9 December 2022

Pro Bono & Human Rights

Annual Newsletter

CDH

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Index

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Introduction

In 2011, as part of its commitment to being a good corporate citizen and to further its strong commitment to promoting access to justice and the rights and values in our Constitution, Cliffe Dekker Hofmeyr Inc (CDH) set up a dedicated Pro Bono and Human Rights Practice (the Pro Bono Practice). Our mandate is to provide dedicated pro bono representation of the highest standard to deserving individuals, communities, NGOs and other organisations whose mandates include the promotion of human rights or the public interest.

The Pro Bono Practice began as a one-person practice based in Johannesburg, but since then has grown significantly not only in size, but also in profile, reach and impact. 2022 ushered in significant growth of our practice. At the beginning of the year our Cape Town representative Brigitta Mangale was promoted from senior associate to director, while Gift Xaba, an associate in our Johannesburg practice was promoted to senior associate. We also welcomed our newest member Elgene Roos, who joined our Johannesburg practice as a senior associate in May. Ours is now a truly thriving and vibrant practice which I believe is up there with the best, and of which I am proud to be a part and to lead. Perhaps testament to our growing impact and recognition are the awards we/CDH received at the 2021 ProBono.Org Awards hosted this January (2021), in which we won the large law firm of the year award for 2020, as well as several special mentions, including for our assistance provided to the Jose brothers in a long struggle to enforce their section 4(3) right to citizenship.

Despite the increase in our size, requests for pro bono assistance as well as CSR/developmental support grow by the day, and far exceed our capacity, or that of members of our firm from other practice areas, whom we encourage to assist in dedicating time to pro bono work. Accordingly, our goal is to increasingly forge relationships and partnerships with other role players in order to maximise our reach and impact, and to carefully consider how we best use our resources. While our aim is to assist those most in need as best we can, our objective is simultaneously to promote the rule of law and the enforcement of the rights and constitutional principles upon which our democracy was founded, and on which its continued existence depends.

The cases and initiatives we have chosen to focus on in this newsletter highlight some of the best of our year's work.

As always, I thank my dedicated team members, and colleagues in other practice areas who have contributed significantly to the firm's truly impressive pro bono achievements during 2022.

The Pro Bono Practice takes great pride and pleasure in reporting that, collectively CDH donated over 11,168 hours (in excess of R25,5 million) in pro bono legal services to deserving individuals, organisations and causes during 2022.

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Johannesburg

Cases and CSR initiatives

Appropriate remedies for the violation of the right to housing: Amicus intervention in *Thubakgale v Ekurhuleni Metropolitan Municipality*

Our Pro Bono Practice assisted ESCR-Net to intervene as an amicus curia in the latest round of High Court litigation in a case with a decades-long history, concerning the enforcement of the right to housing of 133 families living in Tembisa (Thubakgale 4).

ESCR-Net is a collaborative New York-based initiative that connects organisations and individuals from around the world working to secure human rights and social justice. It sought to make submissions regarding comparative and international law jurisprudence on the judicial enforcement of socio-economic rights in the matter.

History of the matter

The applicants applied for and were granted housing subsidies by the Ekurhuleni Municipality 26 years ago. Each applicant was matched with a particular stand in the Tembisa area developed with the subsidy, to which they ought to have been given possession and ownership together with the house constructed on the stand. As a result of maladministration and corruption, the stands and houses meant for the applicants were, however, handed to other people who have been living in these houses for years. This while the applicants continue decades later to live in deplorable conditions in informal housings without access to water, proper sanitation and electricity.

After years of unsuccessful engagements with the municipality as well as the provincial and national Departments of Human Settlements (the Department) the applicants, assisted by Socio Economic Rights Institute (SERI) brought an application in the High Court compelling the Department to provide the houses that were allocated to them in terms of their successful subsidy applications. The High Court rejected the municipality's various defences and ruled in favour of the applicants. The Court ordered the municipality to provide the applicants with houses in Tembisa on or before 31 December 2018 and further ordered the respondents to set up a steering committee to monitor the implementation of the order and to report to the court on progress made (Thubakgale 1).

Ultimately the High Court's order was never complied with. As a result, the applicants were left without a remedy for the egregious breach of their rights. They eventually sought to claim constitutional damages against the state in another round of litigation in the High Court (Thubakgale 2), arguing that there was no other viable or effective remedy available to them. They were unsuccessful and appealed to the Constitutional Court.

In a contentious decision, a divided Constitutional Court issued three separate judgments (Thubakgale 3). Justice Majiedt, supported by three other justices, upheld the applicants' application and granted them constitutional damages. Justice Majiedt found that there had been a clear and egregious breach of rights and that an order of constitutional damages would be the only effective remedy in the circumstances. In the second, Justice Jafta (with two other justices agreeing) rejected their claim for constitutional damages and went on to make a broad and controversial finding to the effect that while constitutional damages may be awarded for breaches of civil and political rights *"as a matter of principle there is no room for constitutional damages when one is enforcing a socio-economic right"*. Finally, in the third judgment, Justice Madlanga (with one other justice agreeing) ruled that constitutional damages could not be sought in this particular case as constitutional damages weren't *"the most appropriate remedy"* because theoretically the applicants could bring legal action against the municipality for contempt of court.

Appropriate remedies for the violation of the right to housing: Amicus intervention in *Thubakgale v Ekurhuleni Metropolitan Municipality*...*continued*

To date, the municipality has not yet provided the applicants with housing, despite it being nearly 11 months since the Constitutional Court ruling. This failure is indicative of the municipality's disdainful attitude, which Justice Majiedt summarised as follows:

> *"The state has not only failed to realise the fundamental right to access to housing, but has conducted itself in such a way that one can only reasonably conclude that it refuses to realise this right."*

ESCR-Net's submissions in Thubakgale 4

In August 2022, the applicants had no choice but to come before the High Court once more to seek renewed relief in the form of a structural order requiring the municipality to provide the applicants with housing and allowing them to track the municipality's progress in carrying out the order, as well as a contempt of court order (Thubakgale 4). Additionally, the applicants sought constitutional damages as an alternative form of relief if they did not succeed in their contempt of court claim.

The High Court was accordingly again required to consider the question of appropriate relief for the applicants, given the Constitutional Court's decision in Thubakgale 3, and whether the matter was open to it to award constitutional damages at all.

ESCR-Net made written and oral submissions to the court about comparative and international human rights law concerning the enforcement of economic, social and cultural rights – and the international law obligation to provide effective remedies for breaches of these rights. It also gave guidance on what would constitute an effective remedy in accordance with international and comparative law. ESCR-Net argued that an effective remedy was one that gave effect to the various aspects of an effective remedy as identified by international and comparative courts and forums including: restitution, compensation, satisfaction and guarantees of non-repetition.

The case provided the High Court with a unique opportunity to develop South African law in a manner consistent with South Africa's international law obligations and it is for this reason that ESCR-Net considered it especially important for it to intervene and make submissions.

Through its submissions, ESCR-Net sought to highlight the importance of effective remedies for socio-economic rights, as well as the appropriateness and effectiveness of constitutional damages as a remedy for the violation of socio-economic rights. These submissions were important because the question of appropriate remedies for violations of socio-economic rights is a relatively underdeveloped area of law in South Africa, and is, as the divergent judgments of the Constitutional Court in this matter illustrate, a matter of some controversy.

In the specific circumstances of this matter, ESCR-Net argued that a finding of contempt alone would fall short of meeting the requirements for an appropriate and effective remedy in international law. It thus urged the court to consider awarding both a contempt finding and the supervisory and/or compensatory relief sought by the residents.

Defending the defenders of public interest

Beyond the critical role it plays in times of crisis, in any nation, civil society is an essential building block of development and national cohesion. In countries blessed with peace and stability, civil society fills the space untouched by government institutions and the private sector. In a fragile and conflict-ridden country, it plays an even more important role of providing services normally forming the responsibility of the state and business, and can lay the foundation for reconciliation, stability and prosperity.

This is one of the many reasons that our Pro Bono Practice has, over the years, built and sustained important ties with many of the credible and respected civil society organisations in the country. Recently, our Johannesburg practice represented a group of public interest law centres, including the Centre for Applied Legal Studies, Centre for Child Law, Equal Education, Legal Resources Centre, Ndifuna Ukwazi and Section27 (our clients) assisting them to intervene as amici curiae in a matter involving an application by a mining company for mining rights and associated water use rights in an environmentally sensitive area.

The purpose of the intervention was not to address the merits of the matter, but rather to address an attack made by the respondent mining company on the Centre for Environmental Rights (CER), which acts as the attorney for the environmental NGOs appealing against the granting of the relevant water rights authorisations. CER was accused by the respondent mining company of unethical and improper conduct and of being conflicted (as the attorney for the appellants) in the matter because of *"a direct interest in the outcome of the litigation"*. The respondent argued that the CER is not merely an attorney for the litigants it represents, but also *"clearly committed to its own agenda and therefore is an attorney litigating in a matter wherein the attorney has its own interests in the outcome of the matter"* (because its mandate is to promote and enforce environmental rights), also stating that the entire legal dispute was part of the organisation's broader *"flagship"* project. The respondent mining company sought a punitive costs order against CER as well as a referral of its conduct in the matter to the Legal Practice Council.

Defending the defenders of public interest*...continued*

Implications of the allegations

The allegations, which were ultimately conceded as being spurious, had they prevailed, would have had grave implications on many levels for all public interest organisations in the country. This is because of the broad and misconceived nature of the allegations. They amounted to a growing trend often referred to as Strategic Lawsuit Against Public Participation (SLAPP) suits and we believe were designed to intimidate. Our clients sought to be admitted and join the proceedings as amici curiae to demonstrate to the court that what CER had done/is doing both as an environmental rights advocacy organisation and as an attorney objecting to an administrative decision by a certain arm of the Government is, of course, what public interest lawyering is all about. Our clients assisted the court with examples of their own work and argued that what CER was doing is not only permitted but encouraged by our courts. Our clients also made representations on relevant comparative jurisprudence.

During argument, senior counsel for our clients, Tembeka Ngcukaitobi SC, began with submissions setting out the importance of *amicus curiae*, highlighting case law in which the importance of the role of *amicus curiae* has been emphasised by our courts in post-1994 jurisprudence, and then addressed the interests, role and purpose of public interest law centres and the important role that the strategic impact litigation they carry out in the public interest has in promoting and enforcing constitutional rights. He also demonstrated how the respondent mining company had mischaracterised the role of CER, and more generally that of public interest law centres, and that the argument that there was automatically a conflict of interest when a public interest law centre, whose mandate is to promote

The CDH Team with counsel and clients at the North Gauteng High Court, Pretoria at the hearing of the matter.

Defending the defenders of public interest*...continued*

constitutional rights, litigated to enforce such rights was misconceived. Importantly, he emphasised that if the respondent's argument was to be accepted, it would deter public interest law centres from performing their constitutional functions in terms of section 38 of the Constitution.

After submissions and arguments were heard on the issue, the court ordered that the relevant allegations in the respondent's answering affidavit be struck out and that every averment made in the respondent's heads of argument in support of those aspersions also be struck out. The respondent mining company was also ordered to pay the costs of all the affidavits and heads of argument that were filed in response to the allegations on a party and party scale – which included the costs of amici and the employment of two counsel.

Our Pro Bono Practice is honoured to have represented all the relevant public interest law centres and to have assisted them to make a meaningful intervention on an issue of great importance. Had public interest organisations not come together to defend themselves, the serious and very broadly stated allegations of conflict of interest and misconduct raised by the respondent mining company would have had a broader and serious implication for all public interest lawyers and the significant work they perform, ultimately to the detriment of our broader society and our constitutional democracy.

The right to health for pregnant women and children under the age of six

Xenophobia has once again reared its horrific head, with even some politicians inciting xenophobic attacks and continuing to perpetuate the narrative that all South Africa's problems rest squarely on the shoulders of foreign nationals residing in our country. Despite these sentiments, CDH has continued to fight for the human rights of foreign nationals in a time when most are afraid to cause 'disturbances'.

In May this year, we launched an important case concerning free health services for pregnant and lactating women and children under the age of six. This matter emanated from migrant pregnant women and migrant children continually being denied free access to healthcare services, including in one tragic case where a two-year-old died after being denied emergency treatment when he swallowed rat poison at home.

Representing Section27, a public interest organisation focusing on the right to health and education, and three individuals, our practice instituted proceedings against the MEC for Health in Gauteng, the Minister of Health, the Director General for Health, and Charlotte Maxeke Johannesburg Academic Hospital.

The National Health Act

At the heart of this matter lies section 4(3) of the National Health Act 61 of 2003 (NHA) and section 27 of the Constitution. Section 27 of the Constitution entrenches the constitutional right to healthcare, food and water – it provides that everyone has the right to have access to healthcare services, including reproductive healthcare. Underpinning this constitutional right is section 4(3) of the NHA, which provides that all pregnant and lactating women and children under six are entitled to free healthcare, provided they are not on a medical aid.

However, despite what the Constitution and the NHA say, we have found that subordinate legislation in the form of ordinances and regulations, currently contravene the governing legislation. And concerningly, a policy implemented in 2020 by the Gauteng Health Department is being interpreted in a manner that requires all foreign national patients to make upfront payments before being able to access any medical care – this is done regardless of whether a foreign national patient forms part of a category of persons entitled to free health services in terms of section 4(3) of the NHA. Thus, because of the disconnect between the Constitution, the national legislation governing healthcare in South Africa and what is happening on the ground, it became necessary to approach the court to ensure that all the current subordinate legislation and policies are brought in line with the Constitution and the NHA.

The right to health for pregnant women and children under the age of six

...continued

In this matter we are therefore seeking an order declaring the relevant Gauteng legislation, Regulations and policies unlawful to the extent they prevent pregnant and lactating women and children under the age of six from accessing free healthcare. This is to ensure that issues relating to the immigration status of a child or a pregnant woman is irrelevant when having to access healthcare institutions, and that there are no arbitrary barriers preventing these two groups of people from accessing much needed healthcare.

CDH recognises that women and children are part of the most vulnerable groups of society. And thus, regardless of their nationality or immigration status in the country, the state is obligated to take steps to ensure their rights are protected. It is important that any arbitrary barrier preventing the implementation of section 4(3) of NHA be removed so as to ensure that pregnant and lactating women and children under six are able to access the rights to which they are entitled.

The matter has attracted significant interest, with a number of entities and organisations, including the Centre for Child Law, Amnesty International, the United Nations Special Rapporteur on the Right to Health, and the International Commission of Jurists seeking to intervene as amici curiae in the matter.

Unfortunately, the state respondents, who have filed a notice of intention to defend the matter, have, since taking that step, been unresponsive and more recently failed to comply with a directive of the Deputy Judge President (DJP) of the Johannesburg High Court who is now case managing the matter. This has caused a significant delay in the prosecution of the matter. A new practice directive from the DJP has ordered them to file their answering affidavits by 16 January 2023 and calls on the state attorney representing them and the head of the Gauteng Health Department, to file an affidavit explaining their conduct and accounting for their failure to comply with the original directive. We hope that this intervention will finally enable us to make progress in the matter.

A matter of life and death: The story of Mr X

Mr X is an elderly man whose life is on the line due to the private healthcare provider treating him and the state entity that was mandated to pay for his medical costs, failing to find a way to deal with prolonged administrative issues standing in the way of payment for the treatment he has been receiving for some years. The state entity in question is the Compensation Fund (the Fund), established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. The Fund, which manages a massive public fund amounting to over R100 billion, provides compensation for workers who are injured at work or fall ill from diseases contracted at work, or for death as a result of these injuries or diseases. However, due to inefficiencies in the processing and settling of claims by the Fund, thousands of injured and sick workers are being refused treatment by medical practitioners and facilities across the country – Mr X being one of them.

Mr X was employed as an operator by a battery manufacturing company (the company) in East London for more than 20 years. As an operator at the company, he was exposed to high levels of lead for a long period of time. In 2004, he was diagnosed with chronic lead toxicity, acute renal failure, and possible lead nephropathy. Soon thereafter, he was permanently boarded on ill-health grounds, and a successful claim was submitted on his behalf against the Fund.

Over the years, Mr X had regular medical check-ups and, although he was on medication, he did not require any drastic medical intervention. Unfortunately, his condition ultimately deteriorated to such an extent that he had to undergo regular haemodialysis. Accordingly, in August 2018, he started receiving dialysis three days a week (Monday, Wednesday, and Friday) from a private renal care centre in Mdantsane, East London.

For reasons that are not clear, but which seem to be related to a combination of the failure of the renal care centre to comply with the Fund's administrative requirements and a dysfunctional Fund administration, the Fund only paid for Mr X's dialysis treatment in July, August and September 2021. Despite various attempts by the renal centre to follow up with the Fund for further payment, no further payments were made for Mr X's treatment.

Non-payment by the Fund

On 11 February 2022, due to the Fund's non-payment, the renal care centre advised that, given the extent of the outstanding balance, Mr X would have to start paying cash for his dialysis, with the cost of treatment being R1,802 per session (Mr X still having to attend three sessions per week). The renal care

A matter of life and death: The story of Mr X*...continued*

centre eventually agreed to continue providing Mr X with treatment without demanding that he pay cash for it, hoping that they would be able to resolve the issue of non-payment with the Fund. It was at this point that the Johannesburg Pro Bono Practice became involved in the matter.

At the time, the renal care centre's view was that it had made some progress in resolving the issue with the Fund and requested that we hold off on sending a letter of demand to the Fund. However, time and again, the centre's emails were left unanswered, or they were referred from one person to the next without the issue being resolved. Accordingly, on 5 October 2022, the renal care centre informed our practice that Mr X would become a cash-paying patient from 1 January 2023, and that no further arrangements will be entertained until full payment of all outstanding invoices was received. The balance owing to the renal care centre for Mr X's dialysis treatment was a staggering R1,458,676.53 as at the beginning of November 2022.

Considering the fact that Mr X is an indigent 74-year-old pensioner who does not have the means to pay for his dialysis treatment, the decision to convert him to a cash-paying patient effectively means that he will no longer receive dialysis from 1 January 2023. This is nothing short of a death sentence. The Fund's failure to pay the outstanding invoices for Mr X's haemodialysis therefore places his constitutional rights in jeopardy, including his right to life and access to healthcare.

In light of the above, we sent a letter to the Compensation Commissioner, demanding that he discharge his obligations by ensuring that payment is made to the renal care centre. We also, on several occasions, called upon the renal care centre to give us an undertaking that it will not convert our client to a cash-paying client pending the resolution of the matter. Unsurprisingly, the Compensation Commissioner and the renal centre have yet to resolve the matter despite our continued appeals. We are, therefore, in the process of drafting an urgent application to, firstly, interdict the renal centre from terminating Mr X's haemodialysis treatment and converting him to a cash-paying patient and, secondly, to compel the Director-General of the Department of Employment and Labour and the Compensation Commissioner to process and pay the outstanding invoices to ensure that payment is made of the amount owed for Mr X's dialysis treatment.

It is a sad state of affairs when litigation is required to save a life, but we are grateful for the opportunity to assist Mr X in ensuring that he continues to receive the medical treatment to which he is entitled.

Cradock 4

On 20 July 2021, the 36th anniversary of the funeral for anti-apartheid activists Fort Calata, Matthew Goniwe, Sparrow Mkhonto and Sicelo Mhlauli, who were abducted and murdered by South African security police in June 1985 (collectively known and the "*Cradock Four*"), CDH assisted the families of the Cradock Four in launching an application to compel the National Prosecuting Authority (NPA) to decide whether to prosecute those responsible for their murders.

This application resulted in an undertaking by the National Director of Public Prosecutions (NDPP) during a case management meeting with the DJP of the Pretoria High Court to decide on whether to prosecute by 2 December 2021. However, no decision was made after the NDPP was advised that numerous documents were missing from the record that the NDPP had filed under Rule 53.

The pleadings have closed in the matter, but it has not been heard as CDH and the Foundation for Human Rights have instead spent considerable time engaging with the NPA and Directorate for Priority Crime Investigation (DPCI) to assist them in completing the investigation to get them to a point where they are able to decide whether to prosecute.

Over this period several meetings with the lead prosecutor, the DPCI and the families of the Cradock Four have been conducted, but the lead prosecutor believes there is still more to be done before the investigation is complete. The Foundation for Human Rights has also commissioned a report from another legal expert on an analysis of the evidence and they have provided guidance to the investigation. Given the importance of this matter, for the families of the Cradock Four and the healing of our nation, we are hopeful the new year will see the completion of the investigation and a prosecutorial decision from the NPA.

Build a Library

As part of its mandate the Pro Bono Practice implements several initiatives to serve the community and improve the lives of those that are less fortunate. Our Johannesburg practice's "*Build a Library*" project is one such initiative. The aim of this initiative is to serve the community by improving children's access to education and promoting a culture of reading. This is achieved through the building and refurbishing of libraries at deserving schools in disadvantaged communities, as well as supplying those libraries with books, furniture and computers.

The school with which we partnered this year is Letare Secondary School in Jabulani, Soweto. While Letare Secondary School had identified the importance of developing a culture of reading amongst its students, the school's library was in a dilapidated state. We therefore set out to improve the situation, and the first step in doing so was the painting of the library.

On Friday, 15 July 2022, 14 energetic CDHers arrived to paint the inside of the school's library as the beginning of a broader refurbishment project. The CDH crew was not afraid to get their hands dirty (literally) to achieve our goals. In addition to the painting of the library, many CDHers also donated books and furniture, which will be delivered to the school on 13 January 2023. We look forward to partnering with Letare Secondary School in the future to contribute, in whatever way we can, towards the education and empowerment of its children.

Mandela Day

The Johannesburg office of CDH celebrated Mandela Day 2022 with a visit to the Hector Pieterson Memorial and Mandela House. Everyone was humbled and inspired to visit these sites, where so many people sacrificed their freedom, livelihoods, and even their lives to defend and advance the ideal of a society based on democratic values, social justice and fundamental human rights.

We ended the day by stopping at Vuli's Book Club in Dlamini, Soweto to donate books and engage with the children who are beneficiaries of this initiative. The volunteers at Vuli's Book Club exemplify the power of ordinary people to make a difference. The children that go to the book club are provided with a safe haven to play and read, with the emphasis being on the latter. We spent some time with the children, playing games and having fun, before returning to the office with a renewed sense of the privilege and responsibility that we all have to make a difference – no matter how small.

Women's Month: Gender equality today for a sustainable future tomorrow

This year in an effort to make a meaningful contribution to communities and ensure that we affect change on the ground, the Johannesburg Pro Bono Practice partnered with the Epic Foundation during Women's Month.

The Epic Foundation was founded by Alta McMaster in 2013. Alta has a profound awareness of how alone and powerless one can feel as a rape survivor, having undergone numerous traumas in her own life. In an effort to create a safe space and create a resource for survivors, Alta established the foundation which has, to date, assisted thousands of women. The foundation assists rape and human trafficking survivors with the process of reporting crimes to law enforcement and providing comfort packs to various organisations.

Alta does not consider the expense as she continues to devote her time to doing everything she can to alleviate the trauma experienced by some women. She continues to relentlessly and generously give of herself, promoting the cause of survivors. This is a tale of the courage needed to confront the truth, take decisive action, stand up, live life with a resolve to forge a new path, witness the breaking of a new day, and maintain hope even when it seems as though all hope is lost.

In a country where the statistics on rape and sexual assault are at a staggering high, now more than ever, we all have a tremendous opportunity to contribute to the justice and balance of society. We live in a time that requires the ability to respond swiftly to the challenges our country and its people are facing.

Winston Churchill was once quoted as saying: "*We make a living by what we get, but we make a life by what we give.*" Alta McMaster is the embodiment of this notion, as she has dedicated her life to promoting and providing innovative ways to give back to our communities.

Alta's generosity and her strength has touched many lives and we are only too proud to partner with such an extraordinary foundation and phenomenal women. We look forward to a long relationship with her and the foundation.

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Cape Town

Matters and CSR initiatives

Prescription for victims of sexual abuse

The Cape Town Pro Bono Practice represents two sisters who reported that they were sexually abused by their stepmother's two brothers for several years in the 1970s and 1980s. Apart from a criminal claim, the sisters also hoped to claim civil damages from the brothers. However, at the time of launching the proceedings, section 12(4) of the Prescription Act 68 of 1969 (Prescription Act) drew an arbitrary distinction between sexual offences by only permitting the interruption of prescription for those sexual offences listed in the section itself. Furthermore, the provision provides that the victim has to prove why they did not launch proceedings sooner, assuming proceedings are launched more than three years after the abuse took place. Accordingly, the victim is required to persuade the court that they only came to reasonably appreciate that a harm was perpetuated against them within three years of taking legal action against their abuser.

In December 2020, section 12(4) of the Prescription Act was amended to do away with the arbitrary distinction between different sexual offences, and now provides that prescription may be interrupted for any sexual offence in terms of common law statute. However, while the arbitrary distinction has been done away with, the amendment did not resolve the issue of the evidentiary burden placed on the victim to explain why they did not approach the court sooner.

Accordingly, along with the sisters' claim for civil damages due to the sexual violence perpetuated on them by the brothers, the Cape Town practice launched a constitutional challenge to section 12(4) of the Prescription Act in October 2020, the effect of which will reach far further than the support of the sisters represented.

Prescription for victims of sexual abuse*...continued*

The constitutional challenge is premised on the fact that section 12(4) continues to perpetuate the secondary victimisation of a victim of sexual abuse by requiring them to persuade the court that they only came to reasonably appreciate that a harm was perpetuated against them within three years of taking legal action. The victim will have to place evidence before a court to prove their mental or intellectual disability, disorder or incapacity, or any other factor the court deems appropriate, which led to the delay in them instituting legal proceedings. The reference to *"any other factor"* would, of necessity, require that a victim plead and lead evidence as to, among other things, their state of mind since the occurrence of the sexual offence, the factors that precluded them from instituting the proceedings sooner, and the extent to which their state of mind, physical condition and/or socio-economic circumstances impacted their ability to institute proceedings.

Argument for abolishing prescription

Accordingly, we argue that section 12(4) of the Prescription Act:

- infringes the victim's right to privacy;
- discriminates unfairly on the grounds of gender and/or sex against women as girl children, as women disproportionately suffer sexual abuse;
- results in the secondary victimisation of victims of sexual abuse;
- infringes the right of victims of sexual abuse to be free from all forms of violence from public and private sources;
- infringes the right of victims of sexual abuse to bodily and psychological integrity;
- infringes the dignity of victims of sexual abuse; and
- infringes the right of access to courts for victims of sexual abuse.

Therefore, we submit that prescription for purposes of civil damages claims rooted in sexual offences should be abolished.

In support of our constitutional challenge, our founding papers in the constitutional challenge will also highlight the reality faced by victims of sexual abuse. In this regard, the consequences of sexual abuse for both adults and children, which are widely accepted by psychologists, will be emphasised, stressing the point that their trauma will have many consequences, and will very often include a delay in reporting the offence.

We will also highlight the judgment of *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* [2018] ZACC 16 wherein the Constitutional Court declared section 18 of the Criminal Procedure Act 51 of 1977 to be inconsistent with the Constitution and therefore invalid to the extent that it bars, in all circumstances, the right to institute a criminal prosecution for all sexual offences, other than rape and other specific offences, after the lapse of

Prescription for victims of sexual abuse*...continued*

a period of 20 years from the time when the offence was committed. This judgment reflects the changes which need to be made in the civil law context and the recognition of the problems which arise when imposing prescription on legal action consequent upon sexual abuse. We will demonstrate that a balancing act must be conducted between the rights of the defendant on the one hand, and the rights of the victim of the abuse on the other, all of which we hope will set out a strong case to do away with prescription in these circumstances.

We will further be setting out the realities of women and children in South Africa, highlighting the problems faced in regard to gender-based violence (GBV). This will be supported by a discussion on the Government's recognition and response to the issue of GBV in South Africa through its various addresses, plans and changes in policy.

Finally, an exposition on foreign law will also be put before the court, as our Constitution enjoins us in section 39(2) to consider foreign law when interpreting the rights contained in the Bill of Rights.

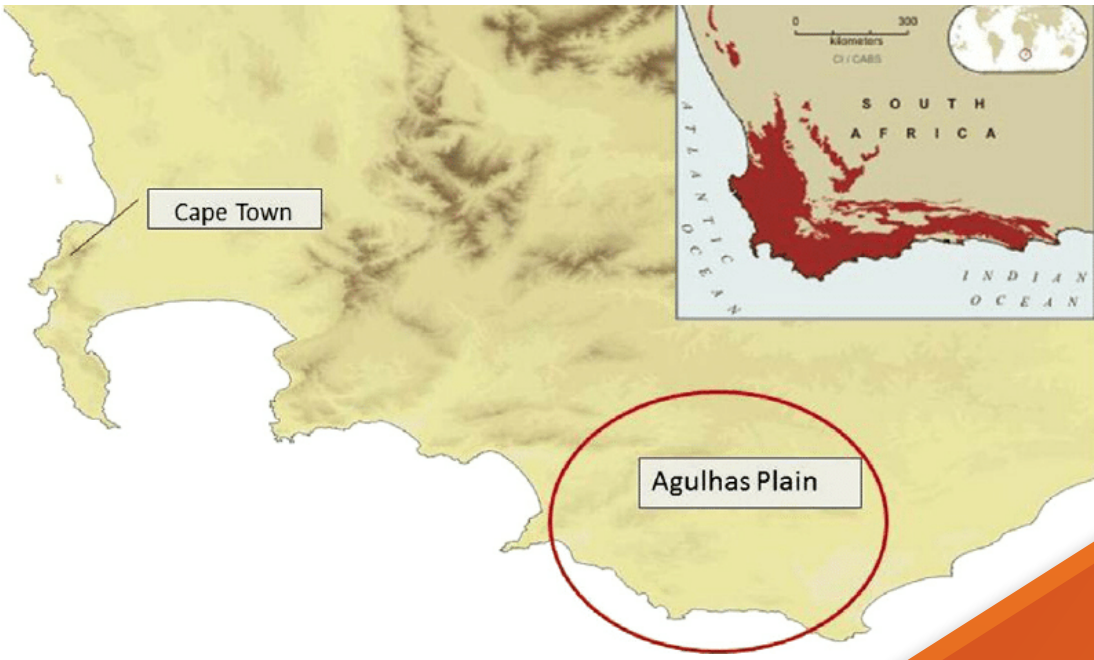
Our submission is that section 12(4) of the Prescription Act should be replaced with a provision that states:

> *"Prescription shall not apply to any alleged sexual offence under the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, any involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013 or any sexual offences under the common law."*

After launching the joint damages claim and constitutional challenge, we approached the attorneys for the opposing parties regarding separating the constitutional challenge from the damages claim in terms of Rule 33(4) of the Uniform Rules of Court. We have obtained the agreement from all parties and are thus en route to progress the separated constitutional challenge in 2023.

A matter of land rights

On the Agulhas Plain in the Western Cape, there are six farms constituting an area known as Elim. Although these six farms are registered in the name of the Moravian Church, the church has historically held the land in trust on behalf and for the benefit of the members of the Elim community.



In 2019 members of the Elim community, whom our Pro Bono Practice represents, were taken to the Western Cape High Court on application by the church and its property management arm. In these proceedings the church sought, *inter alia*, payment of arrear rental in terms of commercial leases between the church and the community, as well as outstanding municipal and South African Revenue Service payments. The church also wanted a declaratory order that only the church has the authority to conclude lease agreements on the basis that it is the registered owner of the land in Elim.

The Elim community saw this as an opportunity to redress the issue of true ownership of the land comprising Elim, as raised in the church's application. Accordingly, our Pro Bono Practice opposed the main application and delivered a counterapplication which submitted that the inhabitants of Elim are the rightful and beneficial owners of the land by virtue of their historical rights to the land having resided on the land for generations, and that the church only holds the land in trust on behalf of and for the benefit of inhabitants. Furthermore, the counterapplication also included a prayer that the church's application proceedings be stayed pending the outcome of action proceedings which would most appropriately resolve the issue of ownership. The interim hearing was heard on 8 February 2022 which, *inter alia*, successfully stayed the application proceedings.

A matter of land rights...*continued*

The four claims in the action proceedings

Accordingly, we then launched the action proceedings in which we are representing the members of the Elim community who are all descendants of the original inhabitants of Elim, as well as long-standing members of the community. There are four claims in terms of the action proceedings. The first is a declaration of ownership and land ownership rights. In terms of this claim, we are seeking a declaration that the Elim community:

- are the true owners of the land;
- have the right to exclusive beneficial occupation and use of the land, alternatively have the right to beneficial occupation and use of the land;
- are entitled to the above rights as beneficiaries under a trust arrangement with the church;
- is, in line with these other rights, entitled to govern Elim and participate in the democratic governance of Elim; and
- that the title deed be rectified to record the rights of the Elim community.

The second claim is a declaration of constitutional invalidity. Although South African law recognises indigenous land ownership rights, the Deeds Registries Act 47 of 1937 (Deeds Registries Act) does not recognise and permit the registration of quasi and/or alternative land ownership rights as real rights. This means that the rights that we are claiming under the first claim, being the right to exclusive beneficial occupation and use of the land, or right to beneficial occupation and use of the land, or the right as beneficiaries of a trust and/or fiduciary relationship, are not recognised in terms of the Deeds Registries Act and cannot be registered, nor can they be enforced. Therefore, we have included a claim that the Deeds Registries Act, particularly section 63, is in conflict with the Constitution.

The third claim relates to the abuse and/or breach of fiduciary duties by the church and its property management arm. We aver that the church has been entrusted to administer the land for the benefit and use of the Elim community, as demonstrated by the history of Elim. However, the church and its property management arm have failed and breached their fiduciary duty to the Elim community as titular owner of the land and in respect of the historical trust arrangement in, among others, the following respects:

- The church takes major decisions affecting Elim and the community without consulting or obtaining approval from the community.
- It has governed Elim autocratically and has failed and/or refused to recognise the rights of the inhabitants to govern Elim, or to democratically co-govern Elim.
- It has failed and/or refused to perform its fiduciary duty and responsibility to use the income generated from the land belonging to Elim and projects in Elim for the exclusive benefit of Elim and its inhabitants.
- It has failed to take meaningful steps to facilitate security of tenure for the inhabitants of Elim.

The fourth and final claim is a declaration that the decision taken by the Provincial Synod of the Church in 2008 whereby it held that all rental for agricultural land received by the Elim Overseers Counsel is to be paid directly to the church's central treasury, is unlawful and should be set aside.

We have recently onboarded further counsel – now bringing the size of our legal team to seven lawyers – for this matter and have assembled a strong team that is committed to protecting and enforcing the rights of the Elim inhabitants. It is important to realise that these proceedings and the constitutional challenge will help more than just the Elim community. They will also provide support to those in similar positions, which includes all mission stations in the Western Cape. The proceedings will continue throughout 2023, with a long road ahead of us toward justice and righting the wrongs of our colonial and apartheid riddled past.

Constitutional protection for all: A case for permanent residence

The Cape Town Pro Bono Practice represents a family of undocumented Angolan nationals with special needs whose continued residence in South Africa is under threat. The youngest son was diagnosed with dystonic spastic cerebral palsy at birth. He is developmentally delayed and non-verbal, requiring a communication device to make himself understood. He is unable to walk and has limited use of his upper limbs. However, due to the lack of medical care in Angola for someone with his disabilities, the mother and her two minor children came to South Africa.

Various charities and medical organisations in South Africa, particularly the Red Cross Children's War Memorial Hospital and the Friends Day Care Centre, have been providing the boy with specialised treatment and schooling. However, the family's visas have expired and they are not eligible for any immigration status, save for exemption. Accordingly, we assisted the family in applying for ministerial exemption from the Minister of Home Affairs (Minister) to be granted the right of permanent residency for a period of at least 10 years in terms of section 31(2)(b) of the Immigration Act 13 of 2002 (Immigration Act). Section 31(2)(b) states that the Minister may grant a foreigner the rights of permanent residence when special circumstances exist which would justify the decision.

Accordingly, in the application, we highlighted the following special circumstances:

- The son's medical condition and need for long-term medical assistance require his continued residency in South Africa for the foreseeable future.
- The son has benefitted from vital medical assistance and an exceptional support system in South Africa, which he would lose and be unable to replace if required to return to Angola, to his lifelong prejudice.
- There are no other adequate alternative visa or immigration options available to the family.
- The family have a right to dignity and to family unity.
- The family have built a connection to South African society, in which they have resided and integrated over the past several years.
- Any ministerial exemption would not undermine the South African economy.

The rights of children to access healthcare

In the application it was highlighted that although in theory the boy may be eligible for a medical treatment visa, the visa requires a guarantee of funding for future medical treatment. Unfortunately, the family is not able to provide such a guarantee, as the funding and treatment received by the charity organisations is not certain to

Constitutional protection for all: A case for permanent residence*...continued*

continue into the future. Furthermore, such a visa would only extend to the *"spouse or child"* of the visa holder and thus would not cover the son's family. The application further placed emphasis on the rights of children and the right of access to healthcare.

After following up on several occasions, the Minister communicated his refusal of the family's application. Despite what is highlighted above regarding the medical treatment visa, the Minister reasoned that the Immigration Act does make provision for foreigners to obtain visas for purposes of medical treatment. He further held that the family would be a public charge.

Accordingly, we have launched a review of the Minister's decision in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). We argue that the Minister's decision is reviewable in that the action:

- is not rationally connected to the information before the administrator or the reasons given for it by the administrator;
- is unreasonable;
- was taken by taking irrelevant considerations into account, while not considering relevant considerations; and/or
- is unconstitutional or unlawful otherwise.

We furthermore boldly put forward that the Minister's decision should be substituted in terms of section 8(1)(c) of PAJA with one that reads *"the family's application for permanent residence by way of ministerial exemption for a period of 10 years is granted in terms of section 31(2)(b) of the Immigration Act"* in light of the fact that the court is in as good a position as the Minister to make the decision and that a foregone conclusion exists where there is only one proper outcome of the exercise of the Minister's discretion.

It is important to realise that although the family are Angolan nationals, our Constitution protects everyone within our borders. Accordingly, our application seeks to uphold the family's right to dignity, life and family unity as enshrined by our Constitution.

Youth Day: Supporting Little Angels

On 15 June 2022, the Cape Town Pro Bono Practice held its annual Youth Day initiative. This year, our practice elected to support Little Angels.

Little Angels is an Educare centre in the township of Hangberg. The centre was set up in 2011 as a crèche, but soon began accepting children from clients of CARES, a substance misuse rehabilitation day centre. Today Little Angels supports, educates and feeds 80 children from the area.

The centre's education wing recently burned down and it was in desperate need of support. To provide some of this support, and to celebrate children on Youth Day, Cape Town CDHers were invited to participate in this initiative in any of the following ways:

- Coming together in the office on 15 June 2022 to create personalised care packages for each of the 80 children supported by Little Angels. The packages included a blanket, essentials and treats for each child, all of which were donated by CDH.
- Donate items required by the centre to assist them in recovering from the devastating fire, or make a monetary donation to Little Angels.

The fifth floor of our Cape Town office was buzzing with CDHers coming together to create the personalised care packages for the children of Little Angels. So much so that all 80 packages were created within an hour. The Little Angels representatives expressed their gratitude for the care packages, essentials and donations provided by CDH for Youth Day.

Mandela Day: Supporting the Night Haven Shelter

On 18 July 2022, in the spirit of the "*67 Minutes of Service to Others*" initiative, Cape Town CDHers, members of the Cape Town Candidate Attorney Association and people from various organisations came together at CDH to give 67 minutes (and then some!) of their day to make sandwiches to be donated to the Haven Night Shelter.

The haven provides temporary shelter, rehabilitation opportunities, social welfare services, family reunification services, physical care and support to adults living on the streets, and it is committed to reintegration. It has 15 shelters in and around Cape Town. The haven has also set up various "*safe spaces*" in Cape Town, where basic beds, toilets and lockers are provided to people in need. Specifically, one safe space is based under the Culemborg Bridge in Cape Town, which hosts up to 180 people. This safe space was identified as the recipient of the sandwich drive.

On Monday, 18 July, between 07h00 and 08h00, CDH's cafeteria was filled with smiles and conversation as everyone settled themselves at a sandwich making station. Everyone worked together as a team in making either peanut butter and jam sandwiches, or cheese and tomato sandwiches. The sandwiches were then wrapped up and placed in a package along with NikNaks, a chocolate and juice. By 7h45 we had already reached our goal of 180 packages. The Pro Bono Practice then loaded up our cars and dropped the packages off at the safe space under the Culemborg Bridge.

It was truly a joyful day, with everyone knowing they were there for one purpose and one purpose only: to help those in need. The haven expressed its gratitude and informed us that the food will go a long way for the residents of the safe space. As stated by Nelson Mandela himself: "*Freedom is meaningless if people cannot put food in their stomachs*".

Women's Month: Supporting young girls

For this year's Women's Month initiative, the Cape Town Pro Bono Practice sought to promote the right to education of young girls in South Africa by supporting their ability to attend school. Roughly 4 million schoolgirls in South Africa go through their monthly cycle without being able to afford basic sanitary wear. Due to this, these young women are often unable to attend school for several days of each month.

Accordingly, Cape Town CDHers were invited to donate sanitary wear throughout the month of August for Grade 8 to 12 girls at Kulani Secondary School in Langa. We identified that the school has many girls in need of basic sanitary wear.

On the final day of August, the Pro Bono Practice supplemented the donations already received by loading their trollies at Makro. This was followed by a trip to Kulani Secondary School, where we were able to donate a total of 4,144 pads and 2,144 tampons to the school. This equates to roughly 10 products per girl. After all 13 boxes of sanitary wear had been unloaded from our cars, we were invited to meet the Principal of the school. He thanked us for CDH's generous contribution, emphasising that the donation will make a huge difference to the quality of education of the girls at Kulani Secondary School. He offered his words of appreciation to every person at CDH who played their part in this initiative.

CDH

CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

Nairobi

Matters and CSR initiatives

Nairobi: Matters and CSR initiatives

Our Nairobi office continues to be active in pro bono work, and over the past 12 months we have carried out a wide variety of activities that have both local and global impact.

We have continued our long-standing partnership with the Thompson Reuter's Foundation as part of the Trust Law Initiative, through which we provide pro bono legal services. This year, we have represented an NGO focused on protecting military veterans' rights to review Kenya's Military Veterans Bill, 2022 and prepare a memorandum on proposed amendments to be presented to parliament with the aim of developing a comprehensive, trauma-informed bill.

The bill has since been passed into law, and we are now working collaboratively with a team of law firms from other jurisdictions to provide a comparative report on laws and jurisprudence governing the rights of military veterans and their dependants, to further support the NGO's work in Kenya.

With regards to our work with Trust Law, a significant achievement in 2022 was having our firm shortlisted in the 2022 Thompson Reuter's Trust Law Award for our involvement in the collaborative project on "*Female genital mutilation/cutting laws in Nigeria – Legislative reforms and lessons learnt from the Kenya and Uganda experience*".

Our team of lawyers has also provided pro bono legal services to Media Legal Defence, an international organisation that provides legal assistance to journalists, citizen journalists and independent media across the world. The team aided Media Defence by developing factsheets for use by journalists, citizen journalists and independent media on variety of subjects including SLAPP suits in Sub-Saharan Africa; disinformation and online harassment against women journalists in Sub-Saharan Africa; and key pointers for defending environmental defenders. These different factsheets all provide useful information and expert advice for a free and more sustainable world.

On a case-by-case basis we support individual innovators and independent social enterprises. This year, our Data Protection, TMT and Intellectual Property Practice has, for example, provided pro bono advice to an innovator on the preparation and prosecution of a patent application for a social impact invention in the agricultural sector.

In addition to providing legal advisory support to various entities, we have also had the opportunity to make a monetary donation to the Gender Violence Recovery Centre (GVRC). This is a pioneering organisation on matters gender-based violence management in Kenya and is a charitable trust of the Nairobi Women's Hospital. To mark International Women's Day, and in light of the theme "*Breaking the Bias*", we made a cash contribution to the GVRC with the aim of helping to bring meaning to the lives of survivors of gender-based violence and their families by supporting GVRC's provision of comprehensive free medical treatment and psychosocial support.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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