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SAJEI South African Judicial Education Institute

Enhancing Judicial Excellence

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FROM THE DESK OF THE CEO

Welcome to the fourth edition of the Judicial Education Newsletter, our electronic publication on judicial education and related matters. The Institute encourages magistrates to contribute to the newsletter.

The Newsletter aims to:

- Create a platform for knowledge sharing and candid expression of ideas beneficial to Magistrates,
- Engender a culture of writing on relevant topical issues of interest,
- Be a source of information on SAJEI activities and commentary thereof, and
- Share current developments in law.

Kindly contact SAJEI if you would like to enhance your writing skills through training.

Dr G Moshoeu
Chief Executive Officer: SAJEI

FROM THE DESK OF THE EDITOR-IN-CHIEF

Service Delivery through judicial work.

Each time we sit in court proceedings as judicial officers, we owe it to the public to deliver pure justice. Handing down judgments speedily, sitting in courts long enough to help out the last person in the court room and preparing our judgments after hours are just other means through which we can deliver justice to our people with pride. The hierarchy of the judicial system exists to guide each one of us towards perfection so that what we deliver to our people could be justice we are proud of. It is normal for the court of appeal to set aside a conviction because it does not believe the evidence that the trial court relied on and believed. A judicial officer need not feel aggrieved when his/her decision is overturned for these reasons.

We however have a reason to be concerned and do self-introspection to our calling, the oath we took and our commitment towards service delivery when our decisions are constantly overturned for failure to adhere to prescribed procedures such as failure to properly admonish the chid witness, failure to sit with the assessors in murder trials, etc. Ours is a different professions from all others in that it is expected of us to familiarise ourselves with all the judgments delivered by the courts of higher jurisdiction. Other professions stop studying at varsity level, but with us, we never stop studying throughout our judicial lives. When judgments guiding us on a particular procedure to adopt already exist, we have no excuse for not adhering to them in line with Stare Decisis principle.
With the dawn of SAJEI Newsletter, there exists as another means to expand and popularise some of these judgments. Through peer training, colleagues are now able to share their views through short articles and hope that through these, we shall deliver on our mandate to deliver justice to our people.

TV Ratshibvumo
Editor in Chief

NOTE TO AUTHORS

Contributions from Magistrates not exceeding 600 words will be appreciated. Articles should be addressed to Ms Poso Mogale at pmogale@judiciary.org.za

- Articles should be in MS Word format (No PDF) and paginated
- Authors are encouraged to provide accurate references to sources
- Contributions should be original. SAJEI uses Turn-it-in software to check originality

The due date for contributions to the fifth issue is the 31st May 2019.

SAJEI AT A GLANCE

SAJEI Council

INTRODUCING NEW SAJEI COUNCIL MEMBERS

Judge President C Musi

Judge President Legodi

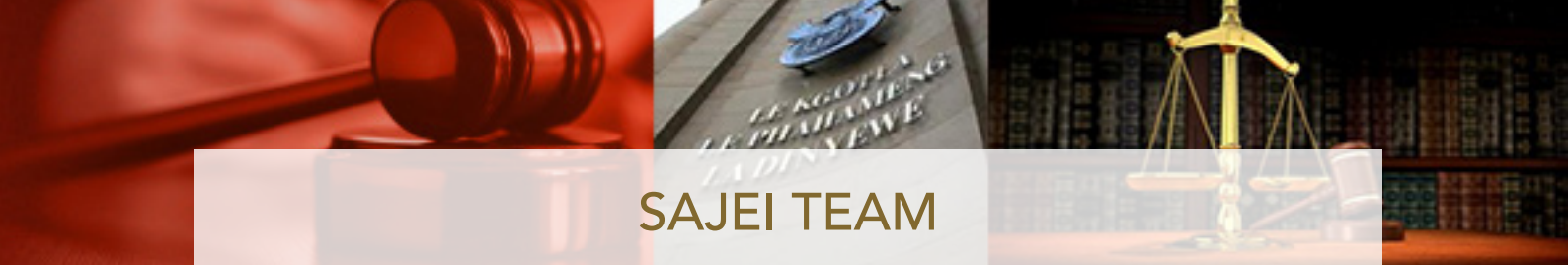
Justice N Dambuza

Mr D Mogotsi

Nkosi N Ngonyama

Mr O Krieling

Prof N Lubisi



SAJEI TEAM

Mr Mashau Ramalebana, SAJEI Judicial Educator has been appointed as a Regional Magistrate in George, Western Cape effective 1st March 2019. SAJEI team is proud of his career progression, the sky is the limit are exposed to a number of dignitaries.

Increase of Small Claims Limit

kindly note that as from 1 April 2019, the limit for Small Claims Court has been increased from R15 000 to R20 000 as per government notice No.296 of 5 March 2019

Court Annexed Mediation: A Way To Go

The Benefits of Court Annexed Mediation are as follows:

a. Facilitates expeditious resolution of disputes,
b. Amicable resolution of disputes,
c. Facilitates interaction between parties in a safe environment,
d. Accelerates access to justice for parties,
e. Promotes restorative justice.

Follow up training on Court Annexed Mediation will take place in January 2019 conducted by Judge Hadfield from USA, the implementation of the project is under the leadership of Judge President Dunstan Mlambo

Norms and Standards Corner

The following norms are hereby established:

(i) Judicial Officers must at all times act in accordance with the core values stated above.
(ii) Judicial Officers should make use of the available resources and time and strive to prevent fruitless and wasteful expenditure at all timesat all times.
(iii) Judicial Officers should at all times be be courteous and responsive to the public and accord respect to all with whom they come into contact.
(iv) Judicial Officers should strive for and adhere to a high level of competence and excellence and to this endare encouraged to participate in regular training under the auspices of the South African Judicial Education Institute.

RECENTS JUDGMENTS AND COMMENTS

Collated by TV Ratshibvumo
Regional Magistrate, Johannesburg

Application for stay of execution

1. The Minister of Police v Kunene and Others
(Case no. 25544/2018, GLD - Johannesburg)

This was an application for stay of writ of execution issued against the Minister of Police pending an application for the rescission of judgment. The Minister was ordered to pay R34 million for unlawful arrest and assault perpetrated by members of the SAPS. Without the mandate by the Minister of Police, the State Attorney headed by the 2nd Respondent (Mr. Lekabe) had mandated the 4th Respondent (Adv Kajee) to concede the merits and the order of the High Court resulted from an agreement between the parties. In this judgment, the High Court highlights how the public funds can be abused with fraudulent collusion between members of the State Attorneys and Legal Practitioners. It is apparent that instructions to defend the action were ignored and Adv Kajee was found to have charged fees for the period prior to him receiving instructions on the matter which the court regarded as fraud. The urgent application for the stay of execution was granted.

Suspension of an Advocate

2. Johannesburg Society of Advocates v Kajee
(Case no. 35095/2018, GLD - Johannesburg)

Flowing from the Kunene judgment above, the Johannesburg Society of Advocates initiated disciplinary proceedings against Adv Kajee. When an order was sought for him to be suspended from practice pending the inquiry, he resigned from the Johannesburg Society of Advocates, nevertheless; the order suspending him from practice was granted pending an investigation into his fitness to remain on the roll of advocates. He was also ordered to furnish all his records such as banking records and fees book to the Applicant even though he was no longer its member.

Road Accident Fund

3. Mzwakhe v Road Accident Fund
(Case no. 24460/2015, GLD, Johannesburg).

It is clear from the two cases above that not all settlements out of the court are clean. When it comes to public funds, the courts are not expected to rubberstamp the agreements. In Mzwakhe v RAF, the court refused to make a questionable settlement, an order of court. It ordered that the matter should be properly pleaded and went on to interdict the Respondent not to make any payment in settling this matter without a court order.

Competency of the child witness

4. S v Sangweni
(Case no. AR220/2018, KZN, Pietermaritzburg, 01 March 2019).

This matter deals with the court's duty to establish the competency of a child witness. The complainant was aged 13 and gave evidence on an incident that took place when she was 12. The Regional Magistrate asked her if she knew the oath and whether she knew the consequences of taking an oath. The witness stated that she knew the oath but did not know the consequences of taking an oath. The court then admonished the witness to tell the truth before giving evidence. The accused was subsequently convicted of rape and sentenced to life imprisonment. Evidence was held to be inadmissible for the reason that the court failed to establish the competency of the child witness. Conviction and sentence were as such set aside.

Competency of the child witness

5. S v Ndlovu
(Case no. CA01/2018, NW - Mafikeng).

In establishing the competency of the complainant who was 11 years old, the trial court asked the child about the religion. The child confirmed that she goes to church but had never heard about the devil, hell or someone who died to save the people. The child confirmed that she knew the difference between the truth and lies although no questions were asked to confirm her knowledge. The court decided that the child will be admonished and postponed the matter due to late hour. On the next date, the court merely caused the child to take an oath before giving evidence that led to the conviction of the accused for rape. The accused was sentenced to life imprisonment. On appeal, the conviction and sentence were set aside for failure to establish the competency of a child witness.

Responsibility of a Judicial officer in respect of judgment writing

6. Minister of Police v Vowana and Others
(Case no. 884/2014, EC Mthatha; 14 February 2019).

The first Respondent was a Magistrate who presided over a case against the Minister of Police for unlawful arrest of the four Plaintiffs. The Second Respondent Ms. Ponoane was an attorney who represented the four plaintiffs. Once the trial was over, judgment was reserved. Ms. Ponoane proceeded to write a judgment in favour of her four clients. The Magistrate then appended his signature before handing it down as his judgment. On review, the High Court ruled that writing a judgment was a duty of a judicial officer which cannot be abrogated for whatever reason. Getting someone who is not a judicial officer to write the judgment erodes the independence of the judiciary. The High Court set aside the proceedings and ordered the trial to start de novo before another magistrate. The High Court was also critical of the practice of not handing down civil judgments in an open court.

COURT ANNEXED MEDIATION IN THE FAMILY COURTS

Ms Lindiwe Gura

Acting Regional Magistrate, Cape Town

Mediation or Conciliation (as used inter-changeably in other jurisdictions) is a voluntary process in which the services of an acceptable third party are used in a dispute as a means of helping the disputants to arrive at an agreed solution. It is submitted that mediation is an integral and inherent requirement of all Judicial Officers at all levels of the Judiciary, as it is also an indicator in judicial case flow management and the administration of justice.

In MB v NB 2010 (3) SA 220 (GSJ) the High Court held that mediation can produce remarkable results in the most unpropitious of circumstances, especially when conducted by one of the several hundred people in this country who have been trained in the process. The court noted that the success of the process lies in its very nature. The court went on to say that unlike settlement negotiations between legal advisers, in themselves frequently fruitful, the process is conducted by an independent expert who can, under conditions of the strictest confidentiality, isolate underlying interests, use the information to identify common ground and, by drawing on his or her own legal and other knowledge, sensitively encourage an evaluation of the prospects of success in the litigation and an appreciation of the costs and practical consequences of continued litigation, particularly if the case is a loser.

It is submitted that through mediation, the backlog in our courts can be reduced drastically. Stakeholders within the legal fraternity namely; Prosecutors in criminal courts, Family Advocates in Family Courts, Maintenance Officers in Maintenance Courts, Attorneys and Advocates should embrace this process to ensure the expeditious settlement of disputes outside the court room. As discussed above, the invocation of this process is bound to reduce case backlogs and save costs for disputants or litigants.

In terms of rule 74(2) of Chapter 2 of the Rules regulating the conduct of the proceedings of the Magistrates' Court of South Africa (Mediation Rules), as amended, the department of justice recently published under Government Notice R183 of 18 March 2014, which aims to designate additional courts for purposes of application of the mediation rules. In the past, only few provinces could deal with mediation in the Magistrates court. However, in term so the above notice, all the Magistrates court in South Africa will be empowered to attend to mediation matters. It is my submission that this is a step in the right direction as this gives effect to the constitutional rights of access to justice entrenched in section 34 of our Constitution.

Conflict is inevitable in all social relationships and exists when parties believe that their aspirations cannot be achieved simultaneously and/or perceives a divergence in their values, needs or interests (latent conflict). When parties manifestly employ their power in an effort to defeat, neutralize or eliminate each other in order to protect or further their interests in their interaction, same is called manifest conflict.

The requirements for one to be a mediator differ from one jurisdiction to another. Most jurisdictions require notional hours of 40 hours whilst Diplomas and Certificates in Mediation are often coupled with Arbitration and other Alternative Dispute Resolution Processes. In my view, mediation should be invoked in various spheres of law in order to expedite the finalization of matters. I will however briefly comment on the use of court annexed mediation in the Family court focusing on matters involving children. Section 276 of the Children's Act 38 of 2005 and Article 10 of The Hague Convention on Civil Aspects of International Child Abduction; bequeath mediation on the Chief Family Advocate appointed by the Minister of Justice as the Central authority. Section 28(2) of the Constitution provides that in all matters concerning children their best interests remain paramount. In terms of section 6(4)(a) of the Children's Court Act, an approach conducive to conciliation and problem solving should be adopted when dealing with matters involving children. A confrontational approach is not appropriate.

In the next article/s I will deal in depth with mediation in relation to Child Justice Court, Family law and divorce matters in the Regional courts, Maintenance courts as well as Domestic Violence courts. Watch the space!!

"THE RIGHT TO ADEQUATE HOUSING AS HAMPERED BY DECEASED ESTATES NOT WOUND UP"

By Lincoln Matjele

1) Introduction.

This article seeks to bring clarity about the impact that unwound deceased estates have on one of the fundamental constitutional rights, namely 'the right to housing'.

Section 26 of the Constitution of the Republic of South Africa, 1996 provides for the right to Housing as follows:

1. "Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

South Africa is a signatory of the International Covenant on Economic, Social and Cultural Rights, whose Article 11 provides that member states should recognize 'the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions', and that they 'will take appropriate steps to ensure the realization of this right…'.
It is trite as per case law authority in South Africa that a "narrow" or "restrictive" interpretation of the right to housing as merely a right to shelter is insufficient, but should instead include the right to live where there is security, peace and dignity; obviously subject to the Government's available resources to cater for this second generation right. For example in the Port Elizabeth Municipality, a case dealing with eviction in the context of section 26(3) of the Constitution, it was stated that "…a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security." The obligation to address this right is placed by the Courts on the Government. This is evident in the cases of Abahlali BaseMjondolo, Grootboom, Olivier Road, Blue Moonlight, Changing Tides, Dladla, Joe Slovo, and Eden Park. In as much as the Executive has a duty as mentioned, so is the Judiciary obligated by the Constitution when dealing with cases that may result in homelessness.

A research by Tim Fish-Hodgson states that the right to housing places a constitutional obligation on the judiciary itself (in addition to the legislature and the executive), and that the Courts have been clear on the duties of judicial officers presiding over eviction cases which may lead to homelessness. It is required of them to "go beyond their normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process". I must hasten to state that this duty extends beyond civil courts dealing with evictions, to all other Courts by the exercise of whose powers or omission thereto over property or property related rights, gross prejudice may be suffered.

This leads me to our main topic of deceased estates that remain with immovable property, yet not wound up, whether handled by the Master of the High Court, or by the Magistrates Courts. Many of the Magistrates Courts in South Africa are still inundated with deceased estates of black / African people that were lodged before 2006 in terms of the Black Administration Act of 1927.

2) Key historical events & legislative developments.

Herewith are historical events and legislative developments providing background as to why magistrates are still inundated with deceased estates.

- 1927: Black/Native Administration Act passed regulating marriages, residence and succession of black natives, and establishing Commissioner's Courts.
- 1956 - 1957: Thirty-year leases obtainable by black people in cities.

- 1968: Implementation of the Regulations Governing the Control and Supervision of Black Residential Areas (GN R1036). Issue of Regulation 6, 7 and 8 permits in black townships (e.g. Soweto, Katlehong, Umlazi etc.)
- 1977: Urban Foundation was formed by the business community. This entity to persuade government to introduce a form of urban land ownership for blacks. As a result, in 1978, a 99-year lease scheme was introduced.
- 1984 - 1986: Black Communities Development Act enacted and amended to provide full ownership rights for Blacks in urban areas.
- 1989: Conversion of Certain Rights into Leasehold or Ownership Act, repealing R1036 Regulations. Provincial governments made responsible for transfer of occupational rights granted by permits to full ownership.
- 1991: Upgrading of Land Tenure Rights Act (ULTRA) – if provided for automatic upgrade of leasehold to full title once township register is open.
- 1998: Transfer Of Rental Property Scheme (TORPS) - adjudications introduced for transfer of township property to one individual subject to a family rights agreement restricting rights of 'custodian' from evicting other family members.
- 1994 - First democratic elections. The powers of the Commissioner's Courts are usurped by the Magistrates Courts to continue to administer Black people affairs as per Black Administrations Act, 1927.
- 2004 –In Bhe v Magistrate of Khayelitsha 2005 (1) SA 580 (CC), it was held that the provisions on male primogeniture in the Black Administration Act 1927 were unconstitutional. All deceased estates must be dealt with in terms of the Administration of Estates Act 66 of 1965 as administered by the Master of the High Court.
- Post 2006 –The Master of the High Court is administering all deceased estates. There is a backlog of the winding up of deceased estates in magistrates courts formerly dealt with in terms of the said Black Administrations Act of 1927, where immovable property was not transferred to the heirs, for various reasons, proving that such estates are not fully wound up. In these circumstances the descendants are occupying family home without a title deed, and at times where there is no estate representative / executor alive or even a legal representative.

3) Pre-2006 deceased estates in Magistrates courts.

Even after the new political dispensation of 1994, the deceased estates were administered in terms of the Black Administration Act of 1927, a discriminatory piece of legislation. It was as a result of Bhe and Moseneke that the provisions of section 23(7)(a) of this legislation and regulation3(1) thereof were declared unconstitutional and invalid by the Constitutional Court.

These provisions, it was stated, resulted in intestate estates of Blacks not being able to be administered properly, resulting in chaos. The Minister of Justice was permitted to join in the proceedings and to appeal the declarations of unconstitutionality. The court held that in the interests of justice the administration of intestate estates of black persons should be resolved speedily. Furthermore, the abovementioned provisions constitute a limitation of the right to dignity of Blacks, and therefore unconstitutional and invalid. All African families were granted a right for two years to choose a method of administration of intestate estates. After these two cases the Master of the High Court administers all deceased estates, including those of Blacks, with effect from 2006.

However, due to lack of capacity, within the Master of the High Court, lack of jurisdiction over the files originally opened in terms of the Black Administration Act of 1927, and other reasons unknown to the author, all deceased estates reported prior to 2006 remain with the Magistrates Courts, hence the duty to finalise them.

Due to the fact that this was seen as an administrative duty, Magistrates mainly issued Certificates of Appointment (in terms of Reg. 4(1) of the Act), an equivalent of the Master's letters of Authority/executorship per s.18 of the Administrations of Estates Act. As a result, most of the holders of these Certificates of Appointment behave as if they are owners of properties, without carrying out their duty of properly winding up those estates as required by law. This leads to many urban township properties remaining in the names of people who are deceased, without being transferred to the legitimate heirs, to enjoy ownership rights over the property rightfully belonging to them in terms of the laws of intestacy. In Johannesburg Magistrate Courts alone there are about 168 000 matters of this nature. One can imagine the cumulative impact of the number of such matters throughout South Africa.

4) Challenges encountered: -

The magistracy has a duty to ensure that estate matters are dealt with expeditiously rather that addressing such matters when they arise as a result of disputes by heirs, spotted while dealing cases of domestic violence or evictions of sibling(s) by another. If the estate matters are not resolved the current situation will not improve. We will still be lamenting the challenge after 20 years. The challenge of estates not wound up affects both the Magistracy and the Master of the High Court.

The impact is undeniably enormous on the obligation by government to provide housing per section 26 of the Constitution and the international instruments. Of significance is how the Magistrates Courts may ease the pressure by becoming creative and hands-on, thereby assisting the parties and stakeholders such as the

Department of Human Settlement, which seems unable to meet its targets to provide adequate housing to the poor and deserving masses. Family members of the deceased lease out properties or live in them still registered on deceased particulars. As a result, the municipality is unable to collect rates and taxes.

In addition, where there is no transfer of ownership properties are treated as family homes and tend to be occupied by a number of family members. This situation often leads to domestic violence and malicious damage to property as well as "back door" eviction applications through Domestic Violence Courts.

5) Proposed solution: -

In the Johannesburg Magistrates Court (Family Section), where the author is based, we initiated a process in 2017, where these matters are adjudicated in Court. When approached by any affected party to the estate for whatever reason, if there is immovable property still in the name of the estate, the matter gets enrolled in Court. The matter is kept on the roll until all issues including the property has been transferred to one heir chosen by all or to all of them in terms of the Intestate Succession Act, 1987. The Court plays a proactive role of ensuring that progress of winding up of the estate is monitored to its end. The parties are always warned in Court to remain in attendance on the next court date, until all requirements are met. The Court in essence holds the parties by the hand until each estate is wound up.

Where the parties are indigent, which is usually the case, the court refers them to organizations like Pro.Bono. Org to source free legal mediation and conveyancing services. The parties settle all disbursements in order for the process to be finalized, including paying off or making appropriate arrangements to settle municipal rates. The process is finalized only when a copy of the new title deed or a Conveyancer's Certificate (coupled with a recent deeds search) is presented to the Court. The matter is then considered fully wound up, and the file is accordingly sent to archives.

The author submits that this solution has been tried and tested for a period of two years at Johannesburg Magistrate Court and therefore it is worth considering at other courts.

From our recent calculation there is about 168 000 files that have not been attended to for one reason or another. The parties have not engaged deceased estate clerks. It is my view that initiatives are required from the members of the judiciary to have these matters in court. They must proactively ensure that all these matters are dealt with and finalized, thereby enabling the Department of Human Settlements and their local government to be effective in providing adequate housing, with proper data. Besides assisting government, this is service delivery by Courts to the poor, less-privileged and at times ignorant people.

If we are proactive as the judiciary, and engage other stakeholders, we will soon discover how desperate and helpless people are about these unwound estates. It is possible that in the next 5 years the problem of the pre-2006 Blacks' deceased estates will be history. All houses held captive by the deceased estates process could be a thing of the past. If we adopt an attitude that it is not our problem as the judiciary, which is not true, over the next 30 years, our courts will still be issuing Regulation 4(1) certificates substituting estate representatives' *ad-infinitum*.

6) References

1. Port Elizabeth Municipality vs Various Occupiers 2005 (1) SA 217 (CC).
2. Abahlali baseMjondolo Movement SA and Another v Premier of the Province of KwaZulu-Natal and Others 2010 (2) BCLR 99 (CC
3. Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).
4. Occupiers of 51 Olivier Road Berea Township, and 197 Main Street Johannesburg vs City of Johannesburg 2008 (3) SA 208 (CC).
5. City of Johannesburg Metropolitan Municipality vs Blue Moonlight Properties 39 (Pty) Ltd & another 2012 (2) SA 104 (CC).
6. City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others 2012 (6) SA 294 (SCA)
7. Dladla & Others vs City of Johannesburg & Another 2018 (2) SA 327 (CC)
8. Residents of Joe Slovo Community, Western Cape vs Thubelisha Homes & others 2010 (3) SA 454 (CC).
9. Ekurhuleni Metro Municipality & another vs Various Occupiers, Eden Park Ext 5 2014(3) SA (SCA).
10. Draft Manual on Housing for SAJEI-ICJ Training in October 2018", Tim Fish-Hogson, 3 September 2018, pg.1
11. Tim Fish-Hogson, Supra.
12. Bhe and Others v Magistrate Khayelitsha and Others, 2005 (1) SA 580 (CC)
13. Moseneke v The Master of the High Court Case No: CCT 51/00 6-12-2000 CC

A LOUD CALL FOR EQUALITY AND DIGNITY FOR SAME SEX-COUPLES

Dr James D Lekhuleni

Regional Magistrate, Cape Town

1. INTRODUCTION

I was shocked in January 2019 when I read a newspaper report which stated that women in Saudi Arabia will from now henceforth, be informed by text message that their marriages have ended. The report stated that the new development is aimed at correcting the practice of secret divorce, whereby men in the Kingdom could unilaterally decide to separate without informing their wives. This really got me thinking. Whilst pondering on this, I thought of the sufferings of vulnerable groups in our country in particular same-sex couples. Little by little it dawned on me that despite the enactment of the Civil Union Act 17 of 2006, this vulnerable group is still ostracized by society and the legislature. The Civil Union Act does not adequately protect them. In my view, speaking truth to power on behalf of this voiceless group is a genuine call to make. Due to lack of space, my submissions in this regard will be crypt, succinct and laconic.

In National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) at para 25, Ackerman J, described the impact of discrimination on gays and lesbians as serious and described them as a group of people with 'vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves'.

Prior to the adoption of the Interim Constitution, a civil marriage in terms of the Marriage Act 25 of 1961(the Marriage Act) between two heterosexual persons was the only form of marriage recognised by South African law. During that period, marriage had only one meaning and was defined in terms of the common law. A civil marriage had to comply with the provisions of the Marriage Act for it to be a valid marriage. In terms of section 26 of the Marriage Act, minors needed the consent of their parents or from the court to enter into a civil marriage. In terms of section 30(1) of the Marriage Act, it was only a husband who can marry a wife.

In Ismail v Ismail 1983 (1) SA 1006 (A), the Appellate Division held that it was quite clear from the context of the Marriage Act as a whole that it means a marriage under the common law, that is, a legally recognised voluntary union for life of one man and one woman to the exclusion of all others while it lasts. The common law definition of marriage did not make provision for same-sex marriage and consequently deprived same-sex couples of the benefits that accrue to married couples.

2. EXTENSION OF SPOUSAL BENEFITS TO SAME-SEX COUPLE ON AN AD HOC BASIS

With the advent of the constitutional dispensation and taking into account the right to equality and the right to human dignity enshrined in the Constitution, it remained to be seen whether same-sex partners would allow the law to continue to deny them the right to marry one another. The new constitutional dispensation, created a platform that allowed gays and lesbians to challenge the Christian hegemony that dominated South African family law. The constitutional commitment to human dignity and equality, and the inclusion of sexual orientation as a prohibited ground of discrimination in terms of section 9(3) of the Constitution formed the basis of several court cases in which recognition and protection of same-sex relationships were contested.

A discussion of all those cases goes beyond the scope of this article. However, it must be mentioned that the extension of spousal benefits by the courts to same-sex life partners amounted to measures designed to advance the constitutional rights of gays and lesbians with the objective to promote the achievement of equality in our

society. Although partners in a same-sex relationship were by no means placed on the same footing as spouses in a civil marriage, the Constitutional Court was prepared to extend spousal benefits to same-sex partners in a number of cases decided before the coming into operation of the Civil Union Act on an ad hoc basis. In the majority of those cases, where the interpretation of spouse was extended to include same-sex partner, the court ordered a 'reading in' of 'permanent same-sex life partner' into the provision. The Constitutional Court justified its findings on section 9(3) of the Constitution which forbids unfair discrimination and section 10 of the Constitution which guarantees the right to human dignity. The rationale underlying the extension of spousal benefits to spouses in the same-sex relationship was based on the fact that same-sex partners could not choose to get married even if they wanted to marry.

For instance, in National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Another 2000 (2) SA 1 (CC) para 56, the Constitutional Court found that section 25(5) of the Aliens Control Act 96 of 1991 discriminated against partners in permanent same-sex life partnerships as it only provided for the spouses of permanent South African residents to apply for immigration permits. In consequence of this finding, the Court ordered that the words or 'partner', in a permanent same-sex life partnership would henceforth be read into the Act after the word 'spouse' to remedy this defect.

In Du Plessis v Road Accident Fund 2004 (1) SA 359 (SCA), the Supreme Court of Appeal had to consider whether the plaintiff was entitled to claim damages for loss of support from his same-sex partner in terms of the Road Accident Fund Act 56 of 1996. The court found that in a society where the range of family formations had widened, such a duty of support might be inferred as a matter of fact in certain cases of persons involved in permanent, same-sex life partnerships. The court concluded that the deceased therefor owed the plaintiff a contractual duty of support and could thus claim from the Road Accident Fund as requested. In Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC), the Constitutional Court concluded that same-sex partners should be included in benefits given to the spouses of judges under sections 8 and 9 of the Judges' Remuneration and Conditions of Employment Act 88 of 1989.

Few weeks before the enactment of the Civil Union Act, the Constitutional Court in Gory v Kolver 2007 (4) SA 97 (CC), declared section 1(1) of the Intestate Succession Act 81 of 1987 unconstitutional on the ground that it unfairly discriminated against permanent same-sex life partners. The Constitutional Court found that as the deceased and the applicant were not legally entitled to marry, this amounted to discrimination on the listed ground of sexual orientation in terms of section 9(3) of the Constitution, which is in terms of section 9(5) presumed to be unfair unless the contrary is established. The court found that given the recent jurisprudence of South African Courts in relation to permanent same-sex life partnerships, the failure of section 1(1) to include within its ambit, surviving partners to permanent same-sex life partnerships in which the partners have undertaken reciprocal duties of support is inconsistent with the applicant's right to equality and dignity in terms of sections 9 and 10 of the Constitution and that the limitation of these rights could not be justified. The court eventually declared the applicant the sole intestate heir of the deceased.

3. THE ENACTMENT OF THE CIVIL UNION ACT 17 OF 2006

The piecemeal recognition of same-sex partnerships was finally addressed in the case of Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae); Lesbians and Gay Equality Project and Others 2006 (1) SA 524 (CC) which ruled that it was unconstitutional for the state to provide the benefits of marriage to opposite-sex couples whilst denying them to same-sex couples. The Constitutional Court required the legislator to afford same-sex couples the same status, benefits and responsibilities accorded to opposite-sex couples. This led to the enactment of the Civil Union Act 17 of 2006 which came into operation on 30 November 2006.

The Civil Union Act allows heterosexual and same-sex couples to enter into a fully recognised civil union, which may be called a marriage or a civil partnership. Section 1 of the Civil Union Act defines a 'civil union' as the voluntary union of two persons who are 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in the Act. In terms of section 2 of the Civil Union Act, the objectives of the Act are to regulate the solemnisation and registration of civil unions by way of either a marriage or a civil partnership and to provide for the legal consequences of the solemnisation and registration of civil unions. In a broader context, the Civil Union Act can be seen as a way to achieve the values and the objectives envisaged in the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. In terms of section 11(1) of the Civil Union Act it is entirely up to the civil union partners whether their civil union is called a marriage or a civil partnership.

4. THE SHORTCOMINGS OF THE CIVIL UNION ACT

In my view, this Act does not adequately protect the constitutional rights of same-sex couples as envisioned by the Constitutional Court in the Fourie Judgment. It is constitutionally contestable in that it discriminates against same-sex couples.

The difficulty with the Act is that it is the only means for same-sex couples who want to obtain full legal recognition of their relationship. Heterosexual couples can acquire such recognition by way of either the Civil Union Act or the Marriage Act.

In terms of section 6 of the Civil Union Act, a marriage officer other than a religious marriage officer may inform the Minister of Home Affairs in writing that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same-sex. The differentiation is in conflict with the equality clause in our Constitution. The fact that section 6 of the Civil Union Act affords secular marriage officers the option to object on the ground of conscience, religion and belief to solemnise a same-sex civil union is violating the equality clause as well as the right to human dignity in our Constitution, since it curtails the rights of same-sex partners to enter into a civil union as freely as their heterosexual counterparts.

It is clear from the definition of a Civil Union Act that both prospective civil union partners must be 18 years of age. Section 24(1) of Marriage Act permits the marriage of a minor with the appropriate consent of a guardian or parent. The blanket ban on same-sex minor couples to conclude a civil union in terms of the Civil Union Act is in conflict with section 26(1) of the Marriage Act and section 3(3)(a) and (b) of the Recognition of Customary Marriages Act 120 of 1998 which allow minors to conclude marriages with Ministerial Consent. In addition to constituting an infringement of minors' right to equality, the Civil Union Act may in this regard conceivably also be regarded as not giving paramount importance to the best interests of children as envisaged in section 28(2) of the Constitution. In SS v The Presiding Officer of the Children's Court: District of Krugersdorp 2012 (6) SA 45 at para 1 (GSJ) it was held that Children are the soul of our society. If we fail them, then we have failed as a society. Children are in need of care, nurturance and protection.

Section 9 of the Children's Act 38 of 2005 echoes the Constitution and clearly sanctions the paramount importance of children's best interests as enshrined in section 28(2) of the Constitution. It is submitted that to the extent that s 1 of the Civil Union Act prohibits same-sex minor couples to conclude a civil union even with parental consent, offends against their right to human dignity which involves the right to family life. It also denies same-sex minors the opportunity to acquire the status, benefits and responsibilities which opposite-sex minors can acquire during marriage. In Dawood and Others v Minister of Home Affairs 2000 (3) SA 936 (CC) at para 30, the Constitutional Court emphasised the fact that marriage and the family are social institutions of vital importance.

5. CONCLUSION

Whilst it is accepted that in a broader context, the Civil Union Act made progress for same-sex couples, it is argued that the Civil Union Act does not completely rise to the occasion in fully protecting the rights of same-sex couples. Importantly, the Act provides equal status for same-sex relationships and acknowledges the existence of a diverse range of family forms. However, certain provisions of the Act need to be revisited. It is further submitted that in an open and democratic society based on human dignity, equality and freedom, the blanket discrimination based on age, and sexual orientation cannot be justified in terms of section 36 of our Constitution. It is submitted that the specific provisions of the Civil Union Act discussed above, should be repealed because they unjustifiably violate the right to equality and human dignity for same-sex couples. Alternatively, the Marriage Act 25 of 1961 should be amended urgently by the insertion of a definition of 'marriage' that extends marriage in terms of the Act to same-sex and opposite-sex couples.

Dr James D Lekhuleni
Regional Magistrate - Cape Town

TO PUBLISH OR NOT TO PUBLISH

THE CONUNDRUM IN GENERAL REGULATION 104[2] AND 56[1] OF THE CHILDREN'S ACT 38 OF 2005

Teresa Horne
Senior Magistrate & Judicial Educator: SAJEI

Jaco Van Niekerk
Tembisa Magistrate

The court in ***Herbst & Tempitope vs The Presiding Officer of the Children's Court, Johannesburg*** Case No. A3025/2018, delivered on 12 November 2018, remarked in the opening sentence of paragraph [49] of the judgment as follows:

"Publishing names of minors and their parents is highly undesirable."

This remark has drawn some exasperation amongst practitioners and presiding officers of the Children's Court as this remark caused doubt if there may be any publication whatsoever in Children's Court matters. Let's have a closer look:

The undesirability of any publication of details of children who are involved in or affected by court cases, is trite. On 28 September 2018, the Supreme Court of Appeal declared Section 154(3) of the Criminal Procedure Act unconstitutional as it failed to adequately protect the identity of children involved in criminal matters (***Centre for Child Law & Others v Media 24 Ltd & Others*** *(871/17) [2018] ZASCA 140).*

The Herbst case was an appeal against the refusal by a presiding officer of the Children's Court to grant an adoption order. The adoption social worker placed an advert to be published in a newspaper in an attempt to trace the whereabouts of the relevant child's biological father. The full names of the biological father as well as that of the child were published.

General Regulation 104(2) of the CA provides that where a person whose consent is required for adoption, whose whereabouts are unknown, may be traced ("the objective") by employing a tracing agency or by publishing an advert in the newspaper. The Court acknowledged that the costs of a tracing agency may well make the effort impractical and criticized the publication due to its undesirability. The gist of this part of the ***Herbst*** judgment is that the avenues available in Regulation 104(2) to trace a person whose consent for adoption is required, are either unattainable or undesirable. No alternative avenues were suggested.

The question then begs whether General Regulation 56(1) of the CA must still be complied with whereby a social worker must cause an advert to be published in at least one newspaper calling upon any person to claim responsibility for an abandoned or orphaned child ("the objective").

In reaching an answer, the following considerations were taken into account:

(i) As far as can be gleaned from the ***Herbst*** judgment, the remarks about the undesirability of the publication, were obiter.

(ii) The ***Herbst*** judgment placed the emphasis on the discretion ('may') given in Regulation 104(2), signifying that it is not compulsory to resort to the publication of an advert in a newspaper.

(iii) Regulation 104(2) was neither declared invalid nor unconstitutional.

(iv) Magistrates are precluded in terms of Section 170 of the Constitution to enquire into or rule on the constitutionality of any legislation.

(v) There was no reference to or consideration of Regulation 56(1).

(vi) While it is trite that the publishing of names of minors and their parents are undesirable, Regulation 56(1) compels the publication of a newspaper advert, which sometimes may necessitate an inclusion of the names of the minor and/or the parents to serve the best interests of the child.

(vii) The differentiation of the mandatory nature of Regulation 56(1) as opposed to the discretionary nature of Regulation 104(2) can be found in "the objective" of the Regulations - Regulation 104(2) being the tracing of parents whose consent is required for adoption whilst Regulation 56(1) focusses on abandoned and orphaned children, who by their very nature are considered to be in need of care and protection.

Despite the High Court's remark regarding the undesirability of publication of names, the provisions in General Regulation 56(1) must still be complied with in applicable circumstances.

IN MEMORIUM

Leigh Davids

Leigh Davids (Right on the picture), a Transgender Sex worker provided a testimony on living with HIV and multi-drug resistant TB. Leigh prefers to be addressed as "they" or "them". In sum, Leigh said the following:

"I am 38 years old. I am a whole person and I am so beautiful. I have done so many things that most people fantasise about. I have done so many things in the underworld which I bring in your world. I live in my shack. Nobody tells me how to conduct my sexual life. I say No to stigma of living with HIV/TB. I have been imprisoned for periods of four years on two occasions. Transgender inmates calm the inmates in one way or the other. There are no special facilities for transgender inmates. There is a pain of telling my story, the pain inside is unbearable."

Leigh advised delegates to enquire from accused persons as to how they would like to be addressed other than assume that they are of a certain gender. Leigh said that appearing in court can be very painful and discriminating for Transgender individuals. The purpose of testimonies is to share real life experiences with the delegates. Experience has shown that they turn to have a lasting impact more so than academic lectures. The session was very emotional and as a result it was followed by debriefing. It is indeed with great regret to inform the readers that Leigh Davids is no more. May Leigh rest in eternal peace and rise in glory. Leigh's testimony will forever be remembered.

NEW INITIATIVES

Wildlife Trafficking

Mr Jacques Du Toit
EMI Capacity Development and Support
Departmental of Environment Affairs

As a follow up to the Environmental project which started in 2016, SAJEI decided to extended the scope of environmental training to specifically deal with Wildlife Trafficking. A working group largely consisting of Regional Court Magistrates has been constituted. The first working session took place on 11 - 13 March 2019. The outcome of the session was an action plan. The group will be meeting on 1 - 2 August 2019 in order to review submissions.

Please fell free to contact Ms Kutlwano Moretlwe, SAJEI Law Researcher on KMoretlwe@judiciary.org.za for any contribution on the project. SAJEI belongs to all members of the Judiciary.

Working group on Wildlife Trafficking with SAJEI officials

Back *(from left - right)*: Dr J Lekhuleni, Mr I Cox, Mr V Ball, Mr T Cass,
Third Row *(Second from Left)* Ms D De Wall, Mr L Claasen, Mr T Boonzaaier, Ms C Zungu, Ms A Mashigo
Second Row *(Second from left)* Ms D Smith, Ms T Horne, Ms V Botha
Front Row *(Third from left)* Ms S Mia

UPCOMING WORKSHOPS: APRIL 2019

DATE	WORKSHOP	PROVINCE
01 - 02 April 2019	Criminal Court Skills	Mpumalanga
03 - 05 April 2019	Civil Court Skills	EC Region 2 (Mthatha)
03 - 05 April 2019	Judicial Skills for Presiding Officers in the Equality Court	Northern Cape
04 - 05 April 2019	Civil Court Skills	KZN Cluster B (PMB)
08 - 10 April 2019	Practical Record Keeping and Trial Management	EC Region 2 (Mthatha)
08 - 10 April 2019	Civil Court Skills	FS Cluster A
08 - 12 April 2019	Civil Court Skills	Western Cape Cluster A & B
08 - 12 April 2019	Criminal Court Skills	Gauteng
09 - 11 April 2019	Children Court Skills	Mpumalanga
15 - 17 April 2019	Equality Court Skills	EC Region 1 (PE & EL)
15 - 18 April 2019	Civil Law and Procedure	North West
16 - 18 April 2019	Civil Court Skills	Mpumalanga
23 - 26 April 2019	Civil Court Skills	Limpopo
23 - 26 April 2019	Criminal Court Skills	EC Region 2 (Mthatha)
24 - 26 April 2019	Equality Court Skills	KZN Cluster A (DBN)

UPCOMING WORKSHOPS: MAY 2019

DATE	WORKSHOP	PROVINCE
06 - 08 May 2019	Children Court Skills	Mpumalanga
06 - 08 May 2019	Criminal Court Skills	EC Region 2 (Mthatha)
08 - 10 May 2019	Family Court Skills	Gauteng
08 - 10 May 2019	Social Context & Diversity	EC Region 1 (PE & EL)
09 - 10 May 2019	Civil Court Skills	KZN Cluster B
13 – 15 May 2019	Civil Court Skills	EC Region 2
13 – 17 May 2019	Equality Court Skills	Western Cape Cluster A & B
15 – 17 May 2019	Family Court Skills	Limpopo
20 – 22 May 2019	Computer Literacy	Mpumalanga
22 – 24 May 2019	Stress Management	KZN Cluster A (DBN)
24 May 2019	Judgment Writing	Northern Cape
27 – 28 May 2019	Environmental Skills	Mpumalanga
27 – 28 May 2019	Family Court Skills	Free State Cluster A
27 – 29 May 2019	Criminal Court Skills	EC Region 2 (Mthatha)
28 May – 01 June 2019	Judgment Writing	Limpopo

UPCOMING WORKSHOPS: JUNE 2019

DATE	WORKSHOP	PROVINCE
05 – 07 June 2019	Criminal Court Skills	EC Region 2 (Mthatha)
06 – 07 June 2019	Civil Court Skills	KZN Cluster B (PMB)
10 – 12 June 2019	Civil Court Skills	EC (Mthatha)
10 – 14 June 2019	Judicial Management	Western Cape Cluster A & B
11 – 13 June 2019	Stress Management	Mpumalanga
12 – 14 June 2019	PAJA	EC Region 1 (PE)
19 – 21 June 2019	Criminal Court Skills	EC Region 2 (Mthatha)
19 – 21 June 2019	Civil Court Skills	Northern Cape
24 – 26 June 2019	Criminal Court Skills	Limpopo
24 – 28 June 2019	Children's Court Skills	North West
25 – 28 June 2019	Social Context Training	Mpumalanga
26 – 28 June 2019	Civil Court Skills	KZN Cluster A (DBN)

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