

the ALR. He said the society is committed to making resources available, to ensure the ALR's sustainability.

President of the Progressive Professionals Forum, Mzwanele Manyi also delivered a speech at the launch. He applauded the decision to revive the ALR and called for all to support it, since its revival was long-overdue. Manyi challenged the legal profession, especially black practitioners to use their expertise to expedite the resolution of the land question. He rhetorically asked why the constitution only seeks to address land dispossessions that took place after June 1913.

He expressed concern about dispossessions that took place before 1913 and challenged lawyers to utilise their skills and reverse the injustices of the past. ■



Acting Chief Executive Officer, Law Society of South Africa, Anthony Pillay



Former Judge of the *International Criminal Tribunal* for the former Yugoslavia and former Director of the BLA-LEC, Bakone Justice Moloto



President of the *Progressive Professionals Forum*, Mzwanele Manyi



African Bank chief executive Basani Maluleke and BLA-LEC chairperson Adv. Mc Caps Motimele SC



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Empowering legal minds



The BLA–LEC is passionate about educating and training legal practitioners. Our objectives are to build the capacity of lawyers and expose them to areas of law where their market penetration is minimal or non-existent. We also want to provide continuing legal education and services to the black community at large and increase the number of black lawyers.

SOME OF OUR WELL-DESIGNED PROGRAMMES INCLUDE:

Continuing Legal Education

This programme is aimed at primarily building capacity and enhancing the skills of lawyers and making the law accessible to all black and or historically disadvantaged legal practitioners in South Africa.

Trial Advocacy Training

This programme was introduced in 1986 to improve the advocacy skills and trial techniques of lawyers. This training is based on a learning-by-doing approach in a simulated courtroom session.

We believe that advocacy is an art of persuasion, it has the ability to use language to tell a convincing and believable story. The programme is aimed at helping lawyers acquire and develop the skills and values they need to become competent and confident litigators.

Commercial Law Programme

This programme has been conducted since 2004. It covers important areas such as; purchase and sales agreements, mergers and acquisitions, dispute resolution and other significant areas of commercial law.

Commercial Law Programme (CLP)

TOPIC	DATE	AREA	NUMBER OF DELEGATES
Commercial Business Establishment	23 & 24 March 2018	Polokwane	19 attended
Contract drafting and negotiation skills workshop	14 April 2018	Rustenburg	17 attended
B-BBEE workshop	30 June 2018	Durban	12 attended

Continuing Legal Education (CLE)

TOPIC	DATE	AREA	NUMBER OF DELEGATES
Prospecting and Mining Law seminar	10 March 2018	Middelburg	15 attended
High Court Motion and Ethics workshop	12-13 April 2018	Polokwane	78 attended

Trial Advocacy Training (PLT Schools)

PLT SCHOOL	DATE	NUMBER OF DELEGATES
Potchefstroom (night class)	28, 29 & 30 May 2018	39 attended
Port Elizabeth (night class)	11, 12 & 13 June 2018	22 attended
Bloemfontein (night class)	25, 26 & 27 June 2018	23 attended

Trial Advocacy for Advocates and Attorneys

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Basic Intensive Trial Advocacy Training – <i>Admitted Attorneys</i>	21, 22 & 23 June 2018	Cape Town	23 attended

Continuing Legal Education (CLE)

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Trust and Business Accounts Management	21 July 2018	Polokwane	15 attended

Trial Advocacy Training (PLT Schools)

AREA	DATES	NUMBER OF DELEGATES
Pretoria (night)	03, 04 & 05 July 2018	64 attended
Johannesburg (night)	04, 05 & 06 July 2018	64 attended
Johannesburg (day)	09, 10 & 11 July 2018	56 attended
Cape Town (night)	16, 17 & 18 July	49 attended
East London (day)	31 July, 01 & 02 August 2018	51 attended
Cape Town (day)	20,21 & 22 August 2018	52 attended
Durban (day)	20,21 & 22 August 2018	59 attended
Durban (night)	20,21 & 22 August 2018	58 attended
Pretoria (day)	11,12 & 13 September 2018	60 attended
Polokwane (day)	26,27 & 28 September 2018	52 attended
Polokwane (night)	26,27 & 28 September 2018	49 attended

Trial Advocacy Training (TAT), University Programme

UNIVERSITY	DATES	NUMBER OF DELEGATES
University of Venda	12, 13 & 14 July 2018	80 attended
University of Zululand	23, 24 & 25 August 2018	81 attended
North West University- Mafikeng	30, 31 August & 01 September 2018	105 attended
Nelson Mandela University	03, 04 & 05 September 2018	12 attended

Commercial Law Programme (CLP)

TOPIC	DATE	AREA	NUMBER OF DELEGATES
Contract Drafting and Negotiation Skills workshop	25 August 2018	Bloemfontein	23 attended
Competition Law and Merger Filing workshop	18 August 2018	Pretoria	28 attended

Trial Advocacy for Advocates and Attorneys

TRAINING	DATE	AREA	NUMBER OF DELEGATES
Advanced Trial Advocacy Training – <i>Admitted Attorneys</i>	01 – 06 October 2018	Pretoria	31 attended

Upcoming Trainings

TRAINING	DATE	AREA
CLP – Corporate Governance workshop	27 October 2018	Nelspruit
CLP- Taxation of Business	27 October 2018	Cape Town
CLE - Prospecting Mining Law seminar on	03 November 2018	Polokwane
CLP – Competition and Merger Filing workshop	10 November 2018	Durban
TAT – Advanced Trial Advocacy Training	19 – 24 November 2018	Namibia
CLE - Entertainment Law seminar	24 November 2018	Johannesburg
CLP - Contract Drafting and Negotiation Skills	24 November	Kimberley
CLE - Corporate Tax Law seminar	01 December 2018	Cape Town



Adv. Mc Caps Motimele SC teaching, Trial advocacy for advocates and attorneys in Pretoria.



Adv. Simon Phaswane teaching, Trial advocacy for advocates and attorneys in Pretoria.



Adv. Tshepo Kennedy Mojela teaching, TAT, Nelson Mandela University.

Participant Feedback

At the end of each session participants receive evaluation forms, some of their responses have been recorded below:

- I appreciate your efforts to capacitate us. I say job well done salute cadres!
Chuenekgolo Joseph Ntsoane, Rustenburg (CLE)
- The presentation was excellent and the content was accessible.
Bruno Seabela, Pretoria (CLP)
- I gained exposure from civil and criminal proceedings.
Mashabake Mphekgwane, Limpopo (TAT)
- Overall the workshop was inciteful, thought provoking and very fruitful.
Susan Pisto, Cape Town (CLE)
- The instructor is well versed on the subject and my passion has grown as a result.
Nhlanhla Shongwe, Rustenburg (CLP)
- The material was very informative and well structured. Trial advocacy is very educational.
Mamiki Mutlaneng, Gauteng (TAT)
- This was a very informative workshop, it was a privilege to learn from some of the wise and seasoned persons in the legal fraternity.
Abel Sebola, Bloemfontein (CLE)
- The BLA-LEC needs to keep up the good work, it is impressive and admirable.
Tebogo Pila, Polokwane (CLP)

The history of the Black Lawyers Association

By Deputy Judge President Phineas Mojapelo, South Gauteng High Court



In 1977, a meeting of young and middle aged men took place in an office opposite the Magistrate’s Court in Johannesburg. These men had certain features in common; they were all Black, had legal qualifications and practised as attorneys mainly in Johannesburg and Pretoria.

The meeting had mostly been convened at the initiative of Godfrey Mokgonane Pitjie, then the most senior black attorney in the Transvaal. He had practised for a short period in Johannesburg, in partnership with John N Madikizela and Desiree Finca; the

first African woman to be admitted as an attorney.

The immediate reason for the meeting was the discriminatory provisions of the Group Areas Act, which barred black people from occupying offices or business premises in the so called *white areas*. The right of black lawyers to open and run practices in town was directly affected. This contentious issue marked the start of the associations work.

The entire town of Johannesburg and all other towns in South Africa were classified as white areas. By law, black lawyers were prohibited from occupying offices in town without a permit from the Minister of Bantu Affairs¹.

The latter was a member of cabinet, responsible for all aspects of the lives of black people, from the cradle to the grave and beyond.

It was a criminal offence for a black person to occupy offices in town without a group area permit issued in terms of the Act. It was also an offence for a white land owner to allow a black person who did not have a permit, the occupation of their land, premises or offices in white areas. The permit, when applied for, was rarely ever issued. This exposed most black lawyers to the risk of being prosecuted under the controversial Group Areas Act. As one would appreciate, very few property owners, who were by law all white, were prepared to conclude an illegal lease of premises at the risk of being prosecuted. Access to proper office accommodation was therefore a major challenge for black lawyers.

The land owners who were prepared

“Several black attorneys occupied offices without permits under one or other arrangement with a fictitious white middleman. They exposed themselves to being prosecuted if the law enforcement agencies found out the conditions of their stay.”

to lease premises to black attorneys, often did so on the outskirts of the central business district, where the premises was often dilapidated and in a poor state of maintenance.

This applied even where the black tenant had a permit. It was unheard of, for a black attorney to occupy an office in the heart of the commercial centre or anywhere near it. Town was white and not for blacks. It was treacherous for a black person to even think of having a business or office in a white town, it was a threat to white interests and therefore criminal.

White land owners in the then well-developed centres appeared to collaborate with the apartheid

government in keeping black owned businesses and professionals out of the CBD. When black people did get office accommodation, their premises were not only neglected by the owners but the rent and conditions would also be exorbitant. The black person's position of negotiation was weakened by the Group Areas Act and other apartheid laws as punishment for intimidating white interests.

The white landlord was in effect doing the black a favour. There could be no real negotiation when power and privilege was on the one side.

Several black attorneys occupied offices without permits under one or other arrangement with a fictitious white middleman. They exposed themselves to being prosecuted if law enforcement agencies found out the conditions of their stay. The meeting in 1977 therefore focused on discussing that problem and others which blacks faced by virtue of being classified as "Native", later "Bantu, and only much later "Black" under the law.

It is not as if the statutory Law Society (in this case the Law Society of the Transvaal) was not aware of the plight of black lawyers. They had repeatedly reported their problems to the society, without receiving much help. There seemed a lack of enthusiasm to address their pressing issues, which were always relegated to the last position on the agenda, if placed on the agenda at all.

The council of the Law Society then consisted exclusively of white attorneys, who as voters in apartheid South Africa, were responsible for the Group Area Act and supported its enforcement. They were part of the apartheid machinery that oppressed their black colleagues and communities.

Some council members and ordinary members of the Law Society also acted on behalf of government and white office block owners in the CBD. As senior members of the legal profession, some were even friends

with cabinet ministers and state officials responsible for enforcing the discriminatory laws.

Black lawyers were in no position to influence decisions in the fraternity. Although they were compelled by law to be members of the statutory law societies after admission as attorneys, they constituted less than 10% of the total membership of the society.

“ The land owners who were prepared to lease premises to black attorneys, often did so on the outskirts of the central business district, where the premises was often dilapidated and in a poor state of maintenance”

The conditions for the black lawyer to practice the profession were unfavourable. It was an unsatisfactory, if not an unworkable state of affairs.

The initial group of black attorneys that had come together decided to meet from time to time, initially under the name; Black Lawyers Discussion Group. Minutes were kept of their discussions, sometimes the group would decide to take up a particular problem which affected one of them with the Law Society.

The meetings revolved around their frustrations over inadequate attention or no attention at all being given to their problems, a situation they were unable to change. This was the genesis of the Black Lawyers Association, the group

continued to meet in Johannesburg and Pretoria. Initially, the two cities were the only ones with practicing black lawyers, especially in the then Transvaal province, where the BLA started.

In the beginning, the meetings would either take place at one of the lawyer's offices or home, but mostly at GM Pitje's home, "Lefakong" in Daveyton, Johannesburg. He was the most senior amongst them and had served his articles of clerkship at *Mandela & Tambo*, prior to its disbandment.

The firm's founders; Nelson Rolihlahla Mandela and Oliver Reginald Tambo were arrested and prosecuted in the Rivonia Trial in the early 1960's.

In due course the Black Lawyers Discussion Group decided to form themselves into a formal association. A constitution was drawn and formally adopted in 1979/80. Under the terms of the constitution, the group formalized itself to become the Black Lawyers Association.

Notes

1 This was a cabinet position in apartheid South Africa which started as Minister of Native Affairs, then Minister of Bantu Affairs, and later Minister of Co-operation and Development. Believe it not under white South African government co-operation did eventually become synonymous with racial segregation. ■

This is the first in a series of articles which seek to trace the formation and history of the Black Lawyers Association (BLA). The Editor welcomes any comments, particularly by lawyers who were part of the process.

Academic writing and legal research are crucial legal practice components

By Luyolo Mahambehlala, Black Lawyers Association Student Chapter President

The Black Lawyers' Association Student Chapter (BLAsc) welcomes the revival of the *African Law review* by the Black Lawyers' Association-Legal Education Centre (BLA-LEC). It comes at a critical stage in the legal profession, where the discourse surrounding the adequacy of legal education is a burning issue. Legal education in South Africa is disappointingly impractical and abstract, it fails to adequately equip students and aspirant lawyers with the sufficient, broad and practical skills required to thrive in practice.

Students' critical legal analysis and creative academic writing are some of the most fundamental concerns of the profession.

It is the hope of the BLAsc that through the *African Law Review*, the BLA-LEC will invigorate the spirit and culture of writing amongst students and young people at large.

Academic writing and legal research are essential components of the legal practice. It is an indictment to our legal education that students reach graduation with no practical experience and unsatisfactory writing skills. As a skill, writing improves with experience, through practice. It is our hope that the ALR will be a platform for young lawyers to express themselves and voice their plight.

It is perhaps an opportune moment for us to intensify the call for a uniform legal education, as this would circumvent the disparities in the quality of graduates produced by institutions across the country. It would also unearth the prevailing prejudice and inequality in the selection criteria

“ It is an indictment to our legal education that students reach graduation with no practical experience and unsatisfactory writing skills...”

of the so called 'Big Five' law firms as they would have no excuse to head-hunt students from predominantly white institutions. Furthermore, while the legal fraternity has an influx of graduates each year, there is a deficit of sober, conscious and politically aware graduates. It is our mandate as the BLAsc to radically agitate for a more conscious and revolutionary legal education.

Like the proponents of critical legal studies, founded on Marxist principles; we need to breed a new



generation of lawyers. A generation which will explore, criticise and reverse the manner in which legal doctrine and education entrench advantage, disempower the vulnerable and sustain a pervasive system of oppressive relations in the legal sphere. It is our mandate to reveal the ideological underpinnings of the legal system, show the unfairness that dominates legal education and ultimately the fraternity in its entirety.

President Nelson Mandela teaches that “young people are capable, when aroused, of bringing down the towers of oppression and raising the banners of freedom”. It is under this context that the BLAsc unequivocally supports and welcomes the revival of the ALR and hopes that it will be a beacon that highlights and nurtures young people's writing skills.

There are not many platforms where young people can be heard in the profession, decisions that directly impact them are often taken in their absence. ■

Private use of dagga decriminalised

By BLA-LEC desk



Possession and cultivation of marijuana for personal private consumption, no longer a criminal offence.

The Constitutional Court handed down its long awaited judgment on 18 September 2018, ruling that the possession and cultivation of cannabis by adults in private, is no longer a crime.

Deputy Chief Justice Raymond Zondo upheld the Western Cape High Court ruling that marijuana can be used at home.

The matter had been brought to that court by Rastafarian Garreth Prince and former Dagga Party Leader Jeremy Acton, in a request for the home usage of the psychoactive drug.

Justice Zondo's landmark decision follows an appeal by the State against Judge Dennis Davies's ruling in March last year which found that preventing marijuana use at home was in breach of one's constitutional right to privacy as it infringed on section 14 of the Constitution.

The state had argued that legalising dagga was not in line with the

constitution as using it increased crime and could be harmful to citizens, causing mental illness and psychosis.

Justice Zondo ruled that Parliament must change its Drug Trafficking and Medicines Control Acts.

In a unanimous judgment he declared the following:

- section 4(b) of the Drugs Act was unconstitutional and, therefore, invalid to the extent that it prohibits the use or possession of cannabis by an adult in private for that adult's personal consumption in private;

- section 5(b) of the Drugs Act was constitutionally invalid to the extent that it prohibits the cultivation of cannabis

by an adult in a private place for that adult's personal consumption in private; and

- section 22A(9)(a)(i) of the Medicines Act was constitutionally invalid to the extent that it renders the use or possession of cannabis by an adult in private for that adult's personal consumption in private a criminal offence.

The judgment has a two-fold effect; *it decriminalises the use or possession of cannabis by an adult in private for that adult person's personal consumption in private; and it decriminalises the cultivation of cannabis by an adult in a private place for that adult's personal consumption in private.*

However, the use or possession of cannabis in public, is not decriminalised. The quantity of cannabis that an adult may use, possess or cultivate in order for it to amount to "personal use" has still not been established.

Justice Zondo said it should be left to Parliament to decide on.

Parliament is expected to correct the statutory defect within two years. ●



Dagga Party Leader Jeremy Acton, Rastafarian Garreth Prince
Source : tnha.co.za

Legal Practice Council elected

By BLA-LEC desk



As of November 1st, the legal profession (attorneys and advocates) will be regulated by the Legal Practice Council.

The National Forum on the Legal Profession unveiled the newly elected 16-member council on 8 October. Elections for the new council, made up of attorneys and advocates were held from 19 September to 3 October. The process follows the LPC's first elections, which were conducted in terms of reg 2 of the Legal Practice Act 28 of 2014.

The new council marks the beginning of a fresh era in the legal profession, replacing the traditional law societies and bar associations.

The 16-member council was elected as follows:

LPC elected attorneys

Member	Region	Votes
Kathleen Matolo- Dlepu	Gauteng	1484
Noxolo Maduba-Silevu	Free State	1465
Nolitha Jali	Eastern Cape	1339
Trudie Nichols	Kwazulu Natal	1170
Lutendo Sigogo	Limpopo	1251
Krish Govender	Kwazulu Natal	1018
Priyeshkumar Daya	Gauteng	974
Janine Myburg	Western Cape	1092
Jan Stemmett	Limpopo	1241
Miles Carter	Gauteng	916

LPC elected advocates

Member	Region	Votes
Anthea Platt SC	Gauteng	500
Harshila Koervejie SC	Gauteng	468

Member	Region	Votes
Ismail Jamie SC	Western Cape	674
Vuyani Ngalwana SC	Gauteng	299
Grace Goedhart SC	Gauteng	788
Greg Harpur SC	Kwazulu Natal	621

The full LPC will be composed in terms of s 7(1) of the LPA, which states:

'(1) The Council consists of the following members:

- (a) 16 legal practitioners, comprising of 10 practising attorneys and six practising advocates, elected in accordance with the procedure prescribed by the Minister –
 - (i) in terms of section 97(1)(a)(i); or
 - (ii) in terms of this section, in consultation with the Council, if the procedure referred to in subparagraph (i) requires revision after the commencement of Chapter 2;
- (b) two teachers of law, one being a dean of a faculty of law at a university in the Republic and the other being a teacher of law, designated in the prescribed manner;
- (c) subject to subsection (3), three fit and proper persons designated by the Minister, who, in the opinion of the Minister and by virtue of their knowledge and experience, are able to assist the Council in achieving its objects;
- (d) one person designated by Legal Aid South Africa; and
- (e) one person designated by the Board [the Legal Practitioners' Fidelity Fund Board], who need not necessarily be a legal practitioner.' ■

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PIONEERING HEADS OF COURT



CHIEF JUSTICE PIUS LANGA (1938 - 2013)

Chief Justice Pius Langa was born in Bushbuckridge, then Limpopo on 25 March 1939. He obtained the B Iuris and LL B degrees in 1973 and 1976 respectively, by long-distance learning through the University of South Africa.

He worked in various capacities in the Department of Justice from interpreter, messenger to magistrate during 1960 – 1977. He was admitted as an Advocate of the Supreme Court of South Africa in June 1977. Langa served in the structures of the United Democratic Front (UDF), the Convention for a Democratic South Africa (CODESA). He was also a member of the Constitutional Committee of the ANC during the 1980's and early 1990's, also serving on the boards and as a trustee of various law-related institutions. He was one of the founding fathers of the South African Legal Defence Fund and the National Association of Democratic Lawyers, becoming its President from 1988 to 1994. Langa practised at the Natal Bar and attained the rank of Senior Counsel early in 1994, when the Constitutional Court of South Africa was established that year, he was amongst those appointed as the first judges of the new court. He was a member of the first commission of inquiry appointed by President Nelson Mandela. In 1997 he was appointed Deputy President of the Constitutional Court, to later assume the position of Deputy Chief Justice in 2001. He was appointed South Africa's Chief Justice and head of the Constitutional Court in 2005, serving until his retirement in 2009. As Chief Justice, he chaired the Judicial Service Commission and the Southern African Judges Commission. He has held various other prestigious positions including, Chancellor of the University of Natal (1998-2004) and the first Chancellor of the Nelson Mandela Metropolitan University (2006-2010).

Justice Langa received several awards for the advancement of justice and human rights from various associations including the BLA, amongst others:

- He was jointly awarded the 2004 Justice Prize by the Peter Gruber Foundation (USA) and the 2006 Sydney and Felicia Kentridge Award for Service to Justice.
- President Thabo Mbeki bestowed upon him the Order of the Supreme Counsellor of the Baobab: Gold in 2008
- Awarded honorary doctorates by the Universities of Zululand, Western Cape, Cape Town, South Africa and Rhodes University, and abroad, Yale University, the National University of Ireland and North-Eastern University (Boston). ■



JUSTICE LEX MPATI (SCA PRESIDENT)

Justice Lex Mpati was the first black Judge to be permanently appointed to the Supreme Court of Appeal.

He was born in Durban on 5 September 1949 and attended the St Joseph's Catholic School in Fort Beaufort which only offered classes up to Grade 8.

Mpati matriculated from the Mary Waters High School, Grahamstown in 1967.

His first job, was that of a petrol attendant, he also worked as a barman and a furniture salesperson. When he had time off work he would sit in, on student activist political trials and several criminal cases.

Justice Mpati started his law degree when he was 30 years old, after encouragement from the owner of the motel where he worked as a barman. The kind owner allowed him to juggle work and studies. In his second and third year Mpati received a scholarship which covered his studies and textbooks. After obtaining his BA Law (1981) and LLB (1983) degrees at Rhodes University, he practiced as an attorney until the beginning of 1989. Mpati was arrested for illegally operating as a taxi driver at the Grahamstown railway station in 1968. He was given the option to either pay a fine or go to court, he chose court and defended himself to eventually be found, not guilty.

He became a member of the Eastern Cape Bar in 1989 and worked as an in-house counsel for the Legal Resources Centre in Grahamstown. In April 1996, Mpati was appointed as senior counsel and shortly afterwards as an Acting Judge. He was a member of the Eastern Cape Society of Advocates from February 1989 to January 1997. After serving as an Acting Judge for eight months, Mpati was appointed as a Judge of the Eastern Cape Division in 1997. He was a member of a 1994 delegation to Chile to study the country's Truth and Reconciliation Committee and was a member of the Trengove Commission to determine the boundary between the Eastern Cape and Kwazulu-Natal. Justice Mpati was appointed Judge of the Supreme Court of Appeal in 2001, having acted in that court from 1999. He was the first black Judge to be permanently appointed to the SCA. In 2003 Justice Mpati was appointed Deputy President of the SCA and held this position until 2008 when he was elevated to the position of President of the SCA, again becoming the first black Judge to lead this prestigious Court. He was appointed as Chancellor of Rhodes University in February 2013. From June to November 2007, Mpati served as acting Judge of the Constitutional Court in Johannesburg.

He was a Professor Extraordinary in the Department of Constitutional Law and Philosophy of Law at the University of the Free State from 2004 to 2008.

He also gained a number of accolades, such as:

- Doctor of Laws (honoris causa) by Rhodes University in 2004, marking the 100th year of the University's existence. The Nelson Mandela Metropolitan University, Port Elizabeth conferred a LLD (Honoris Causa) on Judge Mpati in April 2011. ■



JUDGE PRESIDENT MOGOENG MOGOENG

Judge Mogoeng is being profiled in his capacity as the first black Judge President of the North West High Court.

He was born in Goo-Mokgatha (Koffiekraal) village, north east of Zeerust, on 14 January 1961. He graduated from the University of Zululand with a B Juris (Bachelor of Law) degree in 1983. In 1985 he obtained his LLB (Bachelor of Laws) at the University of Natal. In 1989, he completed his LLM (Master of Laws) majoring in Labour Law, Law of Property, Law of Insurance, Law of Evidence and Law of Criminal Procedure at the University of South Africa.

Judge Mogoeng began his professional career as a Supreme Court prosecutor in Mafikeng from 1986 to 1990. He resigned to do a pupillage at the Johannesburg Bar, upon completion he practised as an advocate in Johannesburg until the end of 1991. He subsequently terminated his membership of the Johannesburg Bar to immediately become a member of the Mafikeng Bar Association (now known as North West Bar Association) up until 1997. During his time at the Mafikeng Bar, Judge Mogoeng served as the Deputy Chairperson of the Bar Council and the Chairperson of the Bophuthatswana chapter of Lawyers for Human Rights. He was also a part-time senior lecturer in criminal law and criminal procedure at the University of the North West, Mafikeng Campus, from 1992 to 1993. In 1994 he served in the legal section of the Independent Electoral Commission in the North West province. In 1997 Justice Mogoeng was appointed Judge of the North West High Court, three years later he became a Judge of the Labour Appeal Court. He was then appointed the first black Judge President of the North West High Court in 2002. Judge Mogoeng was a member of the five member committee, led by Chief Justice Pius Langa, tasked with investigating racism and gender discrimination within the judiciary. In 2009, the Judges President nominated Mogoeng to represent them in the Council of the South African Judicial Education Institute.

In 2009, Mogoeng and Judge Andre Davis of the Federal District Court for the District of Maryland, USA co-hosted a series of workshops on judicial case management throughout South Africa. Mogoeng was appointed to the Constitutional Court in October 2009. ■



JUDGE PRESIDENT FRANS DIALE KGOMO

Judge Frans Diale Kgomo was the first black Judge to be appointed to the bench of the Northern Cape High Court and later become its first Judge President.

He was born on 17 September 1947 near Brits, in the North West and matriculated at Bafokeng High School in Phokeng, Rustenburg, in 1968.

The following year he worked as an interpreter at the Commissioner's Court in Brits. From there he moved up the ranks and became prosecutor in 1972, magistrate in 1974 and Regional Court magistrate in 1981. He obtained the Diploma Iuris and Diploma Legum from the University of Zululand in 1973 and 1977 respectively. In 1985 Justice Kgomo obtained the LL B degree from the University of Bophuthatswana (UNIBO).

He was admitted as an advocate in 1986 and practised at the North West Bar in Mahikeng up to 1998. He moved on to become a Judge of the Northern Cape High Court in Kimberley. In 2001 he was appointed Judge President of the same court.

Whilst serving as Judge President, Kgomo was seconded to the Gauteng High Court where he heard two sensitive, high profile cases involving two female Judges of that court. The first is the Satchwell case. In that matter the applicant was involved in a same-sex relationship and fought for her partner's right to become a beneficiary of her pension scheme. Judge Kgomo delivered a ground breaking judgment where he declared unconstitutional, sections of the enabling legislation and referred the matter to the Constitutional Court, which confirmed his judgment.

In effect, the ruling confirmed that a partner of a Judge involved in a same-sex relationship was entitled to be registered as a beneficiary in their partners (Judge) pension scheme. The second is the De Vos judgment where he found that lesbian couples were legally entitled to adopt children, which put them on par with heterosexual couples. Judge President Kgomo is also well-known for championing the advancement of women in the judiciary and mentored many of them. Whilst practising as an advocate, he was a member of the National Association of Democratic Lawyers, also serving as a member of Lawyers for Human Rights from 1989 to 1998. He retired from active service on 17 September 2017. ■



JUDGE PRESIDENT HENDRICK MMOLLI THEKISO MUSI

Judge Musi was the first black judge to be appointed to the bench of the Free State High Court in Bloemfontein in 1999 and later became its first black Judge President.

He was born in a small village on the outskirts of Brits in the North West. He started his early education at Tshefoge Lower Primary School and passed the old Standard 6 at Elandsfontein Higher Primary School in Legonyane in 1960. Musi proceeded to Bethel Training College near Lichtenburg where he did the old Form 1 in 1961. In 1962 he relocated to Atteridgeville, Pretoria, matriculating at the Hofmeyr High School in 1965.

Judge Musi completed his BA degree at the University College of the North in 1969 where he became active in students' affairs. He was Vice President of the Student Representative Council between 1967 and 1969. He was a student activist and participated in the formation of the South African Students Organisation between 1968 to 1969. He subsequently studied part time while employed in various capacities, including as public prosecutor at the Odi Magistrate Court in Ga-Rankuwa. He attained the following degrees, all awarded by the University of South Africa: BA, B Iuris, LLB. After completing the LLB at the end of 1977 he served articles of clerkship with the firm PB Angelopulo & Co. in Pretoria. He was admitted as an attorney in 1980. A year later he started his own practice in Pretoria under the name Thekiso Musi. He practised for 19 years until he was appointed a judge in 1999. Whilst practising as an attorney he played an active role in the affairs of the BLA and was elected its Deputy President in 1992, becoming its acting President between 1994 and 1996. He served as a senior examiner for the attorneys' examinations of the erstwhile Law Society of the Transvaal. Justice Musi was appointed Judge President of the Free State High Court in 2008. He has acted as a judge in the following courts:

Venda High Court prior to his permanent appointment; Labour Court and Labour Appeal Court (LAC) between 2004 and 2006; Supreme Court of Appeal in the first term of 2007. In April 2007 he was appointed judge of the LAC on a 10 years term.

He served as a member of the Judicial Conduct Committee, for 4 consecutive years up until 2014. Between 2012 and 2015 he served as commissioner of the Arms Procurement Commission.

Judge President Musi retired from active service on 21 March 2014. ■



JUDGE PRESIDENT EPHRAIM MAMPURU MAKGOBA

Judge Makgoba was the first Judge President of the new Limpopo Division of the High Court in 2015.

He was born in 1953 at Ga-Mathabatha village, south-east

of Polokwane near Burgersfort in Limpopo. He was admitted as an attorney in 1980 after obtaining a B.Proc at the then University of the North in 1977. He started practising as an attorney at law firm; Henstock and Green in 1980 while also lecturing Criminal Law at the then University of the North on a part-time basis.

At some stages in his career as an attorney, Judge Makgoba left Polokwane for Nelspruit (Mpumalanga) and upon his return to Polokwane, he practised as an attorney from 1984 to 1992 after which he joined the firm Makgoba Kgomo and Makgeleng Attorneys from 1993 to 2007.

Judge Makgoba was also an instructor in professional ethics, magistrate's court and high court practice at the School for Legal Practice in Polokwane from 1998 to 2007. He acted as a judge of the High Court from 2000 to 2007 and appointed a permanent Judge of the High Court in 2008. In 2015, he was appointed acting judge of the Competitions Appeal Court and also appointed the first Judge President of the Limpopo Division of the High Court. During his years as a practising attorney, Judge Makgoba trained and produced 12 candidate attorneys who are practising today. In his capacity as a part-time lecturer he lectured students who later became prominent judges: Mlambo JP, Bosielo JA, Phatudi J, Kubushi J and acting judge(s) Mandla Mbongwe and Henry Msimang. Judge Makgoba contributed immensely to community work in various aspects, ranging from chairing the following; the Great North Football Association Disciplinary Committee, the revision court for the first Polokwane Municipality elections, the valuation board of the Polokwane Municipality and being deputy chair of the Louis Trichardt Municipality's valuation board.

Judge President Makgoba has been awarded for his excellence and commitment to noble cause(s). His plethora of accolades include:

The Practical Legal Training Achiever Award at the School for Legal Practise, the Legal Education and Development (Lead) achiever certificate (as an instructor in vocational legal training and examiner of candidate attorneys and an award for being an outstanding Board of Control Chairperson of the School for Legal Practice in Polokwane for eight years. ■

Broadening forced land removals under Apartheid

By Judge Legoabe Willie Seriti, Supreme Court of Appeal Judge

Photograph of Sophiatown street
Bob Gosani @ BAHA



The Black Land Act 27 of 1913 gave expression to government policy, to separate different racial groups and maintain white supremacy in all spheres of life.

Various laws which established a range of drastic and discretionary powers, of the removal of land in the hands of state officials, were enacted.

Those who were relocated were left vulnerable and deprived of legal recourse, through sec. 38 of the Black Communities Development Act 4 of 1984 and Prevention of Illegal Squatting Act 52 of 1951.

Race classification was the main feature of the pre-democratic era policy in South Africa. In terms of sec.5 of the Population Registration Act 30 of 1950; every person whose name appeared on the South African population register was classified in one of three groups; white, coloured or black. It further provided for

the ethnic classification of black people.

Under the Promotion of Black Self-Government Act 46 of 1959 and subsequent legislation, black people were classified into separate groups linked to black reserves or homelands which were gradually given certain *so called* self-governing status. This classification was based on ethnic grouping.

Under the National States Citizenship Act 26 of 1970, every black South African became a citizen of the ethnic homeland which they were connected to by birth, language or cultural affiliation.

The strategy envisaged by the regime was simply to ensure that every black person in South Africa would

eventually be accommodated in some 'independent' new state. This meant that the parliament of that regime, would no longer be morally obliged to accommodate or acknowledge them politically.

To achieve this outcome, that regime granted 'independence' to certain areas. Key pieces of legislation were utilised to remove black people from their land; for instance:

- Black Land Act 27 of 1913
- Development Trust and Land Act 18 of 1936
- Black Administration Act 38 of 1927
- Black Communities Development Act 4 of 1984



Black people were at times allocated a site where they could build their own structures but they were not owners of the land..”

The Black Land (Act) created what it called *scheduled black areas*; where black people were expected to live. The Act contained a list of the areas, which amounted to about 7 percent of the total area in South Africa, translating to approximately 10.5 million morgen. Some of the land owned by and occupied by black people was excluded. In terms of the Development Trust and Land Act, additional land was set aside for occupation and ownership by black people. This Act freed 7.25 million morgen to be added as released areas to the 10.5 million units of land measure that had been scheduled as reserved areas in 1913.

The scheduled land and released areas combined constituted 13 percent of the total land of South Africa. A total of 87 percent of the countries land area was thereafter preserved for exclusive occupation by white people and other minority population groups. An interesting provision was contained in sec. 11(2) of the Act. It stated that no company where black people had controlling interests or association consisting of more than six black persons (other than a recognised tribe) would acquire land without written permission from the Minister of Native Affairs or an official acting under his authority. Sec. 12 of the Act stated that a black person could not acquire land outside a scheduled area from a non-black person. The Development Trust and Land Act was not applicable in urban areas. Sec. 5 of the Black Administration Act 38 of 1927 stated that the then Governor General (later the State President) may define the boundaries of the area of any tribe or of a location and from time to time alter such boundaries (*Saliwa v Minister of Native Affairs* 1956 (2) SA 310 (A)). The Governor General could take away a piece of land from a particular tribe through this section by altering the boundaries of the tribe's area. Sec. 5(1)(b) authorised

the Governor General to order a tribe of black people to move from one particular area to another (see, *More v Minister of Co-operation and Development & another* 1986 (1) SA 102 (A)).

The drawing and redrawing of boundaries within South Africa perpetuated the unequal distribution of land to the various racial groups. The right of a black person to own land was limited to a small portion in South Africa because of legal provisions enacted by various regimes, particularly the Black Land Act of 1913 and the Development Trust and Land Act of 1936. There were various regulations, regulating the occupation of land by black people in areas set aside for their occupation. They could not have a full title in the land they occupied, they were granted what was called a right of leasehold.

Black people were at times allocated a site where they could build their own structures but they were not owners of the land, they were referred to as the site permit holders who owned only the improvements on the site. In terms of sec. 1 of the Black Administration Act, the Governor General (who was later to become State President) was proclaimed to become the Supreme Chief of all black people in South Africa. Sec. 5 (1)(b) gave the State President unlimited discretion to order the withdrawal of any tribe, black person or community from one area to another within the Republic. The Governor General could issue the order without making any provisions for compensation. Authorities used direct and indirect force to remove black people from one area to another. They were moved from fertile areas to make way for white farmers to occupy the land. Generally no compensation was paid, they were instead relocated to areas where they could hardly farm. If they refused to relocate to their

new assigned place, the police were authorised to forcefully remove them.

Various government departments attempted in numerous ways to segregate different racial groups. Territorial segregation based on race constituted a significant aspect of their policy. An arsenal of laws were enacted, establishing a range of drastic and discretionary powers of removal in the hands of state officials. This also had the effect of eliminating methods of legal protection and recourse for those who were to be relocated. The various regimes deliberately denied black people any freehold, preventing them from becoming permanent residents of their own areas. They were not allowed to own land even in areas demarcated for their occupation.

Sec. 38(8)(a) of the Black (Urban Areas) Consolidation Act 25 of 1945 gave the Minister of Native Affairs authority to regulate terms and conditions of residence in a location, black villages and hostels. The Minister made regulations to give effect to such outcomes which were of force and effect in terms of Government Notice R1036 of 14 June 1968 as published in Government Gazette No 2096 (Regulation Gazette No 976) of that date. These regulations applied in black residential areas only, they made provision for the allocation of a residential site to a person who qualified for the erection of a dwelling.

If a person to whom a site was allocated builds on it, they were issued with a site permit. The permit gave the holder the right to occupy and utilise the site and buildings with his dependants. The occupation of premises in terms of these regulations amounted to some form of statutory tenancy. Residential permits were allocated to people renting houses from the board (government). In this case a house belonging to the board was allocated to an applicant who was issued with a residential permit

by the Superintendent. A person to whom a residential permit was issued, was required to have dependants who were lawfully entitled to reside in the prescribed area and such a person was not entitled to be a holder of another residential permit or site permit.

Regulation 7(4) provided that the Superintendent may cancel the residential permit if, inter alia the permit holder no longer occupies the dwelling with his dependants or if the permit holder divorces his wife or is estranged from her. Regulation 7(4) also provided that the Superintendent could cancel the residential permit if the holder obtained it in their capacity as an employee or representative of a church, school, state, provincial or local authority. The cancellation could also occur if an employer provided the dwelling and the permit holder ceased to be such an employee. If a tenant erected any improvement on the site or building, they were not entitled to any compensation for the improvements erected if they were removed.

The improvements became the property of the board. The Black Land Act 27 of 1913 gave expression to government policy to separate different racial groups and maintain white supremacy in all spheres of life. The Black Land Act came into operation on 19 June 1913, it set aside a relatively small percentage of land for black people, providing a list of scheduled areas.

Land scheduled in 1913 amounted to about seven percent of the total area in South Africa. The practical effect of the Black Land Act was to control, in a very rigid manner, the acquisition and ownership of land by black people and also limit the size of land they could own.

Black people were officially permitted in larger areas only as temporary sojourners and when they were needed to meet the labour requirements of the largely white run economy. Through the Black Administration Act 38 of 1927, the drawing and redrawing of boundaries within South Africa perpetuated the unequal distribution of land to the various racial groups. Tribes of black

“ Black people were officially permitted in larger areas only as temporary sojourners and when they were needed to meet the labour requirements of the largely white run economy.

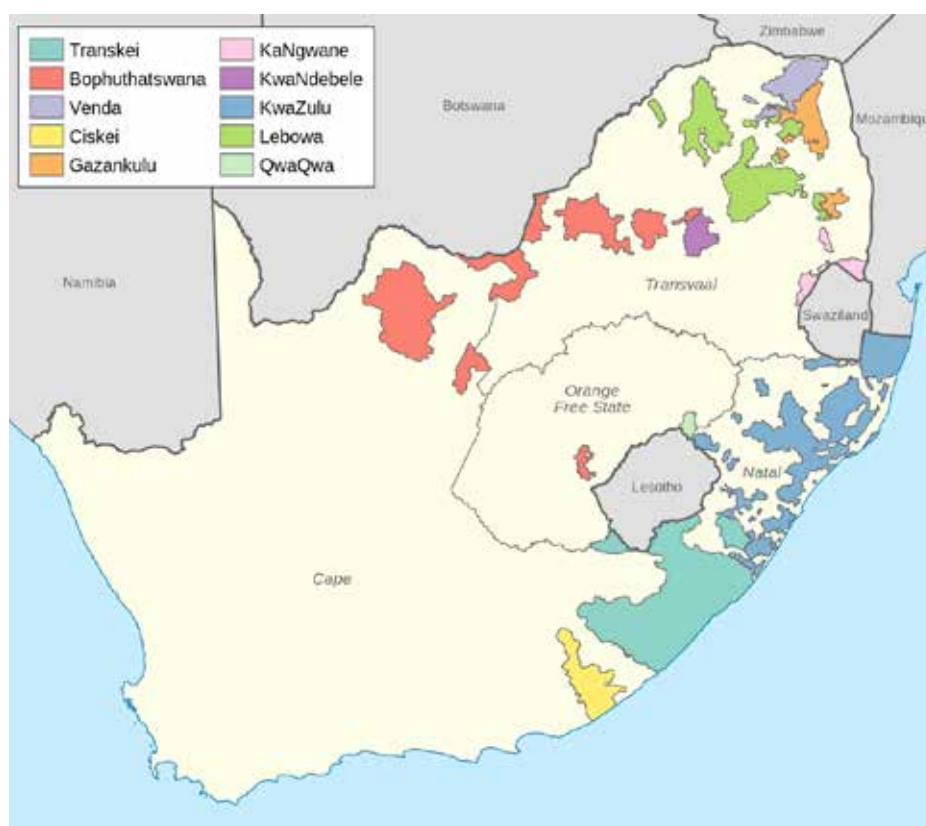
people were moved from one place to another against their will.

Occupation of land by black people in the urban areas was dealt with through the Black (Urban Areas) Consolidated Act 25 of 1945. Sec. 6A made provision to grant the right of

leasehold for a period of 99 years to a person who qualified to be a resident on land controlled by the Administration Board and reserved for occupation by black people.

The pieces of legislation discussed above were the main tools utilised by the previous regimes to dispossess black people of land they owned and occupied, leaving them with a very small portion.

Unfortunately to date, the ownership pattern of land has not changed, the process of land redistribution is slow and ineffective. Other tools of land redistribution need to be designed in order to promptly and effectively bring about a fair distribution of land to all South Africans, particularly the people who were unfairly and immorally dispossessed of their land. ■



Map showing the Bantustans in South Africa at the end of the apartheid period, before they were reincorporated into South Africa proper. Htoni/Directorate: Public State Land Support via Africa Open Data / CC BY-SA 3.0 via Wikimedia Commons

The Roots of the Legal Practice Act

By Lutendo Sigogo, Black Lawyers Association President



source: www.golegal.co.za

The path that gave birth to changes in the South African legal profession started in 1995. Two visionaries and leaders of the Black Lawyers Association (BLA) and the National Association of Democratic Lawyers (NADEL) had a brainwave.

The now retired Honourable Justice Justice Poswa and Silas Nkanunu instigated the association of their two organisations with the Association of Law Societies, in what was established as the Law Society of South Africa (LSSA) on 16 March 1998.

At the time Justice Poswa was an advocate, Dr Willie Seriti, (now the Judge of the Supreme Court of Appeal) representing the BLA became the first co-chairperson of the LSSA together with Esme Du Plessis representing non-BLA and non-NADEL members of the LSSA.

Planting the seed of change

The winds of change, within the legal profession, started to blow after South African's first democratic elections in 1994.

The year 1995 witnessed the appointment of a first female president (Esme Du Plessis) and first black president (Frank Sithole) of the Transvaal Law Society, who later became the first black Judge President of a division of the High Court of South Africa, Natal.

The vision was cemented when legal associations; ALS, BLA and NADEL agreed a year later (27 July

1996) on the *statement of principles* aimed at transforming the legal profession from white male domination to an all-inclusive profession.

Principle 9 of the *statement of principles* arguably gave birth to the thought of legislative intervention, ensuring the regulation of the legal profession at national level, in line with the South African Constitution. The intended legislation happened to be the Legal Practice Act 28 of 2014, the principle reads as follows: "A technical committee will be mandated to draft all documentation necessary to give effect to the foregoing (sic), including legislation."

The intended legislation was only to deal with the affairs of attorneys. The principle was later enshrined in the LSSA Constitution which became operational on 16 March 1998.

The authors of the LSSA Constitution believed that drafting the new legislation would be a two year process, little did they know that it would take more than two decades.

Clause 5.2.2 is the applicable provisions of the LSSA Constitution and it reads as follows:

“Promote, advance and assist in the drafting of legislation within a period not exceeding 24 months, which legislation would form the basis of a new Attorneys Act and to urge acceptance thereof within the legal profession and amongst all interested parties.”

Disagreements between Attorneys and Advocates

Immediately after the LSSA was formed, the focus shifted from the attorneys’ profession to the entire legal profession. This occurred when the Justice department started speaking about the transformation of the legal profession. The new legislation referred to in the *statement of principles* and the LSSA Constitution was now to include advocates after the department’s idea of fusing the professions.

At the beginning of the year 2000 millennium, the Minister of Justice appointed a task team to draft the Legal Practice Bill. The task team was provided with the two drafts; one prepared by the Policy Unit and the other by the General Council of the Bar. The group prepared their draft from scratch, using the two drafts as resources.

The attorneys and advocates had opposing schools of thought on the draft. The majority of the task team produced and presented the Minister with a draft while the LSSA, BLA and NADEL produced their own version which was presented to the Minister in April 2002.

These draft bills were entitled Legal Practice Bill (Task team proposal) and Legal Practice Bill, 2002 (Law Society of South Africa Final Draft), respectively. A report by the task team Chairperson Geoff

Budlender SC, the majority members (and therefore the two Bills) were in agreement, amongst others, on the following aspects:

- The purpose of regulation should be to serve the public interest;
- The ultimate regulatory body should be an independent Council operating at a national level;
- The Council should have a mixed membership of practitioners and nonpractitioners.
- The practitioners should be in the majority, and their representatives should be selected by them;
- At an operational level, the Council should function on a regional basis;
- The office of Legal Services Protector should be created (called the Legal Services Ombuds in the final Act);
- The Fidelity Fund should continue to exist under the control of a newly constituted board, on which practitioners have a majority membership; and
- The four year LLB should continue to be the principal requirement for legal practice, but in addition there should be a requirement of practical legal training.

Budlender’s report pointed to the following points of disagreement:

- The view of the majority of the task team on governance of the profession is that all legal practitioners fall under the Council as well as voluntary professional associations.
- The accredited professional organisation to perform the statutory regulatory and disciplinary functions in respect of its members, subject to oversight by the Council.
- The accredited professional organisation to perform the statutory regulatory and disciplinary functions in respect of its members, subject to oversight by the Council.
- If a legal practitioner is not a member of an accredited organisation, these functions are performed by the Council and its structures.
- The alternative view (proposed by the LSSA/BLA/NADEL) is that the statutory power to govern all legal practitioners should vest in the South African Legal Practice Society, of which all legal practitioners must be members.
- Governance of the society is through the National Council which establishes regional chapters, and delegates certain of its powers to the regional chapters, which may have specialised chambers.
- While voluntary associations of practitioners may be formed, they may not exercise any statutory functions.
- The differences between the attorneys and the advocates persisted even at the level of the National Forum. As a result, the forum could not agree on uniform training of candidate attorneys and pupils during the practical vocational training’s.

BLA’s role in legal practice council formation

It is worth noting that the two Bills provided for the regulation of

“ The year 1995 witnessed the appointment of a first female president (Esme Du Plessis) and first black president (Frank Sithole) of the Transvaal Law Society”

paralegals, a feature which did not find room in the final Legal Practice Act.

From the 'Budlender Bill' of April 2002 to the final bill which was enacted by the President on 22 September as the Legal Practice Act 28 of 2014, no less than 10 drafts of the Legal Practice bills were drafted and considered.

From the background of this article, it is clear that the Legal Practice Act drafting process was not initiated by the Department of Justice but by the BLA and NADEL, when they approached ALS and formed the LSSA.

In the initial drafting process of the bill, leaders of the BLA and NADEL took part as members of the task team. The BLA also actively participated in the production of the parallel draft Bill together with the LSSA and NADEL.

The BLA was instrumental in transforming the legal profession by including transformative clauses in the Act.

For instance, in the powers and functions of the council, the BLA's outstanding contribution was the inclusion of sec. 6(1) (b) (v), read with sec. 6(5)(h). These sections are at the heart of empowerment for black female legal practitioners. In terms of sec.6(1) (b)(v) the council is directed to "develop programmes in order to empower historically disadvantaged legal practitioners, as well as candidate legal practitioners." To ensure that this legislative directive is complied with, the council must, in terms of sec. 6(5) (h)(iv) report annually to the Minister, amongst others, on progress made on the implementation of the programmes contemplated in sec. 6(1) (b)(v) to empower historically disadvantaged legal practitioners and candidate legal practitioners. The Minister shall table such a report to parliament. The BLA will patiently play an oversight role on this function of the council, to guarantee that the interests of women and black legal practitioners are safeguarded and developed.

Despite being empowered under sec. 97(6) of the Act as amended to recommend regulations contemplated under sec. 94, the National Forum on the Legal

“What is both disappointing and discouraging is that those hell bent to frustrate the full implementation of the Act are serving in the NF instead of instilling confidence in the process.”

Profession (NF) failed to make recommendations on any programmes to develop women and black legal practitioners. As a result the council's role will be twofold in this regard.

It will also have to recommend such regulations and implement in terms of sec 6. In the event that the council fails or neglects to fulfil its obligation under sec. 6(1) (b) (v) the Minister may after following due process in terms of sec.14, dissolve the council.

During the Parliamentary Portfolio Committee oral presentations on the Act, the BLA was a lone voice, in support of sec.14.

We knew that this section is the administrative safeguard against the council, should it become indifferent to the transformative agenda of the Act. At National Forum level, the BLA was instrumental and to a larger extent, championing the reflection of the national demography in the composition of the council.

When it comes to race and gender we managed to achieve a 70/30 representation and 50/50 in the council, in the case of attorneys 67/33 and 50/50 representation on race and gender, respectively in respect of advocates. This means that of the 16 elected legal practitioners, 11 shall be black, while 5 are white. Eight will represent men and the other 8 made up of women.

The council's election process which ran from 19 September - 3 October 2018 also signified a

milestone towards the achievement of a transformed legal profession. The process was a watershed moment for the BLA as the association had fought hard against those who were sceptical about the establishment of the council and the full implementation of the Act.

What is both disappointing and discouraging is that those hell bent to frustrate the full implementation of the Act are serving in the NF instead of instilling confidence in the process.

The best development out of the election process was the BLA and NADEL joining forces to compete elections.

I believe the joint efforts, which began as a bilateral between NADEL President Mvuso Notyesi and I, marked the beginning of bigger things to come for the legal profession.

Through this cooperation we demonstrated to the entire legal profession that, black legal practitioners might be fewer in number compared to their white counterpart, but working together we are stronger. While it could not be ignored that the contest to serve in the council like any struggle was to be met by some frustrations, our approach signified the secret of the strength of hunting in a pack.

The end of the council's elections marks the start of the Provincial Councils (PCs) elections. In terms of rule 16 of the council, once the elected council takes office it will be required to conduct the elections of the 9 PCs. The council, at an operational level will function at provincial basis, in terms of regulation 5, it will delegate its regulatory powers to the PCs. The bodies play a huge role in regulating the profession, therefore the BLA must seek to elect experienced candidates of impeccable character and integrity.

We expect that once elected either into the council or the PCs, members of the BLA will not treat their appointment as some form of status and enhancement of their personal profiles at the expense of voters and members of the BLA. They will know that they are privileged to serve their peers and public at large. ■

Alternative Dispute Resolution Africa and China

By Advocate Helen Ngomane



“Arbitration is the end game for the investor who seeks to see returns of his investment in a foreign state and for the investor who signs the investor’s status dispute settlements.”

When one looks at the sustainability, development and anticipation of Africa that will be disputed between an investor state and host state, the question that arises is; Will Africa be ready to handle such legal dynamics on the continent?

The answer is in the affirmative, as the approach will focus of preventing disputes and harmonising the political and economic relationship between members of the BRICS community, particularly China and Africa.

Looking at the view of United Nations Head of the Regional Office for Africa, Dr Joy Kategekwa who

gave a speech in 2016 at the University of Pretoria, stated the following: *“A closer look at investment in Africa shows that Africa is slowly embracing arbitration. Countries such as South Africa and Mauritius have a longer history with arbitration. According to the UNCTAD World Investment Report 2016, in 2015, investors initiated 70 known Investor-State Dispute Settlement (ISDS) cases pursuant to International Investment Agreements, which is the highest number of cases ever filed in a single year. However, as arbitrations can be kept confidential under certain circumstances, the actual*

number of disputes filed for this and previous years is likely to be higher.”

The main concern for any foreign investor is security for the return of their investment. Investors generally feel insecure when governments’ promote policy changes that could potentially have an adverse effect on the rights and legitimate expectations they enjoy.

It will be noted through the world investment report that South Africa was involved as a respondent state against a foreign investor on an international forum in the matter of *Foresti v South Africa*. In the matter, investment was in dispute over claims arising from alleged extinction of certain old order mineral rights held by the claimants; Minerals and Petroleum Resources Development Act and the introduction of compulsory equity diverse requirements in respect of the

“There will from time to time be a difference of opinion regarding the provisions of the Model Law. One of its strengths, is that, it is designed to assist states in shaping their own national arbitration law and does not seek to impose any inflexible or unaccepted rules or procedures on them”

investor’s share in certain operating companies.

The outcome of those proceedings was discontinued, resulting in the South African government cancelling their bilateral internal treaties (BITs) with member states in the European Union. Government justified the cancellation, saying it was within its policy to terminate the majority of its BITs pursuant to the terms of such.

A decision was prompted by a policy review of the actual value of the BITs for foreign direct investment flow to South Africa and the restart of certain policy and domestic intervention measures which may be open to attack by foreign investors (including black economic empowerment).

The termination of South Africa’s BITs does not mean the termination of all investment protection obligations and mechanism for existing investors. A foreign investor who has a dispute with the South African government, over its foreign investment will be limited to the domestic disputes resolution mechanism such as; mediation with the state in the form of the Promotion and Protection of Investment Act or an agreed domestic arbitration.

The Model Law

A foreign investor will now have recourse to any international arbitration after South Africa signed a new law called the International Arbitration Act, 15 of 2017, which came into force on 20 December 2017. The preamble of the Act reads as follows: “*To provide for the incorporation of the Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law, into South African law; to provide anew for the recognition and enforcement of foreign arbitral awards;*

... and to provide for matters connected therewith.”

This gives foreign investors assurance that South Africa has approved the law which incorporates the Model Law to harmonise arbitration regimes throughout the world.

In 2006 the Model Law was amended to include Chapter 4A, to specifically deal with interim procedure relief. The law distinguishes between interim measures and preliminary orders. Over 90 jurisdictions or states have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law in their legislation. This means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 as amended by the said commission on 7 July 2006 and as adapted in Schedule 1. In terms of Section 6 under Chapter 2, the Model Law applies in the republic, subject to the provisions of this Act.

In Africa, the influence of Model Law is not limited to countries which have adopted it.

There will from time to time be a difference of opinion regarding the provisions of the Model Law. One of its strengths, is that it is designed to assist states in shaping their own national arbitration law and does not seek to impose any inflexible or unaccepted rules or procedures on them.

In the South African context against the background of the Constitution which requires equal treatment of parties and due process, this flexibility is a welcome feature of the Model Law. Many experts are in agreement that it is the international goal standard for modern international arbitration

statutes. It provides consistency and familiarity to foreign investors and international businesses which generally prefer to have the same dispute resolution mechanism in all agreements, rather than having to deal with the unfamiliar law and procedure applied by domestic courts in each jurisdiction they conduct business.¹ The Model Law provides an increasingly popular alternative to the diversion approaches taken in international arbitration throughout the world. It has now been adopted by 11 countries in Africa and 78 globally, including many of the Southern Africa Development Community (SADC).

Many experts believe adopting the United Nations’ Model Law confirms that South Africa has recognised the enforcement of foreign arbitral awards, replacing the status previously dealing with court supervision to enforce awards. When it comes to the decision to terminate the BITs, South Africa aligns itself with the International Arbitration Act to govern the relationship between foreign investors insofar as the investment in the host state is concerned.

Section 5 of the Act provides that this Act, subject to the provisions of Section 13 of the Protection of Investment Act, 2015², binds public bodies and applies to any international commercial arbitration in terms of an arbitration agreement which a public body is a party.

With the South African government being embroiled in an international arbitration in the matter of *Foresti* (cited), government then reviewed its investment laws and regulations in efforts to promote the spirit, value and the Bill of Rights in the Constitution.

Arbitration

It is the end game and what is at stake, is the investment. According to the

world investment report, courts have received matters from members in developed and developing states. South Africa can now assure the world that a termination of the BITs was in line with its intentions to align with the Model Law and give guarantees to foreign investors in the event that a dispute arises between the state and the foreign investor.

In terms of Section 16:

- “(1) Subject to section 18 an arbitration agreement and a foreign arbitral award must be recognised and enforced in the Republic as required by the Convention, subject to this Chapter.*
- (2) A foreign arbitral award is binding between the parties to that foreign arbitral award, and may be relied upon by those parties by way of defence, set-off or otherwise in any legal proceedings.*
- (3) A foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court, subject to the provisions of this section and sections 17 and 18.*
- (4) Article 8 of the Model Law applies, with the necessary changes, to arbitration agreements referred to in subsection (1).”*

South Africa is a signatory to the New York Convention and by passing this law it will adopt the UNCITRAL Model Law. There would be certainty insofar as the rights of foreign investors will be concerned as their awards will be made orders of Court as alluded above.

The SADC tribunal

Under the protocol, disputes may also be resolved by the SADC tribunal. SADC was formerly established in 1992 and has the ambitions and goals of developing a regionally economic community in which post-apartheid South Africa was subsequently integrated. SADC currently comprises of 14 member seats: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi,

Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC countries have concluded 27 protocols, including the protocol on finance and investment, also known as the investment protocol. The protocol entered into in April 2010, prohibits nationalisation and expropriation of property and guarantees fair and equitable treatment of investors. The investment protocol also provides that an investor in a state party may submit a dispute to the international arbitration in one of 3 ways:

- Arbitration before SADC tribunal;
- The ICSID arbitration;
- Ad hoc arbitration under the UNCITRAL rules.

South Africa, as a SADC party, is obliged to submit itself to arbitration under either the rules of the International Centre for Settlement of Investment Disputes (ICSID) or the UNCITRAL, provided that domestic remedies are first exhausted.

It should be commended that government's efforts in passing the International Arbitration Act brought the country in line with international best practice. Not only will the Act be helpful to practitioners in the field of investment international law, it will also assist the Arbitration Foundation of Southern Africa (AFSA) and the China-Africa Joint Arbitration Centre (CAJAC), which aims to cater for arbitration of commercial disputes involving Chinese and African parties in a local forum. South African organisations like the AFSA are actively developing their relationship not only with those international organisations, but more broadly with other African organisations. The relationship between the vision of co-building CAJAC will open doors for many African practitioners to take commercial arbitration and represent parties particularly in investment law.

The Act has brought certainty. It will encourage future investment in South Africa. International arbitration is also becoming recourse for the protection of foreign investor's rights across the continent and through cross

border transactions that occur daily between South Africa and Zimbabwe.

Although most African countries or states have entered into BITs, it seems South Africa aligned its stance by adopting this piece of legislation to regulate its economic relationship with investors.

Unlike the Arbitration Act³, 1965, in terms of Section 4, which reads as follows:

- “(1) Subject to the subsection (2), the Arbitration Act is not applicable to an arbitration agreement, arbitral award or reference to arbitration covered by this Act.”*

When it comes to the relationship between the centres, Mauritius has also played a role. The country has its own law centre which offers the same expeditious and cheaper method of arbitration which will be offered by CAJAC. This supports the notion that South Africa is now ready to welcome the world and offer its cities as international arbitration venues, opening up opportunities for skills transformation to those pursuing the field of investment law.

The termination of BITs should not be seen in a negative light. Government has committed to promoting the spirit and values of the Constitution and that cannot be achieved if foreign investors' interests come before, what government wants to achieve in terms of Chapter 2 of the Constitution.

There is no indication that there will be less protection for investors against government measures, in that they will not be afforded equal treatment. In any event, public bodies are now bound by the International Arbitration Act, which is consistent with the Model Law signed by many states and internationally accepted by the South African government. ■

Notes

1 Act 15 of 2017

2 Act 22 of 2015

3 Act 42 of 1965

A tribute to Dr Zola Skweyiya

By Mpho Sithole, African Law Review Editor



The University of South Africa held a two day conference in honour of the late Dr Zola Skweyiya from 2 -3 October 2018.

A Natural Democrat

Various speakers were invited to pay tribute to the Former minister and diplomat. Former Constitutional Court Judge Albie Sachs was among the speakers who delivered a moving tribute on Skweyiya and his contribution in laying the groundwork for what was to become South Africa's Constitution. Sachs starting off by saying, *"not many of us are left and those who are, must talk about the past, the defeat, betrayal, joys and aspirations..."*

He said if one were to conduct a paternity test on the South African Constitution to determine its DNA – the name of Anti-apartheid icon Oliver Tambo, would come up. He further added that if it were possible for a man to be a midwife, Skweyiya would fit

the role as he saw to the delivery of the Constitution.

Sachs recalled how in 1986, Tambo who was then ANC President appointed Skweyiya as Deputy Chairman of the parties Constitutional Committee.

Skweyiya later became chairman of the committee, playing a central role in drafting the country's Constitution.

The former judge described Skweyiya as a visionary, a great teacher of life, a true stalwart and hardworking natural democrat who believed in the Freedom Charter declarations that South Africa "belongs to all who live in it".

A man of many hats

Unisa Acting Chair of the Department of Jurisprudence, Advocate Gugu Nkosi described Skweyiya as a great

leader who wore many hats, executing all his responsibilities with great tenacity. She hailed the accomplished freedom fighter for ushering in the transformation process, describing him as one of the most profound legal minds South Africa has ever seen.

Principled Leader

Unisa College of Law, Acting Deputy Executive Dean Dr Olaotse Kole says Skweyiya fully understood the principle of *Batho Pele* ("People First"). Dr Kole said Skweyiya demonstrated the principle, in his role as Public Service and Administration Minister when he made his mark in the transformation of the apartheid civil service into a new public service.

This, he achieved by drafting the *White Paper* on transforming public service delivery, which allowed for a free, democratic South Africa. It gave citizens the right to access services. "It is through his passion for people, that the struggle stalwart leaves behind a rich legacy of selfless dedication to public service and building a caring society and a better life for the poor", said Dr Kole.

Skweyiya was the first Public Service and Administration Minister (1994 to 1999). He later took up the position of Social services Minister for a decade until 2009 and also appointed High Commissioner to the UK and Ireland in the same year, where he advanced South Africa's interests.

Legacy and Lessons

Unisa Vice Chancellor and Principal Professor Mandla Makhanya spoke about Skweyiya's life and legacy. "The institutions of learning Skweyiya attended were political hotbeds that produced many great leaders of the struggle", said Professor Makhanya. Skweyiya attended school in Port Elizabeth and Retreat in Cape Town, matriculating from the Lovedale School in Alice in 1960.



Top row, from left : Dr Olaotse Kole, Yvonne Madonsela, Adv. Sandile Nogxina, Rev. Frank Chikane, Dr Shighughudwana Mashele, Boniswa Skweyiya, Vuyo Skweyiya, Namhla Skweyiya, Sihle Skweyiya, Prof Clarence Tshoose
Bottom row, from left: Vusi Madonsela ESQ, Adv. Gugu Nkosi, Mpho Mholo, Saki Simelane, Judge Albie Sachs, Thuthukile Skweyiya, Prof Mandla Makhanya, Adv. Mc Caps Motimele SC



Retired Constitutional Court Justice Albie Sachs hugging Ambassador Thuthukile Skweyiya

During his time at Fort Hare University, he was an active ANC member who mobilized support for Umkhonto we Sizwe until 1963.

In that year, he left South Africa to join the ANC in exile in Tanzania and Zambia.

Makhanya said exile was not an easy choice for Skweyiya, revealing that it was through this decision that the leader demonstrated his selflessness. He chose to sacrifice his career prospects, leaving behind his family and friends to fight for the people’s liberation.

Makhanya described Skweyiya as an activist and a scholar saying most of those who made a remarkable impact, shaped themselves in scholarship.

Skweyiya studied law in Germany in 1965, he obtained an LLD degree from the University of Leipzig in 1978.

He passed away at the age of 75 at the Kloof Hospital in Pretoria on 11 April 2018. ■

Independent, dynamic & **black** **woman owned.**

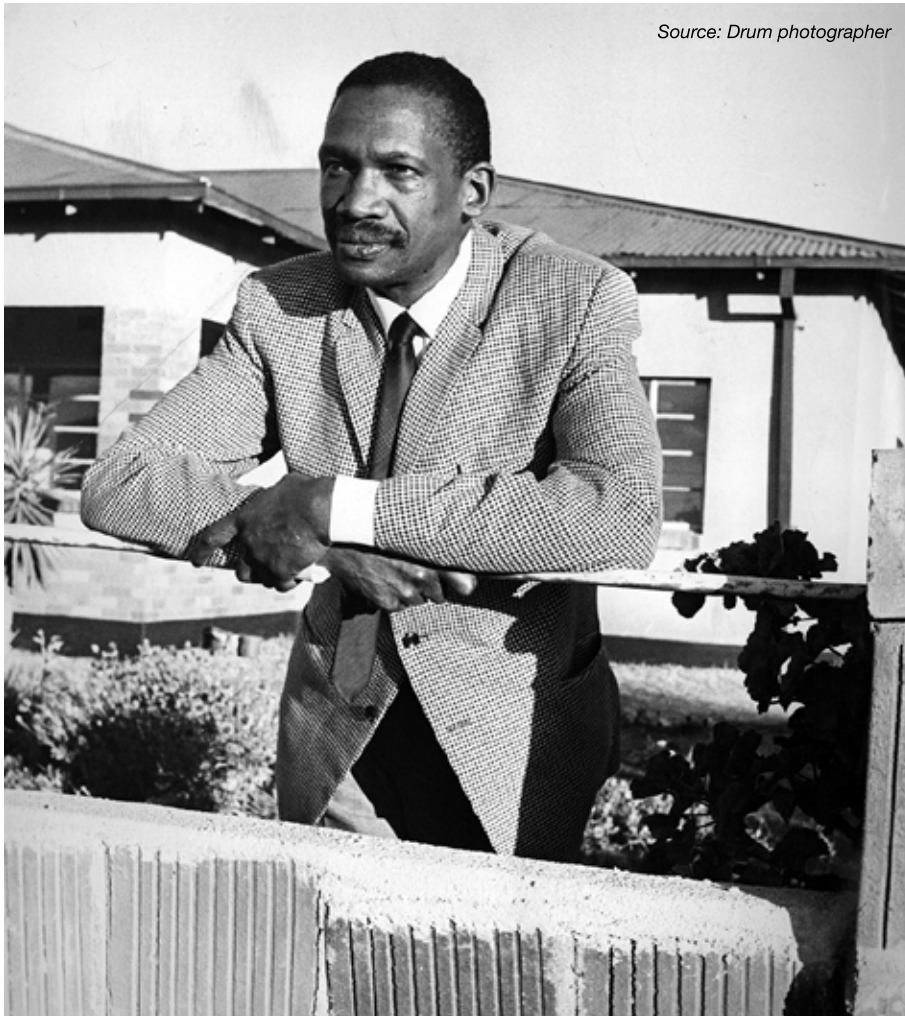
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The life and times of Robert Mangaliso Sobukwe

By retired Judge President Bernard Makgabo Ngoepe



Source: Drum photographer

Occasions such as this enable us as a nation to reflect on our past; on our history. The past is an integral part of our present and our future; as Professor Njabulo Ndebele puts it: “The past is knocking constantly on the doors of our perceptions, refusing to be forgotten, because it is deeply embedded in the present. To neglect it at this most crucial of moments in our history, is to postpone the future.

But history is useful only if it is honestly recorded and not manipulated or distorted. Yet experience has never ceased to reveal these malpractices.

Distorted history has the potential to polarize and cause divisions and hate, this is because, invariably, there’s a lurking evil motive behind every

distortion. History, properly recorded and understood, will enable future generations to know who exactly Robert Mangaliso Sobukwe was; what he stood for, and why he was feared and hated by some, while loved and revered by others. It’s not that he wanted to be revered or rewarded; that is not what he was after. What he wanted was that everyone be allowed to enjoy at least their basic human rights. Properly recorded, history would show that he too played a crucial role in the struggle against apartheid.

History, accurately recorded, would provide points of reference for future generations; that is why distorting it, is almost criminal. While distorting history is bad, not remembering it is far worse. Our recollection of past events culminates in commemorations, which is fine. But there is a caveat, commemorate properly and appropriately without taking sides. Any event sought to be commemorated comprises at least two elements, firstly, a date, like 21 March 1960; this tells us when the event happened. Secondly, there must be context around the date; that is, something of significance must have occurred.

For example, each year “21 March” is marked on our calendars to commemorate the death of 69 people, killed by police in Sharpeville in 1960. We must therefore all agree that changing the date would be a blatant distortion of history.

It would in fact, no longer be the same event you claim to commemorate, it would be your own imagined “Sharpeville Day”. The date “21 March” as an element in the commemoration is therefore immutable, just as “16 June” is with regard to Youth Day.

We must therefore agree that it is not permissible to change or “modify” the date. It is permissible to tamper with the second element of a commemoration, namely; the nature of the event as a context or subject of the commemoration?

You may do so, provided the true nature of the event sought to be remembered, is not lost, otherwise that would also amount to a distortion of history. You might end up not commemorating what happened in Sharpeville on the day, but celebrate something else. For a commemoration to be proper and appropriate, for it to serve its true purpose, none of the two elements should be compromised. The event must be properly referenced and contextualized.

Every country has its own unique history to tell, at one time or the other, it faced adversity. But amongst its people, there are always men and women with the capacity to enable the nation to rise to these challenges and triumph. But who are these people? Turkish preacher and prolific writer Fethullah Gülen speaks of two kinds of people: those he calls “*useless people*” on the one hand, and, on the other hand, those he calls “*people of service*”. As for the first category, says he of them:

“The stomach expels food that cannot be digested and has no benefit (to the body). Time and history does the same to useless people. People of service are those who understand that they are responsible and answerable for work left undone. They are extra-ordinarily resolved and hopeful even when their institutions are destroyed, and their plans upset, and their forces routed”.

These are the people who do not give up; they stand up and pick up the spear again. We have been gifted with such people, amongst them, Sobukwe.

A look into our recent history as a nation, will show that some good can arise out of tragedy; the tragedy of the abominable policy of apartheid. The resilience of the majority of the people of all races who were against it, was

tested to the limit, but prevailed. It brought together people of different ideologies; it glued together Africans, so-called Coloureds, Indians and whites; it glued together men and women; the young and the old.

Yet, as President Nelson Mandela once put it, ironically painful as it was, the struggle against it produced great men and women. It afforded them the opportunity to demonstrate their vision and courage of conviction.

Painful and pleasant memories, compete for space, but is there room for both? Yes, there is. Both are lessons for the future, they are part of the present and they shape our perceptions.

As they jostle for space in our lives, they present a nation the opportunity to consider options in ordering its affairs; present and future.

“ We cannot afford to wipe out of our history, the likes of Sobukwe. In fact, that is what he meant when he warned that Africa would never forget.”

They help us make informed decisions, guided by wise hindsight. Perhaps that explains why people say we in South Africa have come out with the best Constitution in the world. This is because as we drafted our Constitution, we had on the table, the vivid picture of our horrible history, including 21 March 1960.

Without those painful experiences in the past, we might have defaulted on a good Constitution. That hindsight continued to dictate our nation’s path, once the Constitution was in operation. The great task of properly interpreting the new Constitution and applying it, still lay ahead; a task that would be as difficult as the drafting itself.

As the late Chief Justice Ismail Mohammed reminded us, the objective of the new Constitution was to make a clean break with our tragic past; the past that we all knew; the past that we must all know, whether you are a “born free” or not, it’s a past future generations must know.

We have, in the mind of others, been “over-influenced” by the horrors of the past. We have in some instances been “over-liberal”, “over progressive” and so forth. Some say we have in some instances gone overboard; to such an extent that we have become so permissive a society that once anything is permitted anywhere in the world, you can be sure it is permitted in South Africa but that which is permitted in South Africa, would not necessarily be permitted in other countries.

History is to be shared. Some of us are in a generation that has direct experience of the painful past, of the difficult transition and the not so wonderful present. The past experience of being barred from entering certain areas, premises, or indeed, even to spend a night in the then “Orange Free State”. Therefore, it behoves us to share those experiences with younger generations. It is not to nurture division and hate but to enable them too, to navigate the present and future. We cannot afford to wipe out of our history, the likes of Sobukwe. In fact, that is what he meant when he warned that Africa would never forget.

Sobukwe would understand that nobody and no organization could legitimately take credit for our victory against apartheid to the exclusion of other people or organizations, doing so would amount to a mischievous distortion of history. Such a perception would demonstrate a lack of understanding on the dimensions of the struggle against apartheid. The late Judge Higginbotham, a great African American, once chided a member of the South African Student Organization back in 1982, in my presence, for thinking that we could win the struggle



Sobukwe was a visionary, he envisioned a democratic country, free of racism and sexism.”

without outside help. Higginbotham, himself a contributor to our struggle, challenged him to name one country in the world which had won a struggle against oppression without outside help. The struggle against apartheid belonged to all.

We have come to learn from Sobukwe, that while you may restrict or even take away a person's physical freedom of movement, you cannot imprison their freedom of the mind. I have given an example in the first category; as for the second category, we have people who have bought palaces with large gardens even abroad, with ill-gotten monies, but are not free. They are in hiding, jumping from one country to the other.

I never had the privilege of meeting Sobukwe in person. I do not, for that deprivation, resent the fact that could be the result of the age gap between us. What I and many others do resent, is that the deprivation was the result of him being kept away from us by a vicious system, but for that system, this country could have been better than it is today. Many young men and women would have learnt so many things of virtue from him; the gospel he preached could have been spread wider and better understood. The opportunity was lost to learn at the feet of a great teacher; not only an academic, but a teacher of values. It was not for nothing that they affectionately nicknamed him “Prof”. Did he meet the strict criteria set by the Chinese philosopher, Mencius, for a great teacher? Mencius says:

“A gentleman teaches in five ways. The first is by a transforming influence like timely rain. The second is by helping the student to realize, his virtue to the full. The third is by helping him to develop his talent. The fourth is by

answering his questions. And the fifth is setting an example others not in contact with him can evaluate. There are the five ways in which a gentleman teaches.”

Against those criteria, you may want to give the verdict yourselves on the “Prof”. Sadly, there are indications that it is us who failed to learn, from this great teacher of life, the values he espoused. In so doing, we have failed him, we have failed ourselves, we might have failed our country and even more frightening is that we might have failed and betrayed future generations, thereby betraying a nation's future. The consequences of our failure to learn and imbibe his values are all around us to see. People masqueraded as champions of the poor and the masses, when in fact, they were there to serve their own interests by enriching themselves. We have heard of rampant corruption, nepotism etc. We have failed to learn that serving people is not about putting your own interests first and that, it is not even about putting the interests of your political party above the interests of the country. It is about putting the interests of the country and the people first. We have the dubious distinction of being a nation with the widest divide between the rich and the poor, despite the resources we have in the country; economic growth has ground to hardly 1%, the number of unemployed runs into millions. Need I say more? He must be turning in his grave. Sobukwe was the founder of the PAC but there is one mistake we should never make; namely, to try and judge his legacy with reference to political fortunes, or, more appropriately, misfortunes of the party today. His vision was not just for the PAC but for the entire country and entire continent. In any case, who knows what course

the PAC would have taken if he had been unchained? Sobukwe was a visionary, he envisioned a democratic country, free of racism and sexism but at the same time he foresaw, that it could not be achieved unless the issue of land was resolved. He knew that central to the struggle was the issue of the land. The calls we hear today are not new; they are merely echoing what he said many years ago. People may differ on the mechanism to achieve that; but that does not detract from the validity of the call he made many years ago before it became fashionable to do so. I therefore say yes, Sobukwe may be dead but he is still alive because his call for the resolution of the issue of land is still ringing in our ears and will continue to do so until the matter is resolved. Off course, it must be resolved fairly and in accordance with the law of the land. Sobukwe, being the kind of person he was, might have felt he had not done enough for his people by the time he died in 1978, yet he has played his role. He owes us nothing. Absolutely nothing. It is us who remain deeply indebted to him and his dear wife, our mother. For one thing, we have not recognized Sobukwe enough, if at all.

No self-respecting nation, nor nation that is proud of its own history, fails to honour its heroes and heroines who stood up and took the bull by the horns in the face of adversity. We have not lost our soul for political expediency, or have we? We know that we have, through no fault of ours, missed the opportunity to learn from him everything he could offer. ■

Judge Ngoepe delivered this speech at the Sol Plaatje University on, 10 May 2018.

In memory of the late Justice Lebotsang Orphan Ronnie Bosielo

By Justice Mandisa Muriel Lindelwa Maya, Supreme Court of Appeal President



A special sitting in memory of the Justice Lebotsang Orphan ‘Ronnie’ Bosielo was held on 17 September, 2018.

He was born on 19 August 1957 at Bridgeman Hospital in Sophiatown, Johannesburg. He matriculated at Lerothodi High School in Bethanie, North West. Bosielo obtained a B.Juris and LLB degrees from Turfloop, the University of the North in 1981 and 1983, respectively, a LLM degree and a Diploma in Advanced Corporate Law, from the University of Johannesburg in 1992 and 1996, respectively.

He began his career as a candidate attorney at Enver Surty Attorneys in Zinnaville. He was admitted as an attorney in 1986 and formed a partnership practice in Rustenburg in 1987; Bosielo, Motlanthe & Lekabe.

In 1992 he set up his own practice; Ronnie Bosielo Attorneys. In 1998 he was admitted as an advocate and

“ Justice Bosielo was an advocate of restorative justice as an alternative form of punishment ”

joined the Johannesburg Bar in 1999. Justice Bosielo served as Chairperson of the Black Lawyers Association North West branch, from 1992 to 1996 and as President of the Law Society of Bophuthatswana from 1996 to 1998. He was also a member of the Magistrates’ Commission in the North West from 1997 to 1998. He was appointed as a Judge of the, then Transvaal Provincial Division of the High Court on 29 January 2001 to later be appointed Acting Judge of the High Court, in Namibia that same year.

In 2007 and 2008 he acted in the

position of Judge President at the Northern Cape Division of the High Court in Kimberley. He was appointed Acting Judge in the Supreme Court of Appeal, shortly after, he was permanently elevated to the Supreme Court of Appeal on 1 October 2009.

In September 2009 Justice Bosielo was appointed by the Minister of Defence and Military Veterans as Chairperson of the Interim Defence Force Commission. The Commission was tasked with investigating the alleged negative influence of trade unions in the South African National Defence Force and the conditions of service in the military. He also served two terms as an acting Justice of the Constitutional Court in May 2012 and May 2016.

Passion for transformation and restorative justice

Justice Bosielo was passionate about the race and gender transformation of the judiciary. He was involved in judicial training of magistrates, aspirant and newly-appointed Judges. His tireless efforts in creating a pool of competent women Judges, whom he mentored were recently acknowledged, posthumously on Women’s Day at the Annual General meeting of the South African Chapter of the International Association of Women Judges. The first female Minister of Justice in post- apartheid South Africa, Bridgitte Mabandla and retired Judge Navi Pillay were in attendance.

Justice Bosielo was also passionate about access to justice, especially to ordinary South Africans. He often lamented that the majority of cases adjudicated in the Constitutional Court are brought by the wealthy and do not concern the issues affecting the poor and vulnerable members of society.

He was an advocate of restorative

justice as an alternative form of punishment, especially when it was shown that an accused was not a threat to society. As a Judge of the High Court, he wrote a ground breaking judgment in *S v Shilubane* 2008 (1) SACR 295 (T) on restorative justice as a sentencing option. That judgment remains authority to this day, for its promotion of alternative forms of punishment. It was endorsed by the Constitutional Court in a number of its judgments such as *Dikoko v Mokhatla* 2006 (6) SA 235 (CC); *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC); *The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)* 2011 (4) SA 191 (CC).

Despite being a strong adherent of restorative justice as a sentencing option, Justice Bosielo was acutely aware that it could not be applied in every case. This is evident from his judgment in *DPP v Thabethe* [2011] ZASCA 186. There, the accused was convicted of rape in the High Court and sentenced to ten years imprisonment, with a five year suspension after having unlawful sexual intercourse with a girl below the age of 16 years.

Upon appeal to the Supreme Court of Appeal, Justice Bosielo found that, although there were substantial and compelling circumstances, the sentence imposed was disturbingly inappropriate as it failed to consider the gravity of the offence and the interests of society. The court upheld the appeal, the initial sentence imposed was set aside and replaced with a sentence of 10 years imprisonment.

In his judgment (at para 20), Justice Bosielo cautioned against the use of restorative justice as a sentencing option regarding serious offences. He observed that the application of restorative justice to inappropriate cases could discredit it, as a viable sentencing option.

Justice Bosielo was a consummate constitutionalist. His fidelity to the founding values of the Constitution was unwavering, it informed his work as a Judge and permeated most of his judgments. He was especially passionate about an accused's right to a fair trial entrenched in s 35(3) of the

Constitution. To see this one need just read his judgments in *S v Mashinini* 2012 (1) SACR 604 (SCA); *Ndlanzi v The State* [2014] ZASCA 31; *Ngculu v The State* [2015] ZASCA 184; *Msimango v The State* [2017] ZASCA 181 among others.

“ Justice Bosielo was flowery in expression, and expansive in articulation.”

As an acting Constitutional Court Justice, he wrote the judgment for a unanimous court in *Raduvha v Minister of Safety and Security & Another* 2016 ZACC 24, which dealt with the rights of minor children arrested in terms of s 40(1)(b) of the Criminal Procedure Act 51 of 1977. He found that the arrest and detention of the child was unlawful and held that, despite the presence of the jurisdictional facts set out in s 40(1)(b), police officers have a discretion whether or not to arrest; a discretion to be properly exercised, according to the facts of the case and the dictates of the Bill of Rights. The police officers' failure to consider the applicant's best interests as a child, in exercising their discretion to arrest her, rendered the arrest unlawful. The detention of a minor child should be a measure of last resort, which was not the case in that matter, the police officers' decision to detain her was therefore inconsistent with section 28(1)(g) of the Constitution and invalid.

Another judgment, in *McBride v Minister of Police & Another* [2016] ZACC 30, concerned the independence of the Independent Police Investigative Directorate (IPID), a body tasked by the Constitution to investigate police misconduct. After examining the IPID Act, Justice Bosielo, in a unanimous judgment, declared certain of its provisions (and certain regulations and proclamations) invalid to the extent

that they were incompatible with the Constitution as they unlawfully extended the Minister of Police's powers. The judgment reasserted IPID's independence.

Although he believed in judicial comity, Justice Bosielo did not hesitate to stand alone when the need arose. In *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA), he concurred in the minority judgment I wrote which was subsequently upheld in the Constitutional Court. The court also upheld his minority judgment in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143. The court agreed with his findings that the Promotion of Administrative Justice Act does not apply when an organ of state applies for the review of its own decision and that an organ of state seeking to review its own decision must do so under the principle of legality.

Justice Bosielo was flowery in expression, and expansive in articulation. In *Radhuva*, for example, he wrote the following prelude in para 6:

‘The facts of this case might appear prosaic and yet they present us with an opportunity to interrogate some constitutional provisions which are crucial to our fledgling constitutionalism and evolving culture of respect for human rights. This is important given our dark and painful history – which we all committed ourselves to eradicate 22 years ago when we ushered in our fledgling constitutional democracy – a past characterised by oppression and repression, abuse of State power and a wholesale denial of human rights to the majority of the people of our country.’

Justice Bosielo was a warm and compassionate person. He treated everyone with respect and dignity, irrespective of their station in life. An ardent Africanist, who dearly loved his country and the African continent at large, a sharp dresser and a man of sartorial elegance, with a ready smile and a raucous laughter – he will be sorely missed. The judiciary and the legal profession has lost a true servant in this son of the soil. ■

Saluting the life of the late Judge Khaliphi Jacob “Jake” Moloï

By retired Judge President Hendrick Mmolli Thekiso Musi



The late Judge Khaliphi Jacob Moloï ‘Jake’ was born on 4 October 1946 in Kestell, Free State. His long and distinguished career began in 1972 when he joined the Department of Justice, undergoing training as a Public Prosecutor. He obtained the Diploma Iuris from the University of Zululand in 1974. He worked as a Public Prosecutor at the Magistrate Court in Umlazi, Durban until 1976, followed by a short role as a Magistrate in Witsieshoek.

Later that year he joined, law firm Schoeman & Kellerman in Welkom as a Candidate Attorney before being admitted as an Attorney in 1979. He then established his own legal practice; Jake Moloï & Partners, practicing in Welkom for the next 19 years. In 1998 he moved to Pretoria to become Chief State Attorney, a position he relinquished in 2000.

As a practising attorney, Justice Moloï built up a reputation as a formidable trial lawyer, it was no wonder he became one of the first members to join the Black Lawyers Association Trial Advocacy Training in the late 1980’s.

He perfected the art of cross examination, nothing pleased him more than to impart knowledge in this area of litigation. He taught students the art of knowing when to stop cross examination. He was reputed to have had no time for a cross examiner who would persist with questions that served no purpose.

Jake as affectionally known, was the Free State’s first ever black lawyer, he became the doyen of black lawyers in that province and opened up his practise to train others. He did a splendid job. The calibre of some of his former candidates is evidence to that, amongst them are none other than

my successor Judge President Mahube Molemela and Madam Justice Mmamoloko Kubushi of the Gauteng High Court.

The training of candidate attorneys must rank as Justice Moloï’s lasting legacy. Continuing legal education was his other passion, he improved his academic qualifications and acquired new skills in a variety of disciplines. Judge Moloï obtained his B.Proc degree while already practising and followed up with two LLM degrees late in his career; one in Human Rights from the Free State University and the other in International Trade Law from Stellenbosch University.

“The training of candidate attorneys must rank as Justice Moloï’s lasting legacy.”

His CV teems with many certificates and diplomas, ranging from certificates in Forensic and Investigative Auditing, Forensic Investigations to Certificates in Negotiation and Mediation Skills and Advanced arbitration skills.

Justice Moloï also played a pivotal role on the national stage. He was President of the Black Lawyers Association (BLA) between 1997 and 2001. He also assisted the BLA with

the formation of the Law Society of South Africa. Moloï was involved in the amalgamation of the provincial law societies of the country and the non-statutory formations of National Association of Democratic Lawyers (NADEL).

He was involved in drafting a transformation charter for the legal profession as whole. Between 1994 and 1995 he served as a member of the Electoral Appeal Tribunal which played a central role in the ground breaking 1994 elections, ushering in a new democratic dispensation for South Africa.

Between 1997 and 2000 he served on the amnesty committee of the Truth and Reconciliation Commission.

Most recently, he presided in an inquiry that ruled in the fitness to hold office of a National Commissioner of the South African Police Service.

Moloï was appointed a Judge of the High Court on 21 September 2009.

I am proud to announce that I personally recruited him to this bench when I became the Judge President in 2008.

Judge Moloï and I come a long way, in 1999 whilst President of the BLA, he personally persuaded me to make myself available for a vacant position on this bench and this is how I landed here on, 21 June 1999.

Judge Moloï passed away on 23 July 2017, whilst still a serving Judge. ■

This tribute was delivered at Judge Moloï’s memorial service, at the Free State High Court on 7 December 2017.

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