

7 DECEMBER 2017

**ANNUAL** PRO BONO &  
HUMAN RIGHTS  
NEWSLETTER

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## OUR YEAR IN A GLANCE

In 2017 the Pro Bono and Human Rights Practice has taken great strides. In what has been an inspiring and rewarding year, we have assisted many of our clients resolve long, arduous legal battles, with great positive impact, made significant progress in furthering the causes of others, partnered in exciting and innovative human rights initiatives, hosted high profile guests, and assisted other Practice areas in carrying out important and meaningful pro bono work. In recognition of our contribution and those of others in the Firm who have given generously of their time and expertise, we are proud to report that the Firm won three awards during the 2017 year for its pro bono contributions and in so doing has cemented its reputation as one of the leading contributors to pro bono amongst law firms across the country. In what follows we provide a more detailed overview of some of the highlights of ours and the Firm's pro bono work over the year.

Thank you to my senior associate Tricia Erasmus, our administrative assistant, Thea Venter and all the CA's who have contributed to the work of our Practice over the year in review. Thank you too to all the other practitioners in other Practice areas who contributed valuable time and resources in assisting with pro bono instructions, and in helping us roll out some of our special projects and training. During the period in review the Firm donated in excess of 8,000 hours and R16 million to deserving individuals and organisations. A truly significant contribution!

Perhaps in recognition of the work that our Practice has been doing, we are very excited to announce that the Practice area is expanding. On 1 December 2017 we welcome Brigitta Mangale who will be joining us to help set up a Pro Bono Practice at our Cape Town office. Brigitta

joins us from Webber Wentzel, where she has been practicing as a senior associate in their Dispute Resolution Practice. We are also very happy to be welcoming Gift Xaba back to our Practice in January 2018 – this time in a new capacity! Gift who spent a rotation in our Practice last year, will be joining us as an associate here in Johannesburg.

The Firm's commitment to expanding our Practice is illustrative of the importance that CDH places not only on its pro bono obligations to assist indigent and vulnerable people access justice, but on its moral and ethical obligations to use its considerable agency to further the promotion of constitutionalism, accountability and the rule of law.

Brigitta and Gift I look forward to welcoming you and working with you to take our Practice areas' important mandate forward in 2018!



**JACQUIE CASSETTE**

*Director & National Practice Head  
Pro Bono & Human Rights Practice*

## REFUGEE LAW AWARD

With the air of high society that fancy finger food and wine inevitably provides, the Social Kitchen at Hyde Park Corner's Exclusive Books provided an unusual venue for the annual 2017 ProBono.Org awards. However, on the evening of 7 September amongst the name tags and high fashion, a more pervasive air of humility filled the room. It was a time to honour those who ordinarily seek not to be honoured and who, at all costs, would avoid the limelight if they could. This year, the awards celebrated those firms and pro bono lawyers who in the words of ProBono.Org "went beyond the call of duty in 2016."

Our Pro Bono Practice was honoured to win the first award of the evening – the award for the category of refugee law. The Practice has been working tirelessly on matters for a number of refugee clients and accordingly was particularly proud and gratified to have won this award.

Having been unlawfully denied formal refugee status and asylum papers at the Refugee Reception Office (RRO) upon entering South Africa many of our clients have sought our legal assistance with the appeal of decisions taken by Refugee Status Determination Officers (RSDO's). The Pro Bono Practice assists with appeals against these decisions before the Refugee Appeal Board (RAB). Extensive and intensive client consultations, sometimes with language barriers, the drafting of papers and liaising with the relevant government entities are all in a day's work for this team.

Members of the Pro Bono Practice also represent clients, many of whom come from other African countries, including the Democratic Republic of Congo and Angola, during arduous hearings before the RAB. More often than not, the decisions of the RAB require review as they often have no basis in law or in fact. Here, the Pro Bono Practice assists with the institution of the required legal action, covering the ground work as well as instructing highly regarded counsel for argument before the courts of law in deserving matters. We discuss some of these matters in more detail below.

As was highlighted by the guest speaker former Minister of Finance Pravin Gordhan, in a society which according to the latest Gini –

coefficient, is one of the most unequal in the world, and in which people's statutory and constitutional rights are sadly regularly being flouted, pro bono lawyers play an important role in assisting the poor to enforce their rights and to hold institutions accountable. In so doing not only do they assist in promoting the dignity of those affected, they assist in promoting the very stability of society. As Mr Gordhan drove home, an unequal society is an unstable one and affects us all.

From generation to generation, South Africa remains one of the most unequal societies in the world where poverty is almost a guaranteed inheritance for many. Against this backdrop, activism in the form of pro bono work retains its relevance and its significance. It is an equalising force. When the most vulnerable in society are assisted by the law, they are more likely to trust the law and the basic tenet of 'no one is above the law' becomes a reality rather than a hoped-for ideal.

The annual ProBono.Org awards may not solve all the country's problems but a little bit of recognition goes a long way to encourage the attendees to continue with their work in assisting vulnerable members of our society in circumstances where very often all other institutions have failed them.

*Tricia Erasmus and Jamie Lee Fong*





## LAW SOCIETY AWARD FOR OUTSTANDING PRO BONO CONTRIBUTION

At the 125th annual general meeting of the Law Society of the Northern Provinces and potentially the last of its kind with the ushering in of the Legal Practice Act, No 28 of 2014, our Firm was honoured with an award for its pro bono contribution.

The general meeting was held at Sun City on Saturday 18 November 2017 and commenced with a keynote address by the Commander in Chief of the Economic Freedom Fighters, Julius Malema. Politics aside, a common thread of the speech was the need for equality and non-discrimination in the legal fraternity as well as the importance of access to justice for all members of society regardless of class or economic standing. An essential element of such access to justice was emphasized with great energy as being an access to good quality lawyers or as Mr Malema put it "the best of the best". A further address by the recently appointed Honourable Judge President of the Mpumalanga Division of the High Court of South Africa, Judge Legodi echoed these statements.

Following such an impassioned address, it was with pride that I accepted an award on behalf of the CDH Pro Bono Practice in recognition of its "outstanding contribution to the Pro Bono Scheme of the Law Society." This award acknowledges our Pro Bono Practice's tireless efforts and dedication to the needs of society. It also applauds the significant contribution made by many other members of the Firm who generously contribute valuable time and energy to pro bono matters and causes.

The Pro Bono Practice must be congratulated for its recognition as being amongst the "best of the best".

*Maud Hill*

Congratulations



PRO BONO PRACTICE



AMONGST THE "best of the best"



**ANNUAL** PRO BONO & HUMAN RIGHTS NEWSLETTER





## SASLAW AWARD



In September our Employment Practice won the Johannesburg Firm Award in recognition of its dedicated assistance to the SASLAW Pro Bono NPC. SASLAW Pro Bono NPC is a non-profit organisation formed by the South African Society of Labour Law to administer the pro bono projects in the four labour courts in South Africa, situated in Johannesburg, Durban, Cape Town and Port Elizabeth.

Since its inception the SASLAW Pro Bono Advice Centre has assisted over 17,000 clients with high quality advisory and labour law services to those who would otherwise not have had access to legal services.

For the past five years CDH's Employment Practice has managed to dedicate more hours than any other law firm at the Advice Centre. Additionally, CDH has contributed the most hours over the last six years, year on year, at the Advice Centre in Gauteng.

*Michael Yeates*

## HELPING LEARNERS REACH FOR THEIR DREAMS: SUPPORTING THE 7TH ANNUAL NATIONAL SCHOOLS MOOT COURT COMPETITION

Annually, hundreds of high school learners participate in the National Schools Moot Court Competition (the Competition). The Competition is a joint initiative by the Department of Basic Education, the Department of Justice and Constitutional Development, the South African Human Rights Commission (SAHRC), the Foundation for Human Rights, the University of Pretoria and other stakeholders that first began in 2011. Led by the Pro Bono Practice, CDH continued to provide extensive support for the Competition during 2017.

Learners from all secondary schools in the country are encouraged to participate in the Competition, which involves two stages – an essay writing elimination round and various oral rounds culminating in a final round in which the eight finalists argue before a panel of adjudicators in the Constitutional Court. The Competition's main objective is to bring greater awareness in schools and communities about the Constitution and the values that it embodies - values that should underpin every legal and social decision made in the country. It also seeks to encourage learners to pursue careers in law.

CDH has been heavily involved in the Competition since 2014. In addition to assisting the Steering Committee and providing general support, CDH sponsors the four winners with bursaries for their first year of study should they wish to study law. CDH also plays an empowering and equipping role in the national rounds of the Competition. We have also been working on a draft manual that we hope will provide a helpful basic resource for all learners who participate in the Competition going forward.

On 4 October 2017, as part of an intensive few days programme for the national rounds, we hosted all 74 learners participating in these rounds at a seminar held at our Sandton offices, together with their educators. A range of speakers from the legal profession presented at the seminar. Shane Johnson, Neil Comte and Mashudu Thidiela of CDH spoke to the learners about the profession in general and what it means to be an attorney. Renowned Advocates Benny Makola and Tembeka Ngcukaitobi from the Johannesburg Bar had an interactive discussion in the form an interview regarding the role of advocates in the profession. Professor Kok, the Deputy Dean of the University of Pretoria Law School, addressed the learners on academia as a career path and how academia is essential to the legal profession. Commissioner Ameerma, from the SAHRC, addressed the students on the importance of the SAHRC and



## SUPPORTING THE 7TH ANNUAL NATIONAL SCHOOLS MOOT COURT COMPETITION...continued



other Chapter 9 Institutions. The learners also enjoyed a moot demonstration by the Mooting Club from the University of Pretoria. A previous finalist (who was also one of the eight participants in the SA national team that went on to win the 2016 International School Moot Court Competition in The Hague) Shandr  Smith, and who is currently pursuing law at the University of the Witwatersrand, shared her experiences with the learners and also gave some sage advice. To end the evening, Justice Madlanga, a justice of the Constitutional Court, addressed the learners on transformative constitutionalism. His keynote address was a highlight for many learners. To view excerpts from Justice Madlanga's speech click on the following link:

<https://youtu.be/qYCw2GXn3CU>

Later on in the week, practitioners from CDH assisted with adjudicating the quarter- and semi-finals, which were held at the University of Pretoria. The finals took place in the Constitutional Court on Sunday, 8 October 2017, before an eminent bench of adjudicators, including Justice Mojaelo (Deputy Judge President of the South Gauteng High Court), Commissioner Majola (Chairperson of the SAHRC) and Justices Kollapen and Kathree-Setloane, both of whom are currently acting as Justices of the Constitutional Court.

The four winners of the Competition are grade 10 and 11 learners, Qhayiya Mayinje and Kian Terwin (a team from Beaconhurst School in East London), and Sibulele Mbambi and Athenkosi Mthiya (from Holy Cross High School, also in the Eastern Cape).

Qhayiya describes his experience as an 'eye-opener' – as something he needed to experience. He has always wanted to pursue a career in law and participating in the Competition gave him an important opportunity to get a glimpse of what a career in law might be like. Qhayiya felt alive every time he was called up to speak and answer questions. He is of the view that as the Competition grows, it will help produce a generation of better attorneys, advocates and judges who are legally and ethically driven.

Kian's experience was 'like no other'. In his words, 'the last day was a very nerve-wracking and exciting day as we got to go to the Constitutional Court and argue in the finals. All in all one of the happiest moments of my life was when the judge said he rules in favour of the respondent (our side). It was an amazing feeling to know that all the hard work had finally paid off and then when I was called up as best oralist that was just an added excitement to the immense gratification the Competition brought.'



## SUPPORTING THE 7TH ANNUAL NATIONAL SCHOOLS MOOT COURT COMPETITION...*continued*



Sibulele has learnt that when you make a legal argument, you have to substantiate it with precedent – something he did not know before the Competition. He has learnt so much about the law and the legal profession. He is grateful that the Competition has opened his mind and broadened his knowledge. It has also taught him about his rights and responsibilities – for example, freedom of expression, as this year’s hypothetical case was based on freedom of expression. Overall, he was thrilled to have argued in the Constitutional Court and to have been referred to as “counsel”. He has always known that he wants to be a lawyer and the Competition cemented that for him. He encourages learners to participate in the Competition, as it is a worthwhile experience.

As Athenkosi reflects on her experience, she has discovered that this Competition has played a role in her finding herself. She reflects on how winning the Competition is proof that your capabilities are not determined by where you come from, rather by how much effort you put into making things happen for yourself. She was also able to explore her interest in the law and the Constitution further. She describes winning the competition as an overwhelming achievement that has made everyone proud.

*Jacquie Cassette and Nonhlanhla Mohlaba*

## I DECIDE = I AM EXHIBIT

"I isolated myself because people thought I was seeking attention. I was sent to Bara hospital more than five times. Every time I was discharged I experienced rejection from some of my family members including those I stayed with. People with the same diagnosis as me must not listen to the nasty things that people say because if they are not strong enough they might end up being suicidal."

This is an extract from the life story of Thato, one of many individuals in South Africa living with a psychosocial disability. Despite South Africa being a state party to the Convention on the Right of Persons with Disabilities (CRPD), people like Thato still face ongoing discrimination and our current legal system continues to follow an outdated "substituted decision-making model" in terms of which people such as Thato are deprived of legal capacity and are assigned curators or administrators to make decisions on their behalf.

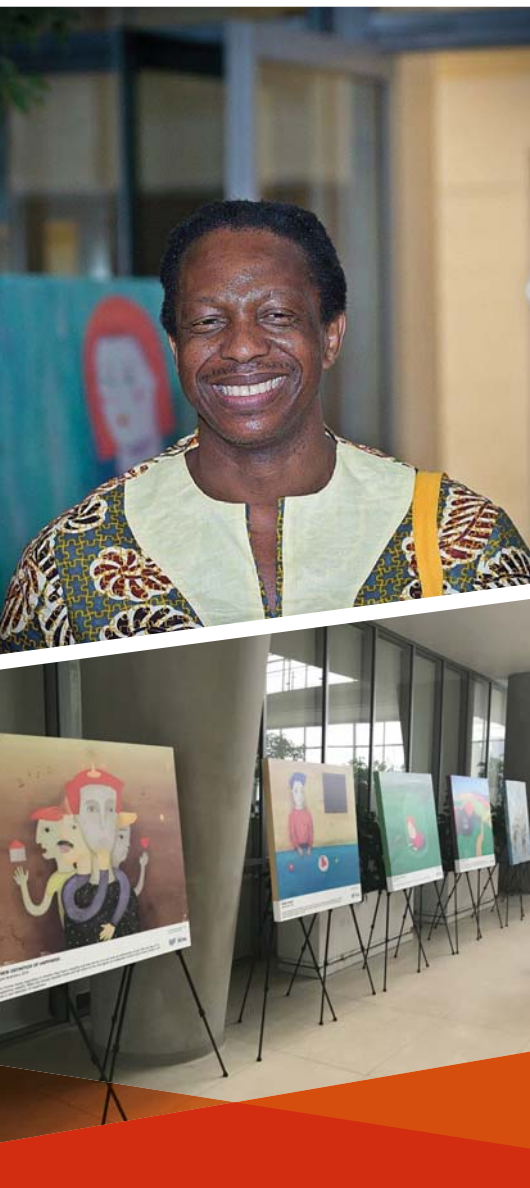
During 2017 CDH was proud to partner with the Centre for Human Rights Faculty of Law, University of Pretoria, in

its initiative to reproduce the Exhibition "I DECIDE = I AM" authored by Bulgarian illustrator Nadezhda Georgieva and award-winning journalist and human rights activist Yana Buhrer Tavanier here in South Africa. The provocative exhibit aspires to raise awareness around the many forms of discrimination faced by people like Thato. It aims to do so through the personal stories of sixteen persons who have been denied legal capacity. It further calls for law reform in accordance with Article 12 of the CRPD which affirms unequivocally that all persons with disabilities have full legal capacity and are entitled to equal recognition before the law.





## I DECIDE = I AM EXHIBIT...*continued*



The exhibition featured emotive images by South African artist Daniel Mosako that piece together the recent death of more than 140 patients in the Life Esidimeni tragedy. Mosako explains his works thus: "...[T]he three artworks portray a puppet master who is manipulating the independence and will to live of innocent intellectually challenged people. Unjustly so as and when the puppet master's strings snap a valuable life equivalence is also snapped at the master's digression."

The exhibition was launched in South Africa at an opening event held at the offices of the SAHRC in June 2017 and made its way to CDH's offices in October 2017. In order to celebrate our turn in hosting the exhibit, CDH held a cocktail event at our Sandton offices (in partnership with the Centre for Human Rights) where the exhibit was displayed

during the month of October. Former Justice of the Constitutional Court, struggle stalwart and activist Zak Yacoob, delivered a stirring address at the event.

Click the below link to view his full address:

[https://www.youtube.com/watch?v=i30sDu\\_0AbQ&feature=youtu.be](https://www.youtube.com/watch?v=i30sDu_0AbQ&feature=youtu.be)

The well-attended event provided legal professionals, colleagues, clients and the business community as a whole with an opportunity to view the exhibition and contemplate the serious issues raised in a relaxed and collegial environment.

I DECIDE = I AM toured five different organisations throughout the year, and ended at the University of Pretoria, where it was displayed for the last time during the Disability Rights Conference.

*Tricia Erasmus*

## PRESENTING AT DISABILITY RIGHTS IN AFRICA CONFERENCE

During November 2017, the Disability Rights in Africa conference was hosted by the Centre for Human Rights, University of Pretoria. The conference theme was 'Domesticating the Convention on the Rights of Persons with Disabilities (CRPD) in the Africa region: A focus on access to justice and legal capacity'. The conference was well attended by NGOs, academics, intergovernmental organisations and state officials across Africa. Director and National Practice Head of the Pro Bono Practice, Jacque Cassette presented at the conference.

The topics of discussion were many and varied. They included strategies for the effective implementation and domestication of the right to access to justice and the right to equal recognition before the law of the CRPD, communication accommodations in the justice system, provision of support to exercise legal capacity, the interaction between persons with intellectual and psychosocial disabilities and the justice system, legal capacity and law reform, the role of non-state actors in advancing access to justice for persons with disabilities, theoretical underpinnings of Articles 12 and 13 of the CRPD, inaccessible justice systems and accessing justice in particularly challenging contexts.

Jacque's paper was titled 'Supported decision making in an African context – An examination of comparative and international models with a view to law reform in South Africa'. Key points that emerged from her presentation were that like in many other African countries, persons with disabilities, and in particular, persons with psychosocial and intellectual disabilities constitute some of the poorest and most vulnerable members of South African society. Not only do they struggle to access social and other basic services, but they also battle with persistent deep stigmatisation, and in many instances serious abuse and gross violations of their rights. She emphasised that South Africa needs to urgently move forward in its initiatives to put in place domesticating legislation to implement the rights in the CRPD, including Article 12.

One of her recommendations was that in order to make equal recognition before the law a reality for persons with psychosocial and intellectual disabilities, South Africa needs to put in place a comprehensive statutory framework to cater for a continuum of support mechanisms to assist affected persons. She also observed that as the recent Life Esidimeni tragedy has shown, initiatives to deinstitutionalise and move towards community based care (one of the goals of Article 12), need to be properly planned, properly co-ordinated, properly resourced, properly regulated, and properly implemented. They need to be phased in over time with appropriate monitoring, and only after bona fide, proper, meaningful consultation with all stakeholders.

*Jamie Lee Fong*



## REFUGEE GUIDE LAUNCH

According to the United Nations Refugee Agency, one in every 113 people worldwide has been forced to flee their homes - that is 62 million people who have been forced to flee for their lives to escape violence or persecution. However, at a time when the numbers of people seeking refuge is increasing each day, many nations have been closing their borders to refugees, or have experienced anti refugee sentiment sweep their nations. The UN Secretary General, António Guterres put it as follows:

*"I've met so many who have lost so much. But they never lose their dreams for their children or their desire to better our world. They ask for little in return – only our support in their time of greatest need."*

CDH's Pro Bono Practice, together with ProBono.Org, Fasken Martineau and Norton Rose Fulbright SA officially launched the Practitioners Guides to Refugee Law at a special opening event on 20 June 2017 - World Refugee Day. The guides have been produced in response to a call for more legal professionals to provide much needed pro bono services. They have been expertly drafted by legal professionals, who provide practical and concise guidance to any practitioner who has limited knowledge of Refugee Law. It is hoped that these guides will equip more practitioners to assist refugees, at a time when they need support the most.

The Practitioners Guides initiative was co-ordinated by the ProBono.Org Refugee Legal Clinic (Refugee Clinic) that runs on a weekly basis and is staffed by a number of different law firms. CDH has been staffing and supporting the Refugee Clinic since its inception, providing much needed assistance and advice to refugees who generally require assistance with a variety of asylum related issues.

*Tricia Erasmus*

ONE IN EVERY  
**113**  
PEOPLE WORLDWIDE



ARE FORCED  
to flee their homes



THAT'S  
**62**  
MILLION PEOPLE



.....  
**FORCED TO FLEE**  
FOR THEIR LIVES  
TO ESCAPE VIOLENCE  
OR PERSECUTION  
.....

## “EACH PERSON MUST KNOW THEIR RIGHTS” - RAISING HUMAN RIGHTS AWARENESS AMONGST OUR STAFF / HUMAN RIGHTS DAY SURVEY AND CONSTITUTIONAL COURT TOUR

*During March 2017, in honour of National Human Rights Day (celebrated on 21 March), the Pro Bono Practice rolled out a human rights awareness campaign for our staff. As part of this campaign we arranged for CDH to take 40 of its support staff (joined by the Pro Bono Practice) on a memorable tour of the Constitutional Court, the Old Fort Prison and the Constitutional Hill precinct.*

This was an opportunity for many of our members of staff who might not otherwise have had the opportunity to do so, to attend a guided tour of the historic Constitutional Hill site and immerse themselves for a few hours in the deep resonance of the site, its history and its symbolism. In our experience attending the tour and visiting the Court is an extremely powerful way of bringing our struggle for freedom alive, and demonstrating the immense strides that we have made in transforming our society. It is also a sober reminder of the terrible human sacrifices that people had to make in order for us to enjoy the rights and freedoms many of us now take for granted.

The tour was the culmination of a period of introspection for our staff facilitated by the Pro Bono Practice. As part of an awareness campaign, we conducted a survey of all staff to assess their levels of awareness of the Bill of Rights and to find out more about what these rights mean to them. We also made copies of the Bill of Rights in all 11 official languages available to everyone in the Firm.

The results of the survey showed that most professional staff, having been afforded access to the Constitution, were aware of their rights. Most seemed to have obtained a copy of the Bill of Rights during their schooling or University studies.

Given that wider research has shown that many people in SA have never read the Bill of Rights, we were saddened, but perhaps not surprised, by the results of the survey conducted on support staff - which indicated that just over 65% had never read the Bill of Rights - because they had either never had the time to read it, had not felt that they had reason to read it or had never been able to access a copy. 25% of the support staff indicated that they did not know that the Bill of Rights was even applicable to them. Some indicated that because they were foreigners they thought the Bill of Rights was not applicable to them. The survey thus confirmed that we have much work to do in our own workplace, let alone the rest of South Africa, to build awareness amongst lay people about the Bill of Rights. Going

forward we would like to plan human rights training initiatives for those of our support staff keen to learn more about their human rights.

Of the support staff that responded to the survey, a group was selected to join the tour. Those who could attend came away with an unforgettable experience. We were able to laugh, to cry, and to reflect together on our hard fought for and precious human rights. Follow up with the staff who attended, showed that the tour had a deep impact on them all, as is encapsulated in the following quotes taken from debriefing interviews conducted:

“It was touching but at the same time sad to see what our forefathers went through. The prison was not a nice place to be. Imagine a cell meant for two people with eight people crammed into it. There was no privacy. There was no dignity. Their Human Rights were undermined. I learnt that the people in those days really had it hard. It made me thankful for the freedom that we now have.”



## RAISING HUMAN RIGHTS AWARENESS AMONGST OUR STAFF / HUMAN RIGHTS DAY SURVEY AND CONSTITUTIONAL COURT TOUR...continued

"This was a very important trip as a generation that must learn how the previous generation lived under the iron fist rule and the difficulties that they experienced in their lives. We as the coming generation have to come together to build anew. Now as the Rainbow Nation, with our Human Rights, things have changed. Each person must know their rights, especially their rights to Human Dignity, Equality and Freedom. We need to start our own journey. We must build a new South Africa

together. We need to combine and build a strong non-racial and non-sexist nation. We must work together to build a happy Rainbow Nation."

"First of all, I would like to say thank you for this opportunity to do the tour, it does not come often. I am more aware of my Human Rights than I was before. The tour made me sensitive to the fact that all Human Rights should be respected, regardless of age, race or gender. Human Rights must be

respected at all costs. A lot of people are not aware how it was before, we need to educate people to respect Human Rights. I am very appreciative of the lessons that we all learnt on the tour. I am very lucky to have had this experience."

We look forward to building on the initiative next year and in years to come.

*Jacquie Cassette, Craig Thomas and Nqolokazi Nomvalo*



## USING THE "K" WORD – IT'S NEVER OK...

"It can never be over-emphasised that being called a k\*\*\*\*r is the worst insult that can ever be visited upon an African person in South Africa, particularly by a white person. It runs against the very essence of our constitutional ethos or quintessence." – *Mogoeng CJ, South African Revenue Service // Commission for Conciliation, Mediation and Arbitration and Others (CCT19/16) [2016] ZACC 38; (2017) 38 ILJ 97 (CC) at paragraph 53.*

A quick law report search using the keywords "hate speech" and the "k" word produces too many reported judgments for the year 2017 alone. Unfortunately, racial abuse is something that we still have to deal with in South Africa. One would assume that we all know that the use of this word is unacceptable, but it seems for some – indeed too many - that this is not the case. In February 2016, our client, Constable Clement Mkhondo (Constable Mkhondo), was subject to such abuse.

While Constable Mkhondo was on duty and patrolling his designated area, a motorist in a shopping centre flagged him down. When he stopped, together with his colleagues, to see if the driver needed assistance, an alleged victim of a smash and grab, Ms Vicki Momberg (Ms Momberg), met him with a racist attack – during which she used the 'k word' many times. Not only did Ms Momberg attack Constable Mkhondo in his personal capacity, but she made racist remarks in relation to all black people in general. Constable Mkhondo approached the SAHRC to seek redress. The SAHRC agreed to assist the Constable in pursuing a claim in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act

(PEPUDA). In September 2016, with the help of Advocate Usha Dayanand Jugroop, from the Johannesburg Bar, we assisted Constable Mkhondo and the SAHRC in bringing a hate speech claim in the Randburg Equality Court.

Our team argued that Ms Momberg's remarks constituted a violation of s10(1) of PEPUDA, which prevents everyone from publishing, propagating, advocating or communicating words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful; be harmful or to incite harm; promote or propagate hatred. Additionally, we argued that her remarks constituted a violation of his constitutional rights to equality and human dignity. Constable Mkhondo was deeply hurt and traumatised by the incident. He was also humiliated as this incident took place in the presence of his superior officer and members of the public. This incident also affected him in the performance of his duties – he was no longer confident.

On 8 June 2017, the Court found that Ms Momberg's remarks did indeed amount to hate speech and infringed Constable Mkhondo's constitutional rights to

equality and human dignity, and thus caused him emotional suffering. The Court ordered that Ms Momberg is to pay damages to Constable Mkhondo in the sum of R100 000 (one hundred thousand Rand) and is to perform community service for a total of 100 (one hundred) hours over a period of 6 (six) consecutive months and attend sensitivity training administered by the SAHRC. She was also ordered to write an unconditional apology to Constable Mkhondo – which is to be published on Twitter and/or Facebook and on the SAHRC's website. The Equality Court's judgment reiterates the importance and necessity of eradicating racist notions and behaviour in South Africa. It also illustrates that racist attacks will no longer be tolerated and will be met with harsh punishment.

Unfortunately, Ms Momberg who is once again apparently without legal representation, has indicated that she wants to appeal the order and has yet to comply with it. We will oppose any appeal and if necessary will bring contempt of court proceedings against her, should she delay any further in prosecuting her appeal.

*Jacquie Cassette and Nonhlanhla Mohlaba*

## 'I DO!' ... BUT NOT TO YOU

Imagine arriving at your local Department of Home Affairs (Home Affairs) office one day while trying to apply for a new Identity Document (ID) because you misplaced yours, only to be told by the official on the other side of the counter that you are married – when you are not. Not only are you advised that you are married to a stranger, but to add injury to insult, you are told that you are married in community of property!

Marriages of convenience or fraudulent marriages are not a rare phenomenon in South Africa (SA). Thousands of people unwittingly find themselves married to foreigners as a result of fraudulent or "fake" marriages (often the result of scams carried out by bogus employment agencies or unscrupulous crime syndicates aided by corruption). These marriages are so common that Home Affairs has set up an instant SMS-notification service and runs initiatives where women are invited to their nearest offices to check their marital status.

In 2005, Khensani\* fell victim to a fraudulent marriage to an unknown foreigner. She was notified of her "marriage" when she went to Home Affairs to have a new ID issued to her after she had misplaced hers. She was advised by an official at Home Affairs to depose to an affidavit and attend the Johannesburg Family Court in order to have the marriage expunged. She followed this advice and believed that the marriage had been expunged. In 2012, Khensani and her long-term partner, and father of her child, wished to get married in order to formalise their relationship. She returned to Home

Affairs to obtain a marriage licence. To her dismay, an official informed her that she was still married to the unknown foreigner, and thus could not be issued with a marriage licence. She, once again, returned to the Family Court to try to resolve the matter.

In mid-2013, our Pro Bono Practice came on board to assist Khensani. After a year of numerous unsuccessful attempts to have Home Affairs expunge the marriage, in October 2014, we were forced to bring an application in the Pretoria High Court to have the erroneous marriage expunged from the Home Affairs records, with the help of Advocate Kendall Turner from the Johannesburg Bar. Although the court proceedings were protracted and unnecessarily delayed by attempts on the part of our opponents to thwart the finalisation of the matter (including launching a meritless rescission application) justice finally prevailed and Khensani was finally able to marry her long-term partner in May 2017.

Khensani, like thousands of other similarly situated women, faced a multitude of challenges during the subsistence of her "marriage" – both legally and socially. Legally, she was unable to obtain a loan from the bank to buy a house and buy furniture on credit as she was married in community of property and required the written consent of her "spouse". Khensani was also exposed to her unknown spouses' debts and would be liable for them as they had a joint estate.

On a social level, Khensani experienced fear, humiliation and anxiety. She is a Tsonga woman who had wished to get married according to custom before having her marriage registered civilly. However, because of the already registered "marriage", she was unable to get married

according to her cultural practices and her wishes. She was chastised and shunned by her community and her in-laws. She was labelled a liar and a woman of excuses as they believed that she was privy to the "marriage". The tension between herself and her in-laws was fuelled by the tension in her own relationship with her partner. Culturally, her son was unable to use his father's surname as his parents were not married – something her son yearned for. One of Khensani's fears was that, in the event of her passing away before the "marriage" was expunged, her funeral and burial would be contentious. According to Tsonga custom, a deceased bride has to be buried by her in-laws. In her case, she didn't know who or where her "in-laws" were. Khensani was, therefore, socially and culturally isolated.

Since resolving the matter and marrying her long-term partner, Khensani feels liberated. Her son is now able to use his father's surname and her relationships with her in-laws and her community have been mended. Khensani's story is one of hope – it's not all doom and gloom when you find out that you're married to someone you don't know. Khensani has started speaking about her experience in her community in the hope that she will encourage other women to get help in this regard and to try to address the stigma that comes with being caught up in fraudulent marriage scams.

If you're unsure about your marital status, SMS the letter M followed by your ID number (example: M 5001010050080) to 32551. A reply SMS will be sent back to your cellphone to confirm your marital status and the date of your marriage. (SMS costs R1).

\* Name has been changed.

*Nonhlanhla Mohlaba*



## “THINGS ARE GOING SO MUCH BETTER” - ASSISTING A FAMILY OBTAIN REINSTATEMENT OF THEIR REFUGEE STATUS

.....

One of our Pro Bono Practices' most satisfying victories of the year was our success in assisting a family of Angolan nationals whose refugee status had been unlawfully withdrawn as part of Angolan repatriation process in 2013, to have their refugee status reinstated. This has enabled the family to once again access much needed health care, and to be able to again step out each day without fear of arrest, detention and deportation.

.....

Mr N and his children were granted refugee status in the early 2000s. In 2013 the DHA announced a cessation of all Angolan refugees in terms of which the refugee status of Angolan refugees was withdrawn. The Standing Committee for Refugee Affairs (SCRA), a statutory body created by s9 of the Refugees Act (one of whose statutory duties and powers is to determine if and when a person's refugee status should be withdrawn), however decided that an exemption from repatriation should be facilitated for Angolan refugees with a serious medical condition. Mr N and three of his children

fell into this category. He has a serious heart-related condition while three of his children suffer from sickle cell disease, a genetic blood disorder with the potential to cause severe pain and permanent damage to vital organs in the body. They all require urgent ongoing medical treatment.

Mr N's representations, in which he explained his and his children's medical conditions and circumstances (even though received by the DHA) were never forwarded to or considered by the appropriate decision makers. As a result, although they fell within the exemption for persons with serious medical conditions determined by the SCRA, the family's refugee status was unlawfully withdrawn.

Despite the SCRA having acknowledged that their status should not have been withdrawn, with the help of an NGO called Scalabrini, the family fought for years with no success to try and have their refugee status reinstated. In the meantime, the DHA refused to renew their refugee permits and the children who required ongoing medical care struggled, and at times were unable to receive, the necessary ongoing medical care that they require. The eldest son, despite having managed to secure funding, was also unable to apply to study at university. The family as a whole was perpetually vulnerable to arrest, detention and deportation because they were unable to secure the necessary papers affirming their status.

Eventually, Scalabrini reached out to CDH for help in taking the matter to court. Armed with a legal opinion from three very able counsel from the Johannesburg Bar (Hamilton Maenetje SC, Nick Ferreira and Katherine Harding) we managed to get the SCRA to revoke its incorrect decision. Disconcertingly, however, the DHA unlawfully refused to comply with the SCRA's decision and refused to reissue the family with the relevant refugee permits. We were accordingly forced to bring an urgent court application to force the DHA to issue them with the necessary papers.

The application which was heard on 5 September 2017 was successful and the family was eventually granted written recognition of their reinstated refugee status in October and they were, needless to say, overjoyed. In the words of one of our client's children "things are going so much better" since the family's refugee status was reinstated and their refugee papers were renewed. The family no longer faces an imminent risk of arrest and deportation, the ill family members can now access much needed medical treatment and the eldest child has now been able to apply to study at university.

Victories like this fill us with determination to fight for and uphold the rights of others and to continue to provide a voice to the voiceless.

*Jacquie Cassette and Jamie Lee Fong*

## “JUST HOW LONG DO WE HAVE TO WAIT?” - ASSISTING A CLIENT WITH A LONG - OUTSTANDING LAND RESTITUTION CLAIM

In a sometimes forgotten clause, our Constitution in s25(7) makes express provision for the restitution of land for persons deprived of their land as a result of Apartheid laws. It provides that:

*“A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided for by an act of Parliament, either to restitution of that property or to equitable redress.”*

But as the experience of one of our clients starkly reminds us, rights in the Bill of Rights mean very little to those whom they are intended to benefit unless taken seriously, implemented and enforced by the state institutions empowered and duty bound to give effect to them.

In what constitutes a deplorable failure on the part of some such state institutions to comply timeously with their constitutional and statutory obligations, we are assisting a family to have a long outstanding claim for restitution of land in terms of the Restitution of Land Rights Act (one of the pieces of legislation adopted to give effect to s25(7) of the Constitution) finalised.

Our client’s uncle submitted the claim on behalf of the family way back in 1997 in respect of a property in Durban which the family was dispossessed of pursuant to the Group Areas Act. Our client’s father,

who was one of the original claimants, has since passed away and our client who is his lawful heir has now become entitled to a portion of the proceeds of the claim. The claim is being dealt with by the KZN Regional Claims Commissioner (RLCC).

After many years the RLCC made our client and his family a monetary offer of settlement in terms of s42D of the Restitution of Land Rights Act, which our client and the other family members accepted. Despite having been promised that payment was imminent, years later (for reasons that have yet to be explained), client and his family have still not received payment of the amount due to them under the settlement agreement.

Eventually in 2015, after attempts to have the matter resolved via the Public Protector’s Office failed, client approached the Pro Bono Practice for assistance.

In response to our interventions, the RLCC very recently made a new higher offer of settlement to the family based on a renewed valuation of the property. The new offer has been accepted by the family. However, more than two months have intervened and we are still awaiting feedback on whether the settlement offer has been approved by the Minister as is apparently required. We are concerned that our client’s uncle who is the main claimant, and who is now very frail and elderly, may not himself live to enjoy the benefit of the payment, unless the claim is finalised expeditiously. We are accordingly in the process of briefing counsel to assist with a court application to compel the Minister and the RLCC to finalise the matter and make payment.

*Jacquie Cassette and Jamie Lee Fong*

## WITHOUT ID? WITHOUT RIGHTS... LONG-OVERDUE REDRESS FOR A CITIZEN STRUGGLING TO OBTAIN A REPLACEMENT ID

*In another matter involving inexplicable delays on the part of the state to meet its obligations, we are assisting a client who has despite her best efforts, for the better part of two decades, been unable to obtain a replacement ID document after her ID was stolen in a burglary at her home.*

Over the course of the last seventeen years, our client has made multiple applications with various offices of the DHA for a new ID, but with no success. Many years into the process, it emerged that someone else on the population register had been given the same ID number as her and so she had been removed from the population register. As a result, on one of her many follow up visits to a DHA office she was instructed to renounce her previous ID number and to reapply to be registered on the population register. She faithfully followed this and all other instructions issued by numerous DHA officials over the years, including attending a number of interviews with a committee tasked with verifying her identity, together with family members who have attested to her South African identity, but to no avail. She even lodged a complaint with the SAHRC.

Despite all of this, the DHA has failed to meaningfully assist her and she remains without legally recognised status in the country of her birth. The consequences of living without documented status have been devastating for both her and her youngest daughter. As a result, she has not been able to vote, to get formal work, obtain a birth certificate for her daughter, who as a result has been unable to attend a public school or be admitted to a public hospital. She currently resides in a shelter for abused women together with her daughter. After many attempts to engage with the DHA we recently launched an urgent application on behalf of our client and her minor daughter in the High Court in which we asked the Court to review the DHA's failure to process

her applications and order the DHA to register her birth and provide her with an ID book. Advocates Kate Hofmeyr and Amie Armstrong from the Johannesburg Bar are acting as her counsel.

While the Court was concerned by the indefensible conduct of the DHA, in failing to resolve our client's predicament, it gave the DHA one more chance to comply with its constitutional and statutory obligations on an urgent basis, failing which it ordered that our client would be entitled to re-approach the Court for an order compelling the DHA to do the necessary to register her and provide her with an ID.

The DHA has since failed to comply with the deadline imposed by the Court and we accordingly returned to the Pretoria High Court on 28 November 2017 where an order has finally been granted in favour of our client. The DHA was ordered to grant our client's application for late registration of birth and register her on the population register within 10 (ten) days of service of the court order.

The DHA was also ordered to issue our client with a birth certificate and an ID in the form of a smart ID card within 15 (fifteen) days of service of the court order.

Our client is overjoyed by this and it fills her with hope that she will soon be able to reclaim the rights she is entitled to in terms of the Constitution of South Africa.

*Jacquie Cassette, Tricia Erasmus and Jamie Lee Fong*



## “THIS IS OUR COUNTRY TOO” - HELPING REFUGEES BORN AND LIVING IN SOUTH AFRICA FOR MORE THAN 18 YEARS TO APPLY FOR CITIZENSHIP

*With the able help of Advocates Steven Budlender and Mmakgomo Maenetje from the Johannesburg Bar, the Pro Bono Practice is currently assisting two brothers who were born in South Africa (SA), who are over 18 (and have lived all their lives in SA) to apply for citizenship in terms of s4(3) of the Citizenship Act. Section 4(3) of the Citizenship Act provides that people who were born in SA to parents who are neither citizens nor permanent residents, and who have lived in SA continuously until the age of majority are entitled to apply for citizenship, provided that their births were registered in accordance with the Births and Deaths Registration Act.*

The brothers' parents are Angolan citizens who fled Angola in 1995 and who sought and were granted refugee status in SA from 1997 until 2014 – when their refugee status was withdrawn as a result of the Angolan refugee repatriation process entered into by our government in 2013. The two brothers were born in SA in 1996 and 1997 respectively and were also granted refugee status until 2014 when their status was also withdrawn together with that of their parents. Both brothers who have never been to Angola, who have lived in South Africa all their lives, and who know no other home, were in high school at the time that their refugee status was withdrawn and had to apply for temporary study permits in order to

remain in the country. No application forms have been promulgated by the DHA for s4(3) applications (which it seems is more than reluctant to give effect to the provision). We accordingly, on behalf of the brothers, had to make applications to the DHA in terms of s4(3) by way of affidavit. No meaningful response was received from the DHA.

As a result, we instituted legal proceedings in the High Court on 8 June 2017. The relief sought is, *inter alia*, the granting of citizenship to the brothers. The respondents only filed their answering papers in October 2017, long after they became due. This means that the hearing of the matter will have to be deferred to next year.

In the interim, the Minister has granted the brothers, together with their mother and younger brother, permanent residence for four years in respect of the exemption application which they made under the Immigration Act. The brothers, together with their mother and younger brother have completed their applications for the residency permits and now await to receive same from the DHA. Their rights and interests will accordingly we hope be protected in the interim.

*Jacquie Cassette and Jamie Lee Fong*

## GOING THE EXTRA MILE IS REWARDING

Our Corporate and Commercial Department assisted Going the Extra Mile Payment Services NPC (the NPC) in 2015 with its constitutional documents on a pro bono basis. After it was registered as a non-profit company, the NPC launched The GEM Project. The GEM Project offers volunteering opportunities and rewards volunteers with points, called GEMs, for volunteering their time and efforts to help improve their respective communities.

The GEM Project is run through the USSD platform and a mobile app called GEM. GEM has partnered with a number of non-governmental organisations and has created a network that is easily accessible to GEM users. After completing a volunteer session, which is all organised on the app, a volunteer is rewarded with GEMs – one GEM is equal to one South African Rand. GEMs are donated by corporate sponsors that wish to improve their control and impact over Corporate Social Investments. GEM users can spend their GEMs on digital rewards, which include data, electricity, airtime, groceries, petrol, and many more or they can donate them back to the organisations at which they volunteer.

The NPC recently approached us again for assistance on a pro bono basis to amend its constitutional documents to

cater for the NPC's expansion. The NPC is currently in the process of registering as a non-profit organisation (NPO) as well as a public benefit organisation (PBO) in order to qualify for the relevant tax exemptions. Additionally, we have incorporated a new GEM Pay entity, which is a subsidiary of the NPC. The constitutional documents have been filed with the Companies and Intellectual Property Commission and CDH has attended to the issuance of shares and the appointment of directors.

CDH agreed to assist the NPC because it promotes humanity in the age of technology and it encourages people to volunteer their time towards bettering our communities.

*Nonhlanhla Mohlaba*

### GEM PROJECT



#### OFFERS

volunteering opportunities



#### REWARDS

volunteers with points



#### FOR VOLUNTEERING

time and effort to improving their respective communities

# ROOIBOS – BENEFITTING A COMMUNITY IN MORE WAYS THAN ONE / ESTABLISHING A TRUST FOR THE FAIR WUPPERTHAL AGRICULTURAL CO-OPERATIVE

CDH was approached by the Fair Wupperthal Agricultural Co-Operative (Fair Wupperthal) during the course of 2016 to establish a community development trust to benefit rooibos tea producers situated in the village of Wupperthal. Our Corporate and Commercial Practice in Cape Town gladly assisted.

Wupperthal is an expansive Moravian Mission Station established by missionaries of the Rhenish Church in 1829, approximately 280km from Cape Town and 80 km from Clanwilliam, in the remote semi-arid Cedarberg Conservancy in the Western Cape.

The story of Rooibos is a uniquely interesting one and it was the locals who discovered that the fine, needle-like leaves of the wild *Aspalathus linearis* plant, growing in South Africa's fynbos, made a flavoursome, aromatic tea. Rooibos tea, characterised by its mahogany colour and deep aroma, is a very popular drink in South Africa due to its full-bodied taste, and health benefits.

Wupperthal is the epicentre of the global Rooibos tea industry and it represents roughly 70% of all rooibos tea producers in the area. Its primary business is to plant and produce rooibos tea. The Wupperthal community comprises of persons who are the direct descendants of the Khoi and San people. There are a few thousand inhabitants in the area living in extreme poverty and whom rely predominantly on the state for financial support. Their predominant cash crop is known as Wupperthal Rooibos Tea and the crop is distinguishable from others with its deep copper colour and natural sweet taste. Producers are located in all major production areas including Langkloof and Eselbank.

The objective of the trust is to benefit the community of Wupperthal through the funding of community development programmes. These community development programmes fall within the sectors of education, development, healthcare, agriculture, land, housing, job creation, welfare, humanitarian, conservation, the environment and animal welfare.

*Jamie Lee Fong*

2016



CDH APPROACHED BY Fair Wupperthal



TO ESTABLISH community development trust



TO BENEFIT rooibos tea producers in Wupperthal



.....  
Our Cape Town CORPORATE & COMMERCIAL PRACTICE gladly assisted  
.....



## BUT IS IT “HATE-SPEECH”? - PILLAY VERASHNI / AFRIFORUM

On 18 August 2017, the Appeals Panel of the Press Council (Appeals Panel) set aside the Press Ombud’s ruling of 22 April 2017, that a blog published by The Huffington Post South Africa (HuffPo) on 13 April 2017 titled “Could it be time to deny white men the franchise?” violated articles 5.1 and 5.2 of the Press Council Code.

Media Monitoring Africa (MMA) and the South African National Editor’s Forum (SANEF), filed an amicus curiae application to intervene in the matter on the issue of whether the blog amounted to hate speech. Advocates Steven Budlender, Carol Steinberg and Smanga Sethene, all acting on a pro bono basis, were instructed by CDH.

The blog raised considerable debate, indignation and commentary, with some views advanced that that the blog was racist and discriminatory against white men. The so-called author of the blog, Shirley Garland, claimed that white men through their actions, were to blame for the woes of the world such as Brexit, the election of Donald Trump as President, the DA’s governance of four of South African biggest cities, slavery, various wars in history and genocide. The author suggested that white men should be denied their vote for 30 years in order to reduce their influence in the world.

It was subsequently discovered that Shirley Garland was in fact a white male, posing as a female who wrote the article to illustrate a point. The fall out of the blog resulted in the editor of HuffPo, Verashni Pillay resigning, aggressive debate over the blog, over HuffPo’s initial defence of its publication of the piece and its effort to drive social media traffic to it, editorial standards and a complaint filed with the Press Council by Afriforum. The Afriforum complaint claimed that the blog amounted to hate speech and unfair discrimination.

The Press Ombud ruled that the blog breached articles 5.1 (discrimination) and 5.2 (incitement of violence or advocacy of hatred that constitutes incitement to cause harm) of the Press Code and that it was discriminatory and denigratory and in effect, amounted to hate speech. The decision of the Press Ombud was appealed. MMA and SANEF were admitted as amici curiae to appeal only the elements of the Press Council’s ruling pertaining to the interpretation of s16 of the Constitution in respect of the finding of hate speech.

On article 5.1 of the Code, the Appeal Panel found that the Blog did not amount to discriminatory speech, as it did not depict the victim of the discrimination (white men) in a denigratory or discriminatory light.

On article 5.2, the Appeal Panel accepted the argument of the amicus that the call to disenfranchisement of white men does not amount to an advocacy of hatred and that the call “is hardly credible as a source of harm.”

Adopting the standard set by the Constitutional Court in the matter of the *Islamic Unity Convention v Independent Broadcasting Authority and Others*, the Appeal Panel found that there was no real risk of any serious and significant harm to white men as a result of the Blog which the panel described as amounting to a “spoof”.

The Appeal Panel agreed with the view advanced by the amici that in order to amount to hate speech, “what is said should not only advocate hatred”, but

(on a reasonable and objective view) “must also be an incitement to cause harm. Both elements must exist.” As Advocate Budlender argued, “the piece is neither aggressive nor inflammatory” and was simply “faux academic”. On the other hand, “freedom of expression is valuable as it enables us to discuss and test ideas, and discard those that are found wanting. There must therefore be room for robust debate.”

However, the Appeal Panel ruled that the Ombud erred in not treating articles 5.1 and 5.2 as a compendium and not drawing a clear distinction between the two: discriminatory speech is not necessarily hate speech and while the piece may be “irritating to some”, it therefore cannot be classified as hate speech”. Accordingly, the appeal was upheld and the Ruling of the Press Ombud from 22 April 2017 was set aside.

Although the Appeal Panel did not adopt the test proposed by the amici for evaluating if speech indeed amounts to hate speech, the Applicants’ win was both outright and well deserved. MMA and SANEF as *amici curiae*, made a significant contribution to a critical and relevant area of law and CDH are honoured to have had the opportunity to assist and to contribute to cases of constitutional importance.

*Tracy Cohen and Keitumetse Makhubedu*

## DEEDS REGISTRIES REFORM PROJECT

*In July 2017, Cliffe Dekker Hofmeyr's Pro Bono and Human Rights Practice was approached by ProBono.Org to assist in alleviating the plight of those unable to take transfer of immovable property that they have inherited because they do not have the funds to obtain a rates clearance certificate or pay deeds office fees.*

Currently s118 of the Municipal Systems Act prohibits transfer without a rates clearance certificate. John Webber, the National Practice Head of CDH's Real Estate Practice, has prepared a proposal tabling for an amendment to the Act. The proposed amendments seek to exempt an heir or legatee from having to produce a rates clearance certificate as a prerequisite to taking transfer of immovable property from a deceased estate. The proposed exemption will only apply to what are commonly termed 'small estates' where the value of the deceased estate falls

below the monetary threshold determined by the Minister of Justice pursuant to s18(3) of the Administration of Estates Act, at present being an amount of R250,000 or less.

The hopeful outcome of the project is to prevent immovable property from becoming trapped in unwound deceased estates, while still enabling local authorities to recover outstanding rates and taxes from the applicable heir or legatee post-transfer.

*Nirvana Ajodha*



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### **BBBEE STATUS:** LEVEL THREE CONTRIBUTOR

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