

LRC

LEGAL RESOURCES CENTRE



ANNUAL REPORT 2007/8

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OUR VISION

Inspired by our history, the Constitution and international human rights standards, the LRC is committed to a fully democratic society based on the principle of substantive equality and to ensure that the principles, rights, and responsibilities enshrined in our national Constitution are respected, promoted, protected and fulfilled.

OUR MISSION

To strive, both for itself and in its work, for a fully democratic society based on the principle of substantive equality and to ensure that the principles, rights, and responsibilities enshrined in our national Constitution are respected, promoted, protected and fulfilled.

To function as an independent, client-based, non-profit public interest law clinic which uses law as an instrument of justice and provide legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social, economic, and historical circumstances.

To work for a fully democratic society and to build respect for the rule of law and constitutional democracy; enable the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; and contribute to the development of a human rights jurisprudence and to the social and economic transformation of society.

The LRC seeks creative and effective solutions by using a range of strategies, including impact litigation, law reform, participation in partnerships and development processes, education and networking within South Africa, the African continent and at the international level.



Chairperson's Message

The publication of this 2007-2008 annual report takes place amidst what can only be described as political and constitutional turbulence in our country. Events at Polokwane and their aftermath have created quite high levels of uncertainty. While on the one hand it may be regarded as a sign of a growing and maturing democracy, on the other, one hopes that the contestation for political power will not leave the country more fragile. A general election in the next few months and the inevitable changing of the guard will create major challenges of leadership.

The Constitution, its values and imperatives should continue to form the basis for transformation and State and civil action. But increasingly, one sees a departure from these values; whether by the State, individual Ministers, other politicians who capitalize on popular sentiment or groups within society who seek to fight for a better future. The incidents of racism and xenophobia towards our African sisters and brothers, very much still an on-going problem, suggest that the imperative of a nation 'united in its diversity' still remains unfulfilled.

Even though the commitment to equality is a constitutional imperative, we remain a deeply divided and unequal society. Too often, one sees that the ability to access and enjoy rights depends on the economic status of the individual: this, in a context where the gap between the rich and poor has increased over the past decade and too many people live in abject poverty. The struggle in South Africa continues along socio-economic and gender lines, among others.

Under these circumstances, the role of institutions, civil society and organizations such as the Legal Resources Centre (LRC) that uphold the Constitution

is critical. While the LRC has a rich and proud past in the role it has played in contributing to the birth of a democratic society, it has an equally, albeit differently, important role to play in contributing to the *continuing growth* and *consolidation* of that democracy. Certainly the LRC's work over the past 14 years has compellingly displayed its ability to comprehend and give effect to that role.

At the same time, the LRC recognises that it is continually important to re-examine what it does and how it does it, the priorities it chooses, the issues it advances and the methods it uses in advancing those choices. The challenges that we face in our young democracy show us that we cannot afford to rest on our laurels. The work of the LRC canvassed in the following pages is a tiny reflection of its on-going contribution towards the building of a society based on the rule of law, equality, dignity and the other values of our Constitution.

On behalf of the Legal Resources Trust, many thanks to the LRC's National Director, who despite serious health challenges has continued to lead ably, continued to create a positive climate within the organization and done remarkably well in locating the LRC within the larger family of civil society and State institutions committed to upholding the Constitution and its values. Much appreciation also goes to all members of staff who work tirelessly to advance the mission, the vision and the values of the LRC.

Jody Kollapen
 Chairperson
 Legal Resources Trust

National Director's Message

In order to effect a transition from the iniquities of apartheid to democracy and the vision of freedom for all, transformation of society and our economy are essential. In this process, it is our Constitution that is the greatest instrument in the hands of the South African people. It is there not only to protect us and to guide governance. It also demands that steps be taken to bring such transformation about.

For three decades, the LRC has been at the forefront of using the law in the pursuit of justice and freedom. While many gains have been made, the dream has yet to be claimed. Our work continues. The fundamental law of the Constitution, providing us with our primary means of pursuing our goals, must be protected, its impact extended and its requirements fulfilled.

The LRC has used law and the courts to defend equality and social justice in South Africa on behalf of the most vulnerable and marginalized communities. The nature of this struggle has changed dramatically with the rise of democracy, but it is nonetheless as crucially important today as ever.

Our recent and ongoing work includes land reform, access to health services and education, environmental protection, the establishment of the scope of authority of traditional leadership, and the protection of vulnerable people including refugees and children. The LRC itself also faces challenges of sustainability and has to continue to keep a close watch over our limited resources. Notwithstanding this, our work has made a great deal of difference in the lives of people who might otherwise have had no access to the law and legislative processes.

South Africa is a young democracy in a critical period. We have the foundation for and a history of a strong civil society and a network of government institutions - but progress has not been consistent. However, this provides a unique opportunity for contributing to the transformation of society through using law. The Constitution of the Republic of South Africa is one of the finest in the world. However, the legal protections to which its people are entitled have not yet been fully established in the practices of institutions and in the law. Much work is required of the legal community and those with whom they work to provide added impetus for the implementation, oversight and protection of our constitutional rights.

The development of law through the courts and the legislatures is an ongoing process, which can and should be receptive to public involvement. One of the goals of the LRC is to support access to the legislative process by our clients – communities and organizations who wish to have their perspectives considered and their rights established by our democratic institutions.

Democracy requires public engagement and a set of strong social values. An understanding of the contractual nature of the Constitution is crucial: the Constitution is our contract with government and government can be held accountable where it fails to meet the transformation challenges included in it. Failures and delays in delivery and in the criminal justice system have helped cause a weakening of respect for and trust in the law. The obligations imposed by the Constitution in relation to human rights must also be respected. Such respect and trust are fundamental for the rule of law that underpins democracy in any society. It is crucial that the LRC and

other public-interest law firms are able to demonstrate that law can be used as a tool for social justice and the protection of the most vulnerable.

This requires not only success in advocacy and litigation, but also the active implementation of court orders. Here, alas, we have encountered problems in the implementation by government of court orders fairly awarded. It seems that oversight is required at every step in the process.

We face many major challenges in the coming years. One will be dealing with xenophobia. Tragic xenophobic violence has exposed deep frustration and resentment in marginalized communities. A conscientious response to this situation must include consideration of that frustration, as well as an attempt to change the hostility towards refugees and build mutual understanding. Government institutions are failing to respond to the influx of refugees and immigrants in accordance with law and fair practice. Work with refugees has become a major focus for the LRC.

While South Africa spends a major portion of the national budget on education, the system is fraught with problems. So too is health: the latest health care statistics make the prospect of achieving the Millennium Development Goals seem even further away. The HIV/Aids pandemic will leave its mark on generations to come. It will not only impoverish our country from the consequent loss of active participants and their contributions to our economy. It will also leave hundreds of thousands of orphans without adequate support or guidance. Much progress has been made in the provision of basic services to the general population. However the sustainability of the utilization of our natural resources is a growing concern.

The high price of mineral resources has strengthened the historically powerful position of mining and related industries in South Africa, and emboldened them to pay scant attention to law and regulations: sometimes jeopardizing the health and liberties of whole communities. Too often, government fails to engage directly with communities that are negatively affected and fails to enforce environmental and water quality protections. The energy crisis in South Africa has resulted in the prioritizing of quick and

cheap energy production which, unfortunately, is being sought in an unsustainable manner. Illegal practices, which have caused extensive degradation of the environment, and polluted the air and water used by vulnerable informal communities and local agriculture, have been tolerated.

South Africans have a constitutional right to 'an environment that is not harmful to their health or wellbeing' (section 24(a)), and government institutions which were established to enforce this right must be held accountable for their failures. Additionally, corporations must be held liable for their violations if we are to establish that illegal and unsustainable practices cannot be profitable in the long-term. The long-term costs to residents of undoing the pollution of decades of profiteering during apartheid cannot be allowed to grow in our democracy. The legal mechanisms whereby polluters must pay for rehabilitation need enforcing.



Land reform is an ongoing project. Early in this decade, LRC lawyers sounded warnings about problems in relation to the land restitution process. Firstly, equitable access by individuals to the collective rights and resources need to be clarified and there are mechanisms of State support required to underpin these. Secondly, dysfunctional post-settlement land-holding arrangements often arise because these developments are not linked to local development planning. Thirdly, the Land Claims Commission had incorrectly sought to verify claimants in a community claim on the basis of direct descent rather than whether the group constituted a community at the time of dispossession and continued to do so up to the submission and

settlement of the claim, as required by legislation. This created uncertainty and confusion in relation to membership.

Notwithstanding the problems, in 2007, the Land Claims Commission suggested that restitution was 90% complete and committed itself to finalising the restitution process by 31 March 2008. Clearly, this has not happened. It is hoped that rather than making artificial deadlines the focus of the State's endeavours, additional mechanisms will be put in place to support the prospects of long-term development and the sustainability of these arrangements.



Annette Reed

Related to the issue of land reform is the question of the scope of authority of traditional leadership bodies. The question is not whether South Africans have the right to live by the traditional laws and practices of their ancestors, but whether they have the right not to. There is also a failure of related legislation to take into account traditional methods of accountability. Many communities could end up under the jurisdiction of tribal leadership with which they are not historically affiliated, or which authorities were engineered under apartheid government for the administration of black communities. The LRC is continuing to represent communities in this regard.

The sustainability of non-profit organizations for social justice is difficult. A global shift of focus has occurred. Funding organizations and national governments that previously were generous donors are now more concerned with issues of global security than with human

rights and social justice. However, an effective programme for ensuring global security would require addressing questions of national stability, especially in the developing world and young democracies. There is a need, and initiatives are under way by a number of legal services NGOs, to coordinate programmes which focus on regional issues facing the entire African continent, such as HIV/Aids, conditions of labour or refugees. This requires reorganization and new funding if it is to be pursued without jeopardizing existing national programmes.

The national legal community is also undergoing transformation and the question of implementing a system of pro bono work is still under discussion in the Law Society.

Looking to the future, the LRC requires some organisational restructuring and redefinition of roles within the organization. We must address the sustainability of the LRC, grow the resources of the organisation, and find new funding for ongoing projects as well as new ones. We may be able to increase effectiveness by creating better reporting and monitoring mechanisms. This could also help our donors appreciate better the way in which our work is positively impacting on people's lives.

In all, our work should contribute to the strengthening of civil society. To defend democracy and constitutional democratic values, we need to raise social consciousness for human rights and encourage the mobilization of civil society in defence of these rights. We must encourage the free flow of information, education about constitutional values, and build trust in legal remedies.

I would like to express my great appreciation for the excellent work of the staff in the regional offices, the national office and the Constitutional Litigation Unit. Over the last year, all have contributed well to our mission in the finest traditions of the LRC. Sadly, we have lost two fine colleagues during the course of this year – 'Pinky' Madlala and Moffat Khumalo – whose involvement will be sorely missed. I would also like to thank the Legal Resources Trust for their crucial efforts on behalf of the organization.

Janet Love
National Director

Taking her rightful place – Hosi Shilubana



Andreas Lehner

Tinyiko Lwadhlamuni Nwamitwa Shilubana was inaugurated as the Shangaan people's sixth Hosi (Chief) and their first female Hosi in August 2008 in Limpopo. This follows a protracted case in the courts, leading to a landmark judgment of the Constitutional Court which was delivered on 4th June 2008.

Shilubana's father, Hosi Fofeza of the Valoyi community, passed away in 1968 without a male heir. Despite Shilubana's being of age, the eldest

child of Hosi Fofeza and the natural heir to the chieftainship, her father's younger brother Richard Nwamitwa succeeded as Hosi. Then, more than two decades later, in an attempt to align their customary law with the Constitution, Hosi Richard and the Royal Family of the Valoyi unanimously resolved to bestow chieftainship in the next succession to Shilubana. On 5th August 1997, the Royal Council confirmed this decision, and the Valoyi tribe resolved that 'in accordance with the usages and customs of the tribe' Shilubana would be appointed Hosi.

However, after Hosi Richard passed away in 2001, his eldest son, Sidwell Nwamitwa, challenged Shilubana's ascendance as Hosi and interdicted her succession claiming that, according to traditional law, her succession was unlawful. Both the Pretoria High Court and the Supreme Court of Appeal found in his favour.

In 2007, Shilubana approached the Constitutional Court for leave to appeal on the grounds of gender equality enshrined in Section 9 of the Constitution, which reads that 'the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex...'

The Constitutional Litigation Unit (CLU) of the LRC intervened in the case as *amicus curiae* on behalf of the Commission for Gender Equality (CGE) and the National Movement of Rural Women (NMRW).

Hosi Shilubana commented that she was not asking for any favours, 'it's my birthright and I have the Constitution to back me...I am glad that the whole thing is over, we can now move on with our lives. I'm planning to retire from politics next year so that I can be closer to my people!'

The CGE argued that where a traditional community has of its own accord developed its customary law to reflect the spirit and purpose of the Constitution, the court must as far as possible recognize that development. Furthermore, the NMRW argued that the actions of the Valoyi authorities were well within their powers and reflected the spirit and purpose of the Constitution. The CGE and NMRW emphasized that customary law is a flexible, living system of the law, which develops over time according to the needs of the community and that the authority conferred upon traditional leaders to bring their customs in line with the Constitution includes the ability to remedy discrimination.

The Constitutional Court unanimously upheld the decision of the traditional authorities of the Valoyi to appoint Shilubana as their Hosi. Citing Section 211 of the Constitution, which states that 'the Court must

apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law', the Court affirmed the right of the Valoyi people to develop their own customary laws to bring them in line with the supreme law of the land. 'The time when customary law had to be proved a foreign law in its own land is behind us.'

Further, the Court stated that the value of recognising the developments by a traditional community of its own law, in accordance with the constitutional right to equality, was not on the facts of this case outweighed by the need for legal certainty and the protection of rights. In any case, the Court concluded that Sidwell Nwamitwa was not vested with the power to be Hosi.

The LRC values the importance and significance of this case in advancing gender equality and the development of living customary law in line with constitutional values and principles. Achmed Mayet, Director of the Legal Resources Centre's CLU, pointed out that this case builds on the gains made in the judgment of *Bhe and Shibi* where the rule of primogeniture as applied in intestate succession was declared discriminatory and therefore unconstitutional. 'This case is yet another example of how the LRC works together with Chapter 9 institutions to promote, protect and fulfill the rights enshrined in our Bill of Rights.'

Hosi Shilubana commented that she was not asking for any favours, 'it's my birthright and I have the Constitution to back me...I am glad that the whole thing is over, we can now move on with our lives. I'm planning to retire from politics next year so that I can be closer to my people'. Shilubana has served four terms as an African National Congress Member of Parliament. Her plans for her role as Hosi include the construction of a new dam near Tzaneen and the creation of a medical facility which will obviate patients' walking long distances.

The Valoyi led the way in advancing women and promoting their equality within their community. This case illustrates that the development of customary law in South Africa in line with our Constitution is taking place from both the highest court in the land and from the community level.

Abused Women's Syndrome

After five women were sentenced to lengthy prison terms for murdering their abusive husbands, the LRC, in 1999, brought an application for leave to appeal against the sentence of one of them. Though this application failed, it was the opening salvo in attempts to secure the freedom of the five women, and to introduce a precedent on the issue of abused women's syndrome in South Africa.

In 2003, Moray Hathorn, an attorney with the Webber Wentzel Pro Bono Unit, acted for the accused in *S v Engelbrecht*. The Constitutional Litigation Unit (CLU) of the LRC represented the Centre for Applied Legal Studies as *amicus curiae*.

In this case, Ms Engelbrecht, a mother of one, was charged with murdering her abusive husband of nine years. Several volumes of documentation were submitted to the court relating to the effects that an abusive relationship can have on the psyche of an abused woman and to mitigation of sentencing in circumstances where the woman kills her tormentor in the laws of other countries.

When considered against the overall prevalence of domestic violence in South Africa, abused women rarely kill their abuser. When they do so, it is typically in response to an attack or a threat by the abuser to harm another person, such as a child. Typically, the women kill while their abuser sleeps or is intoxicated, convinced that it is the only way to end the abuse. They kill because they have lost hope – because the aggression, anxiety and horror have reached a point where death seems unavoidable. They thus face a choice between suicide and homicide.

The failure of the criminal justice system to provide adequate legal protection against domestic violence contributes to the state of desperation that drives abused women to kill their abusers. Very often, abused women seek recourse through the criminal justice system. However, due to a range of factors, including stereotyped views of women and how they are expected to respond to domestic violence, the criminal justice system has repeatedly failed them, perpetuating systemic sexist behaviour.

Most of the women concerned admit to the killing and there is often little or no doubt that it was intentional. Therefore the defences available are generally limited, in that they tend to be framed within a traditional male paradigm that does not take into account the experiences of abused women and the circumstances in which they kill. For instance, arguing self-defence allows the concept of reasonable force against another person when the self-defender reasonably believed that she was being threatened with imminent and unlawful bodily harm and that such force was necessary to prevent the threatened harm. This requirement is difficult to meet where an abused woman kills her abuser while he is sleeping, as was the case in *S v Engelbrecht* because the element of imminence is absent. Thus, amongst other factors, this defence fails to take into account the physical differences between men and women which often result in women not striking back immediately and the profound psychological and emotional effects on women living under the constant threat of eruptions of violence.

With the information placed before it, the Johannesburg High Court was able to hand down a comprehensive and well thought judgment. It high-

lighted the importance of correcting existing myths and misconceptions about women in these situations, as compared to men who kill. The court also stated the importance of encouraging the development of legal principles in a way consistent with the protection of vulnerable social groups.

While Ms Engelbrecht was found guilty, she did not receive a prison sentence because the court found that she was indeed subjected to a lengthy period of physical, mental and sexual abuse at the hands of her husband of nine years. The court also found that she had diminished mental capacity at the time of the murder. The judgment is important because a South African court recognized the abused women's syndrome and the consequences that it has on the victims of such abuse, and reassessed the male-orientated approach to the issue.

Following this judgment, over the past two years, all five women from the initial application have been released on parole. One woman originally sentenced to death had her sentence changed to 25 years. In February 2008, she was granted parole and will be released in February 2009. These women were also assisted by the Webber Wentzel Pro Bono Unit, who was in turn assisted by the Centre for the Study of Violence and Reconciliation and the Tshwaranang Legal Advocacy Centre. In the course of this landmark work, a sixth woman was assisted with her parole application and was released in November 2007.

This work highlights the strides that have been made in the law's treatment of abused women who kill their tormentors after *S v Engelbrecht*. These changes have positive ramifications in working towards correcting gendered bias in the criminal justice system.



Annette Reed

Protecting Children who Testify in Court

Each year there are more than 20 000 cases of child rape and attempted rape reported to the police in South Africa. One in five of all rape cases are of children under the age of 18 years and the figures continue to increase.

In May 2008, the Pretoria High Court finally confronted the impact of courtroom testimony on child witnesses or victims in criminal trials and declared section 170A(1) and several other subsections of the Criminal Procedure Act 51 of 1977 unconstitutional. These sections deal with the manner in which children are required to testify in court.

The matter arose from two rape cases referred to the High Court for sentencing. The non-governmental organization Resources Aimed at the Prevention of Child Abuse & Neglect (RAPCAN) noted that these two cases 'provide clear examples of the array of problems experienced by child victims and witnesses in the criminal justice system, particularly with respect to the oath and admonition, competence tests, the appointment of intermediary, proceedings in camera, lack of trained personnel, and problems arising out of the inherent nature of the court environment.'¹

Section 170A(1) provides, 'Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary'. The High Court found this section unconstitutional since it confers a

discretionary power to the trial court to decide whether to appoint an intermediary when a child witness is called to testify.

Judge Bertelsmann declared that the criminal justice system must operate in a way that takes account of children's interests, by protecting them from further trauma and treating them with respect and consideration for their unique status as vulnerable young human beings. Despite well-documented research showing the increased traumatic effects on children who testify without an intermediary, in practice, children who testify via intermediaries have been the exception rather than the norm.

Further, even though an intermediary could reduce the trauma to some extent, section 170A(1) does not adequately address the damaging effects of a trial procedure. Researchers Coughlan and Jarman wrote in an article on the intermediary system for child victims of sexual abuse that the functions of the intermediary are to protect the child against the aggression inherent in cross-examination, and to convey the questions asked in court to the child in an age-appropriate manner. The cross-examination process can be embarrassing and severely distressing to any complainant and more so for a minor. In such a situation, a child can become confused, scared and unable to understand questions so that the most important objective of the adversarial process, truth, may not be disclosed. Thus what is in the best interest of the children witnesses is that they are removed from the adversarial approach through a method such as the intermediary system which can provide a more child-friendly mechanism and, more importantly, for the child to be removed from the presence of the accused.



Benny Gool

The LRC represented three NGOs with specific interests in and knowledge of the effects of abuse and court proceedings on children as *amici curiae* (friends of the court). RAPCAN, based in Cape Town, develops child abuse prevention strategies including those involving legislation and policy; Operation Bobbi Bear, based in Amanzimtoti, is committed to rescuing child rape victims and minimizing their risks of HIV infection; and Children First, based in Durban, has as its mission to promote and protect the rights and well-being of children with a primary focus on minimization of stress experienced by survivors of child sexual assault.

On behalf of our clients, the LRC argued that section 170A(1) should be compulsory as it best protects the child's right under section 28(1)(d) of the Constitution ('Every child has the right to be protected from maltreatment, neglect abuse or degradation'), and under section 28(2) ('A child's best interests are of paramount importance in every matter concerning the child'). The courtroom confrontation and the unsympathetic pressures that the criminal justice system places on children have a lasting negative

impact on their lives, which is inconsistent with the Constitution and the Children's Act.

The court held that children are entitled to a procedure that alleviates as much as possible the suffering that the child would re-live as a victim or witness in the criminal justice system. The court further held that provisions in the Criminal Procedure Act that shield child victims must be applied to child witnesses as well.

Mahendra Chetty, attorney with the LRC's Durban office, said that the court's decision was a step in the right direction. 'This judgment is long overdue and is important for their protection. Although the law cannot shield children from all the harsh realities of the world, it can put mechanisms in place to protect them and ensure that they emerge from painful ordeals with less to repair'. The court order has been referred to the Constitutional Court for confirmation of the order of invalidity.

1 Tagwireyi and Waterhouse, 'Summary of research into children's experiences of court' (2008).

A Dangerous Paper Chase

Approximately 11 million South African children live in dire poverty on less than R200 per month, according to the Alliance for Children's Entitlement to Social Security (ACCESS), an alliance of more than 1000 organizations working for a social security system accessible to all poor children in South Africa. In a situation of widespread poverty, social grants play a critical role in reducing poverty and are one of the most important poverty relief measures put in place by the state as acknowledged by the government.

In 2001, research was undertaken into childhood malnutrition in the Mount Frere district. Findings revealed that many children were hospitalized for starvation and malnutrition and some were dying because their caregivers could not access their grants due to not having the required identity documents. In a follow-up study it was found that 21% of the caregivers did not have identity documents and therefore could not apply for their children's birth certificates.

Section 27(1) of the Constitution provides that everyone has the right to access sufficient food and water and social security. Section 27(2) obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of these rights.

Represented by the LRC, ACCESS took the Social Development Minister Zola Skweyiya to the High Court seeking child support grants, care dependency grants and foster grants for those applicants who do not have an identity document or a birth certificate bearing the 13-digit identity number of the child concerned.

Until 2001, welfare regulations granted discretion to the Director-General to accept alternative proof of identity. However, Section 7(c) of the 2001 regulations removed that discretion, making it impossible for a child who did not have an officially required document to receive a grant. The result of this decision had a terrible impact on a substantial number of poor children who otherwise qualified for a child grant.

The Minister argued that the removal of discretion was important in order to combat fraud and that negative impact on poor children was mitigated by the fact that the Department of Home Affairs and the Department of Social Development were working together to process documents faster, and that in any case a person can receive the Social Relief of Distress (SROD) (an emergency food package) while waiting for their grant.

The LRC countered that government cannot fight corruption by denying financial assistance to children entitled to a grant. In addition, the government was not able to show evidence of a connection between the existence of discretion to accept alternative proof of identity in relation to child grants and corruption in the social welfare system. In addition, based on its own experiences and that of ACCESS, the LRC stated that most people do not know about their right to SROD or how to access such relief. Recipients of such relief have also complained that they waited months to receive such support and that it is not an immediate response as the government asserted.

The main reasons that many people do not have a birth certificate or identity document are poverty and Home Affairs' failure to deliver the documents within a reasonable period of time. This applies especially to

people living in rural areas with remote access to Home Affairs offices. Often, because of inefficiencies in the system, people are required to make many visits to Home Affairs and the transport costs are compounded.

Patricia Martin, Managing Director of ACESS explained that 'in poor areas, up to 35% of children eligible for the child support grant are not able to access it, and lack of documentation from Home Affairs is a significant reason for this...They must not be stopped from getting the grant by this paper chase.'

The government's position on the removal of discretion was clearly a violation of the rights of a child to have access to food and social security. Also at stake is the right to life, as the provision of a child grant is a lifeline for severely malnourished and deprived children.

On 19 March 2008 the Pretoria High Court ordered the Minister of Social Development to implement the 2005 regulations which would allow children and care givers without valid identity documents access to child grants. Martin acknowledges that it was an enormous advance for children, many of whom are too poor to afford the process involved in obtaining documents. 'There are many ways to prove a child's identity. This opens the door for all those locked out because they don't have a piece of paper...We are delighted with this outcome and want to thank our attorneys at the Legal Resources Centre for their work over four years on this case.'

Sarah Sephton, the LRC attorney on the case, also thanked counsel Geoff Budlender, Steven Budlender and Jacquie Cassette who worked tirelessly on a contingency basis.



Benny Gool

New Safer Homes for Thousands

From 24 April 2008 and throughout May 2008, between fifty to seventy families per day voluntarily dismantled their shacks and packed up their personal belongings, windows, doors and furniture, which had stood on either side of the dangerous railway line in Khayelitsha, Cape Town, for almost 10 years. With the assistance of local and provincial government officials, these families were moving to new fully serviced sites in Bardale, Mfuleni, 5 kms away, where they could build new homes.

The owners of the railway land, the South African Rail Commuter Corporation (SARCC), had launched an application in 2003 in the High Court seeking the eviction of the thousands of occupants living in danger and under conditions of abject poverty along the railway line.

The residents had several committees, two of which instructed the LRC to represent them. On the instructions of the committees, the LRC joined the national, provincial and local government in the eviction case. The committees submitted their responses on the basis that the landmark Constitutional Court judgment of *Grootboom* had concluded that there was an obligation to provide access to adequate housing for those desperately in need. The occupiers of these shacks along the railway line argued that it was irrelevant to them which sphere of government took responsibility, but that one of them had to implement the *Grootboom* obligations.

In the end, the case was never argued and a settlement was reached in terms of which land would be made available under the emergency housing programme, a consequence of the *Grootboom* case.

Although it was initially envisaged as a pilot project which would be carried out urgently, the settlement proposal became bogged down because of the difficulty in finding land, environmental challenges, agreements and disagreements about who would be entitled to land, and the task of ensuring that all basic services, such as water, electricity and sanitation would be delivered and ready at the time of occupation by the railway residents. The land was ready some time in 2007 but because there was no lighting on site it was considered too dangerous to move to. By December 2007 a new relocation plan had been drawn up, but was immediately suspended when the first occupants from Khayelitsha were met by angry residents of Mfuleni who claimed that the railway residents should not get a share of the land in Bardale first.

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The emergency housing programme for the Khayelitsha railway residents had in the interim grown to encompass a joint emergency housing programme and informal settlement upgrade programme. This merger saw the area expand to offering close on 5000 sites, which was an extremely welcome development for Cape Town. However, though admirable, this programme expansion slowed down progress in readying the area for relocation. According to the City Council resolution, the Khayelitsha railway residents would move first, followed by other occupants from Mfuleni, Lwandle and Nkanini in Cape Town. In this way, many poor residents would move from areas of poor conditions to more secure environments which would be properly serviced.

The plan then evolved so that approximately 5000 residents from Khayelitsha, who lived in nearly 2000 shacks, would move to their new homes within the unrealistic time frame of 10 weeks. In light of the disturbances that took place with residents of Mfuleni in December 2007 when the occupants first moved to the site, added attention was given to security. There was a high presence of both Metropolitan and South African Police Service personnel when the relocation recommenced after several months of renegotiation and facilitation. Each household received a pegged plot and every 5 plots share water and ablution facilities.

Ultimately, the long-term plan is that a house will be built on the plots of all qualifying occupants. By June 2008, almost all the residents of the railway line settlements had moved to the new site and have been assisted by members of local and provincial government.

Although this programme took much longer than expected, and was not without numerous problems along the way, it is the largest successful voluntary relocation in the Western Cape. It is proof of what can be achieved if the different spheres of government co-operate with one another and potential evictees are consulted and given the opportunity to participate in the decisions that fundamentally affect their lives.

Steve Kahanovitz, the LRC attorney for the Khayelitsha rail residents' committees, commented that the Bardale area has changed from being an empty site with tarred roads and high mast lighting to being filled with a new village population of thousands of men, women and children now living in a much safer environment than previously. The LRC is part of the monitoring committee, a joint committee which includes local and provincial government and the SARCC, overseeing the ongoing relocation of residents to their new homes in Bardale.

Evicted from the Inner City

In 2006, the City of Johannesburg attempted to evict about 300 residents living illegally in various run-down buildings in the inner city, including four houses on Joel Street, the 16-storey San Jose building on Olivia Street and a disused panel-beating workshop on Main Street. These houses and flats, home to some of Johannesburg's poorest residents, were earmarked for redevelopment under the Better Building Programme (BBP) ahead of the 2010 Soccer World Cup. If successful, it was estimated that approximately 70 000 inner-city residents would face similar eviction processes.

Many of the homeless people who occupy inner city 'slum' buildings scrape together a meagre living by begging, watching and washing cars and selling produce and other items on the streets. A large percentage of this group is disabled and many are blind.

In the Johannesburg High Court, the City submitted that in terms of the National Buildings Regulations and Buildings Standards Act 103 of 1977 and the Health Act 63 of 1977, the residents were living in unsafe conditions and that the evictions would promote public health in the area and reverse the decay that the City was trying to address with its inner-city regeneration programme.

The residents, desperate enough to live without basic amenities such as water, electricity and sanitation and unable to afford a better alternative, disagreed that their homes were harmful, as contended by the City. The evictees, represented by the Centre of Applied Legal Studies (CALs) and law firm Webber Wentzel, argued that they were being taken out of homes that they already occupied with only the open

streets and homelessness as an alternative. Accordingly the City was violating their right to adequate housing under section 26 of the Constitution. They also argued that they should be offered alternative accommodation in the city itself as this would enable them to continue with their lives, pursue their means of earning income and their children to continue attending their schools.

Judge Jajbhay ordered that the City must provide alternative accommodation to those desperately in need. He said that the City had failed in its statutory and constitutional obligations to provide a suitable plan of action for rehousing such inner-city residents within the boundaries of their current municipal area, and stayed the evictions until such a plan had been put in place. By dealing with both the right to shelter as well as the right to live near economic and employment opportunities, this judgment went further than any before it in relation to the right to housing.

In response, the City applied for leave to appeal to the Supreme Court of Appeal (SCA), as it believed

Many of the homeless people who occupy inner city 'slum' buildings scrape together a meagre living by begging, watching and washing cars and selling produce and other items on the streets. A large percentage of this group is disabled and many are blind.

that the burden of having to find alternative accommodation for the residents before they are evicted was impossible. This was especially considering that this application for eviction was one of many and ultimately the City would be obliged to provide homes for tens of thousands of people living illegally in Johannesburg's derelict buildings.

At this point, the LRC joined the proceedings acting on behalf of the Centre on Housing Rights and Evictions (COHRE) based in Geneva and the Community Law Centre from the University of the Western Cape, who were admitted by the SCA as *amici curiae*. The appeal was argued before the SCA in February 2007.

Unfortunately, Harms JA, delivering the unanimous decision of the SCA, ordered that the City could continue with the evictions. However, while holding that the City did not have to provide alternative housing, the court did hold that in the circumstances, the eviction would trigger a constitutional obligation upon the City to provide at least minimum shelter, though it need not be located within the inner city, to those who are evicted and desperately in need. 'The temporary accommodation is to consist of at least the following elements: a place where they may live secure against evictions; a structure that is water-proof and secure against the elements; with access to basic sanitation, water and refuse services.' This was

an advance in South Africa's housing law, building on the gains made for the right to access to adequate housing by those 'desperately in need' in the landmark Constitutional Court judgment of *Grootboom*.

However, regardless of this small victory, the evictees were only being offered temporary housing in terms of Chapter 13 of the National Housing Code, and on the periphery of the City. They were not included in the City's urban regeneration programmes and sought to appeal at the Constitutional Court, where the LRC also represented the *amici*. After hearing argument, the highest Court of South Africa reserved judgment in the matter. Deputy Chief Justice Moseneke urged the 300 residents and the City of Johannesburg to try to reach a settlement, for which the Court would gladly issue directions or reach a finding if no agreement was reached.

The parties negotiated at some length, finally reaching agreement in early 2008 on the relocation within the inner city of certain occupants living in dangerous conditions. Later, the Court handed down an important judgment, which amongst other aspects, emphasised the need for 'meaningful engagement' between the parties to be shown before any eviction order can be granted. It also declared certain aspects of the National Building Regulations and Building Standards Act unconstitutional.



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Traditional Communities Challenge the Communal Land Rights Act

In March 2006, four communities in the North West, Mpumalanga and Limpopo provinces instituted legal proceedings challenging the constitutionality of the pending Communal Land Rights Act 11 of 2004 (CLRA). The LRC represents the Kalkfontein, Mayaeyane and Dixie communities and Webber Wentzel represents the Makuleke community. The matter will be heard in the Pretoria High Court on 14 October 2008.

As Henk Smith, attorney with the LRC, explains, 'The core of the Act deals with the transfer of land title from the state to traditional communities; the registration of individual land rights within 'communally owned' areas; and the use of traditional council or modified tribal authority structures to administer the land and represent the 'community' as owner...The Act applies to all communal land, including the former homelands and post-1994 land reform land.'

Amongst its defects, according to the claimants, the bill had been rushed through Parliament before the 2004 election without following the provincial consultation process required by the Constitution. It contravenes section 25(6) of the Constitution, which requires that a 'person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. It gives unprecedented and undemocratic powers to traditional leaders without taking into account traditional methods of accountability. It incorporates autonomous communities into the jurisdiction of unrelated tribal authorities created during apartheid and reconstituted as traditional councils. It also gives traditional councils the power to exercise property rights on behalf of

communities with whom they have little or no historical connection without the permission of the community members themselves. The CLRA could undo the rights to land won through restitution claims and reincorporate the communities back into apartheid-era 'tribal' units. It also fails to address adequately the insecure tenure and dispossession of African women due to racial as well as gender discrimination.

A fourth tier of government could be created by the CLRA, especially in conjunction with other acts (the pending Traditional Courts Bill and the Traditional Leadership and Governance Framework Act 41 of 2003), providing a greater sphere of executive influence for traditional leadership than that envisioned in the Constitution. This could create a separate system for the regulation of land affairs for nearly 50% of the South African population with decidedly inadequate provision for financial accountability, constitutional guarantees, and democratic mechanisms.

The members of the applicant communities hold their land and exercise their land rights in accordance with customary law. Professor Thandabantu Nhlapo,² who has filed a supporting affidavit in the matter, said: 'One of the key features of living customary law is that land relations are created by and mirror the bonds and relations between people. Another is that access to land is a function of membership at different levels of rural society, for example, membership of the family, lineage, village or wider community'. The CLRA, by vesting ownership at the level of the 'community' and control at the level of the traditional council, undermines the strength of land rights at other levels of society as well as local control and accountability. By taking an individualised

approach to tenure rights, and ignoring the layered rights which vest in members of the family other than the husband and wife, the CLRA weakens the already insecure tenure which some members of the family have. This is in breach of the obligation on the state under section 25(6) and (9) of the Constitution.

In the 1960s, the Makuleke community was forcibly removed from their land to the Nthlaveni area, and placed under the jurisdiction of the Minga Tribal Authority. There is documented evidence that the Minga Tribal Authority and Chief Adolf Minga had actively lobbied the Minister of Native Affairs for this. The Makuleke received their original land in restitution by order of a Land Claims Court on 14 December 1998, but as it had been incorporated into the Kruger National Park, the restitution settlement limited residency. In compensation, the Makuleke were granted rights to the Nthlaveni area.

The CLRA will remove the land from the control of the Makuleke community's democratically constituted communal property association, and place it in the hands of a traditional council. The destruction of land-holding instruments of the local community, and placing control in the hands of a larger institution, would inevitably undermine the tenure security of members of the local community.

The Kalkfontein community comprises two separate sets of community buyers, whose claims of restitution to portions of the Kalkfontein farm were granted in 1994 by the Transvaal Provincial Division. The farm had previously been held in trust for the community in the name of the Minister of Land Affairs, formerly the Minister of Native Affairs, due to a racially discriminatory policy which prevented black communities from owning communal land in their own names. However, it took another *ten years* for the title to be transferred to entities representing the communities.

When the former Kwa-Ndebele homeland was established in 1986, the Kalkfontein community was, against their will, incorporated into a tribal authority with an appointed chief, Daniel Mahlangu. Mahlangu allegedly abused his position of authority – he sold residential plots without community consent and levied illegal 'tribal' taxes. The communities

petitioned for a government inquiry and the resulting Kruger Commission recommended that Mahlangu be removed and the disestablishment of the tribal authority be considered. Mahlangu was removed, but the unwanted tribal authority remained, and a relative, also a Mahlangu, was appointed to replace Daniel as 'acting chief.' Over the years, the Kalkfontein communities have petitioned and litigated for protection of their rights to the land but their pleas have been ignored by various branches of government and opposed by the House of Traditional Leaders. Under the CLRA, the co-purchasers of Kalkfontein farm would, as communal land owners, fall under the jurisdiction of a traditional council comprised of the former tribal authority, with the unelected chief Christopher Mahlangu as member. The Kalkfontein community would once again be denied their right to hold full title, secure rights of use and administration to their land.

The Dixie community living on the Farm Dixie 240KU was placed under the jurisdiction of the Mnisi Tribal Authority under the terms of the Black Authorities Act 68 of 1951. They had no historical association with the Mnisi prior to that event. The farm borders on Kruger National Park, Manyeleti Game Reserve and Sabie Sands Reserve, and is a very valuable piece of real estate. The Mnisi Tribal Authority signed a contract with Curato Developments to build a lodge on the farm with no regard for, consultation with, or compensation to the Dixie community, and before their right to do so was properly established through the Land Claims Courts. The community sought an interdict in terms of section 2 of the Interim Protection of Informal Land Rights Act 31 of 1996 to prevent the development, and when confronted with the possibility of litigation, the investing parties withdrew. However, under the CLRA, the land rights of the Dixie community would be destabilized, with land use and development of the farm potentially coming under the jurisdiction of a traditional council. The Dixie community stands to lose the legitimate right to make their own land use determinations.

1 Henk Smith, 'An overview of the Communal Land Rights Act 11 of 2004' in Aninka Claassens & Ben Cousins, *Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act (2008)*; 39.

2 Professor Nhlapo is Deputy Vice-Chancellor and a Professor of Law at the University of Cape Town. He has held a presidential appointment as a full-time member of the South African Law Commission, in which capacity he specialised in the field of customary law.

Mining and the Plight of Rural Communities

Inequity in the mining industry has its roots in the dispossession of the African population's land. Colonial and apartheid land and mining laws discriminated against black communities by preventing them from participating in mining on the land that they occupied. In the case of land occupied by black communities, the state awarded royalties payable by the mining companies to itself (the state). In the case of 'white' land, there were special measures to promote the interests of the landowners and occupiers. Mining laws under apartheid guaranteed minimum royalties or equity to white land owners and surface occupiers.

The first form of redress undertaken by the democratic government in relation to this legacy of inequity was to divorce mining rights from surface land

occupation and ownership rights. Secondly, in its effort to achieve some shift in the skewed demographics relating to the ownership of the mines, a limited notion of black economic empowerment was introduced.

However, considerations not taken into account in the current scheme included using the ownership and use rights that communities acquire through the restitution process as a highly effective way of enabling those who were dispossessed to exercise their rights in a manner they think best; and the importance of deriving full restitution of past rights and taking up their rightful places as African communities holding a genuine stake in the mining industry. While the placement of the country's mineral wealth in the hands of the State enables the nation



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to benefit from future extractions, it does not compensate for past injustice and plunder.

Examples of past statutory discrimination against black communities and promotion of white interests include the following:

- a) Black people were not allowed to participate in the industry, in that they were prohibited from applying for prospecting and mining permits.
- b) White land owners and tenants (i.e. those who had acquired the occupational ownership rights of the surface) were given legislative backing to participate in mining and shares in the proceeds of mines, whilst black people could not become owners of the land they occupied and did not get benefits from mineral exploitation on their land.
- c) The Development Trust and Land Act of 1936 contained a blanket provision reserving all mineral rights on trust land and black owned land for the Trust and all proceeds went to the trust fund as if it were the private holder of mineral rights.

The new Constitution requires that the substantive and procedural rights of occupying communities have to be recognised. The Land Reform White Paper of 1996 promised consultation and community participation in all decisions concerning tenure reform, sale of communal land and development of communal land.



Pretoria News

The Restitution of Land Rights Act provides for the restoration of rights in land, arguably including mineral rights, to dispossessed communities. However, today, only a fraction of the rural community claims have been finalised. A small number of these involve claims to the mineral rights associated with the land claims.

In 2007, at Polokwane, the ANC resolved that natural resources, including our minerals, water and marine resources, must be used 'in a manner that promotes the sustainability and development of local communities...In this regard, we must continue to strengthen the implementation of the Mineral and Petroleum Resources Development Act (MPRDA), which seeks to realise some of these goals'. However, as seen below, there are problems with this Act.

The stated aim of the Act (MPRDA) is to redress past racial discrimination in respect of access to the mining industry. Unused 'old order' rights (rights awarded under the previous system) including mineral rights where the surface and minerals were not separated, could be converted into 'new order' mining rights within one year of the coming into operation of the Act (i.e. by 1 May 2005). Other old order mining rights (those in use) could be converted into new order mining rights within five years (i.e. by 1 May 2009), and prospecting rights within two years (i.e. by 1 May 2006). Otherwise, these old order rights would be permanently extinguished.

The Minister of Land Affairs, as current owner of communal land and unused old order rights, did not apply on behalf of communities for new mining rights within one year. According to the MPRDA, the mineral ownership rights of communities on this communal land, through the ownership of the Minister, were thereby deemed extinguished. The MPRDA does not provide for a holding mechanism or moratorium on new mining pending the finalisation of land claims or tenure reform and transfer of ownership to communities.

The MPRDA requires notification and consultation with the owner or lawful occupier before new mining commences, and such consent may include compensation for loss of use of the land. But a damages claim will be limited to 'reasonable' compensation or rental.

It does not provide for the affirmative measures afforded to old order landowners.

The MPRDA does not prescribe the procedure for consultation and notice before new mining begins. Communities are not consulted about the feasibility of mining and appropriate conditions to ensure that there is a satisfactory way in which the communities would benefit. In other words, whereas the apartheid regime enabled white land owners to benefit from any minerals to be extracted from their land, in its current form, this law will make this difficult for African communities to achieve.

An amendment bill to the MPRDA proposes that the Minister gets the discretionary power to afford communities participation privileges in new prospecting and mining ventures and when authorising the conversion of old order mining rights. The amendment fails to require that communities be consulted before the Minister sets participation conditions. Consultation is critical to ensure that the local community's needs are met.

Experience tells us that the demands of the affected rural communities include the following:

- the MPRDA be applied in a manner more consistent with section 12 of the MPRDA that requires a comprehensive and effective programme of assistance to historically disadvantaged persons to conduct prospecting or mining operations
- consultation with and consent by the community owners before new mining development happens should be supervised by the state or an independent party delegated by the State and governed by regulations
- state assistance should be available to those communities who give their consent, to negotiate fair agreements and compensation
- community royalties should be made available on application to qualifying communities, and assistance should be provided to make applications to the state to impose community royalties on mines located on community lands
- existing community royalties should be retained (subject to the transitional provisions of the MPRDA and further regulation under the Mineral and Petroleum Resources Royalty Bill (MPRRB))

- all community royalties and their management entities must be managed according to a strict regime of planning, budgeting and reporting under the MPRRB
- any hardship caused by the introduction of the community royalty could be offset by ringfencing the current state royalty or an appropriate adjustment of the state royalty formula.

Allocation of mineral rights should not be allowed to proceed in a manner that exacerbates the existing negative impact of lengthy delays in the resolution of land claims on communities who were illegitimately dispossessed of their land. The empowerment of communities who were the direct victims of apartheid's geographical planning should be the first priority in pursuing black economic empowerment.

The empowerment of communities who were the direct victims of apartheid's geographical planning should be the first priority in pursuing black economic empowerment.

In the face of the financial and technical resources that established mining companies have at their disposal to support the narrow interests of their shareholders, lack of state action results, intentionally or unintentionally, in supporting the interests of the wealthy rather than protecting the interests of the poor. It is therefore essential that due process and adequate support are assured in the election of community representatives, in making decisions and in developing and signing agreements that clearly protect their interests.

Furthermore, rights to access new order mining rights cannot be allowed to be extinguished through oversight or lack of consultation by any official. New order mining law should create enabling mechanisms to achieve outcomes that satisfy the obligation to redress the results of past racial discrimination.

Protecting the Water Rights of the Poor

Five residents of the Phiri Township, Soweto, on behalf of themselves and others similarly situated, challenged the City of Johannesburg's water service delivery policy in Phiri on two bases. The first challenge was to the legality and constitutionality of the City's policy of imposing prepayment water meters on the residents of Phiri. The second challenge was to the City's decision to confine its free basic water supply to the residents of Phiri to 6000 litres per household per month (200 litres per household per day).

The residents were represented by the Centre for Applied Legal Studies (CALs). The LRC represented the Centre on Housing and Evictions (COHRE) who intervened as an *amicus curiae* ('friend of the court') in the case arguing that both policies violated international human rights law on the right to water.

The groundbreaking decision of Judge Tsoka of the Johannesburg High Court illustrates that courts are promoting a vision of transformation in which government policy cannot neglect the basic socio-economic needs of the poor. These basic needs are enshrined in the Constitution, mainly in section 26 and 27. They include rights to adequate housing, to health care services, to sufficient food and water, as well as to social security. This case was the first major test concerning the interpretation of the right to access to 'sufficient water' in section 27(1)(b) of the Constitution.

The court noted that the effect of prepayment meters is automatically to cut off a household's water allocation when the free basic allocation is exceeded and the household has insufficient funds to purchase further water. In the case of the applicants, this meant

that they went without water for the last 15 days of each month. The court further held that the implementation of prepayment meters with an automatic shut-off mechanism violates the right to lawful, reasonable and procedurally fair administrative action protected in section 33 of the Constitution and the Promotion of Administrative Justice Act 2000. Applicants were deprived of basic due process such as the right to notice and to a hearing prior to the cut-off of the water supply.

The court compared the administrative standards and procedures afforded to the residents of Phiri to



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those applicable in the wealthy, historically white areas which obtain water on credit from the City. In contrast to the complete absence of fair procedures afforded to the Phiri residents, residents of wealthier suburbs are entitled to receive notice before any cut-off of water supply and have the opportunity to make the arrangements to settle arrears, including an opportunity to make representations to the City. The court ruled this unfair discrimination on the basis both of geographical area of residence as well as indirect discrimination on the grounds of race. The court also noted that 'South Africa is a patriarchal society' in which most domestic chores are performed by women. In this social context, prepayment of meters discriminated unfairly against women.

The court rejected the City's argument that the prepayment systems had been widely accepted by residents. The court examined the process by which these systems had been introduced and concluded that it had been procedurally unfair, lacking consultation, adequate notice, advice on legal rights, and information provided to the users on available remedies. The court also rejected the City's argument that prepayment meters were beneficial for users in Phiri who could not afford water on credit. The court termed such an attitude as deeply patronising and discriminatory, noting that bad payers cannot be described in terms of colour or geographical area, as the City's policy implied.

The court accordingly declared that the water payment system used in Phiri was unconstitutional and ordered the City to provide the Phiri residents with the option of a metered supply installed at the cost of the City.

The court held that the national water supply regulations (providing for a minimum quantity of potable water of 25 litres per person per day or 6000 litres per household per month) were constitutional. Nevertheless, it held that the standard constituted a 'floor and not a ceiling'. Therefore, Water Services Authorities are obliged to consider both the needs of the residents and available resources in striving to provide more than the bare minimum.

The 25 litres per person per day standard was based on an average household size of 8 persons. The average household size in Phiri is more than 8

persons, as there are many shared connections with informal settlers living in the yards of households. This effectively means that many Phiri residents receive far less (or none) of the 25 litres per day. The court also noted that it takes 10-12 litres of water to flush a toilet in areas of water-borne sanitation and that many residents suffer from HIV/AIDS, therefore requiring extra water. The court accepted expert evidence that 50 litres was required to ensure that the Phiri residents could live in dignity, free from severe threats to their life and health.

The judgement vindicates what activists have long been arguing: that the introduction of prepayment meters, particularly in poor communities, can inhibit the right of access to water as they do not take into account inability to pay, the specific needs of the users or basic standards of administrative justice.

In addition, by carefully assessing the City's Indigency Policy, the court showed that aiming to target the poor by individual means-testing is problematic. The court's remedy, therefore, applied to all the residents of Phiri, not just those whom the city considered indigent. This is highly significant, given that examples from other countries, such as Colombia, show that geographically-based subsidies – particularly where poverty is concentrated, as in townships and informal settlements – can help remedy the under-inclusion that is prevalent in individual means-testing.

The judgment is also noteworthy for the detailed analysis of the lived realities of poor communities in South Africa and for articulating how the intersection of race, gender and HIV-status impacts on poor communities' ability to access the socio-economic rights promised by their Constitution.

In developing the content of the right to water, the judgment draws on the best of both South African jurisprudence and international law to aid its interpretation. In so doing, it illustrates how domestic courts and the international human rights bodies can learn from each other and mutually support global and local endeavours to protect socio-economic rights.

The City of Johannesburg has been granted leave to appeal against the judgment.

Erosions in the NEMA Amendment Bill

An issue growing in prominence in South Africa involves the potential for large-scale degradation of the country's scarce water resources as a result of coal mining. The negative impact that this may have in the near future on the lives and livelihoods of poor communities is considerable.

Key to decision-making to ensure that this does not happen are the provisions of the National Environmental Management Act 107 of 1998 (NEMA), which govern integrated environmental management. Environmental impact assessments (EIAs) are the main regulatory tool under this act, which aims to ensure sustainable development and the prevention of adverse impacts on poor communities and on the environment. The provisions of NEMA governing EIAs are therefore vital to the protection of scarce water resources from mining activities, as well as from a plethora of other industrial activities which impact directly on the health of the LRC's clients.

During the 2007/2008 Parliamentary term, drastic changes to NEMA were proposed which would significantly weaken the protections afforded by this act. The amendments could even encourage transgression of the law. These concerns have led communities and NGOs from all over South Africa to ask the LRC for assistance in opposing the proposed changes to NEMA.

After being circulated for public comment by the Department of Environmental Affairs and Tourism (DEAT) in early 2007, the NEMA Amendment Bill underwent a number of substantial changes. Public comment to the Portfolio Committee on Environmental Affairs and Tourism was allowed in respect of a second version, Bill B36, but the final

version, Bill B36B, which would have the most adverse consequences, was not presented to the public for comment. This version of the Bill raised a host of new concerns, many of which were unsatisfactorily explained in briefings to Parliament by DEAT. Numerous submissions concerning the procedural irregularity of the process were made to Parliament by the LRC on behalf of its clients, resulting in some changes to the text, but many concerns remained. The Bill was then presented for public comment in the provinces at very short notice, limiting the ability of poor communities, who may be most directly affected by environmental degradations from industrial activities, to respond in any meaningful way to the proposed changes.

The key feature of concern in the Bill was the fact that it introduced wide-ranging discretion in decision-making on the part of government officials.

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Previously the requirement of EIAs had been mandatory and included the consideration of alternatives and mitigatory measures to keep impacts to a minimum.

The Bill also proposed to water down the protections in respect of mining EIAs that currently apply under the Mineral Petroleum Resources Development Act 28 of 2002 (MPRDA). The Bill will retain the Minister of Minerals and Energy as the decision-maker in relation to mining and related activities for an interim period and according to a memorandum of understanding which has not been made public. Concerns were raised that this would erode the powers of the provincial authorities to protect the environment where activities (such as the building of roads or waste disposal) are related to mining. Other concerns raised included the fact that there is a potential conflict of interest in retaining the powers of the Minister of Minerals and Energy to this additional, yet undefined, category of activities, as this department's main purpose is to promote mining rather than to protect the environment.

The LRC has engaged in the Parliamentary process by submitting comments to the Portfolio Committee on Environmental Affairs and Tourism on behalf of client

communities and NGOs. In its submissions, the LRC highlighted both constitutional concerns about the content of the proposed legislation, as well as concerns that the procedures for participation in the legislative process had not been properly followed.

The first objection related to a proposal to amend the MPRDA to state that the provisions of NEMA (prior to its amendment) should not apply to the mining EIAs under the MPRDA. This proposed amendment to the MPRDA was undesirable because the NEMA process, in its unamended form, provided for a more independent and legitimate assessment procedure than provided for under the MPRDA. This proposed amendment to the MPRDA was later dropped.

Thereafter, the LRC also made submissions objecting to the watering down of EIA provisions. Changes were later made to the Bill to include public participation as a mandatory requirement, but other provisions central to the protection of the environment still remained discretionary.

It remains to be seen if the provinces will approve a bill which seriously weakens their powers over the next few years. If so, the way may be open to challenge the constitutionality of the new law.

Biowatch & the Costs of Public Interest Litigation

Biowatch South Africa (Biowatch) is a non-profit, public interest NGO, which campaigns for the sustainable use of biodiversity in South Africa. It promotes sustainable agriculture, food sovereignty and security, and social justice. One of the ways in which it advances its work is through oversight of corporations and government bodies whose interests may conflict with the responsible use of South Africa's natural resources.

Genetically modified foods and products have been available commercially in South Africa since 1997. Genetically modified organisms (GMOs) have the potential to benefit farmers, consumers, and indeed the environment but the technology is new and unproven; the products have not been around long enough to conduct proper longitudinal studies or assessment of potential economic, health and environmental risks.

Between 2000 and 2001, Biowatch requested information from the Department of Agriculture (DoA) about the status of GMOs, including information about permits issued for testing of GM products. The response to their initial requests was insufficient and uncooperative, and later requests received no response at all.

In August of 2002, Biowatch served court papers on the Minister of Agriculture, the Registrar of Genetic Resources, and the Executive Council for Genetically Modified Organisms, demanding access to information as guaranteed by the National Environmental Management Act, 107 of 1998, The Genetically Modified Organisms Act of 1997, The Promotion of Access to Information Act of 2000, and the Bill of Rights in the Constitution.



Benny Gool

Several major suppliers of GMO products joined the government respondents in their defense, including Stoneville Pedigree Seed Company and Monsanto. The latter is an American corporation, which supplies GMO seeds and agri-chemicals, and which has produced chemicals used in chemical warfare. These corporations claimed to be interested in protecting confidential documents which might have been covered by Biowatch's requests.

The case was heard in 2004 in the Pretoria High Court and in February of 2005, Acting Justice Dunn ordered

that the majority of the requested information be made available to Biowatch, with the exception of documents, or sections of documents, which were specifically confidential, and documents requested by Biowatch in too broad a manner to be easily identified.

Biowatch was pleased with this result; it had made clear that it did not expect to be granted access to confidential documents, only that it be made aware of which documents were confidential, and to be granted access to the rest. Biowatch had already reached an agreement with Pannar (Pty) Ltd, a local maize seed company, in terms of which that company had agreed to supply copies of the documents it had provided to the DoA with the exception of those covered by corporate confidentiality. Biowatch therefore considered the judgment to be a substantial victory.

However, Dunn AJ instructed that Biowatch pay Monsanto's costs, and that the government respondents need not pay Biowatch's costs as requested. This was a devastating blow to Biowatch, which, as a small, non-profit organization cannot bear the burden of the corporation's fees. Apart from being contrary to customary practice (which is to award cost orders to the successful party and against the unsuccessful party), Biowatch and other NGOs were concerned that the costs orders set a dangerous precedent, which might discourage public interest litigation. It was feared that organizations would be less willing to use the law to defend their rights and the rights of others if they believed that they might be punished with a costs order causing insolvency if they are unsuccessful. Furthermore, the order was contrary to an international movement to excuse entities which come to court in the public interest from cost orders, even when they are unsuccessful.

Monsanto maintains that it was in fact substantially successful, because it prevented the release of confidential information to Biowatch. However, Biowatch contends that it did not seek access to information covered by confidentiality; the application was initially against the government respondents who had refused to allow access to information, and they were successful in this dispute. Monsanto had joined the proceedings voluntarily.

The respondents argued that Biowatch's suit was frivolous, because Biowatch did not exhaust

non-litigious, internal appeal mechanisms of the DoA before serving court papers. Dunn AJ agreed that Biowatch had not exhausted these mechanisms, but upheld Biowatch's actions and did not find the case inappropriate.

Instead, Dunn AJ justified the cost order on the basis that some of Biowatch's requests for information were too broad, caused an undue burden on the court and required the respondents to sift through information and produce a more specific list of documents. Biowatch alleges that this criticism is misplaced – it is an almost unavoidable feature of access to information litigation that an applicant will not always know in advance which documents might be useful, or which relevant documents even exist; it simply could not have provided a more specific list without the cooperation of the Registrar, the Executive Council, or the corporations themselves.

At this stage, the LRC stepped in to represent Biowatch in an appeal against the costs order. This is unusual, as costs orders are considered to be a discretionary power of the judge hearing the original matter, and are not usually taken on appeal where the judgment itself is not in question.

In April 2007, the appeal was heard by the Pretoria High Court. The majority judgment (Mynhardt and Molopo-Sethosa JJ) was handed down in November. It not only dismissed the costs order appeal, but also ordered Biowatch to pay the additional legal costs of the appeal; a further devastating blow for the NGO. However a comprehensive minority judgment was handed down by Poswa J in May 2008, recommending that the costs orders against Biowatch should be overturned, that the government respondents be ordered to pay Biowatch's legal costs, and that no cost orders be upheld in favor of Monsanto. This minority judgment provides a basis for further appeal.

Biowatch and the LRC applied to the Constitutional Court and the Supreme Court of Appeal for leave to appeal the majority judgment of the Pretoria High Court. The Constitutional Court has refused leave to appeal directly, and the decision of the Supreme Court of Appeal is awaited as at the time of writing.

Refugees and Asylum Seekers Camps – A Trip to Tanzania

From 30 October to 3 November 2006, the Legal & Human Rights Centre in Tanzania hosted a Southern African Legal Assistance Network (SALAN) delegation, including two LRC representatives. The purpose of the trip was to establish conditions in refugee camps in Tanzania and to hold a workshop to discuss findings and proposals to improve refugee rights. Tanzania had about 330 000 refugees at the time.

The three camps visited were Nyarugusu, Muyovosi and Mtabila. They were all situated near Lake Tanganyika but at a considerable distance from the nearest large town. Nyarugusu was established in 1996 and caters for asylum seekers from the Democratic Republic of Congo (DRC). The camp had about 53 000 Congolese nationals at the time of the visit. Generally speaking, the structures in the camp were adequate and well-spaced in a fairly thickly wooded area, but regrettably, water was only available at particular points.

LRC attorney William Kerfoot was one of the delegates from the LRC: 'Bitterness and concern about the situation in the DRC in 2006 was evident in that no one I spoke to in the camp said he or she would ever return.' Despite the presence in the camps of the Office of the UN High Commissioner for Refugees (UNHCR), the World Health Organization, the United Nations Children's Fund, Red Cross, World Vision, German Technical Services, CARE International and the Tanzania Water and Environmental Sanitation, there were widespread complaints about health, insufficient food and educational services. Teenagers were particularly aggrieved about the fact that payment was required for secondary education which prejudiced poor

children and orphans. Women complained about being abandoned by the fathers of their children, and many children were concerned about their inability to find out what had happened to their parents and whether they were alive or dead.

Very little time was spent in Muyovosi camp, also established in 1996, which caters for Rwandese refugees. It is situated very near to Mtabila, established in 1974, which caters for refugees from Burundi.

Mtabila is exceptionally well set-up with fine buildings, small businesses, farming operations and sports facilities. Many of the refugees there said they were simply waiting to buy appliances to help them with their businesses before returning to Burundi, which they hoped to do fairly shortly.

Interestingly, in all three camps there were local councils elected by the communities to settle disputes both on civil matters and petty offences. Most councils applied customary law from their countries of origin. Serious crimes were dealt with by the Tanzanian authorities.

An unfortunate feature of gender inequality was that female refugees who married Tanzanians were allowed to leave the camps to live with their spouses, but male refugees who married Tanzanian women had to bring their wives to the camps. In principle, refugees with over seven years in Tanzania could apply for Tanzanian citizenship but this rarely happened and citizenship was rarely granted. Again, there was a distinction drawn between children of a Tanzanian father and refugee mother and those born to Tanzanian mothers and refugee fathers. The former could immediately obtain Tanzanian citizenship where the others had to wait until they were 18 before deciding on nationality.



Benny Gool

A representative from the Tanzanian Ministry of Home Affairs said that Tanzania lacked the resources to achieve integration of refugees on any significant scale. The policy of restricting asylum seekers and refugees to the camps meant that Tanzania could not benefit from the skills of well-qualified refugees and that the only outlet for refugees was teaching in the camps.

Leonard Elias of the Legal & Human Rights Centre recorded a set of recommendations drawn up by SALAN after the tour, which included the following:

- Women should be included in all decision-making committees set-up to settle disputes in the camps.
- Relevant stakeholders should introduce programmes to address challenges that former child soldiers are facing within the camps.
- Refugee orphans should be provided with resources to enable them to attend secondary and tertiary education.
- Refugees should be given more information, especially about their rights on repatriation.

Following the tour of the camps, a seminar was held at which the importance of creating a network for all parties dealing with refugee rights was stressed. Presentations were given on the work of SALAN, the UNHCR's role, how to combat xenophobia and a summary of the group's observations in the camps. It was resolved that all civil society organisations working in the field be co-ordinated by the Centre For the Study of Forced Migration at the University of Dar-es-Salaam, with the goal of promoting refugee rights and reform of the system. A bi-annual meeting of these organisations was proposed.

Dr Khoti Kamanga of the University of Dar es Salaam highlighted the irony of xenophobia in Tanzania, a nation of migrants, as he stressed the importance of the positive contributions to be gained from refugees by the host country. He pointed out that ignorance and lack of information were major causes of xenophobia and emphasised the need for awareness campaigns to make xenophobic discrimination socially unacceptable.

Working in Southern Africa with SALAN

The Southern African Legal Assistance Network (SALAN) was founded in 1994 to encourage the exchange of information and collaborative efforts that promote human rights in Southern African countries. Membership currently consists of eleven non-profit legal organizations from the Southern African Development Community Member States that advocate for the rights of the poor and the marginalized. These are: LRC (South Africa), Black Sash (South Africa), Ditshwanelo (Botswana), Legal Assistance Centre (Namibia), Legal Resources Foundation (Zambia), Legal Resources Foundation (Zimbabwe), Legal Mocambique Dos Direitos Humanos (Mocambique), Malawi Centre for Advice, Research & Education on Rights (Malawi), Zambia Civic Education Association (Zambia), Zanzibar Legal Services Centre (Zanzibar), and Legal and Human Rights Centre (Tanzania). The LRC was one of the founding members of SALAN.

In March 2001, the Canadian Bar Association (CBA), together with the LRC, held a workshop in Windhoek, Namibia on Gender Equality in Family Law in the Southern African Region. After this workshop, it was decided that the LRC would start a pilot project on African customary law with Community Legal Resource & Advice Centre (CLARC) in Lesotho as a partner.

The long-term objective of the project is to ensure the development of African customary law in a manner that is consistent with women's needs within their countries in Africa. It is well-known that all the countries on our continent need to deal with customary law issues and that women suffer particularly under discriminatory customary practices. Around the time the project was conceived, many

human rights groups throughout our region were either grappling with these issues or planning to embark on projects dealing with them. South Africa had also completed a consultative process that resulted in the 'Recognition of Customary Marriages Act'. It was hoped that this pilot project would enable other countries in the region to use some of the successes of the South African process but, as importantly, to learn from the mistakes made in South Africa.

The project consisted of three phases:

- holding a workshop in Lesotho with all relevant stake-holders to identify the customary law issues which need to be addressed in the region
- setting up a fully operative gender desk in Lesotho which will continue the work on customary law

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- using the Lesotho project as a precedent for other similar projects in the region. The SALAN network presented a perfect opportunity to develop customary law in a manner that is consistent with women's needs in the region.

The LRC and CLRAC started the first phase of the project jointly. The aim of this phase was to explore the similarities and differences in the Lesotho and South African customary law system, prioritise the areas of law to be targeted and identify strategies to ensure that customary law was practised in a non-discriminatory manner. This pilot was then to be replicated in other countries.

The next phase included Zambia and Namibia. During January 2004, a meeting was held in Lusaka, Zambia to plan the next conference. The participants identified the most pressing legal issues for women living under customary law in the sub-region and worked out a common strategy to address them.

Overall, the project provided the participants with an opportunity to share litigation and advocacy skills with one another and to network with regional organizations in other countries. Most importantly, however, it provided an opportunity to point out the loopholes in dealing with issues of equality in customary law.

One of the outcomes of the project was a loose-leaf binder publication, *Women's Rights in African Customary Law*, published by the LRC, the CBA and the Canadian International Development Agency. Part 1 of the publication deals with an overview of women's rights in African customary law. It opens internationally and regionally by focusing on the Convention on the Elimination of All Forms of Discrimination against Women and the African Charter on Human and People's Rights. It then gives overviews of individual countries, including Botswana, Malawi, Mozambique, Namibia, Tanzania, Uganda, Zambia and Zimbabwe. Part 2 of the publication provides detailed country-by-country analyses, with discussions of constitutional human rights provisions, international human rights conventions, legal capacity of women, marriage, divorce, maintenance, proprietary rights, succession and inheritance.

The next two workshops were in Malawi (focusing on Zimbabwe and Malawi) and Dar Es Salaam (Zanzibar and Tanzania) during 2008. The outcomes of these and other phases will continue to be added to the loose-leaf publication.



THE FUTURE OF 'TRANSFORMATIVE CONSTITUTIONALISM' IN SOUTH AFRICA



Annette Reed

Ten years ago in an article published in the *South African Journal on Human Rights*, Professor Karl Klare – a leading intellectual light in the critical legal studies movement – described the South African Constitution as a transformative document. By ‘transformative constitutionalism’ he meant: ‘a long-term project of constitutional enactment, interpretation, and enforce-

ment committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.’

He went on to argue the South African Constitution included many features of a social democratic constitution with its commitment to substantive equality, restitution and redistribution and socio-economic rights. However, it also transcends this conception by including features such as the promotion of diversity, equality on grounds such as gender and sexual orientation, environmental justice, participatory governance and holding private actors accountable for human rights violations. The Chief Justice, Pius Langa, in a lecture at Stellenbosch Law Faculty described 'transformative constitutionalism' as 'a permanent ideal' which embraces an openness to the other, a commitment to inclusive, democratic dialogue, and a sharing of the responsibility of transformation between all three branches of government in partnership with a vibrant, independent civil society.

The notion of 'transformative constitutionalism' has found a deep resonance in the jurisprudence of the courts, academic literature and civil society campaigns for social justice. As our constitutional institutions are feeling the strain of recent developments, it is fitting to reflect on some of the challenges which face the realisation of this transformative vision of the Constitution. I highlight three developments which represent the antithesis of the transformative constitutional project sketched above, but conclude with what I consider to be three signs of hope for the continued viability of this project.

The first challenge concerns the increasing signs of the emergence of a strand of narrow, patriarchal nationalist identity with its characteristic penchant for the exclusion and marginalisation of 'the other'. This was most graphically manifested in the explosion of xenophobic violence earlier this year. However, its insidious presence can also be detected in the reactions of the Labour Minister and other leaders to the court's ruling concerning inclusion of South Africa citizens of Chinese descent in empowerment legislation, the daily 'bureaucratic violence' dished out to refugees, asylum-seekers and other categories of non-nationals in their attempts to gain access to basic services from government departments, the endemic violence against women and AIDS activists, and the horrific conditions in which prisoners are incarcerated in many prisons in South Africa. These phenomena are the antithesis of

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a constitutional project which values human dignity, interdependence and a diverse society.

Secondly, the statistics continue to tell the tale of increased socio-economic disparities in wealth. The on-going systemic inequality and deep conditions of poverty afflicting a large proportion of the population risks making the constitutional commitment to social justice and an improvement in people's quality of life seem hollow.

Finally, there are the subtle undermining and the not-so-subtle attacks on the foundation of a constitutional state – the rule of law and an independent judiciary. The subtle undermining refers to the trend which has emerged of many government departments failing to respect court orders. This has a long history stretching back to provincial governments' failure to respect orders of the courts to ensure that social grants are paid timeously and are not unlawfully terminated. The courts have struggled valiantly to deal with this phenomenon through a range of mechanisms such as maintaining judicial supervision over mandatory orders against government departments, making awards of constitutional damages against the relevant departments, citing government officials for contempt of court, and even threatening to make government officials and the heads of department responsible for paying the costs of cases out of their own pockets.

This culminated in the Constitutional Court's decision on 2 June 2008 in *Nyathi v MEC for Department of Health Gauteng* in which the provisions of the State Liability Act, which prevent execution of orders against the property of the State, were declared unconstitutional. Parliament was given 12 months to devise new legislation which enables the effective enforcement of court orders. During this case, it was

discovered that there were over 200 court orders which government departments had simply not complied with – some going back a number of years. This resulted in the Constitutional Court undertaking judicial supervision over the settlement of these orders. Writing for the majority of the Court in this case, Judge Madala sounded the following warning:

‘Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts are not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That, in my view, means at the very least that there should be strict compliance with court orders.’

Much has been written about recent overt attacks on the judicial institution in response to the trial of Mr Zuma. There can be no gainsaying the seriousness of these persistent and corrosive attacks, including ones by those who either personally or through their organizations played an important role in drafting the very Constitution they are now actively undermining. There are even some who would have us contemplate the abyss of violent confrontation in support of the political ambitions of one man. Once we start walking down this road, we risk trampling on the commitment we made in stepping back from the abyss in 1994 – to strive to build a transformed society through non-violent processes grounded in respect for our Constitution and the rule of law.

Despite these challenges, there are important signs of hope for the continued viability of the project of transformative constitutionalism in South Africa. Widely respected members of the ruling party have made their voices heard in response to these challenges. Consider for example the role of those who have championed women’s rights, exposed corruption in the arms’ deal, promoted the rights of people living with HIV/AIDS, and mobilised support to defend the Constitution. There have also been members of other parties and intellectuals who have taken public stands

of integrity and principle on these issues. Moreover, a cross-section of civil society organizations have mobilised on a massive scale to provide material support and stand up for the rights of those facing xenophobic attacks and discrimination on the grounds of their nationality and status in South Africa. A number of NGOs and social movements continue working tirelessly to defend the rights of women, people living with HIV/AIDS, and to promote sustainable development and socio-economic rights. This civil society activism enables a participatory model of democracy which our Constitution values and plays a vital role in assisting people to know and defend their constitutional rights.

Finally, the judiciary under the leadership of both its former and current Chief Justices plays a significant role in keeping the ideal of transformative constitutionalism alive in South Africa. South African jurisprudence is lauded internationally for illustrating how courts can protect the rights of disadvantaged and marginalised groups, for promoting human dignity, freedom, equality and diversity as central human rights, and for enforcing socio-economic rights.

While the courts’ jurisprudence should not be beyond critique, this is very different from the gratuitous attacks on the judicial institution and leadership we have witnessed in response to the litigation surrounding the Jacob Zuma trial. These attacks amount to no more than the thinly-veiled proposition that the rule of law should not apply to a person who is politically popular and who is being promoted as the next leader of the country. This makes a mockery of the basic principle of equality of all before the law. It is laudable that the Constitutional Court has responded with integrity, courage and transparency in defending the judicial institution against attempts to interfere with its independence and functioning.

If transformative constitutionalism is to survive and thrive in South Africa it is vital that all in South Africa assume the responsibility of protecting and promoting its fundamental tenets – respect for the rule of law and the independence of the judiciary, the eradication of poverty and inequality, and the building of a diverse, open and non-violent society.

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Comments on the Independence of the Judiciary

The independence of the judiciary is an essential component of democratic government. There should be no doubt about this. It is spelt out in our Constitution, which gives effect to internationally accepted principles, which have been applied in judgments of the Constitutional Court.

The international standards, endorsed by resolutions of the General Assembly of the United Nations in 1985, include two principles entrenched and elaborated upon in our own Constitution:

1 The independence of the judiciary shall be guaranteed by the state and enshrined in the Constitution of the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2 The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

Consistently with the General Assembly resolution, section 165 of our Constitution provides:

The judicial authority of the Republic vests in the Courts.

1 The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.

2 No person or organ of state may interfere with the functioning of the courts.

3 Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

4 An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

The Constitution is explicit on these issues –

Firstly, judicial authority vests in the courts. Not in the government, not in any political party, not in any trade union, not in any organ of civil society, and not in any disgruntled litigant.

Secondly, that authority must be exercised by the courts in accordance with the law. Not in accordance with the dictates of the government or any political party, trade union, organ of civil society, or litigant.

Thirdly, the law must be applied impartially and without fear, favour or prejudice. This means that the law must be applied equally, irrespective of who the litigants are; and when the law requires this to be done, courts must rule against the government and powerful figures in society.

Fourthly, there must be no attempt to interfere with the decision of a case. This has long been considered one of the core principles of judicial independence. The Constitutional Court has dealt with this on two occasions, first, in 1998 and then again in 2002. On both occasions the Court cited with approval a description of this core principle of judicial independence given by Chief Justice Dickson, a highly respected former Chief Justice of Canada:

Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.



It is this core of judicial independence that is of particular relevance to us. In the light of the clear wording of the Constitution, and these judgments of the Constitutional Court, no one should have been in any doubt about what the Constitution requires. Yet judges of the Constitutional Court have been pilloried for reporting to the Judicial Service Commission (JSC) a judge said to have attempted to interfere with the way judges of that court should make their decision in cases concerning the President of the African National Congress. Somehow that has been wrenched from its content and context to be made the basis of an allegation that the judges of the Constitutional Court are prejudiced against the ANC and its President. This, despite the fact that the public statement of the Constitutional Court judges stressed that there was no suggestion that any of the litigants – and that included the President of the ANC – was aware of or instigated this action.

Building on this allegation against the judges of the Constitutional Court there have been a series of attacks on the Court by some political activists, based

on misinformation and a lack of understanding of the functioning of the courts, which in turn have raised national and international concern. Public statements condemning these attacks have been made by many legal and political commentators, including the General Council of the Bar of South Africa, the Association of Law Societies of South Africa, the Southern African Law Deans Association, and the Council of the Society of Law Teachers of Southern Africa.

A more reasoned and temperate statement about these issues was made by the ANC's Deputy President in the ANC's weekly newsletter, ANC Today. I take this to be the official position of the ANC on this issue to which I wish to respond. After making the point that the ANC is entitled to show support for its leader, the Deputy President goes on to say:

The ANC's position on the case brought against Jacob Zuma is informed by the very same principles that underpin our democracy, and by the need to build a society founded on a democratic constitution, in which there is an independent, impartial and fair judiciary that safeguards the rights and interest of all people. This remains an ongoing challenge. While we have put in place the fundamental laws and the necessary constitutional provisions for the existence of such a judicial system, there is much that still needs transformation. Matters of composition, representivity, cultural bias, and language remain concerns. As does the crucial question of improving access of the law for the poor and the vulnerable. It is for these reasons that the ANC will consistently strive to uphold and defend the integrity and credibility of the judiciary and other institutions of state. Even if this means publicly raising concerns about members of such institutions who through their own actions undermine the integrity of the bodies in which they serve. It is important to remember that these institutions do not belong to the individuals who serve in them. They belong to the people, and those who currently occupy important positions in such institutions cannot take lightly the responsibility that the people have placed on their shoulders.

There is for instance no contradiction between the need to safeguard the integrity of the Constitutional Court and the right of any individual or organisation to criticize the manner in which the judges of the court conduct themselves. It is important that while there is vibrant public debate on such matters, we should allow the appropriate processes to run their course without any undue external influence. The ANC maintains, for example, that the complaint laid by the Constitutional Court against Cape Judge president John Hlophe should be left to the JSC to deal with.

There are four critical propositions in this statement:

1. An affirmation of the importance of our democratic Constitution and its commitment to an independent, impartial and fair judiciary that safeguards the rights and interests of all people. I welcome this statement and there is no need to dwell on it.

2. There is much in the judicial system that still needs transformation. That may be so, but it has no relevance to the attacks upon the Constitutional Court. None of the 11 Judges of the Constitutional Court held judicial office under apartheid. All were appointed to the Bench after 1994 in accordance with recommendations of the JSC. Only 3 of the 23 members of the JSC are judges: the majority was nominated by parliament and the executive.

Who are the Judges of the Constitutional Court? Eight of the 11 judges are black. Look into their backgrounds and you will see that all of them have strong credentials in the struggle against apartheid and in the struggle for human rights and freedom, and have a deep concern for the crucial question of improving access to the law for the poor and the vulnerable. Those were factors that influenced the JSC in recommending that they be appointed to the office they now hold. If you read their judgments you will see that they have remained true to these concerns.

3. Then there is a commitment that the ANC will strive to uphold and defend the integrity and credibility of the judiciary and other institutions of state. I welcome that commitment. But it is meaningless unless it is implemented.

4. The statement goes on to say that those who currently occupy important positions in our institutions cannot take lightly the responsibility that the people have placed on their shoulders. I agree, and that goes as well for everyone in government and all who exercise political power. Recklessly to undermine the standing and integrity of the highest court in the country for a short-term political gain is a negation of that responsibility.

As far as the courts are concerned, the responsibility placed on the shoulders of the judges is defined in the Constitution. It is to apply the law impartially, without fear, favour or prejudice. I can say without any reservation that this is what the Constitutional Court has always done. This does not mean that everyone must agree with the judgments that are given; it does mean, however, that its judgments bind all persons and organs of state to which they apply.

It is said that any individual and organisation has the right to criticize the manner in which judges of the Constitutional Court conduct themselves. I agree that all judges, including judges of the Constitutional Court, have a duty to conduct themselves in ways befitting their office, and that criticism of judges and their judgments is not in itself inconsistent with judicial independence. However, criticism that amounts to an unwarranted attack upon the integrity of the court, made with the stridency and the intensity we have recently witnessed, is potentially harmful and destructive of our democracy. It is part of an insidious process, which demeans the courts, deters persons of integrity and competence from making themselves available for judicial office, undermines one of the pillars of our democracy, and if allowed to continue, can lead to irreparable harm.

Finally, the ANC's Deputy President stresses the importance of allowing appropriate processes to run their course without undue external influence. That holds good, not only for the proceedings against Judge President Hlophe, but for all cases, including the case against the President of the ANC. The time has come to allow that process to run its course.

Arthur Chaskalson is former Chief Justice of South Africa. This is an edited version of a speech made at the Gordon Institute for Business Science Forum.

Judicial Accountability and Values in South Africa

A constitutional system which gives the final word on the lawfulness of governmental conduct to the courts will inevitably thrust the judges into the political spotlight. Over the past twenty years, many emergent democracies in the developing world have adopted such a model, pioneered in the United States of America more than two hundred years ago. Some have argued that this will lead to a “juristocracy”, where the courts effectively govern society, but nowhere has this truly come to pass. How has this matter been dealt with in South Africa? In an adaptation of a well-known saying, who judges the judges and against what standards? Such questions have become increasingly prominent over the last year or so, and I hope in what follows to offer brief thoughts on these two issues, which impact directly on the practice of law in the public interest.

Those who negotiated our Constitution fifteen years ago were deeply aware of the greatly increased formal authority accorded the Bench as the third branch of government, for judicial review of laws made by Parliament and of executive action. Judgment in such matters is inevitably ‘political’, in the sense that, in law, it finally disposes of or allocates power between competing groups. Of course such decisions about power also occur even in private disputes between an employer and a worker, or between husband and wife, for example, but these are less often perceived to be ‘political’.

The increased prominence given to judicial authority must be balanced by greater public accountability resting on the courts. This is typically achieved through a series of mechanisms well-known to our legal system:

- the process of judging relies on arguments put by independent and skilled counsel, and judges must give reasoned judgments which are reported
- judgments are subjected to critical discussion by fellow judges, practitioners, academics, the media and the general public
- a system of appeal and review exists through which judicial errors may be corrected.

Ultimately, however, transparency is the best means of ensuring judicial accountability. This particular quality is to be found in the mechanism for judicial appointments (radically revamped through the involvement of the Judicial Service Commission (JSC) since 1994), in cases being argued in open court, in informed and critical media publications, public discussion and criticism, and, increasingly, in international scrutiny and forums for judicial collegiality.

Therefore, judges must expect their judgments and their behaviour to be subjected to intense scrutiny and criticism, but critics must be required to respect the office of judge and to act both responsibly and from an informed position. Sections 165(3) and (4) of the Constitution make such respect an obligation resting on us all. Wild rhetoric and destructive invective undermine the integrity of the Constitution.

Secondly, is there a common framework of values or ethics within which our judiciary functions? A superficial glance at the history of the judicial system shows that, until 1994, those appointed to the Bench were almost all drawn from the ranks of advocates at the Bar. This ensured that there was an exclusive definition of ‘judicial ethics’ and practices as being those that were acceptable to the Bar, effectively enshrining the rules of one branch of legal practice.

Many of the best features of the 'rule of law' as understood in Britain provided the foundations of this ethical framework. Of course I am not by this statement advancing any kind of *apologia* for the judicial record under apartheid, I am merely remarking that certain values informed by the best traditions of justice became entrenched among most of the country's advocates.

After the political transition in 1994, we perhaps too easily assumed a common understanding of judicial ethics among people appointed from 'new' quarters, e.g. attorneys, magistrates, academics. I am not arguing that appointments from this diversified pool of lawyers should be stopped. Work on the development of a widely-internalised Code of Conduct on Judicial Ethics is urgently needed. However, the draft code produced by the judiciary several years ago lies shipwrecked on the desk of the Minister of Justice, a casualty of the raging dispute about the 'judiciary bills' of 2004/06.

In pursuit of accountability and ethical conduct, how should judicial misconduct be dealt with? On a separation of powers basis, there are strong arguments for the judiciary (or, more widely, lawyers) to resolve such questions. Thus section 178(5) of the Constitution prescribes that those members of the JSC who are party politicians do not consider complaints about judicial conduct. A critical element of judicial independence is security of tenure, so it is proper that the grounds for impeachment (in section 177(1)(a)) are very seriously couched, but what is to be done about judicial misbehaviour short of such misconduct? Draft proposals on process in such

circumstances exist, but they too have fallen victim to the fate of the various 'judiciary bills'.

At the same time, the JSC has not acted in such matters sufficiently clearly and decisively, so as to set the appropriate tone and to provide unambiguous guidance to judicial officers about what is unacceptable conduct, both on and off the Bench. For example, the decision of the majority in the JSC in October 2007 not to proceed with a full inquiry into the several complaints against Judge President John Hlophe was inexplicable and a great disappointment to many. It served to divide the legal profession largely along racial lines and opened the door to those who want to limit the judiciary's authority as a regulator of public power, to capitalise through opportunistic attacks on the judiciary and courts more generally.

I have no doubt that these serious challenges demand urgent remedial action from both Parliament and the leadership of the judiciary. As mentioned at the outset, a higher political profile for the courts and lawyers brings with it added responsibilities, among them clear, honest and decisive leadership throughout the legal profession. Events in the next few years will determine whether our constitutional democracy will thrive, survive or stagnate, and lawyers must be active participants in this continuing struggle, even if in their own selfish interests.

Professor Hugh Corder is Dean of Law at the University of Cape Town



Annette Reed

APPROVAL OF THE FINANCIAL STATEMENTS

The National Director, after consultation with the Executive Committee, is responsible for monitoring the preparation and integrity of the financial statements and related information in the annual report.

The financial statements are prepared in accordance with the stated accounting policies and incorporate responsible disclosure in line with the accounting philosophy of the Legal Resources Centre. The financial statements are based on appropriate stated accounting policies consistently applied, except where otherwise stated, and supported by reasonable and prudent judgements and estimates.

The National Director and Executive Committee are satisfied that the Legal Resources Centre will continue as a going concern in the year ahead. For this reason, the financial statements have been prepared on a going concern basis.

The Legal Resources Centre is registered as a non-profit organisation in terms of the Non-profit Organisations Act No. 71 of 1997 (NPO No. 0023-004 NPO); and the legal Resources Centre has also been approved by the Commissioner of the South African Revenue Services (SARS) as a tax-exempt Public Benefit Organisation for purposes of Section 10 (1) (cN) as read with Section 30; and has been further approved by the Commissioner for the purposes of Section 18A of the Income Tax Act (PBO reference number 930003292).

The financial statements for the year ended 31 March 2008 set out on pages 3 – 14 were approved by the Executive Committee on 10 October 2008 and signed by the National Director.

The image shows two handwritten signatures in black ink. The signature on the left is stylized and appears to be 'M. J. ...'. The signature on the right is more legible and appears to be 'J. ...'.

REPORT OF THE INDEPENDENT AUDITORS

To the Executive Committee

LEGAL RESOURCES CENTRE

Report on the financial statements

We have audited the accompanying financial statements of the Legal Resources Centre, which comprise, the balance sheet as at 31 March 2008, and the income statement, statement of changes in equity for then ended, and a summary of significant accounting policies and other explanatory notes set out on pages 3 to 14.

Executive committee's responsibility for the financial statements

The executive committee is responsible for the preparation and the fair presentation of these financial statements in accordance with their accounting policies. This responsibility includes; designing, implementing and maintaining internal control relevant to the preparation and fair presentation of financial statements that are free from material misstatement, whether due to fraud or error; selecting and applying appropriate accounting policies; and making accounting estimates that are reasonable in the circumstances.

Auditor's responsibility

Our responsibility is to express an opinion on these financial statements based on our audit. We conducted our audit in accordance with International Standards on Auditing. These stands require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statement. The procedures selected depend on the auditor's judgment, including the assessment of the risk of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal controls relevant to the entity's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity's internal control.

An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by management, as well as evaluating the overall presentation of the financial statements.

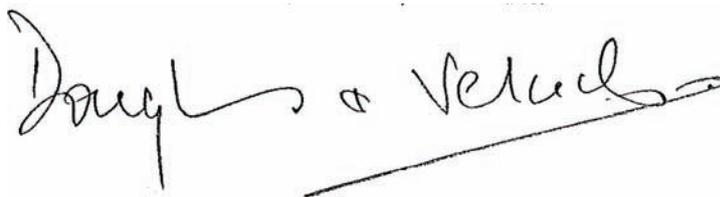
We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Unqualified Opinion

In our opinion, these financial statements fairly present, in all material respects, the financial position of the Legal Resources Centre as at 31 March 2008, and of its financial performance for the year then ended in accordance with its accounting policies.

Emphasis of matter

The Centre needs ongoing donor support if it is to continue operations. These financial statements have been prepared on the basis of accounting practices applicable to a going concern, which assumes that the Centre will generate sufficient funds by way of grants from Legal Resources Trust to continue funding its activities in the ensuing year. Accordingly they do not include any adjustments, relating to the recoverability and classification of assets or to the amounts and classification of liabilities, that would be necessary if the Centre were unable to continue as a going concern.



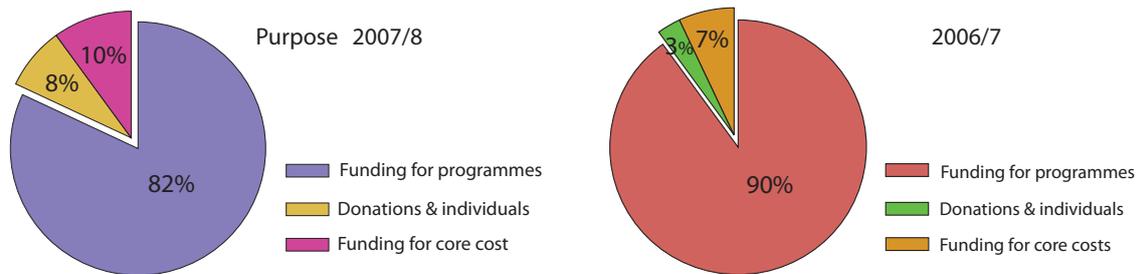
Douglas & Velcich
Chartered Accountants (S.A.)
Registered Accountants and Auditors
Johannesburg

Financial Director's Report

Income

The LRC has built up its profile, systems and procedures to be a mature civil society organisation in South Africa. A high proportion (over 90%) of the income received by the organisation is for programmes and a relatively small proportion (10%) covers core costs.

Income Received

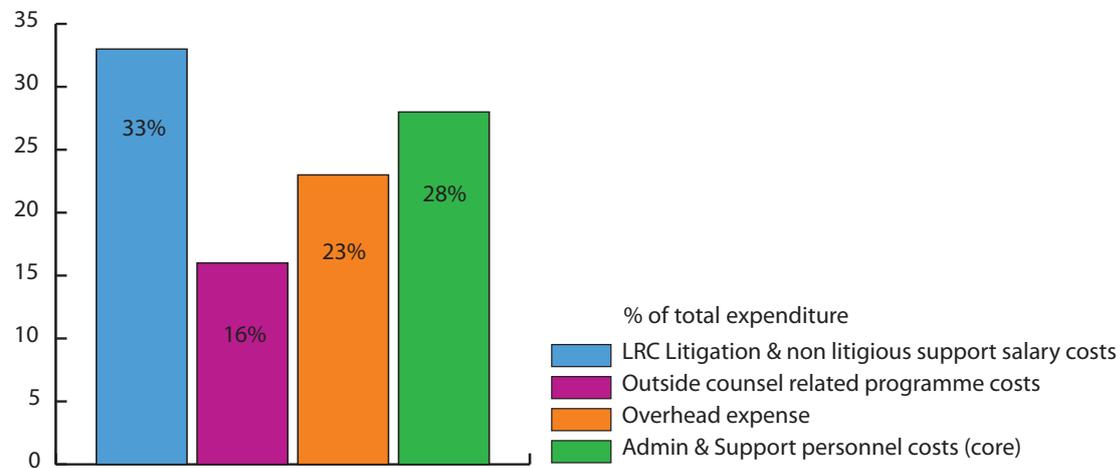


Salaries and contributions

As is reflected in the table above, 82 % of funding is for programmes. The LRC is a law firm that delivers legal services and, for this purpose, retains a professional staff complement. The bulk of the staff costs are related to the provision of litigation and non litigious advice which is delivered by these staff members. As a result, "salaries" constitute a very high portion of the operating expenditure (61%). Over half (54%) of this is for programme costs. The remainder (46%) is for core costs, i.e. core costs that are connected to salaries (28% of total expenditure).

Resources allocation

Resource utilised



As can be seen from the above, the LRC's overhead expenses at 23% are managed prudently and maintained within the acceptable range in the developmental sector.

The LRC constantly strives to improve its systems, policies and procedures. In the period under review, the LRC has designed and implemented the following systems:

- Case Management System
- Grant Management System
- Asset Management System, and
- Centralised Creditors System.

We furthermore have adhered to all the contractual stipulations and obligations emitting from the funders agreements.

On staff issues, we have finalised the restructuring process in this financial period and have streamlined the operations of the organisation.

Conclusion

At present, the LRC generates between R20 million and R25 million per annum in donor income, a demanding target. Any significant shift in donor sentiment and the current global economic meltdown could place the organisation under enormous financial pressure.

In addition, the LRT has reserves which were valued at approximately R50 million at the end of FY2007/8. The reserves have been eroded in recent years as a result of shortfalls between donor income and expenditure which necessitated drawing down from the reserves to make up the deficits. Unlike most other NGOs, it is critical for the organisation to have significant reserves in place, in order to be in a position to attract and retain its staff lawyers of the calibre necessary for the LRC to remain the country's foremost human rights legal practice.

There remains a great need for the LRT to increase its current reserve fund and to investigate and develop an appropriate funding model which will yield a reliable source of basic operating income.

LEGAL RESOURCE CENTRE BALANCE SHEET AT 31 MARCH 2008 (ABRIDGED)

	2008	2007	2006
	R	R	R
ASSETS			
Non current assets	467 657	683,553	752,662
Tangible assets	467,657	683,553	752,652
Current assets	2,455,834	2,043,497	1,620,953
Trade and other receivables	1,193,411	845,259	430,543
Accrued income – cost recovery	-	497,538	556,922
Amount due from – Legal Resources Trust	340,811		
Cash and cash equivalents	252,163	8,271	157,968
Client trust bank accounts	669,449	692,429	475,520
Total Assets	2,923,491	2,727,050	2,373,605
LIABILITIES			
Non-current liabilities	-	-	-
Accumulated funds	-	-	-
Current Liabilities	2,923,491	2,727,050	2,373,605
Trade and other payables	1,541,699	607,655	484,934
Provisions	712,343	721,221	821,022
Client trust funds	669,449	692,429	475,520
Amount due to – Legal Resources Trust	-	705,745	592,128
Total reserves and liabilities	2,923,491	2,727,050	2,373,605

INCOME STATEMENT FOR THE YEAR ENDED 31 MARCH 2008

	2008	2007	2006
	R	R	R
INCOME	23,961,691	26,889,899	27,099,261
Cost recovery	2,061,071	4,261,766	3,743,983
Distribution from Legal Resources Trust	21,668,562	21,164,583	22,835,255
Sundry income	231,063	1,438,296	506,402
Interest Received	995	25,254	13,621
OPERATING EXPENDITURE	23,961,691	26,889,899	27,099,261
Salaries and contributions	14,696,074	15,788,788	16,427,538
Office Expenses	5,537,313	5,731,474	5,999,906
Administrative costs	799,361	870,472	1,234,813
Books and periodicals	438,815	433,316	438,355
Computer expenses	340,480	425,367	390,362
Depreciation	505,709	264,118	274,826
Lease rentals on operating lease	1,849,063	1,663,355	1,406,430
Printing and stationery	215,448	320,304	293,960
Temporary staff	116,691	62,011	108,054
Telephone and fax	462,116	574,122	679,851
Travel – local	809,630	1,118,409	1,173,255
Project expenses	3,728,304	5,369,637	4,671,817
DEFICIT FOR THE YEAR	-	-	-

LEGAL RESOURCES TRUST

TRUSTEES REPORT FOR THE YEAR ENDED 31 MARCH 2008

The trustees have pleasure in presenting their report on the activities of the Trust for the year ended 31 March 2008

NATURE OF ACTIVITIES

The Legal Resources Trust has oversight and fiduciary responsibility for the Legal Resources Centre so as to enable the Legal Resources Centre to provide free legal services in the public interest to poor and vulnerable South Africans.

FINANCIAL RESULTS

The results for the year under review are set out in the attached financial statements.

STATEMENT OF RESPONSIBILITY

The trustees are responsible for the maintenance of adequate accounting records and the preparation and integrity of the financial statements and related information. The auditors are responsible to report on the fair presentation of the financial statements.

The trustees are also responsible for the Trust's systems of internal control. These are designed to provide reasonable, but no absolute assurance as to the reliability of the financial statements, and to adequately safeguard, verify and maintain accountability of assets, and to prevent and detect misstatement and loss. Nothing has come to the attention of the trustees to indicate that any material breakdown in the functioning of these controls, procedures and systems has occurred during the year under review.

The financial statements have been prepared on the going concern basis, since the trustees have every reason to believe that the trust has adequate resources in place to continue operations for the foreseeable future.

TRUSTEES

Jody Kollapen (Chairperson)

Janet Love (National director – Ex-officio trustee)

The Honorable Mr Justice Lee Bozalek

The Honorable Mr Justice Arthur Chaskalson

University Professor Harvey Dale

The Honorable Mr Justice Yusuf Ebrahim

Professor Michael Katz

Raisaka Masebelanga

Sibongile Mkhabela

The Honorable Mr Justice Dunstan Mlambo

The Honorable Mr Justice Lex Mpati

The Honorable Mr Justice Mohammed Navsa

Thandi Orleyn

Richard Rosenthal

Resignations during the year

Derric Reid

Professor Franklin Sonn

LEGAL RESOURCES TRUST

BALANCE SHEET AS AT 31 MARCH 2008 (ABRIDGED)

	2008	2007	2006
	R	R	R
ASSETS	26,590,492	29,093,025	28,994,793
Non-Current assets	24,772,134	27,253,152	26,730,808
Tangible assets	1,268,105	1,328,000	595,717
Investments	23,504,029	25,925,152	26,135,091
Current Assets	1,818,358	1,839,873	2,263,986
Accrued grant income	380,000	587,662	1,639,019
Amount due from Legal Resources Centre	-	705,745	592,128
Cash and cash equivalents	1,438,358	546,466	32,838
TOTAL ASSETS	26,590,492	29,093,025	28,994,793
RESERVES AND LIABILITIES	26,590,492	29,093,025	28,994,793
Equity and reserves	24,160,481	26,155,131	27,162,222
Initial trust capital	250	250	250
Revaluation reserve	1,140,711	1,197,678	462,467
FNK Scholarship reserve	239,598	239,598	534,373
General reserve	22,779,922	24,717,605	26,165,132
Current Liabilities	2,430,011	2,937,894	1,832,571
Deferred grant income	1,845,644	2,886,844	1,742,571
Amount due to Legal Resources Centre	340,811	-	-
LEAP creditor	243,556	51,050	90,000
TOTAL RESERVES AND LIABILITIES	26,590,492	29,093,025	28,994,793

INCOME STATEMENT FOR THE YEAR ENDED 31 MARCH 2008

	2008	2007	2006
	R	R	R
Income	21,402,726	19,632,337	20,979,333
Grants and donations	20,175,583	14 881,001	15,181,757
Divided revenue	502,377	377,721	296,977
Fair value adjustment on investments	-	2,623,153	3,913,207
Interest received	724,766	983,877	1,227,840
Gains on disposal of investments	-	765,585	359,542
Expenditure	1,728,814	227,823	325,468
Investment managing fees (Investec)	165,436	161,045	119,292
Audit fees	56,058	-	90,000
- current year	56,058	-	90,000
Bank charges	35,778	46,083	14,404
Loss on disposal of investments	1,344,974	-	-
Depreciation	59,895	20,695	20,695
Exchange loss	-	-	81,077
Traveling and accommodation – trustees	66,673	-	-
Net income for the year	19,673,912	19,404,514	20,653,865
Distribution to the Legal Resources Centre	21,668,562	21,164,583	22,835,255
(Deficit) for the year	(1,994,650)	(1,760,069)	(2,181,390)
Net transfer from reserves	56,967	312,542	3,810,905
Balance at beginning of the year	24,717,605	26,165,132	24,535,617
	22,779,922	24,717,605	26,165,132

DETAILED SCHEDULE OF GRANT AND DONATION INCOME FOR THE YEAR ENDED 31 MARCH 2008

	2008	2007
	R	R
Foreign funders	9,666,490	13,315,598
The Atlantic Philanthropies	2,067,073	3,959,598
Banyan Tree	-	247,313
British High Commission	704,578	689,526
Comic Relief	1,451,217	1,300,245
CS Mott Foundation	-	577,393
DANCED / Danida – Environmental Justice Project	(176,817)	4,267
Evangelische Entwicklungsdienst	2,046,977	841,817
Embassy of Finland	930,000	-
Embassy of Finland	-	794,750
Farm Africa	101,887	125,248
The Ford Foundation	303,254	795,862
Gatsby Charitable Foundation – received	-	211,687
Hilden Foundation	67,363	-
ICJ – Sweden	-	1,511,643
Kaiser Foundation	63,800	-
Mallinicks Inc. Trust	500,000	-
Norwegian Centre for Human Rights (NCHR)	99,600	-
Norwegian Centre for Human Rights (NCHR)	131,400	-
Open Society Foundation for South Africa	410,301	938,142
Rockefeller Brothers	101,961	250,228
Save the Children – Sweden	268,750	440,125
Sigrid Rausing Trust	595,146	627,609
Local funders	10,509,093	1,565,403
Foundation for Human Rights	-	715,000
H J Baker	23,904	68,962
Justice A Chaskalson	16,313	-
P T French	22,284	41,221
Michael Mones Trust	-	40,000
Dr N H Motlana	18,000	18,000
NBC Anderson	15,500	-
ABSA Foundation (Batho Bonke Scheme)	990,897	-
Donation of share portfolio – Estate late Barker	3,572,187	-
Batho Bonke Scheme (Mvelaphanda Group)	5,366,823	-
Edward Nathan Sonnenbergs	140,000	-
Goldfields Foundation	75,000	75,000
Legal Aid Board	-	465,712
The Frank Robb Charitable Trust	100,000	100,000
The RAITH Foundation	104,829	-
Webber Wentzel	20,839	-
Other Local Donors	42,517	41,508
TOTAL	20,176,583	14,881,001

In the Words of Jody Kollapen, Chairperson, the Legal Resources Trust

How long have you been on the Board of Trustees of the Legal Resources Trust (LRT)? Is it challenging to balance the demands of your role as Chairperson of the LRT with your duties as Chairperson of the South African Human Rights Commission?

I've been on the Board of the LRT for eight years. It was initially as a trustee and then I started chairing soon thereafter. In many ways my roles at the SAHRC and the LRT are complementary because even though the strategic focus of the two organizations is different, the broad vision of both is to improve the human rights of marginalized and vulnerable communities. If anything, the challenge for me is in finding the time to do justice to both! But the arrangement works well because one is able to see common issues arising in the two contexts, which can help me develop the knowledge and learning from one to the other.

What do you think are the most pressing issues in South Africa today? What can public interest lawyers do about them?

There are many but if I had to pick I would say poverty, inequality, HIV/Aids and crime and violence. By inequality, I mean material inequality but also in terms of prejudice and attitudes about the 'other', whether that be based on race, gender, sexual orientation, disability or nationality – all the differences we see in humanity that seem to be regarded as fault-lines rather than as enrichment.

The role of public interest lawyers is increasingly changing. Beyond litigation, lawyers are also taking on the roles of policy reform, law reform and to some extent, advocacy. These roles inform the way that public interest lawyers can continue to use the law as



an effective tool of redress, ensuring that the protections of the Constitution are meaningful and substantial for those who need it.

Public interest lawyers can begin to anticipate some of the problems we will be facing and be bold and creative in this regard. By way of example, it is likely that we will face a food crisis in this country, if we are not already facing one. How do we respond

to this beyond simply asking the question of what does government do and what does or can it not do? Does it require an examination of the macro-economic framework or of the role of non-state actors? The public interest lawyer must be able to draft strategy having a component of litigation, advocacy, lawyers linking up with other lawyers in other regions, etc. An issue like food crisis is not just a South African problem. Global problems are presenting themselves and the response should not be uniquely South African.

The LRC first opened its doors in 1979. In your view, what has been the greatest success of the LRC in its nearly three decades of providing legal services with the aim of promoting human rights? What has been the LRC's greatest weakness?

In the 1980s, at a time when law was discredited, the LRC, with its group of lawyers with a real commitment to what they were doing, was able to achieve incredible successes against seemingly insurmountable obstacles in various areas of the law. Whether it was in defending victims against the state, dealing with freedom of movement or inequality issues, the LRC kept alive the possibility that law can be used as an effective tool in challenging injustice and in changing society. The LRC also played an important role in the transition from a race-based to a democratic society. The LRC's supportive role is also very noteworthy, for example, some of its staff advised a young democratic government that was strong in its commitment and perhaps short in capacity.

The LRC's new role is in drawing a line between itself and the democratic government with which it shared historical commonalities, because as an organisation involved in litigation that uses that as a key strategy, its role would sometimes bring it into conflict with government. And the LRC has taken on this role quite courageously.

The success was that throughout, the LRC was able to continue to use law as an effective tool of redress and transformation. Its resilient ability to evolve with the material conditions of change and circumstances means that the LRC continues to remain a vital part of our democratic society.

Its weakness, which is being addressed now, is in not sooner recognising the limits of litigation, or embracing different strategies that can be used in tandem with litigation. These strategies don't contradict each other and they arise out of the LRC's experiences, knowledge and historic role as a key civil society actor.

Another weakness is the late recognition that the LRC is an African organisation and making the links more explicit with the rest of the region. One has to see this as a potential of partnerships. It's a question of linking people, and sharing knowledge and experiences is the philosophy behind it.

The attacks in mid-2008 against foreign nationals and other South Africans are shameful for the nation. What does it mean for you to be a South African?

For me the sense of shame came home very hard when I recently went to Maputo to speak to Mozambicans, some of whom lived in South Africa for a long time. One woman I met lived in South Africa for 26 years, was forced to flee and now is trying to start a new life with her children who have no connection to Mozambique. On some level it demonstrates how fragile our democracy is and how little we have done to bridge the gap about this destructive idea of the "other". Because apart from xenophobia, this year we have seen homophobic attacks and sexist violence, perhaps in different degrees but providing ample evidence of our difficulties in dealing with difference.

This is an example of where we see that we can litigate about legal exclusion but changing the hearts and minds requires different processes. Even though this is not the LRC's core mandate, hopefully we can be a part of such processes.

In your free time, what are your favourite places to visit or travel to, locally or beyond our borders?

I don't really travel! Well I do travel but all of it is in respect of my work so there is hardly time to simply walk through the city centre or speak to locals as a tourist. But in my free time I'm very much a family person. I also like watching and playing sports.

In the Words of William Kerfoot, LRC attorney

You joined the Legal Resources Centre as a lawyer in 1984. How did you first get involved with the LRC?

As soon as I qualified in 1981, I applied to join the LRC in Johannesburg, which did not have a vacancy. In 1984, I saw an advertisement for the LRC in Cape Town in *De Rebus*, which led to my joining in October 1984. The LRC has not advertised in *De Rebus* since!

What was it like to work as a human rights/public interest lawyer in South Africa in the mid- to late-1980s? In the 1990s? How were these times different from the environment in which you practice now?

Apart from the 'new' labour laws, which provided an exciting new area of work and the advent of third party dispute resolution, which showed that not all practice had to be adversarial, most of our work in the 80s was hostile litigation against the State within the confines of a legal system with a supreme parliament. In the early to mid-80s we did a lot of influx control cases which one felt would make a lot of the legislation unworkable in practice, which was inspiring. And we did a lot of interdicts and damages claims against the State which were worthwhile but had a limited effect on the system. The 1990s, after 1994, were a heady period with the marvels of the new Bill of Rights at our disposal.

Today, constitutional litigation is still enormously satisfying but it is sad in 2008 that such a lot of it relates to non-delivery. A major problem we face now is funding. Our cases are becoming more and more complex and expensive and our staff has dwindled.

In your time with the LRC, what was your proudest accomplishment? And what, if anything, do you wish had been done perhaps differently?



I think I am happiest with some of the work I have done with asylum seekers and refugees. There are many things I wish I had done differently and better.

What made you decide to commit to public interest legal work? If you had not become a public interest lawyer, what do you think you might have done instead?

It is all Professor John Dugard's fault! Although my commitment to human rights work wavered briefly before I joined the LRC, his lectures are the main reason for my wanting to do public interest law. I often

speculate wildly about what else I might have done but really do not know.

Into the second decade of democracy, how do you see the work of the LRC evolving?

Somehow we need to find ways to step up the amount of impact litigation we do, particularly in the socio-economic sphere; make appropriate submissions to Parliament on legislation; position ourselves effectively in the human rights field in southern Africa and in the changing pro bono/Legal Aid Board climate; and realise the goals set out in our Mission Statement.

These goals remain as compelling now as when they were first drafted.

How do you spend time when you're not working? What are your favourite hangout spots?

The mountain, the beach, reading.

Can you name some things you've always wanted to learn or do but haven't gotten around to yet?

It would be nice to learn some law and stop practising on low cunning. An intern from Matabeleland accused me of typing like a Zimbabwean policeman – I would like to improve my computer skills, and get my timesheets and reports done on time and generally do things better. I have a vague ambition to climb Kilimanjaro before its snowcap disappears altogether.

What is the last book you read or the last event you went to and really enjoyed?

I have just finished *Naples 44* by Norman Lewis – a brilliantly written but troubling account of poverty, famine, corruption, callous officialdom and violence in Naples towards the end of the Second World War. It was quite eerie reading it under present conditions.

Hamba kahle, Mtungwa

Moffat Khumalo joined the National Office of the Legal Resources Centre in 1987 as a salaries administrator. He was the first black man to work in the Finance Department of the LRC.

Moffat was born on 13 February 1953 in Washbank, KwaZulu-Natal. He was raised by his grandmother because his mother worked in Gauteng. He was the only child to his mother.

He started his schooling in Washbank and when the family moved to Uitvaal near Ladysmith, he attended Sikweje High School. He married Thandi Nyasula who was a teacher, and they were blessed with two boys. Thereafter, Moffat joined his mother in Gauteng to seek employment. Just prior to joining the LRC, Moffat worked at Blue Ribbon in Isando as a salary administrator and was elected as a shop steward.

Always, each month Moffat would send groceries home and he would ask me to go with him to buy his mother clothes. His mother was everything to him.

Moffat was an honest and cheeky person with a keen sense of humour. What I always remember is when people used to phone and ask him for a duplicate



copy of their payslips and enquire how much they earned every month, he used to say to me: 'Maybe I am doing something wrong.' Then he would laugh, shake his head and go for his smoke. When he came back, he would ask me: 'How come you don't ask me for a copy of your payslip and how much you earn?' I would tell him that it is because I know how much I earn and that I always keep my payslip.

We will miss Moffat very much.

by Martha Bopape

LRC Directors and Staff

National Office

Janet Love	National Director
Koop Reinecke	Finance Director
Annette Reed	Donor Liaison Director
Martha Bopape	
Zunaid Dada	
Moffat Khumalo	
Topsy Mackenzie	
Pinky Madlala	
Moleshiwe Magana	
Adelline Malema	
Tumi Mokoka	
Isabella Rangata	
Esme Wardle	
Rory Williams	

CLU and Johannesburg

Achmed Mayet	Regional Director
George Bizos	Senior Counsel
Richard Moultrie	Counsel
Adrian Friedman	Counsel
Sushila Dhever	
Naseema Fakir	
Durkje Gilfillan	
Paula Howell	
Nomsa Mabena	
Nkele Mashiloane	
Constance Mogorosi	
Josephine Mokwebo	
Tebogo Mosikidi	
Bethuel Mtshali	
Mamta Nathoo	
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