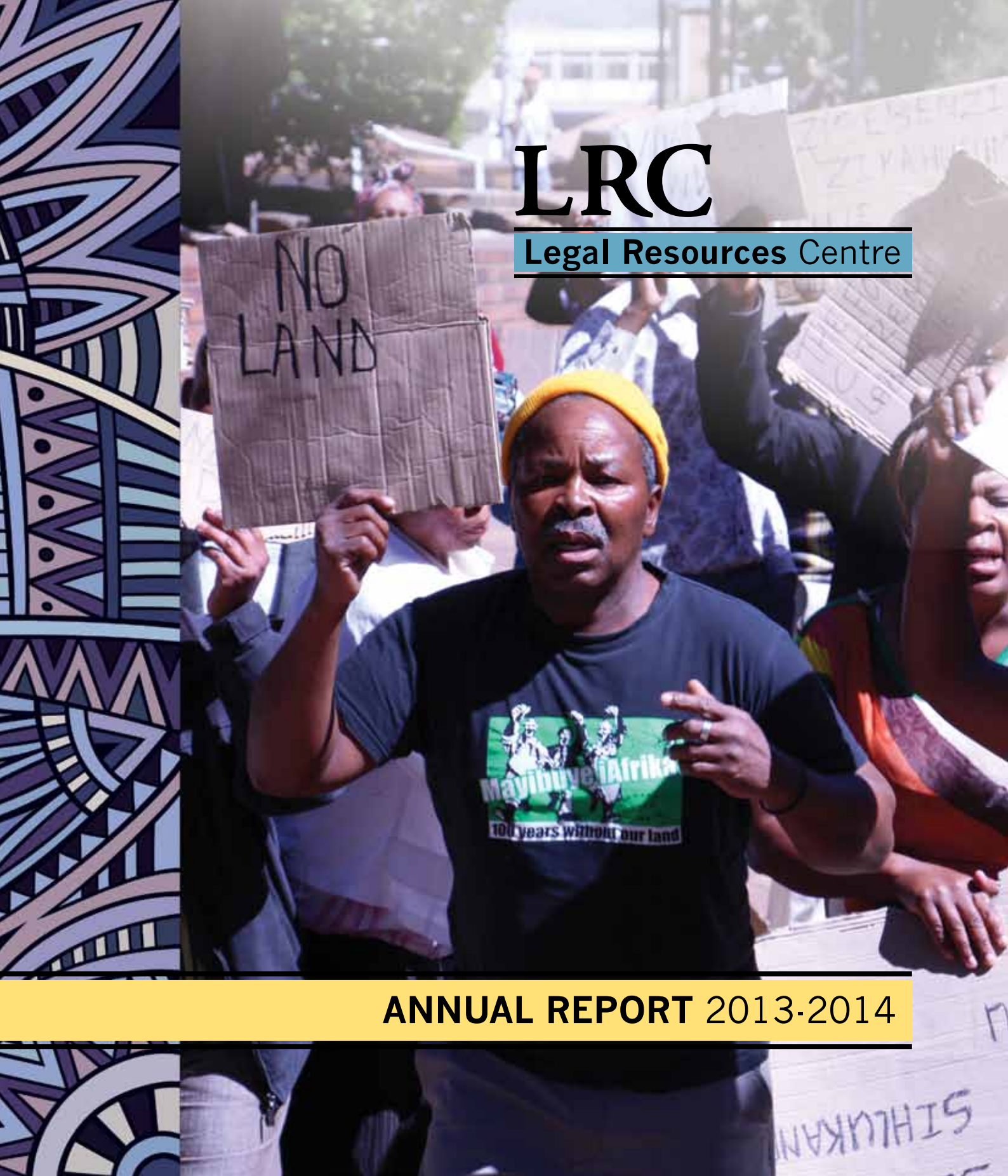

LRC

Legal Resources Centre

ANNUAL REPORT 2013-2014

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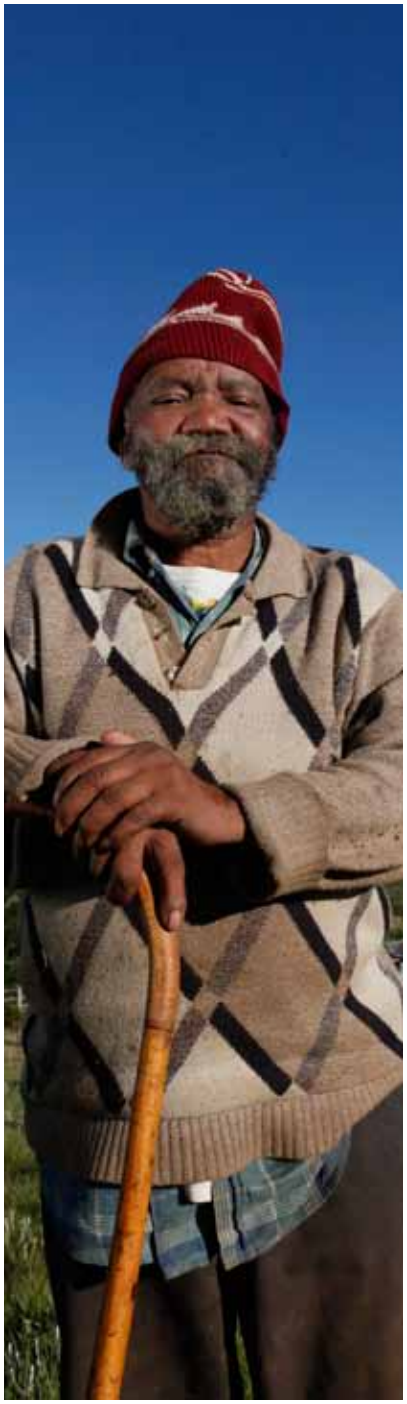

THE LEGAL RESOURCES CENTRE'S VISION AND MISSION

VISION

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

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 the law as an instrument of justice and provides 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 towards 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, contribute to the development of a human rights jurisprudence and to the social and economic transformation of our 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.

CHAIRMAN'S REPORT

Thandi Orleyn

National events that have shaped South Africa's social and political landscape over the past year have given impetus to the LRC's work with and on behalf of poor and marginalised communities.

In the on-going enquiry into the Marikana massacre, the LRC presented expert evidence on policing, and raised tough questions about Lonmin's failure to meet its obligations to its employees.

In collaboration with other human rights and legal groups, the LRC has challenged the configuration and economics of national commissions of enquiry, which are generally dominated by organs of state and paid for by taxpayers, whilst the poor and vulnerable are expected to pay for themselves.

The fifth general election since apartheid was won by the ANC with a reduced majority of 62.1%; the DA increased its share of the vote, and the Economic Freedom Fighters (EFF) obtained 6.4% of the vote.

A thorn in the side of the ruling party, the EFF, with its large following of youth, has backed service delivery protests by angry and frustrated citizens across the country. Protests have primarily been fuelled by grievances about housing, water and sanitation, political representation, electricity and general service delivery. However, corruption, unemployment, demarcation, land and health issues have also featured. Threats of violence against whistle-blowers and police brutality have been in evidence in these protests. The LRC's response has been to interrogate and challenge police conduct; to promote the protection of whistle-blowers; to support consumers expressing their political right to protest, and to back calls for access to information.

Evidence submitted to the Khayelitsha Commission by the LRC, adds weight to the Commission's recommendations and throws into question the situation of policing nationally.

With regard to the State Prosecutor's finding that public funds worth R246-million were spent on upgrading the state president's private estate, Nkandla, in KwaZulu Natal, the LRC was behind an application by the Mail & Guardian's Centre for Investigative Journalism under the Promotion of Access to Information Act (PAIA). In April 2014, the High Court ordered that documents requested be made available.

For the poor, the law exists as potential insofar as they know how to participate in it so the LRC's emphasis on educating individuals and communities about their constitutional rights is very important. LRC activists have continued to promote the rule of law and to spearhead discussions and initiatives in the legal sector. Their efforts have been hampered by an ineptness associated with legal enquiries and processes; the state's failure to implement the promises of the constitution, and pervasive disregard for the supremacy of the law.

The LRC is still tackling problems associated with longstanding apartheid policies that have not been addressed by the new dispensation, such as the Communal Land Rights Act. Other

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NATIONAL DIRECTOR'S REPORT

Janet Love

Our experiences over the year reaffirm the critical role the LRC plays in ensuring that the rights, particularly the socio-economic rights, of the poorest people in South Africa are protected. This requires meticulous legal work of an exceptionally high standard and strategic advocacy, liaison and negotiation with a wide array of public, private and civil society partners. The idea underpinning this approach to human rights and public interest legal practice is that, while the constitution and the law exists with the potential to advance human rights, it is people's understanding and the momentum of their participation that will make the law work for them.

Using the law is something that needs to be combined with a number of other mechanisms which engage along different frontiers for change. The relationship between the legal staff and the clients with whom we work requires on-going, respectful and inclusive engagement. This takes time, listening, facilitation and mediation. Expectations need to be managed. The role of a lawyer as a representative and activist is something around which there are no fixed or absolute rules, but rather demand constant management and self-awareness.

The complexity of cases has increased, requiring extensive research within a range of disciplines, such as history, economics, finance and environmental science. Aside from lengthy court processes, delays and appeals, the state more often than not allows processes to get to the court door before agreeing to attempt other forms of resolution. In addition, orders of court are routinely not fully complied with. This requires the LRC to engage in monitoring of the implementation of the order and sometimes requires returning to court on numerous occasions around the same matter.

A key challenge relates to LRC's status as a funded NGO and the related workload which has increased over time. It also generates some inevitable tensions; not least between the need for centralised fundraising, reporting and accounting, on the one hand, and an ability to be responsive and strategic, on the other hand. Monitoring and evaluation is becoming increasingly important and the LRC has found that it needs to devote constant attention to develop these skills internally and to ensure adherence to processes and systems that underpin reporting. To address this, the LRC is not only promoting the value of this reflection and engaging in building the capacity of key staff members to collect and analyse information, but is also consciously promoting institutional learning and accountability to improve the implementation of LRC programmes. Our experience has not only seen increased and varied forms of communication, but has also highlighted the need for more effective knowledge management within the organisation.

The issue of staff recruitment and retention is seen as part of our efforts to reproduce and extend the type of legal practice we are involved in. All professions in South Africa have faced serious challenges in their efforts to ensure demographic transformation and improve the diversity of staff and managers. The South African legal profession has been no exception, despite the progress. In 1994, 97% of judges were

white; in 2014, 40% were black men and 20% white women. 78% of law students are now black and 54% are women. However, 73% of advocates are still white and 80% of silks are white. As the public and private sectors compete to attract newly qualified black lawyers, like others, the LRC has struggled to retain a middle and senior tier of black lawyers. While the LRC continues to make an important contribution to building the capacity of the human rights profession in South Africa, we need to think of how to do more; both within our organisation and through our involvement in the debates and developments within the legal sector as a whole.

The stronger coordination within the organisation is matched by the increased effectiveness of our paralegals and our use of satellite offices to enable a more consistent presence in rural areas. The work of each of our offices has grown and the Constitutional Litigation Unit has served as a vital resource in this work. In addition, our global engagement has gone from strength to strength, enabling important sharing; particularly in the areas of the extractives industry and corporate human rights obligations; education rights; protest and policing; equality including LGBTI rights; and access to information, accountability and privacy.

These themes resonate with areas of our domestic work; from our cases against major banks involving irresponsible lending, to matters of policing in Marikana and Khayelitsha. Cases that deal with education have seen significant progress. In our efforts to use the law to enhance transparency and accountability we have also focused on challenges that deal with the Promotion of Access to Information Act (PAIA) and the Protection of State Information Act, including Nkandla and mining.

There are huge challenges that relate to dealing with our apartheid past; challenges that will not go away on their own. Land reform needs to be addressed, as does the failure of the National Prosecuting Authority to advance any prosecutions after the Truth and Reconciliation Commission. Poverty retains the same demographic profile - those in the most desperate circumstances are African, women and living in rural or peri-urban informal settlements. The last 20 years have fallen short of popular expectations and the persistence of inequality has heightened issues of accountability and inclusion. The failure to realise the constitutional promise of transformation have generated a worrying momentum of disregard for the rule of law.

The need for the LRC, and the work that it does, remains of great importance today. The commitment and determination of all within the organisation has built a team that is a privilege to be part of. ■

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areas of focus in the year under review have been access to education; violence in schools; customary law; gender rights; the rights of communities affected by mining and extractive industries; refugee rights; LGBTI rights, rights to housing, and irresponsible lending by banks.

The LRC is acknowledged within South Africa and abroad for its steadfast, professional commitment to ensuring that constitutional rights become a lived reality for all South Africans. This reputation is a source of pride for me as Chairperson of the Legal Resources Trust, and for my fellow trustees, to whom I am indebted for their support of my role and for the wisdom, experience and skill they bring to bear on the work of the LRC as a whole.

Thank you to Janet Love for her pioneering leadership as National Director of the LRC, and to the entire dedicated team. The rigorous demands of a human rights lawyer today are more complex than ever before. The LRC has to pay its way whilst acting as a legal instrument, and increasingly LRC staff are expected to develop a spread of capabilities: ingenuity, resourcefulness, empathy, fundraising, mediation, administrative and management skills are part of the skills mix required to sustain the LRC's work.

Partnerships with civil society groups and legal bodies, and the confidence of donors who continue to support the LRC's work in challenging economic times, are the organisation's lifeline. I thank you all.

Finally, I believe it is fitting to pay tribute to Nelson Mandela who died last year. A global icon of justice and democracy and a friend of the LRC from the early days, Madiba's legacy continues to inspire LRC staff and trustees. His fundamental creed, expressed at his trial in 1964, has relevance for us today: "I have fought against white domination, and I have fought against black domination…I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities." ■

STATE CUSTODIANSHIP OF MINERAL RIGHTS: THE QUIET NATIONALISATION OF MINERALS

There has been much public debate about the need to 'nationalise' South Africa's natural resources. Public calls have been made for an amendment to the property clause in section 25 of the Constitution allowing expropriation of land, minerals and other resources without the state having to pay compensation.

Amidst the furore of this debate in the public domain, the country has already seen major changes to the law relating to mineral rights. The Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA) introduced a new system of dealing with mineral rights whereby the government is the 'custodian' of the country's mineral wealth, but may grant rights to exploit minerals. The system enables the government to pursue two critical policy objectives. The first is to broaden access to mineral wealth, especially for previously disadvantaged South Africans; and the second is to implement environmental controls over mining. Arguably, the new system is already a nuanced form of nationalisation.

The implementation of the MPRDA sparked a storm of litigation, both in South African courts and in international investor-state arbitration (or arbitration that takes place in terms of an international agreement to resolve a dispute between a state and a foreign investor). The LRC played a leading role in both arenas; co-ordinating a non-disputing party NGO intervention (equivalent to an *amicus curiae*) in *Piero Foresti v South Africa*[1] and acting for the Centre for Applied Legal Studies as *amicus curiae* in the South African courts. The LRC's stance was to defend the important government objectives underpinning the new legislation, particularly the need to broaden access to the country's mineral resources.

Agri South Africa v Minister for Minerals and Energy[2] is the final instalment in Agri South Africa's (AgriSA) challenge to the MPRDA. Here, AgriSA's argument was that by abolishing 'old order' mineral rights and replacing them with 'new order' rights that afforded existing right holders a preferential right to apply to the state to continue mining activities, the MPRDA expropriated property without the compensation required by section 25(3) of the Constitution. AgriSA brought a test case claim for compensation for expropriation of old order rights.

The High Court concluded that the MPRDA involved a loss that required compensation. The Supreme Court of Appeal reversed the High Court decision, but the matter was appealed to the Constitutional Court.[3]

1 *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01. Download from http://www.italaw.com/cases/446

2 2013 (4) SA 1 (CC).

3 *Minister of Minerals and Energy v Agri South Africa* 2012 (5) 1 SA (SCA).

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THE FLORENCE FAMILY: CONSTITUTIONAL COURT RULES ON JUST AND EQUITABLE COMPENSATION

In 1995 the Florence family lodged a restitution and restoration claim for their family home in Black River, in the suburb of Rondebosch, Cape Town. The family had lived on the land since the 1950s, initially as tenants and later as purchasers in terms of an instalment sale agreement. They were forced to cancel the purchase in 1970 when they received government notices to leave the area which had been declared a white area under the Group Areas Act of 1950. The family left Black River, the land was subdivided to accommodate the M5 highway and their home was demolished.

The Land Claims Commission accepted the claim as valid but did not take steps to acquire the vacant plot. The processing of the claim was delayed by the Commission despite Mr Lionel Florence repeatedly writing letters and visiting the claims offices. He insisted that his family would not accept a meagre standard financial compensation offer.

In 2008, the LRC helped the Florence family to bypass the Commission and prosecute the claim for restoration directly in the Land Claims Court, claiming restoration of the property and compensation.

The trial finally commenced in 2010. By that time, the parking garage for a private hospital had been built on the land in question. The claim was now for compensation for the current value of the property and symbolic restoration in the form of a plaque on the land, which the current owner of the hospital had agreed to. It was agreed that the value of the land had been R30 000 in 1970. One of the issues that had to be determined was the change in the value over time so that the compensation would be "just and equitable" as required under the Constitution and the statute law.

The LRC is assisting many clients with land claims. As at the cut-off date in 31 March 1999, approximately

67 531 claims from individuals and communities had been submitted via the Land Restitution Programme

(Parliament South Africa 2013)

The government prepared expert reports that favoured the use of the Consumer Price Index (CPI) as the escalation factor to determine the change of value over time. However, experts employed by the Florence family felt that the CPI was not the appropriate index for determining just and equitable compensation. Instead, two economists, supported by an historian and a valuator, presented evidence that supported the argument that an investment rate, such as the government bond rate, would be appropriate to determine the current value of the family home and property of the family.

The matter was heard in stages and finally argued in the Land Claims Court in June 2011 and judgment was only handed down a year later in June 2012. The judge held that just and equitable compensation does not include compensation for lost "investment opportunities". The judge felt that the CPI was the best index to use in determining the value of compensation in land claims. The court awarded the family an amount of approximately R1.4 million and disallowed the claim for the costs of erecting a memorial.

The family sought leave to appeal, which was granted, and the matter went to the Supreme Court of Appeal (SCA). In the judgment handed down in September 2013, the SCA partly upheld and partly dismissed the appeal against the judgment of the Land Claims Court. Again, the court found that the CPI rate was an appropriate method for determining the current value of the Florence property, relying on the precedent set in the *Farjas*[1] matter. The *Farjas* matter was also a land claims case but did not involve the dispossession of a family home. Both the Land Claims Court and the SCA decided that escalation of historic value should be based on the CPI rate.

However, the SCA decided in our client's favour regarding the erection of the memorial plaque on the land and ordered the state to bear the costs of it. Tshiqi JA stated that the court is "not concerned in this case with state monuments, but with a plaque to recognise the private hurt and indignity to which the erstwhile members of the family were subjected."

1 *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others, Rainy Days Farms (Pty) Ltd v Minister of Agriculture and Land Affairs of the Republic of South Africa and Others* (2013) (3) SA 263 (SCA)

The family took the matter to the Constitutional Court where judgment was given on 27 August 2014. In the judgment, the majority of judges upheld the SCA judgment regarding the index to be used to determine the value of the compensation, and also struck down the SCA judgment regarding who should bear the costs of the erection of a memorial plaque, resulting in the Florence family's case being overturned on both counts.

The majority held that the market value of the property is but one of the factors which must be taken into account when determining what would be fair compensation and that, on a proper reading of the Restitution Act, the Land Claims Court and the Supreme Court of Appeal exercised their discretion properly in opting for the CPI to measure changes over time in the value of money.

The minority of four judges rejected the use of the CPI, finding that it would not result in just and equitable redress in this instance, in that it measures the change in the costs of consumption, rather than returns on investment, and therefore does not adequately account for the loss of immovable property.

Approximately R25.72 billion
has been spent on Land Restitution from 1994 to 2013

(Parliament South Africa 2013)

When considering the conclusions reached in the majority judgment, there appears to be an internal incoherence in the opinions expressed by the judges in the Constitutional Court; in particular on the purpose of the Restitution Act and whether it is better to under-compensate or compensate to the value of what has been lost. It also appears that the majority judgment is contrary to previous judgments made by the Constitutional Court on these particular issues.

The majority's approach will likely have consequences for future restitution claims. By under-compensating the Florence family, as the LRC believes it has done, the Court has established a system where under-compensation is permitted but over-compensation is not.

The government may rely upon this established precedent and limit the amount of compensation it offers to claimants. The government may also argue that restoration is too expensive and therefore not feasible. Yet, the clear constitutional purpose of the Restitution Act is to benefit claimants. ■

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Chief Justice Mogoeng wrote for a court that unanimously dismissed AgriSA's appeal and upheld the MPRDA. The real dispute was whether or not the MPRDA had expropriated property and, in particular, whether the state had acquired any property. The Chief Justice explained as follows:

> "To prove expropriation, a claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired….There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state." (Paragraphs 57–58)

AgriSA contended that this element of expropriation existed because "mineral rights were extinguished and vested in the Minister, on behalf of the state, to have them enjoyed by any third party to whom she may decide to grant them." In evaluating this submission, the court held that it must "interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in this country" and that the MPRDA was "meant to broaden access to business opportunities in the mining industry for all, especially previously disadvantaged people", create jobs, and advance social and economic welfare "for the common good of all South Africans."

Although the government had, under the MPRDA, become the "custodian" of all mineral rights, the Constitutional Court held that, "whatever 'custodian' means, it does not mean that the state has acquired and thus has become owner of the mineral rights concerned." In the eyes of the court, there was no expropriation and AgriSA's appeal was dismissed. However, like the SCA, the Constitutional Court left open the possibility of future claims that the MPRDA had expropriated property. ■

WHOSE LAW IS IT? CONTESTED CUSTOMS AND THE CONSTITUTION

Chapter 12 of the Constitution recognises "the institution, status and role of traditional leadership, in terms of customary law". On the face of it, this provision was designed to bring traditional leaders into the constitutional framework. What it does not reflect is the reality on the ground: a reality fraught with deep contestation concerning various traditional institutions and their incumbents as a result of the manipulation of customary systems of law by both the colonial and apartheid governments. These governments manipulated these systems in order to facilitate their projects of indirect rule and separate development, and this left many illegitimate leaders ruling over state-constructed communities at the time of the adoption of the Constitution.

In an attempt to unscramble the contestation, in 2004 President Mbeki established the Commission on Traditional Leadership Disputes and Claims, which became known as the Nhlapo Commission. The Nhlapo Commission was tasked with investigating all leadership claims and disputes, but by the time of its winding up in 2010, it had only managed to deal with the disputes relating to king- and queenships.

Following the publication of its report on determinations of king- and queenships, the Nhlapo Commission faced litigation on every determination it had made. This is not surprising: custom and history are not exact sciences and are therefore open to interpretation – and manipulation.

The first of these challenges was brought by Justice Mpondombini Sigcau, who claimed to be the rightful king of the amaMpondo aseQaukeni, and who went to the Constitutional Court in early 2013. In the Constitutional Court, the LRC represented the Centre for Law and Society (CLS), based at the University of Cape Town, which entered the matter as a friend of the court. CLS argued that the Nhlapo Commission's narrow genealogical approach to the disputes before it did nothing to affirm and promote customary law. We argued that the customary law recognised by the Constitution is a living and dynamic system based on the principles of reciprocity and democratic process. This customary law allowed communities to 'decide' their rulers, not on the basis of the methodical application of rules, but on the basis of political support within the community.

The court found in favour of Justice Sigcau on the narrow

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VICTORY OVER THE TRADITIONAL COURTS BILL

The Traditional Courts Bill (TCB) was first introduced into Parliament in April 2008. It followed the promulgation of the Traditional Leadership and Governance Framework Act (TLGFA) in 2003 and the controversial Communal Land Rights Act (CLRA) in 2004. The CLRA was finally struck down by the Constitutional Court in 2010. The TCB was seen as the third pillar of the trio of legislation that would solidify the governance powers of traditional leaders.

The TLGFA ensured that these leaders were to be accountable to the government rather than to the communities they serve. The CLRA gave them unfettered power to control land and resources. The TCB would ensure that chiefs had the power to dispense justice over their people; thereby creating mini-states of unaccountable and undemocratic governance for rural people by placing administrative, legislative and judicial powers in the hands of the chief.

The rural communities who came to know of the Bill rejected it outright. Women groups in particular voiced their deep concern with the Bill's inadequate response to the discrimination experienced by women in many existing traditional courts. Traditional leaders, in contrast, made no secret of their reasons for supporting the Bill. They argued that without this law, they had no power over their communities and thus could not perform their 'functions'.

When it was introduced into Parliament in 2008, the LRC was one of the few organisations that objected vociferously to the Bill, arguing that it provided traditional leaders with unilateral power to create and enforce customary law within the bounded

As part of the public participation processes, the LRC conducted consultations with communities to inform them of the Traditional Courts Bill.

areas created by the TLGFA. The Bill was withdrawn, only to be reintroduced in an identical form in late December 2011. This time, organisations were ready to mobilise on a large scale and the Alliance for Rural Democracy (ARD) was formed with the LRC as its legal representative.

Many organisations opposed the Bill. A key organisation that dedicated a large amount of its time and resources to its opposition was the Centre for Law and Society at the University of Cape Town. Communities in all the provinces were informed of the Bill, encouraged to comment on it and were encouraged to attend hearings. Members of the ARD attended provincial and parliamentary hearings, monitored proceedings and made submissions at every opportunity. The media was engaged, and stories of the plight of rural communities filled the mainstream newspapers and airwaves. The message was clear: rural communities did not want a separate and inferior justice system. Rural women did not want to be at the mercy of patriarchal chiefs.

Any law that is to regulate customary law must be written by those who live by it. What the TCB itself, as well as the rhetoric around it, illuminated was the central reason why "custom" and the Constitution currently collide rather than co-exist: the South African government has come to understand the Constitution as recognising traditional leaders rather than customary law. In reality, the Constitution recognises customary law, while traditional leaders are thus recognised in as far as custom and community law provides for it. The difference is subtle, but increasingly devastating for rural communities in South Africa.

The pressure from non-governmental organisations, community-based organisations and communities had a remarkable effect. The Select Committee of the National Council of Provinces, tasked with considering the Bill, held round after round of hearings, apparently unable to reject the Bill and admit that it had been a mistake to introduce it, nor push it through and face a backlash from rural communities. In February 2014, the Select Committee held a meeting to consider the negotiating mandates of the various provinces. During the meeting, various members expressed disbelief at the fact that the Bill was still in Parliament.

After an abrupt end to proceedings, a quiet announcement followed some days later stating that, due to an apparent 'oversight', the Bill had not been reintroduced in the National Council of Provinces at the start of the year and had thus lapsed on the basis of a technicality. This was an exceptional victory for democracy. Soon after, in an address to the University of the Western Cape, former Constitutional Court Judge Albie Sachs cited the victory over the Traditional Courts Bill as one of the most significant indications that our democracy is indeed alive and well. ■

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ground that the President had followed an incorrect procedure in giving effect to the Nhlapo Commission's finding. The court avoided interrogating the real issue at the heart of the Nhlapo Commission: how it restores the dignity of customary law, as it is tasked by the Constitution to do, rather than supporting the status of particular incumbents.

While the court found it unnecessary to consider whether the Nhlapo Commission's approach was correct in finding and applying customary law, there were important statements made during the hearing and in the judgment that indicated that the Court had identified the material issue plaguing this Commission, and indeed legislation dealing with customary law. The issue at stake was: whose law is it; the community's law developed through its practice or the law of the State as regulated, codified and adapted by the legislature?

While the motivation for state manipulation of custom in order to control traditional leadership may have changed from pre-constitutional times, the power of state institutions and the legislature to facilitate such manipulation remains. One does not have to look much further than the wealth of resources buried under the soil of many traditional communities to find a latter-day reason for the government's preoccupation with keeping the current and future traditional leaders on their side, rather than accountable to their communities.

It was significant that, in its Sigcau judgment, the Constitutional Court differentiated between those leadership disputes settled "statutorily", and those settled "customarily". The court privileged the latter as being in line with what the Constitution envisions. The court has thus recognised that custom cannot be found in the statute or the history books. It is necessary to consider what is happening on the ground. Leadership must speak to, and be accountable to, the will of the people. The uproar last year from rural communities around the Traditional Courts Bill provided a strong indication that it is a lesson the legislature is yet to learn. ■

LEARNING WITHOUT THE BASICS: THE FURNITURE CASE

The case of *Madzodzo*[1] emerged from the need to protect learners' ability and capacity to learn, and ultimately to promote their sense of self-worth. Section 29 of the Constitution provides for the fundamental right to education. A central component of that right is the duty on the government to ensure the availability of desks and chairs for learners. The Legal Resources Centre, together with the Centre for Child Law (CCL), successfully launched this case with the objective of guaranteeing that the state fulfilled its constitutional duty to ensure that every learner in grade R through grade 12 has an appropriate seat to sit on and a desk to write at.

The High Court ordered the Department of Education to ensure that the applicant schools received adequate, age- and grade-appropriate furniture. Furthermore, the court ordered the appointment of an independent firm of auditors tasked with establishing the furniture needs of all the schools concerned. Thereafter, the Department was ordered to make available a copy of the audit report, together with a comprehensive plan detailing when each child would receive outstanding furniture. This positive outcome was weakened by the Department's failure to comply with the court order.

Most recently, Goosen J stated the following:

> "Our own history demonstrates the role that education plays in shaping social and economic development. Apartheid education has left a profound legacy, not only in the unequal and inadequate distribution of resources but in the appalling levels of literacy and numeracy still found in the general population as a consequence of decades of unequal and inadequate education. The State's obligation to provide basic education as guaranteed by the Constitution is not confined to making places available at schools. It necessarily requires the provision of a range of educational resources: - schools, classrooms, teachers, teaching materials and appropriate facilities for learners. It is clear from the evidence presented by the applicants that the inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education."

The judge further held that the Department was unreasonable when it contended that there were inadequate funds budgeted for the furniture and that it could not be ordered to deliver the identified furniture to schools within a fixed period of time. The judge stipulated that learners within the Eastern Cape are entitled to have immediate access to basic education, as well as to be treated with dignity. The Department's persistent failure to provide furniture, especially to schools located in rural and impoverished areas, constituted an ongoing violation of the right to basic education.

1 *M Madzodzo obo Parents and Learners at Mpimbo Junior Secondary School and Seven Others v Minister of Basic Education and Four Others* 2104 (3)SA 441 (ECM)

"Schools are formative sites of childhood and adolescence. They are intimate places where youths construct identities, build a sense of self, read how society views them, and forge the skills to initiate change. Put in another way, schools are the environments where South Africa's youth either grows or shrivels. To learn in a school without such basic resources as desks and chairs is to learn about indignity and the monetary and psychological worth that the state places on some members of its next generation of leaders."

Affidavit of Hendricks M in *M Madzodzo obo Parents and Learners at Mpimbo Junior Secondary School and Seven Others v Minister of Basic Education and Four Others* (Eastern Cape High Court, Case No. 2144/2012).

The applicant schools have subsequently received their furniture; however, many other schools in the province are still without furniture. The Department did not comply with other material parts of the order, as they failed both to produce a legitimate audit recording the furniture needs of all public schools in the Eastern Cape, and to deliver the furniture needed to those schools that were recorded on the audit.

The process of obtaining school furniture was frustrated further when a number of companies who supply furniture raised concerns regarding the lawfulness of a tender for its procurement. The LRC and CCL have become involved in several cases related to the failure to procure the furniture in a lawful manner. Despite these challenges, the LRC continues to make positive steps in effecting change. Goosen J stated that the section 29 right to basic education as envisioned by the Constitution calls for the *immediate* provision of basic education and the LRC strives to hold the Department accountable to this right.

Example of the extent of furniture shortages: Sirhudlwini Senior Primary School, in Mount Frere, Eastern Cape, one of the applicant schools in the furniture case.

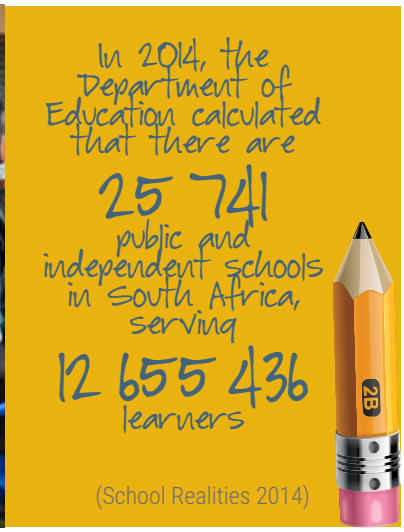
GRADE	NUMBER OF LEARNERS	DESK/CHAIR SHORTAGES
Reception	27	8 desks and chairs
1 & 2	38 (18 & 20)	24 desks and chairs
2	20	12 desks and chairs
3	16	10 desks and chairs
4	23	21 desks and 23 chairs
5 & 6	19	10 desks and chairs

"...inadequate resources in the form of insufficient or inappropriate desks and chairs in the classrooms in public schools across the province profoundly undermines the right of access to basic education."

- Judge Goosen

EDUCATIONAL FUNDING: SUBSIDIES TO SCHOOLS

In 2008, the Kwa-Zulu Natal Department of Education circulated a notice to independent schools setting out "approximate" subsidies for the 2009 financial year. Independent schools entitled to receive subsidies are not-for-profit schools charging fees below a prescribed level (less than 2.5 times the cost of educating a learner in the public system). After the payment due date had already passed, the Department warned schools to expect a 30% cut in these subsidies. An association of independent schools in the province brought an application asserting that the original notice gave rise to an "enforceable undertaking" to pay the 2008 promised funding without reduction. Although independent, the schools in question depend on government subsidies for survival, and many of them were in danger of closing due to the impending subsidy cuts.



With the assistance of the Legal Resources Centre, the Centre for Child Law (CCL) intervened as *amicus curiae* in this case. Because these subsidies assist independent schools in realising the right to basic education under the Constitution, they are matters central to the mission of both the LRC and CCL.

The LRC argued that it is incorrect to regard an independent school and the government as mere parties to a contract in relation to a subsidy. Instead, the LRC asserted that the question should be framed in light of proper interpretation of the South African Schools Act, 84 of 1996 (SASA), and the Amended National Norms and Standards for School Funding (Norms and Standards), which govern government subsidies for independent schools. Together, the SASA and the Norms and Standards clarify the rights and expectations of independent schools in relation to government subsidies, and are the basis on which the government may grant and subsequently reduce subsidies for independent schools. The LRC asserted that facts related to the promise and past practice gave rise to a legitimate expectation by these schools that they would receive the full subsidy detailed in the 2008 notice.

On 25 April 2013, the Constitutional Court handed down judgment.[1] In the majority judgment, the Constitutional Court held that although the 2008 notice did not give rise to an enforceable contract between the schools and the Department, the notice constituted a publicly promulgated promise to pay. A public official who promises to pay specified amounts to named recipients cannot unilaterally reduce the amounts to be paid after the due date for their payments has passed. The Court ordered the Department to pay the full amount of subsidies specified in the 2008 notice.

The LRC and Centre for Child Law's contribution was vital to this matter. By reframing the issue away from whether an enforceable contract had arisen, a position that the majority and many of the dissenting judges did not accept, and by refocussing on the basic right to education in light of the SASA and the Norms and Standards, the court accepted that the Department had made a promise in terms of the law.

1 *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal and Others* 2013 (4) SA 262 (CC)

BACK TO COURT: TEACHER APPOINTMENTS AND PAYMENT

"It is astounding to imagine that educators, who work so hard to ensure that children receive a decent education in accordance with the Constitution and their basic human rights, are not paid by the government for the work that they do. It is equally astounding to imagine that the government fails to fill vacant teaching posts. Yet this is the reality of the education system in the Eastern Cape, and it has taken lengthy court proceedings to effect change."

(LRC Press release on class action matter)

In 2012, Mrs Pinini worked as an educator at Alfonso Arries Primary School in Port Elizabeth, Eastern Cape. She was placed by the Eastern Cape Department of Education (ECDOE) in a vacant position at the school but she did not have a formal letter of appointment and the ECDOE failed to remunerate her for her services. Her case was not an isolated one. At Alfonso Arries alone, there were eighteen educators who were awaiting appointment by the ECDOE. All of these educators had been placed in vacant posts at this school by the ECDOE.

Each year, the departments of education in each province determine how many educator posts they have. These posts are then allocated to schools based on certain criteria. Educators occupying these posts should be appointed and paid by the respective department. A post provisioning plan should ensure that there is a fair distribution of teachers to all schools in the province and that schools have the teachers (and other staff) that are required to provide basic education.

In the Eastern Cape, the ECDOE has regularly failed to fill all the educator posts in its plan. This has resulted in School Governing Bodies (SGBs) appointing and paying teachers in posts that should be filled by the Department. SGBs have to increase school fees to meet these additional costs and then rely on lengthy and expensive court proceedings to recover from the Department the money that they have spent. At 'no fee schools', many of these educators work for a small donation.

In July 2012, the LRC represented the Centre for Child Law (CCL) and five SGBs in a case which concerned the unequal and unfair distribution of teachers to schools in the province and the failure of the Department to implement their own 'post provisioning plan' for 2012. The organisations wanted the ECDOE to appoint teachers to the vacant post establishments at schools and pay them.

The CCL and SGBs argued that the failure to implement the ECDBE's own approved post provisioning plan is a breach of the right to basic education. Tens of thousands of learners attend schools that do not have adequate teaching and non-teaching staff, resulting in parents in the poorest communities being forced to use their own money to pay for educators and other essential school staff.

Lazola Mweli is a grade two teacher at Alfonso Arries Primary School in Port Elizabeth. After LRC's litigation he was appointed on a permanent basis.

In August 2012, the court directed that the Department appoint educators to all vacant posts declared in its 2012 educator

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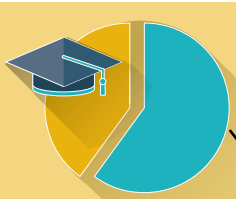
THE LAUNCH OF READY TO LEARN

On 25 October 2013, the Open Society Foundations in New York City played generous host to a number of dignitaries at the launch of the LRC's publication, *Ready to Learn? A Legal Resource for Realising the Right to Education*.

Speakers at the launch included Harvey Dale, Professor of Philanthropy and the Law at New York University School of Law; Janet Love, the LRC's National Director; Aryeh Neier, President Emeritus of the Open Society Foundations; Sarah Sephton, the LRC's Regional Director in Grahamstown; and Kishore Singh, the Special Rapporteur for the right to education for the United Nations Human Rights Council.

Other notable guests included the South African Consul General George Monyemangene, South African Consul Bernard Legodi, and Teresa Clarke, Chairperson, Chief Executive Officer, and Executive Editor of Africa.com LLC.

Ready to Learn is a powerful resource for human rights organisations around the world, emphasising challenges in using the courts to expand socio-economic rights. The publication is based on discussions that took place at a conference held at the Pocantico Center of the Rockefeller Brothers Fund in early 2012. The conference was organised by the LRC's partner organisation, the Southern Africa



In 2013, it was estimated that of those living in poverty,

60% have no or little education

In 2011, there were an estimated **400 mud schools** in the Eastern Cape. The government has committed funding to replace these with proper infrastructure. After the LRC's intervention, the government agreed to replace mud schools with formal structures.

Legal Services Foundation (SALS), with the support of the Rockefeller Brothers Fund and the Wallace Global Fund.

The conference was entitled "The Legal Resources Centre and the Courts in South Africa: Realizing Social, Economic, and Cultural Rights through Litigation", and was attended by lawyers from the LRC and other human rights organisations in Colombia, India, Israel, South Africa, and the United States, as well as experts from the Harvard Law School, New York University School of Law, Northeastern University School of Law, the Open Society Foundations, and Oxford University.

The conference gave participants an opportunity to learn more about how South African lawyers implement social, economic and cultural rights through legal avenues, including the courts. South Africa is in a unique position to undertake such important litigation because of the country's progressive Constitution, which recognises second-generation rights, and because of the proliferation of non-profit public interest law firms which undertake this work on behalf of poor, landless, homeless and marginalised groups residing in the country.

Ready to Learn documents the work of the LRC in South Africa in relation to education. The Constitution recognises the right to education as an immediately realisable right, which means that the government must ensure the implementation of the right without qualification. The LRC has been to court on a number of occasions ensuring that the recognition and promotion of the right to education is adequately implemented. Through recent court victories, the LRC has ensured that the substance of the right to education is promoted. The South African government is now eradicating 400 mud schools throughout South Africa; the government has been ordered to fill 7,000 vacant teaching posts in the Eastern Cape; the government must complete a comprehensive audit of all schools in the Eastern Cape and explain how it will provide each student with a desk and chair; and the government must publish binding norms and standards for all South African schools.

Dr Kishore Singh has said that *Ready to Learn* is an "important step in supporting and concretising the Human Rights Council resolution 23/4 on the Right to Education, adopted in June 2013, which urges all countries to adopt legislation on the right to education, to create independent institutions and mechanisms to enforce such rights and to ensure lawyers, judges and administrators can be adequately trained on how such rights can be enforced. Courts should be empowered to require governments to take action when the right to education is being denied."

We are confident that *Ready to Learn* will contribute to the post-2015 development agenda on the right to education, publicise information on the great strides being made in realising the right to education through litigation in South Africa, and strengthen the LRC's way of litigating on this right, as well as that of other organisations representing the rights of children around the world. The publication is available without charge on the LRC's website at www.lrc.org.za under Publications/Booklets.

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establishment plan. The Department was further directed to pay the salaries of all educators whose temporary appointment had been approved by the Department.

The Department's subsequent failure to comply with aspects of the court's directive led to further litigation by individual schools. As a result of this, on 6 June 2013 an order was granted against the ECDOE directing it to appoint identified educators to vacant posts, process their letters of employment promptly and pay them. Following the court order, Mrs Pinini and the other educators from Alfonso Arries Primary School were paid by the Department.

Despite the success story of Mrs Pinini and her fellow educators, there are numerous posts still vacant in the Eastern Cape and a large number of teachers who are currently awaiting employment. At the time of writing, the LRC is again in court in the matter of *Linkside v Department of Education*, which is a class action on behalf of 120 schools that have opted to join in the class action. The purpose of this application is to have named educators appointed to vacant posts at schools and to have SGBs reimbursed for the payments that they have made.

The first phase of this case was settled on 20 March 2014. The government was ordered to appoint and pay educators retrospectively and to reimburse SGBs for the full amount that they have spent on employing teachers in vacant posts during 2013. The court also certified the "opt-in" class, consisting of all schools in the Eastern Cape where posts had not been filled or who had paid teachers out of school funds. A further 90 schools came forward and opted in. This litigation is still pending. In this way, the LRC is contributing to efforts to address issues of infrastructure and quality of education at schools.

ADMISSIONS OF LEARNERS: THE POWERS OF SCHOOL GOVERNING BODIES

In 2011, Rivonia Primary School refused to enrol a grade one learner because the school had already reached its maximum capacity, which had been set by the School Governing Body (SGB) at 120 learners per grade. The child's mother appealed to the Department of Education (DOE), which took steps to enrol the child, despite the SGB's objections. The SGB brought an application in the High Court, seeking a declaration that it had the power to make admission policies, and to admit learners in accordance with those policies. Litigation on this matter reached the Constitutional Court. On 3 October 2013, the Constitutional Court handed down its judgement.[1]

The issue was whether the SGB or the DOE has the final say in admission decisions. The Constitutional Court's decision would have a direct impact on the right of a child to basic education, as the judgment would determine whether the Department would be able to override admissions policies in instances where a school has a lower-than-average teacher-to-learner ratio. Furthermore, the decision stands against a backdrop of inequities in the public education system, particularly in former black schools, including an acute shortage of classrooms nationwide and unequal school infrastructure and learning materials.

The LRC represented Equal Education (EE) and the Centre for Child Law (CCL), who intervened as *amici curiae* in this matter. The admission of learners to schools is a matter central to the mission of both the *amici curiae* and the LRC.

On behalf of EE and CCL, the LRC first asserted that the decision would have a far-reaching impact that transcends the interests of the parties immediately before the court, in that it would affect school admissions across the country. Specifically, the LRC contended that what was critically at stake was "the relationship between the powers of School Governing Bodies, on one hand, and provincial Departments of Education, on the other," at a national scale. Secondly, the LRC asserted that what was necessary for the resolution of the case was an interpretation of the relevant legislation and the Constitution that produces an "appropriate balance" between the powers of these two contending bodies. A zero-sum result, where the DOE would either have full control or no control to override an SGB's decisions, does not fit with any constitutional or statutory scheme. Instead, the LRC recommended factors and considerations to be taken into account that would achieve an appropriate power balance between SGBs and provincial DOEs.

Overturning the Supreme Court of Appeal's earlier decision, the Constitutional Court adopted an approach broadly consistent with the LRC's argument. The majority of the Court held that the Head of the provincial DOE had the power to admit a learner in excess of the number stipulated in Rivonia Primary School's admission policy. While the school governing body may determine capacity as part of its admissions policy, this power is constrained by other provisions in the South African Schools Act. The DOE has ultimate discretion and control over the implementation of admissions decisions. Furthermore, provincial regulations allow the Head of Department at the DOE to overturn a principal's rejection of a learner's application for admission. Taking a step back, the Court then emphasized that cooperation is the compulsory norm in such disputes, because cooperation is rooted in the shared constitutional goal of promoting the right to basic education.

The LRC's contribution emphasized the importance of this decision to future admission disputes, and provided the Court with a perspective that focused on cooperation as a basis for resolving similar disputes in the future. Instead of a zero-gum game between the two bodies, the LRC successfully advocated for a more balanced approach in the best interests of learners. ■

1 *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* 2013 (6) SA 582 (CC)

ENVIRONMENT: AIR POLLUTION STANDARDS

Over the past five years, the Legal Resources Centre has assisted a wide range of civil society organisations to secure greater regulatory controls over the polluting air emissions of our major industries, in particular the oil industry. A multi-stakeholder process convened by the Department of Water and Environmental Affairs in 2008 allowed the organisation to make expert submissions on over 300 proposed emission limits. The resulting regulations, published in 2010, were largely benchmarked to international standards. The multi-stakeholder engagement was aimed at creating greater consensus between the government, industry and those communities affected by the emissions of air pollutants, given the far-reaching consequences of these emissions to the public's health and the economy.

However, following the publication of the limits/standards, the energy and oil refining industries indicated that they were opposed to these standards. Behind-the-scenes lobbying resulted in the Department's publication of a significantly diluted set of standards in November 2012. The multi-stakeholder process was scrapped.

The relaxation of emission standards proposed for the oil industry will have an impact on the health of hundreds of thousands of vulnerable and disadvantaged persons, including thousands of children, who live in close proximity to oil refineries and other affected industries in Durban, Sasolburg and Cape Town. One of the main emissions, sulphur dioxide, has been found to be responsible for significantly increased levels of respiratory illnesses, including the exacerbation of asthma.

The new amendments were proposed in breach of the Department's duty to consult in terms of the Air Quality Act Framework and the expectations created by the multi-stakeholder process. Working in collaboration with the Centre for Environmental Rights (CER) and Professor Eugene Cairncross, the LRC made submissions to Parliament's Portfolio Committee on Water and Environmental Affairs, requesting it to intervene in the setting of standards and to solve the substantive and procedural defects. The LRC were asked by the Chairperson of the Portfolio Committee to give its legal opinion in this regard and this resulted in the Department of Environmental Affairs organising a further round of stakeholder negotiations, which included civil society organisations. Ultimately the LRC's interventions resulted in the 2010 standards being, to a large extent, upheld. ■

In 2014, the World Health Organisation estimated that **1 in 8 deaths** worldwide are caused by pollution.

2014 research by Greenpeace International concluded that air pollution caused by Eskom leads to approximately **2 700 deaths** a year. No other substantial and independent research has quantified the scale of the air pollution from Eskom and other industrial polluters.

Health problems in nearby communities have been attributed to emissions from the Engen Refinery in South Durban

ILLEGAL, BUT NECESSARY FOR SURVIVAL?

"Zama-zama mining" (zama-zama is roughly translated as those prepared to "have a go"), or small-scale, artisanal mining, has garnered public attention over the past few months after several rescues and numerous deaths occurred below ground. Over the past year, the LRC's staff in Johannesburg has conducted research on the matter. They have interviewed miners, gold buyers and community members throughout the East and West Rand of Johannesburg, where much of this mining takes place. While the LRC's involvement with the issue is ongoing, what follows is a profile of the miners, as well as information related to zama-zama mining.

Some artisanal miners are South African citizens while others, such as many who are mining in Benoni, are foreign nationals: Zimbabweans, Mozambicans, and Basotho. Regardless of their nationality, the miners are united in a common struggle: they had worked previously in the mines, were retrenched, and returned to mining out of a need to survive and provide for spouses and children.

While both the National Environmental Management Act of 1998 and Mineral and Petroleum Resources Development Act of 2002 regulate the closure and rehabilitation of former mines, the government does not enforce many of the provisions. Instead, shafts are left open and zama-zama miners run small-scale operations in the abandoned mines. Men descend for up to two months at a time, while women sell food to the miners, as well as trade in sex work.

In the process, these communities expose

There are approximately

6 000 abandoned mines in South Africa. In 2008, it was estimated that rehabilitating them would cost R100 billion (US$14 billion at the time)

(Director of Environmental Policy, Department of Minerals and Energy)

Artisanal miners working to extract gold from abandoned mines in the Gauteng area. Miners expose themselves to numerous health and safety hazards.

themselves to numerous health and safety hazards. Miners often use mercury and other toxic chemicals to kill acids and grind the ore with homemade machines; all without protective equipment. Many of the mines are still radioactive and operations produce both air and water pollution, leading to cancer and a spike in childhood mortality in communities such as Mindalore, Krugersdorp and Soweto.

The lives of zama-zama miners are incredibly difficult and the practice is illegal. In a press release in September 2013, former Mineral Resources Minister, Susan Shabangu, warned illegal miners operating in the West Rand that "the law will soon catch up with them." "Illegal mining poses a danger not only to the miners themselves, but to the communities, as well as the economy and existing mines," Shabangu said. Beyond the hazards of mining itself, the practice has produced other illegal activities, including turf wars and the creation of syndicates who carry weapons and steal from miners. In July 2013, the Bontate syndicate killed a group of men in an East Rand mine shaft.

In an article in Business Day ("Desperate pay high price in illegal mining boom", 25 April 2014), it is stated that zama-zama mining is estimated to include 14 000 miners and is valued at R6 billion per year. "Illegal" mining will not end soon. The report goes on to mention that the industry's stimuli, as noted by the Chamber of Mines, including poverty, unemployment, and large numbers of illegal immigrants, are unlikely to disappear quickly.

Rather than attempting to ban the practice of zama-zama mining, or board up all mines, a former mine manager felt that the situation is in desperate need of "mainstreaming." Without government regulation, a complex criminal industry of bribes and gold buying and selling will continue to flourish. Regulating zama-zama mining could curb these practices, lead to more stability and less violence in Gauteng communities, and enforce better working conditions for the miners. ■

According to the Minister of Mineral Resources, it is estimated that artisanal or small-scale mining in South Africa is valued at

R6 billion.

WHEN GOVERNMENT AND COMMUNITIES COLLIDE: THE MATTER OF DELFT

Thousands of people living in or near Cape Town, who have been evicted from their homes or faced eviction elsewhere, now live in the community of Delft in Temporary Relocation Areas (TRA'S). Those living in these temporary communities are waiting for the government to build permanent homes for them. Many of those living in TRA 5 and the Tsunami informal settlement expected to be made beneficiaries of one of the 1951 houses being built in the area known as Delft Symphony 3 and 5. In anticipation, these residents had already elected committees, consisting of representatives of the communities.

However, one morning during April 2013, the leaders of those committees found themselves in the High Court facing an urgent interdict launched by the provincial government. At that time, they did not have legal representation but later approached the LRC for assistance. The committee leaders told the LRC that the occupants of the areas that they represented had been expecting to be able to move into their newly built homes within months. However, they had discovered that, without consulting the community, the Western Cape government had decided to use new materials for building their homes. This meant that their homes were to be built of material other than brick and mortar, using "alternative build technology" (ABT). The community decided to protest against this decision because they had not been consulted on the use of ABT and because they did not trust the material. The protests led to clashes with South African Police Services. Some weeks after the protests, the committee leaders found themselves being summoned to the High Court.

> While the Delft matter was being heard in court, a tender matter was also being heard which concerned the contracting party using the ABT technology. In this matter, the successful bid by the contracting party was being challenged by one of the unsuccessful parties in that tender. Significantly, the LRC compared the pleadings in our own case to those that the Department of Human Settlements Director had attested to in the tender matter and found contradictions. The Court dismissed the application to set aside the tender. At the time of writing, our clients are still opposing the use of ABT in building their new houses. The tender matter was appealed to the SCA where judgment is awaited.

Once the case was heard in court, the State Attorney recorded that on the 4 April 2013, at approximately 19h43, his office had served a Notice of Motion and an affidavit on some of the respondents in this matter (some of whom later became the LRC's clients). This was done by phoning them and telling them that an urgent application would be heard in court the next morning at 10h00. The urgent application was seeking to interdict them from disrupting construction work in Delft and also from gathering "within a perimeter of 300 metres of the site for the duration of the building construction…." When carefully measured, this was shown to include some of the homes of our clients.

The State Attorney further claimed that the documents had been properly served on those whom he could not phone, because he had asked those respondents to whom he did talk to tell the others. Five of the committee leaders were referred to by name and surname whilst the sixth and seventh committee leaders were simply referred to by one name. Many of their names were incorrectly spelt.

Our clients rushed to the High Court that morning. Although the Province's senior counsel had tried to persuade them to accept an interim order, they decided to withstand the pressure that was being placed on them and sought assistance from the presiding judge in the urgent court, who postponed the matter to enable them to obtain legal representation.

It was at this time that they approached the LRC for assistance. The LRC filed answering papers claiming that the provincial government had failed to obey the rules of court in respect of the service of the documents. The government had also failed to treat our clients with the

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NO LAND AVAILABLE FOR THE RELOCATION OF ISIQALO RESIDENTS

Portion 5 of Farm 787, Cape Division, is a large agricultural property located near Mitchell's Plain and the Phillippi Horticultural Area on the outskirts of Cape Town. The property is owned by Lyton Props Twelve, a dormant close corporation, and Ross Demolishers, a well-known company specialising in building demolitions and rubble removal. The property largely consists of sand dunes and is covered by natural vegetation and dense scrub. The sand dunes on the property have been extensively and illegally mined by Ross Demolishers resulting in exposure of the water table and extensive flooding during the winter months.

Approximately 8000 men, women and children live on the property in an estimated 2500 informal structures constructed from wood, plastic and zinc materials. The informal settlement has become known as "Isiqalo" which means "the beginning" in isiXhosa. The property itself was vacant and largely unoccupied until January 2012, when homeless and desperately poor people who had been evicted from backyards in surrounding informal settlements began to occupy the property. The occupation is symptomatic of the acute housing shortage in the Western Cape and the severely overcrowded conditions in the informal settlements of Philippi, Khayelitsha and Gugulethu, which surround Isiqalo.

The vast majority of the residents of Isiqalo are unemployed. Those who have formal employment, receive low wages. Most of the residents earn a living in the informal sector selling fruit and vegetables. A substantial number of the residents have no other form of income except for child support grants.

Census 2011 reported that **13.6%** of South Africa's population live in informal dwellings and **7.9%** in traditional dwellings.

An informal dwelling is defined as a 'makeshift structure not approved by a local authority and not intended as a permanent dwelling. Typically built with found materials.'

A family sits outside their shack in the Isiqalo informal settlement in Cape Town

After the initial occupations of the property in January 2012, the size of the settlement increased significantly and by July 2012, approximately 1000 households had occupied the property. In August 2012, the owners of the property launched urgent proceedings in the Western Cape High Court seeking an order evicting the residents from the property in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE).

The residents approached the LRC for assistance. The LRC assisted them to file answering affidavits opposing the eviction application on the grounds that the eviction would not be just and equitable unless the City of Cape Town provided the residents with alternative land

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THE HARDSHIPS FACED BY STREET TRADERS

Informal street traders are among the most vulnerable and marginalised people in the South African economy. Together with the local non-governmental organisation, *Asiye eTafuleni,* the LRC's Durban regional office continues to assist in the protection of their human rights. We recognise that the need to protect the human rights of informal street traders is inextricably bound up with the need to alleviate the poverty in which many traders live.

One of our many clients is Mr John Makwicana, an informal street trader who has a permit to trade in terms of the applicable municipal bylaws. In August 2013, his goods, consisting of 32 pairs of plastic and rubber sandals, were impounded and confiscated by the eThekwini Metro Police. A dispute exists as to whether Mr Makwicana's trading permit was presented to the police officer prior to the confiscation. At the relevant time, Mr Makwicana was away from his street trading table and Mr Makwicana's street trading assistant interacted with the police officer. The assistant was informed that he had the option of paying R300 as an admission of guilt fine, or he had to appear in court to face criminal prosecution for violating the municipal street trading by-laws for "illegal trading". Neither Mr Makwicana nor the street trading assistant could afford the payment of R300. The criminal charges have since been provisionally withdrawn and the Court ordered the return of the goods. However, the Municipality is unable to return the goods as they have been disposed of. This issue will be dealt with in the High Court application.

Mr Makwicana's case represents one example of the hardships endured by many street traders. He buys goods on a cash basis and all his stock is sold on a cash basis. He ekes out an existence on small profit margins. The goods he sells generate the capital for purchase of new stock. Mr Makwicana does not have access to credit facilities. Once Mr Makwicana's goods were impounded and confiscated, he lost the means to earn a living for that day and, significantly, he was unable to generate income to purchase new stock for sales the next day.

Mr Makwicana approached the LRC who chose to take the matter to court to review and set aside the decision to confiscate his goods. In addition, the constitutionality of certain provisions of the street trading bylaws and certain provisions of the Business Licenses Act are being challenged. A key challenge is whether the street trading bylaw relied upon

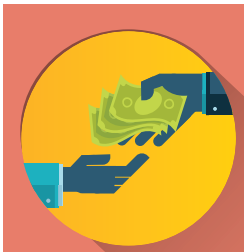
The contribution of the informal sector to South Africa's GDP has remained stagnant at roughly **5%** from 2001 to 2013. Over the same period, the sector's contribution to employment has declined by one percentage point to **15.8%**

(Statistics SA 2013)

John Makwicana outside his stall on Fishmarket Street.

by the eThekwini Metro Police authorises the impoundment and confiscation of goods. In October 2013, the case was enrolled on an urgent basis seeking the return of Mr Makwicana's goods, pending the later determination of the review and the constitutionality challenges. The High Court dismissed the case, stating a lack of urgency and the Court ordered costs against our client.

The LRC awaits the government's response to its constitutional challenges. The High Court application will be argued later in 2014. We are hopeful that the successful outcome of the legal challenges raised in this case will result in changes to the relevant street trading by-laws. If this happens, the livelihoods of many thousands of street traders will be secured.



Census 2011 reported that **1 613 078** persons were employed in the informal sector (including agriculture). The LRC has been working to promote their rights and secure their livelihoods.

In another matter regarding street traders, the LRC represents members of the Berea Station Concourse Traders' Committee. The traders are aware that the eThekwini Municipality has put plans in motion to develop the Berea Station mall. Our clients maintain that they are not opposed to the development. However, they remain concerned that they are not being meaningfully consulted and that they are not being provided with complete information. In particular, they would like to know how the development will accommodate their trading interests and where their new trading spaces will be located. This matter is in the formative stages of engagement with the Municipality.

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dignity befitting parties being summonsed to court. Importantly, our clients pointed out that the government had failed to make a case against any of them personally.

Many members of the community, as well as the chairperson of the committee representing the community of TRA 5 at Delft, packed the courtroom to listen to argument. In his answering affidavit, the chairperson told the court that there had been protests against the decision by the provincial government to begin the process of building their houses using material different from that used in other low-cost housing developments, without giving notice to the community about these changes.

Following the community's protests, one morning at approximately 3am, a local councillor arrived at the chairperson's house with members of the South African Police Services who arrested him. They accused him of vandalising the councillor's house earlier that night. The chairperson claimed that, subsequent to his arrest, he did not formally appear in court and that the prosecutor in his case told him to go home. Several days later, he received a call from the State Attorney regarding the application for an urgent interdict. Other community members, while not having suffered the indignity of being arrested, told similar stories of receiving the notice of the interdict application.

In his judgment on the urgent application, the presiding judge stated that the government's action, "constitutes an abuse of this court's process which justifies the dismissal of the application without further ado." He stated that the government, "owed a constitutional obligation to the Respondents, their community and to the Court to be candid and put a full and fair account of all the circumstances surrounding the application before the Court." He held that the government had failed to do this. In considering the application, the judge pointed out that, "there is not a single factual allegation linking the Respondents to the actions of the crowd;" and that the application which was launched as an urgent on 5 April 2013, was launched in respect of events that had all taken place on 22 March 2013, at the very latest.

The court also agreed with the LRC's argument that there was no justification for the government having brought the case with such urgency and that there was no evidence demonstrating any reasonable fear of harm.

The court then considered the merits of the urgent application and concluded that the government had no basis for succeeding in the application.

Significantly, the court warned that this type of friction between community and government, "will not be eased by arbitrarily hauling leaders of the community before the court and seeking to impose some type of legal obligation on them to prevent unrest."

MDODANA: INVALIDATING APARTHEID-ERA LAWS

In 2010, Mr Bension Mdodana, a subsistence farmer living in Lady Frere in the Eastern Cape, had his goats impounded by the local municipality after they strayed onto the property of a neighbouring farmer. The municipality fined him R41 157.20 which he had to pay before the release of his goats, an extraordinary amount that he simply could not afford.

The amount was based on the Pounds Ordinance no 18 of 1938, which had been enacted by the Provincial Council of the Cape of Good Hope. The Cape of Good Hope, as it was known then, formed part of the current provinces of the Eastern Cape, Western Cape and the Northern Cape. The three Provincial Legislatures have not amended the Ordinance since 1994 and it continues to operate throughout the provinces, with the exception of the former Ciskei territory in the Eastern Cape.

Mr Mdodana asked the LRC to represent him. The LRC approached the Eastern Cape High Court in Grahamstown with an application in two parts; for urgent relief, so that his goats would be released immediately, and for parts of the Ordinance to be declared unconstitutional.

The LRC argued that certain sections of the Ordinance "unfairly discriminate against the landless" and "unjustifiably limit the right to equality guaranteed in terms of section 9 (1) of the Constitution, and accordingly has no place in an open and democratic society, based on human dignity, equality and freedom."

Although not affecting Mr Mdodona, whose identity was already known, the LRC noted that section 14 of the Ordinance requires a poundmaster to inform the owner of impounded livestock only where the latter's name is known. In essence, the poundmaster is not obliged to establish the identity and whereabouts of the owner prior to the sale of the livestock. This constitutes an unjustifiable limitation of the owner's constitutional right to fair administrative action.

On 13 June 2013, the Eastern Cape High Court in Grahamstown declared certain sections of the Pounds Ordinance to be inconsistent with the Constitution and therefore invalid. In the High Court's judgment, Judge Smith noted that the Ordinance was enacted during a time when there was scant regard for basic human rights and "its language is redolent of an era when the majority of South African citizens were subjected to discriminatory laws which resulted in their social and economic disempowerment."

The judgment was referred to the Constitutional Court to confirm the validity of the judgment. On 25 March 2014, the Constitutional Court dismissed the application to confirm the validity of the judgment but only on a procedural technicality. The reason the court gave is that the Ordinance is not a provincial act and the High Court's judgment therefore does not require confirmation by the Constitutional Court.

The High Court's order of invalidity therefore stands and the Constitutional Court directed that the order be made known to the Premiers of the Western and Northern Cape.

The High Court judgment is a victory for the poor, landless, commonage and subsistence farmers whose rights were threatened by the impoundment of their stock and accompanying unaffordable pound fees.

Mr Mdodana with his livestock

MADLALA VILLAGE: EVICTIONS NOT UNIQUE TO SOUTH AFRICA

The right of access to housing is one of the most contested rights in South Africa. In a Mail & Guardian article ("Where the heart is – South Africa's post-apartheid housing failure", 2 August 2013) it was estimated that the housing backlog has expanded rapidly over the past two decades, from 1.5 million in 1994 to 2.1 million in 2013. Reasons for the backlog include a lack of financial resources, shortages of available land in and around city centres such as Johannesburg, Cape Town and Durban, and poor oversight and management of the rollout of the provision of accommodation.

In Durban the housing backlog is significant and eThekwini Municipality's development plan to address this states that it will only clear the current backlog in 40-82 years (eThekwini Municipality IDP 2013-2017). Many South Africans who are still waiting for houses feel increasingly hopeless and frustrated.

Another obstacle to the provision of housing is that the number of people who need houses is rapidly growing. While this growth is partly as a result of population increase in city centres, there is significant migration from rural areas to these urban settings. This migration results in large numbers of people arriving in cities that need to find somewhere affordable to stay. As a result of a shortage of affordable accommodation, many are forced to build shelters on vacant land close to their place of work or transportation routes. In many cases this vacant land is municipal-owned land.

The LRC's Durban office represents a community of approximately 390 people who occupy government-owned land in Lamontville, Durban. The land they live on is not suitable for the development of houses as it has a large sewerage pipe running through it, above the ground. In September 2012, our clients moved onto the land out of desperation mainly because they were no longer able to afford to pay rentals for the "backyard shacks" that they had previously lived in.

Since they settled there, our clients have faced regular demolitions of their shelters and this has been done by the eThekwini Municipality. The demolitions have been carried out in a cruel manner: clients have been assaulted, shot at with rubber bullets, and have had their supplies, food and medication destroyed. Despite a court order being required by the Prevention of Illegal Eviction Act (PIE), for much of the time, the demolitions have all been done in the absence of a court order. The Municipality's contention is that it is acting to protect Durban from the threat of illegal "land invasions"; however it has failed to produce any concrete evidence of such land invasions. Our clients' shelters have been demolished more than 45 times, but they have no other place to move to and simply rebuild after the demolitions.

In March 2013, the Municipality and the Provincial Department of Human Settlements obtained a court order to prevent anyone moving onto more than 1 000 pieces of land without providing the court with any information as to the circumstances of the thousands of people who are already living on this land. Although the order is prospective, the Municipality has used it as justification for the demolition of the shacks of our clients and those of members of other communities living on some of the 1 000 pieces of land. Significantly, on the return date, the Durban High Court refused our clients' application to intervene in the proceedings and they were unable to make submissions on the constitutionality and the legality of the contents of the March 2013 order.

The sewerage pipe running through the Madlala Village settlement

The LRC contested the order refusing our clients' leave to intervene and argued that the March 2013 order was unconstitutional. After following the various appeal procedures, on 12 February 2014 the matter was heard by the Constitutional Court. At the hearing, the MEC for Human Settlement's legal team tried to convince the court that this order was not intended as an eviction order but merely to prevent so-called "land invasions". The next day, before our clients had returned to their homes after attending the hearing, the Municipality's Land Invasion Control Unit carried out a further demolition. This occurred despite an undertaking by their legal team that no evictions would be carried out in terms of the order we had appealed. We then obtained an urgent interdict preventing further demolitions to our clients' homes while we waited for the decision of the Constitutional Court.

Staff from the LRC's Durban office consulting with members of the Madlala Village community

Sadly our clients' experience of perpetual violent demolitions is not unique. The Municipality's strategy of obtaining an order to prevent future "land invasions", without providing concrete evidence of such a threat or providing those who are occupying the land with an opportunity to challenge this order, has happened multiple times.

The Constitutional Court has since handed down judgment granting our clients' leave to intervene and the matter has been sent back to the Durban High Court. ■

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or temporary emergency accommodation. The City of Cape Town argued that the residents had unlawfully invaded the property and that no accommodation was available for the relocation of the residents in any of its emergency housing. At the hearing of the eviction application in November 2012, the court granted an order directing the parties to engage with each other in order to reach a resolution on the issue of emergency accommodation for the residents. With the assistance of Professor Marie Huchzermeyer, a renowned expert on informal housing and professor of architecture from the University of the Witwatersrand, we filed an affidavit indicating the Municipality's failure to properly consider the possibility of upgrading the property for formal housing, given that both owners have offered to sell the property to the City of Cape Town.

In June 2013, the High Court granted an order in which a number of departments in the national and provincial governments were joined in the case as respondents, on the basis that they had a direct interest in the eviction proceedings, and directing each sphere of government to provide the court with reports on the availability of alternative land or emergency accommodation for the Isiqalo residents. This far-reaching and unprecedented order by the High Court received considerable publicity.[1]

Further reports by the City of Cape Town and the national and provincial departments were filed in October 2013 contending that no land was available for the relocation of the residents. Following further discussions between the parties, consensus was reached that the matter would not be ready for hearing without a detailed social survey being undertaken of the number of residents on the property. An order to that effect was granted in May 2014 and the first meeting of the Steering Committee established to facilitate the implementation of the survey, was held in June 2014. Given the number of residents and the scope of the survey, the matter will most likely return to court in mid-2015.

The eviction application against the Isiqalo community is one of the largest and most complex eviction cases in Cape Town's recent history. The government parties in the case have shifted significantly from the adversarial positions they adopted at the outset of the litigation. The current engagement and social survey process provided for in the most recent court order holds the real possibility of a long-term solution for the security of tenure and housing needs of the Isiqalo residents. ■

1 See for example http://www.iolproperty.co.za/roller/news/entry/legal_experts_hail_court_ruling

THE MYTH OF THE HOUSING LIST: EDEN PARK

In March 1999, the community of Eden Park, a low-income township in Johannesburg, discovered that they were not going to be allocated houses in a new development taking place in a small section of the area known as Eden Park Extension 5. They also discovered that the number of Eden Park residents on the waiting list had shrunk from 2600 to 304. The community marched to the offices of the Ekurhuleni Metropolitan Municipality to request an investigation into the matter. Over the following months, the community continued to hold meetings with the Municipality in order to ensure that the identification of beneficiaries for housing was transparent and done in a manner that prioritised the needs of the homeless people and backyard dwellers in Eden Park and in the immediate surrounding low-income communities.

Late in 1999, the Municipality called a public meeting where municipal officials stated that the Eden Park residents would get preference in respect of any Reconstruction and Development Programme (RDP) development that had been earmarked for the area. The community left the meeting on the understanding that they would benefit first from any new housing developments.

In September 2000, a private property development company was contracted by the Municipality to develop the area. However, the development was going to be funded through donor funding. For reasons unknown to the community, during 2003 the Municipality took over from the private company and a total of 2419 stands were developed in the area for the purpose of erecting low-cost housing. When development began, many of community's residents were hopeful that they would be allocated housing. They were not advised that the allocation process would differ on the basis that the donor funding had been withdrawn or because the developer was now the local municipality and not the private company.

It was therefore a shock to the community when the waiting list for the new housing was released. Only 77 applicants from Eden Park were approved for housing at Eden Park Extension 5. The community decided to lobby the Municipality. As a result, the Municipality withdrew the beneficiary list and suspended the allocation process.

Early in 2004, the Municipality issued a statement indicating that two waiting lists had been generated and that, in terms of the first waiting list, 77 applicants from Eden Park area had been approved for housing and in terms of the second waiting list, 300 applicants from Eden Park area had been approved. The Municipality indicated it would use the second list to make allocations. Again, the community went back to the Municipality to share their grievances and to try to understand the criteria for housing allocation. But the Municipality failed to advise the community members on the criteria.

In spite of the problems associated with the waiting list and the allocation of housing, the Eden Park community resolved that the development should continue. As a result, during November 2005, phase one was completed and the Municipality began the process of allocating the houses. None of the beneficiaries were from the Eden Park area or the feeder areas. On further investigation it appeared that the first set of beneficiaries were from Tembisa, 60 kilometres away from Eden Park. The community also discovered that the first beneficiary would have been 11 years old at the time that the waiting list was drafted, which was a clear sign that something was wrong.

The Eden Park community felt betrayed. As a result, some members of the community moved into some of the houses unlawfully. They were removed within a couple of hours by police officers. More houses continued to be built and allocations made. However, during October 2008, fearing that they were again not going to benefit, more community members decided to move into houses without the permission of the Municipality. In March 2009, the Municipality brought an application for eviction against those who unlawfully occupied houses.

The LRC represented the community members in the South Gauteng High Court. In our arguments, we asked the court to take into account various aspects when deciding whether to evict the occupiers. The first concern was the discrepancies in the housing waiting lists. Secondly, there seemed to be two different policies and criteria for allocation of houses, which made the process arbitrary. Lastly, the Municipality had displayed uncertainty and confusion as to the identity of those persons who were to be evicted.

The South Gauteng High Court decided that it was not just and equitable to issue an eviction order against the occupiers. The application for eviction brought by the Municipality was dismissed with costs. The Municipality then approached the Supreme Court of Appeal in order to appeal the decision. Again, the court found in favour of the LRC's clients and the appeal was dismissed with costs.

CARING IS WORKING: WOMEN'S UNPAID WORK

"Care – like we have been doing all these years – is a job; it is deserving of being paid. If you care at your own home … you feel tired at the end of the day. You have worked… and more now that we are working with other people in homes that are not our own. But it's just unpaid. So it's not a job."

Ma Anna (Community Care Worker, South Africa)

Since 2010, the Legal Resources Centre has been working with the Wellness Foundation to advocate for the rights of community care workers. Throughout 2011, we participated in the establishment of the South African Care Workers Forum, an association started by care workers to advocate for their rights. We have been assisting in their organisational development and registration as a non-profit organisation.

As a result of the lack of secure formal employment, the majority of community care workers form part of the informal economy. They have largely become an unseen labour force providing much needed health and wellness services to women. They act as midwives or care for those infected and affected by the HIV/AIDS pandemic in South Africa. In the majority of instances, they fall outside of the mechanisms put in place to protect those within the formal economy, such as access and participation in social security structures and labour laws.

In May 2013, the LRC, together with the Wellness Foundation and the Parent Centre, made submissions to the Special Rapporteur on Extreme Poverty and Human Rights on her call for participation in preparing a report to the 68th Session of the United Nations General Assembly. The Special Rapporteur had identified women's unpaid care work as an essential element that underpins all societies and which contributes directly to wellbeing, social development and economic growth.

She estimated that if unpaid care work was recognised within national accounts, it would add a further 10% - 39% to the Gross National Product. The objective of her report was to highlight and raise awareness on the: (1) effect of unpaid care work on poverty, human rights and women's economic empowerment, (2) clarify the human rights obligations of states with regard to unpaid care, and (3) provide recommendations to states on how to recognise, reduce and redistribute unpaid care work, with a view to realising the human rights of women and to tackle their disproportionate vulnerability to poverty.

The joint submission sought to provide a broad overview of the context within which care work happens in South Africa. The submission focused on the two areas of care work in which our partner organisations has specific expertise; namely home-based care to women before and after the delivery of their baby at a government maternal obstetric unit and care provided by community care workers to those infected and affected by communicable

Members of the South African Care Workers Forum came together to discuss issues around the recognition and payment of care workers in South Africa.

South Africa's Ministerial Declaration on care work

In South Africa, although a Ministerial Determination was gazetted in terms of the Extended Public Works Programme, the majority of the care workers we engaged with over the past year have never heard of the Determination. The Determination sets a minimum wage, includes care workers in socio–economic benefits and gives them protection under the labour laws of the country. It would appear that even though the contributions made by community care workers are recognised, the Ministerial Determination is not being implemented by employers, and care workers are not aware of it.

diseases, such as TB and HIV/AIDS. The care is provided either within their homes, communities or as part of Department of Health or Social Development programmes.

We submitted that care work within these contexts is undertaken either by women who take up the role and responsibility of care, as the family is too impoverished to obtain private care services, and in cases where care work is performed by a care worker who is 'employed' by a community-based organisation or one of the government departments. We highlighted that, regardless of whether the person is volunteering in the position or the person works for an organisation or government, the employment is "informal". Care workers report that they are not provided with employment contracts. Employers do not register them for social security benefits and they are not afforded sick or maternity leave. The majority of care workers state that they are not paid a salary, but usually receive a stipend to cover their transport costs. Wellness Foundation confirmed that care workers will use their stipend to help feed the person they are caring for, as well as the person's relatives. Based on their working conditions, they believe that their work is "unpaid" and "undervalued".

In our concluding remarks we highlighted that a rights-based approach to care work was needed. We listed the following rights that would be directly respected, promoted and protected should care work be recognised:

The right to work

The recognition of care workers through formal policies and legislative reform effectively promotes and protects the rights of women who provide unrecognised care. It emphasises their right to work and to choose their own profession, which promotes their right to dignity and equality. Care workers gain personal satisfaction from their work and see it as a commitment to their families and to developing their communities. In our submission, we identified the international covenants and conventions that recognise the right to work and what that right entails.

The financial independence of women

We highlighted the experience of our partner organisations and their confirmation that the majority of care workers are women. As most women perform this work either voluntarily or for a stipend, it means that women have limited access to financial independence. These limited financial resources contribute to the entrenchment of women into poverty. We highlighted the need for legislation and policy for minimum wages for care workers to ensure that they are paid and can enjoy access to a livelihood that does not entrench them within the cycle of poverty.

The treatment of carers

Carers do not have access to formal protection in terms of labour laws. Many are employed under contracts that are dependant on available funding. They are excluded from social security benefits such as unemployment insurance and maternity benefits. As a result of the little value that is placed on their role within the health care framework, care workers report that they are often discriminated against by health care workers at hospitals and clinics. They suffer high levels of isolation, burnout and fatigue and a general decline in their own health and wellbeing as a result of the demands of the work they perform.

The Special Rapporteur confirmed some of our submissions in her final report. She confirmed that care work impacts directly on the right to work and on women's rights to dignity and equality. She confirmed the infringement on the right to work when care workers have no access to just and favourable working conditions. She identified the fact that care work is predominantly done by women and that these women and girls lose out on the right to education as a result of their function as care workers for their families and communities. She also highlighted the infringement on the right to health due to our submission that long hours of care work impacts negatively on the health of carers. She supported our submission that access to social security is critical where no provisions are made in this regard. The key message in the final report was that carers must be included in a meaningful way in all reforms, programmes and legislation concerning them. ■

KHAYELITSHA COMMISSION OF INQUIRY: POLICE LOSING THE WAR ON RAPE IN KHAYELITSHA

In 2012, five civil society organisations, Social Justice Coalition, Equal Education, Treatment Action Campaign, Ndifuna Ukhwazi and Triangle Project, lodged a complaint with the Premier of the Western Cape regarding police inefficiency and a breakdown in relations between the police and the community of Khayelitsha. Subsequently, the Premier established the Khayelitsha Commission of Inquiry to investigate the complaint. The LRC represented the five organisations at the proceedings. The Commission was headed by retired Judge Kate O'Regan and Vusi Pikoli.

The complainant organisations alleged that members of the Khayelitsha community routinely experience violations of their constitutional and other rights when they require the services of the South African Police Service (SAPS). They further alleged that the SAPS in Khayelitsha are overburdened and under-resourced; investigating officers and prosecutors appear not to cooperate effectively; investigating officers often do not communicate with victims of crime regarding the progress of investigations or prosecutions, including informing them about court dates and bail hearings; and investigations and securing of crime scenes, gathering of forensic evidence, interviewing of witnesses and other basic procedures are often not complied with or performed competently. This article highlights the alleged inefficiencies in instances when rape cases are reported to the SAPS in Khayelitsha.

In their complaint to the Premier, the organisations reported that girls and

In the years 2007/2008, the 3 police stations in Khayelitsha (Harare, Site B and Lingelethu West) accounted for

15.94% of reported rape cases in the City of Cape Town

(Crime Stats SA)

In 2008 a report by the City of Cape Town rated Khayelitsha as having

the **4th highest** number of reported rape cases in Cape Town

(Crime in Cape Town, 2001–2008)

The LRC's Mandy Mudarikwa and Michael Bishop at the launch of the Khayelitsha Commission of Inquiry report

women were frequently beaten and raped whilst walking to and from communal toilets, or when fetching water from communal taps close to their homes, and that domestic abuse posed a threat to the safety of many women within their own homes. The complainant organisations noted that in December 2003, Khayelitsha was the scene of the sexual assault and murder of 22-year-old Lorna Mlofana by a group of young men who learnt that she was HIV-positive. Lorna Mlofana was the leader of the Treatment Action Campaign for her area. At that stage, the community and civil society organisations began calling upon the state to provide improved police and other services for rape victims.

During its proceedings, the Commission heard that in 2010, the national branch of the SAPS gave an instruction that each police cluster – of which there are 25 in the Western Cape – must have a Family Violence, Child Protection and Sexual Offences Unit, commonly known as FCS units. The Khayelitsha FCS Unit serves the eight police stations in the Khayelitsha cluster, which includes a number of other stations. Evidence about the Khayelitsha FCS Unit was placed before the Commission principally by the Provincial Commander: Family Violence, Child Protection and Sexual Offences Unit, Colonel Sonja Harri.

In her evidence Colonel Harri identified the following challenges facing the Khayelitsha FCS Unit. FCS unit staff members suffer from low morale due to the nature of the cases that they deal with and because the unit is understaffed. Although the national instruction regulating the units requires that unit members, including these officers, go for debriefing sessions every six months, this is often not observed. Colonel Harri also testified that over the last three years, due to the poor performance of the Khayelitsha FCS, other teams have been sent to assist. Sending these teams to the Khayelitsha FCS then results in understaffing of the units where they are based. Our testimony revealed that incomplete or poor police investigations conducted by the FCS unit have resulted in some cases being struck from the roll or withdrawn by magistrates. Furthermore, her evidence showed that FCS investigators pursued unstructured, unfocused and therefore ineffective investigations.

In the first ten months of 2014, there were **543** sexual crimes reported in Khayelitsha

(Crime Stats SA)

A march in support of the Khayelitsha Commission of Inquiry just before the release of its report on the 25 August 2014

An inspection of the Khayelitsha FCS Unit conducted by the Police Inspectorate in June 2013 revealed that members of the unit are not registering their informers, despite this requirement being included in members' job descriptions. Additionally, although the provincial commander has attempted to ensure that their workload is reduced, the two officers at the unit were not managing the office effectively. As such, it was found that the Khayelitsha FCS Unit is the worst performing of all units in the province.

On behalf of the complainant organisations, the LRC showed that repeated findings of poor performance without any remedial steps indicated that the FCS Unit in Khayelitsha was operating inefficiently. It was also argued that the FCS Unit has not had the capacity and expertise to develop and implement an effective strategy for responding to sexual violence in Khayelitsha. The Commission heard closing arguments on the 29 May 2014 and released the report on its findings on the 25 August 2014.

REFUGEE PROTECTION FOR SEXUALLY AND GENDER NON-CONFORMING PERSONS

"You seem to be on the belief that you suffer that you alleged you suffer because you are a member of a particular social group called gays. It is my findings that you are not gay. In your testimony you stated you know nothing about gay association in Zimbabwe… Your evidence failed to demonstrate that you are a gay…"[1]

According to Article 1 A (2) of the 1951 UN Refugee Convention read together with the 1967 Optional Protocol, the term "refugee" shall apply to any person who "…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, *membership of a particular social group* or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." (own emphasis.)

Similarly Article 1 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 defines a refugee as "every person, who owing to a well-founded fear of persecution by reason of race, religion, nationality, membership of a social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country, who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable, or owing to such fear, unwilling to return to it."

Sexually and gender non-conforming persons belong to such a social group and increasingly face persecution from both private and public actors in their home countries and are left with no option but to flee and seek asylum elsewhere.

The LRC's experience has been that sexually and gender non-conforming persons are often unable and unwilling to approach their own government for protection largely due to the presence of homophobic laws and policies or discriminatory belief systems. There is a growing anti-homosexuality sentiment internationally, with increasing legislation and policy development criminalising what is considered as sexually or gender non-conforming actions. Nigeria and Uganda have enacted legislation that seeks to criminalise same-sex sexual acts, as well as same-sex marriages. These countries follow a number of others, such as Cameroon and Malawi, who have penal codes in place that criminalise same-sex practices.

As countries continue to enact legislation that promotes hatred and violence aimed at those who are different, we have seen an increase in sexually and gender non-conforming persons fleeing to South Africa to seek asylum in a country which is perceived by many to be open and welcoming towards sexual and gender non-conforming persons. After all, South Africa recognises equality in Section 9 of the Constitution and protects the dignity and right to privacy of individuals. Our courts have spoken out against discrimination based on sexual orientation and gender identity in law and practice. Parliament has enacted legislation that allows for the alteration of sex description and the recognition of same-sex unions.

We use the term **"sexually and gender non-conforming"** to refer to asylum seekers and refugees of variant sexual orientation and gender identity in an attempt to encompass all sexual and gender minority asylum seekers and refugees.

Asylum seekers hope that the receiving country will be friendlier towards their sexual orientation and gender identity and will allow them the dignity to live their lives without fear, prejudice or persecution. Why then does the Department of Home Affairs and, more particularly, Refugee Status Determination Officers (RSDOs) continue to deny claims based on gender non-conformity?

In making decisions on the validity of asylum claims, RSDOs appear to be applying the correct legal principle but, at the same time, place a reverse and prejudicial onus on the claimants to prove persecution in the form of physical violence and detention or physical violence and no

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1 Decision by a Refugee Status Determination officer in respect of an asylum seekers claim for refugee status.

DOUBLE PERSECUTION IN THE ASYLUM PROCESS IN SOUTH AFRICA

AKM is an asylum seeker from the Democratic Republic of Congo (DRC). He fled to South Africa because he had suffered persecution at the hands of his family and community for being a gay man and for being in a relationship with another man. While living in the DRC he was forced to conceal his sexuality. It is illegal to conduct an openly gay relationship in the DRC and AKM had witnessed a friend stoned to death at the University of Lubumbashi because other students had found out that he was homosexual. This experience reinforced AKM's decision to conceal his sexuality in order to avoid being killed.

However, AKM's brother-in-law discovered him and his lover one day and became so incensed that he locked the door to the house and proceeded towards the kitchen to get a knife and threatened to hurt them. AKM managed to escape and went to the police to report the incident. He told them the details of what had happened but struggled to admit his sexuality to the police, as this also posed a threat to his well-being. As fearful as he was, he admitted his sexual orientation to the police, who in turn laughed at him and told him that he deserved to die for his actions. He quickly left the police station as he saw from their reaction that they would arrest him. He went to his friend's house to spend the night. The next day, AKM was told that the friend's business had been ransacked and vandalised. AKM was then convinced that his life was in danger and his friends advised him to flee to safety in South Africa.

AKM arrived in South Africa in June 2010. He applied for asylum at the

As of January 2014, same-sex relations were illegal in

36 countries in Africa

(Amnesty International)

In Lesotho, homosexuality itself is not illegal but sodomy is still considered a crime punishable by law

Chad may become the 37th country in Africa to outlaw homosexuality, following the drafting of a bill in September 2014

Cape Town Refugee Reception Office and was interviewed by a Refugee Status Determination Officer (RSDO). The interview consisted of questions interrogating AKM as to why he was gay and whether he knew that being gay was a sin before God. The RSDO noted in the decision that AKM had left his country of origin due to discrimination suffered, but failed to expand on the nature of the discrimination suffered. The RSDO rejected AKM's claim as manifestly unfounded, i.e. a claim for asylum which is regarded as lacking foundation because it is either clearly fraudulent or not related to the criteria for the granting of refugee status laid down in Section 3(a) the Refugee Act, or to any other criteria justifying the granting of asylum.

This decision to reject AKM's claim as manifestly unfounded was, without a doubt, incorrect. In 2012, we assisted AKM to make submissions to the Standing Committee of Refugee Affairs (SCRA) disputing the rejection by the RSDO and explained why he should have been granted refugee status in light of both his personal experiences of persecution and the objective country assessment of the DRC. We further explained that these circumstances clearly highlighted that AKM had a well-founded fear of persecution and that he could not openly live as a gay man in the DRC without suffering persecution, and that he should not be expected to hide his sexuality which, in itself, would amount to persecution.

In 2013, the SCRA, in reviewing AKM's application for asylum, upheld the RSDO's initial rejection and gave AKM 30 days to leave South Africa and return to his country of origin. In considering AKM's claim, this decision failed to apply section 3(a) of the Refugees Act. His case is based on persecution suffered as a result of his membership of a particular social group (sexual minorities). This was also a violation of the principle of *non-refoulement,* which requires that parties to the Refugee Convention, of which South Africa is one, not return a person to a country where he would suffer persecution as a result of reasons set out in the Convention, which are the same as those set out in the Refugees Act of South Africa. The LRC filed a review application in the Western Cape High Court in terms of the Promotion of Administrative Justice Act to review both the decision of the RSDO and the SCRA decision. The LRC has requested the court to review and set aside these decisions and send the matter to a new RSDO for determination or, alternatively, make a decision to recognise AKM's refugee status. ■

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relief administered in respect of private actors. In some recorded cases, an asylum claim does not involve proving that the person suffered persecution, but whether or not the person can satisfy the RSDO that they are in fact sexually or gender non-conforming.

In some cases, simple ignorance of the law results in RSDOs rejecting claims outright, which means that they don't recognise that gender and sexually non-conforming persons fall under the category of persons belonging to a particular social group. This decision is then sent to the Standing Committee for Refugee Affairs (SCRA) who appears to rubber stamp the decision taken by the RSDO. Although asylum seekers have the right to make written submissions to the SCRA, they are not informed of it and SCRA does nothing further to scrutinise the cases before it.

Clients report having experienced prejudice and hostility from RSDOs and other officials and some have reported being verbally abused by officials and security guards when they do not physically resemble the sex on their status documents. Because of this hostile and prejudicial behaviour, clients may not renew permits on time, contributing to their vulnerability.

A number of our clients have also reported that, as a result of the persecution that they faced in their countries and because they still live in communities made up of their country men and women, they have purposefully hidden their sexual orientation or gave the RSDO false reasons for having fled to South Africa.

"Due to the language barrier I made use of a woman from my country to interpret during my interview. We go to the same Church and I live with her family. I could not risk telling the RSDO in front of her that I left Malawi because I was lesbian and the villagers burnt down my house when they found out…" [2]

The Legal Resources Centre is currently providing services to sexually and gender non-conforming persons who have had their claims rejected as unfounded and are able to lodge appeals with the Refugee Appeals Board. We are also drafting written submissions to the Standing Committee on Refugee Affairs in those cases where the clients have either not disclosed their status or where the RSDO has not applied the law. In certain cases, where the internal processes have been exhausted, we have approached the High Court to set aside the decision. ■

2 An asylum seeker from Malawi explains why she did not tell the RSDO about the persecution she suffered as a lesbian woman and her reasons for fleeing Malawi.

ACCESS TO ADMINISTRATIVE JUSTICE: A CASE FOR REFUGEES

In May 2012, the Department of Home Affairs (DHA) announced that it intended to close the Cape Town Refugee Reception Office (CTRRO) to new asylum seekers, with effect from 29 June 2012. The DHA indicated that new asylum seekers would have to apply for permits, as well as have them processed, in Musina, Pretoria or Durban; many thousands of miles away.

At the time of the announcement, the CTRRO was the second busiest office for newcomers in the country, dealing with over 1500 applicants a month. As the Crown Mines and Port Elizabeth offices had previously been closed (the former completely, the latter to newcomers), the burden on the remaining offices increased dramatically.

Closure of these offices is prejudicial to poor and vulnerable asylum seekers. For newcomers to apply for applications, it may entail repeatedly travelling thousands of kilometres on four separate occasions, at the very least, with one's family. This is very costly and there is a risk of losing employment. Everyone must travel these distances irrespective of age, gender, pregnancy, infirmity or illness. At Musina, where many migrants cross over the border from Zimbabwe in South Africa, accommodation is scarce and DHA assistance may not immediately be available as asylum seekers from particular countries are processed on specific days of the week only. This increases the dangers faced by applicants who are then forced to sleep outside.

Refugees and asylum seekers wait outside the regional Home Affairs offices at Customs House in Cape Town

In 2013, the number of new asylum applications in South Africa was estimated at **70 000**. Asylum claims have gradually dropped from the 2009 peak of

222 300 claims

(United Nations High Commission of Refugees)

The reasoning behind the closures appears to be that the DHA intends to situate its Refugee Reception Offices on the northern borders of South Africa. Much emphasis was placed by the department on the anticipated building of a new office in Lebombo.

On behalf of the Scalabrini Centre of Cape Town, the LRC (and co-signatory, the University of Cape Town's Refugee Clinic) launched an application in the Western Cape High Court for urgent relief and for a judicial review of the decision. Scalabrini is a non-profit organisation founded by the Missionaries of St Charles to assist migrant communities and displaced people.

On 25 July 2012, the Western Cape High Court upheld the urgent application and directed the DHA to reopen the office pending the outcome of the review application[1]. The DHA was refused leave to appeal and was ordered to comply with the decision but did not do so. Instead, the DHA sought leave to appeal to the Supreme Court of Appeal (SCA).

On 19 March 2013, again the Western Cape High Court upheld the review application and ordered the DHA to reopen the RRO[2].

Again the DHA sought leave to appeal to the SCA.

Both the Western Cape judges held that the DHA's actions had constituted unreasonable administrative action, that it had unlawfully failed to consult the Standing Committee for Refugee Affairs or to hold a proper form of public consultation before making the decision, and that the decision breached the principles of legality.

At the request of all the parties, the SCA granted an early hearing date for the appeal, which took place on 3 September 2013.

In its judgment on the 27 September 2013[3], the SCA dismissed the DHA's appeal but on the narrow basis that the DHA had failed to properly consult with civil society before making its decision to close the CTRRO. The court's view was that the action was of an executive rather than an administrative nature, so irrationality and not mere unreasonableness was required before it could be reviewed. It also held that civil society merely had to be afforded an opportunity to give its views on the matter; not necessarily be consulted. It did not order the reopening of the CTRRO but ordered the DHA to hold proper public consultations and then to make a fresh decision.

At a consultation in Cape Town on 5 December 2013, many interested parties, including the Legal Resources Centre, Lawyers for Human Rights, University of Cape Town, the Somali Association of South Africa and the United Nations High Commission on Refugees, made representations against the closure. Every organisation and every individual who addressed the meeting was against the closure. But, on 31 January 2014, the Director General of the DHA issued a decision to confirm the closure. Reasons for the decision were provided a week later.

The LRC and its clients believe that the decision is unlawful for many of the reasons articulated by the judges of the Western Cape High Court. These reasons are further fortified by the DHA's misinterpretation of one of the judgments on which the new decision partially relies. Recently in Parliament, the Minister of Home Affairs declared that no RRO is to be opened at Lebombo after all, thus intensifying the burdens and backlogs experienced in Pretoria and Musina.

We were accordingly instructed to issue a fresh challenge to the decision, which we launched on the 8 May 2014. ◘

1 *Scalabrini Centre, Cape Town v Minister of Home Affairs and Others* 2012 (4) ALL SA 576 (WCC)

2 *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2013 (3) SA 531 (WCC)

3 *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* 2013(6) SA 421 (SCA)

PROTESTS AND POLICING IN SOUTH AFRICA

Section 17 of the Constitution protects the right of everyone to assemble peacefully, demonstrate and present petitions. The related rights to freedom of expression and freedom of association are entrenched in section 16 and section 18 of the Bill of Rights. Read together, these rights are a foundational element of the Constitution's vision of a society in which human rights are respected and democratic values of equality, human dignity and freedom are protected and promoted.

The LRC's work on policing and protests is focused on ensuring that the constitutional right to peacefully protest and assemble is protected and promoted and that the state is held accountable when it violates this right through its conduct or in its legislation. In a society characterised by historical inequality, massive disparities in wealth and increasing abuse of state resources through corruption and maladministration, the right to advance causes and voice dissent through protests, demonstrations and pickets is critically important. The duty of the state to respect the right to protest and assemble peacefully is central to the proper functioning of our democracy.

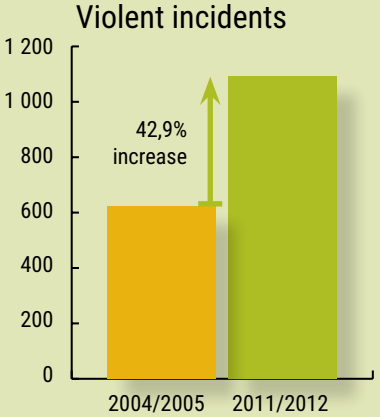
continued on page 42

Crowd management incidents

"Crowd management incidents" have increased from 8 004 in 2004/2005 to 11 033 in 2011/2012, an increase of 27.45%, while the number of violent incidents increased by 42.9% over the same period from 622 in 2004 to 1 091 in 2011/2012

(Minister of Police Nathi Mthetwa, in an address to Parliament, March 2012)

Violent incidents



LANDMARK SETTLEMENT IN LRC SILICOSIS TEST CASES

In 2004, the Legal Resources Centre issued its first summons against Anglo American South Africa at the South Gauteng High Court on behalf of a group of former gold miners who had been employed in Anglo American gold mines in the Free State. All of our clients had contracted an incurable but preventable disease called silicosis that makes people more vulnerable to tuberculosis (TB) infection. Our clients were from various parts of the country including the Free State and Eastern Cape, as well as from Lesotho.

Silicosis is caused by inhaling silica dust created during the process of gold mining. It is a disease that takes many years to manifest and in the early stages has far less impact on affected miners' ability to work.

Initially, our cases had been lodged as part of a larger group of 'test cases'. The LRC hoped that the test cases would establish the legal principles for the liability of mining companies towards individuals who contracted silicosis as a result of their employment at gold mines.

On behalf of our clients, the LRC argued that Anglo American South Africa, the former parent company of the mines that our clients worked for, was negligent in its control of and advice to mines with regard to the prevention of dust exposure and silicosis. This negligence ultimately led to our clients contracting the disease.

Various experts gave evidence for the LRC regarding the medical and mining aspects of silicosis and gold mining. We partnered with Leigh Day, a UK-based law firm specialising in human rights litigation against multi-national corporations, and received funding for the matter from Legal Aid South Africa. We had a legal team of approximately 15 lawyers working on the case.

As the case progressed, the LRC were saddened by the deaths of a number of clients from the disease. Due to the prolonged court procedures (interlocutory applications and appeals), an agreement was reached with Anglo American SA to have the matter arbitrated before three arbitrators: former Chief Justice Ngcobo, and retired Judges Farlam and Hurt. The matter was set down for hearing over a period of approximately three months and the award (judgment) was to be handed down within four months after the hearing was finalised. The award would be final, with no option of an appeal. Both parties viewed this as the quickest and best way to finalise the matter.

The LRC's Sayi Nindi (middle right) stands with gold miners and families of gold miners who contracted silicosis. A successful settlement was agreed to in September 2014 with the result that ex-gold miners and their families received compensation for their suffering.

In September 2013, Anglo American SA made an attractive offer to our clients, which would see them compensated for their suffering. We advised our clients to accept the offer and an agreement was signed on 19 September 2013. Only certain terms of the settlement agreement may be disclosed; these terms did not include the amounts paid to our clients. The terms that may be disclosed include the fact that the matter got settled; that there was no admission of liability by Anglo American SA; and that the LRC was to be paid its costs.

Following this favourable settlement, it was necessary to seek relief for the many thousands of silicotic miners who were not parties to the test case. Three law firms instituted applications to certify class actions – Richard Spoor, Charles Abrahams and the LRC. The LRC brokered an agreement in terms of which all three firms now act jointly for the class.

The class action is still ongoing. We represent former gold miners with a confirmed medical diagnosis of silicosis or silico-TB. In order to be included within the class, the gold miners must have been employees of Anglo American SA mines after 1960 for a period of two years or more prior to diagnosis of silicosis or silico-TB. The proposed class would include all Anglo American SA silicosis and silico-TB victims except for: (a) the claimants in the settlement discussed above and (b) the named claimants in proceedings pending in the United Kingdom courts. ■

continued from page 40

The South African government's record in respecting and protecting the right to peaceful assembly has come under increasing and severe criticism. Faced with mounting social unrest over rising unemployment, widespread chronic poverty and a lack of delivery of basic services, the reaction of government officials to social protests has ranged from heavy-handed and, on occasion, lethal use of force by the security services, to the legalistic and restrictive application of national laws governing protests and demonstrations.

The deaths of 34 striking mineworkers at the Lonmin Mine in Marikana on 16 August 2012, who were shot by members of South African police units, captured national and international attention and sparked local outrage. The ongoing work of the LRC in the subsequently established Marikana Commission of Inquiry has revealed systemic failures of basic crowd control policing measures and an alarming resort to the use of deadly force by police when dealing with protests. A threat to the vision of participatory democracy in the Constitution has been government reaction to applications for protest marches and a resort to bureaucratic delay, legal formalism and obfuscation to frustrate and impede social protests.

The primary method by means of which this has occurred has been through state suppression of protests by way of the Regulation of Gatherings Act 205 of 1993, which regulates assemblies, demonstrations and gatherings. The LRC is currently preparing a constitutional challenge to the Gatherings Act, arising from the arrest of activists in Cape Town for non-compliance with its provisions for notice of demonstrations and gatherings. On 11 September 2013, 21 members of the Social Justice Coalition, in an act of peaceful and organised civil disobedience, chained themselves outside Mayor Patricia de Lille's office in Cape Town. This action was taken after numerous failures on the part of the City and Mayor to engage with the SJC on the crisis of sanitation facing the City's informal settlements. The activists were subsequently arrested by the police and charged with breaching the Regulation of Gatherings Act. Our clients have declined to plead guilty to the criminal charges and we have brought an application to the High Court to challenge the Gatherings Act on the basis that it restricts the right to freedom of assembly.

During 2014, the LRC participated with our partners in the International Network of Civil Liberties Organisations (INCLO) in a joint action before the United Nations Human Rights Commission regarding the resolution on social protest that was being negotiated at the Human Rights Council's 25th session. The context of negotiations around this resolution became complicated after a regressive proposal for amendments to the draft, led by the South African delegation. We partnered with the Argentinian organisation, Center for Legal and Social Studies, to coordinate actions to lobby the South African government to desist from this initiative. We issued a widely publicised statement condemning the South African position and the proposed amendments, which would have allowed states to restrict protests on the dubious ground of "national security". In a significant victory for INCLO and our other civil society partners, the resolution was approved without the amendments proposed by South Africa. ■

REGIONAL WORK: LRC HOSTS THE WORKING GROUP ON EXTRACTIVE INDUSTRIES IN MARIKANA

The African Commission on Human and Peoples' Rights, mandated to protect and promote the rights enshrined in the African Charter on Human and Peoples' Rights and related instruments, employs special mechanisms to fulfil its mandate. One such mechanism is the creation of Working Groups, consisting of Commissioners and Expert Members, who are tasked to investigate particular topics. In 2009, the Commission constituted a Working Group on Extractive Industries, Human Rights and the Environment (WGEI). The Working Group was tasked with investigating the impact of the extractive industries (mining and associated activities) on communities in Africa and come up with ways to address adverse impacts that they might find.

The WGEI is unfunded and thus reliant on external support to do its work. In 2011, the LRC stepped into the vacuum of support for the WGEI and assisted it to begin its work by arranging the first two meetings of the WGEI in 2012 and 2013 in Pretoria. Both meetings had private and public sessions – the latter giving the WGEI a chance to interact with its 'constituency' and promote its work. Since then, the WGEI has been able to raise independent funding and has strengthened its mandate, with significant support now also provided by other civil society organisations.

A major part of the strengthened mandate of the WGEI is its plan to undertake four official country visits to inform its status quo report of extractive industries in Africa. The countries identified for visits are Zambia, Tanzania, the Democratic Republic of Congo and Liberia.

These country visits were preceded by the first site visit undertaken by the WGEI, which was to Marikana in South Africa in May 2013. This visit was arranged and facilitated by the LRC and coincided with the second public meeting of the group with civil society organisations from Southern Africa. It proved to be an extraordinary experience for the members of the WGEI, including Commissioner Pacifique Manirakiza of Burundi (currently based in Canada), chair of the WGEI, and Clement Voulle, an expert member from Togo who is based in Geneva. The day provided their first close encounter with the realities of the impact of large-scale mining upon various communities, an encounter that they described as unforgettable.

The day started with a visit to the Marikana Commission of Inquiry at Rustenburg. The members were introduced to the chair of the Commission, Judge Farlam, who publicly welcomed the delegates. The official transcript of the Commission records read:

CHAIRPERSON (Farlam): I also understand that we have representatives of the African Commission of Human Rights here today. I've already had the opportunity of meeting them and I want to welcome them there and say we hope that they find their visit with us a source of enlightenment and information. We are very grateful for their presence because it emphasises once again that what we are doing here in this Commission is of importance not only to South Africa but to the whole African continent and indeed to, generally speaking, internationally as well. And so the interest that they are showing and their presence here today is a clear manifestation of that fact.

Chairperson of the Working Group on Extractive Industries, Commissioner Manirakiza, accompanied LRC staff and Chris Mulabatsi and David van Wyk of Benchmarks Foundation, to the low-cost housing settlement where miners from Lonmin live, as well as the scene of the Marikana massacre.

Such public recognition of the importance of the African Commission and its mandate was a landmark achievement for the WGEI and fulfilled a key objective of the regional project of the LRC, namely, to promote the Special Mechanism of the Commission, thereby strengthening the Commission itself as a central mechanism of access to justice on the continent.

From Rustenburg, the WGEI travelled to Wonderkop, accompanied by a Chris Mulabatsi and David van Wyk of Benchmarks Foundation, who provided background information. We visited the local low-cost housing settlement where Commissioner Manirakiza, in particular, was struck by the undesirable living conditions of many of the locals and spoke to people on the street. The party then proceeded to the miners' township where the Commissioners spoke to male and female mine workers. We ended the day with a visit to the mining hostels and a short engagement with the Wonderkop land claims committee, representatives of the local community who have seen their land plundered by mining without any benefits accruing to them thus far.

In January 2014, the WGEI undertook its first official country visit to Zambia. Given the LRC's work in Zambia and, in particular, with communities in the North West province, the LRC's Henk Smith and Wilmien Wicomb travelled to Solwezi to facilitate the site visit of the WGEI at Musele village. This is the community that the LRC supported in overturning what is considered to be an unlawful surface lease agreement and inadequate Environmental Impact Assessments by a Canadian mining company, First Quantum Minerals. The company wanted community land to the extent of about 1000 km^2 to develop a mine with a footprint of no more than 43km^2 (by the company's own assessment). Members of the WGEI were hosted by Chief Musele. The Musele Community Task Force was present to recount their struggles in resisting the mass relocations and other significant impacts of the mine. The WGEI then met with representatives of First Quantum Minerals and relevant government officials in the province. We also travelled to Lusaka where the WGEI met with a group of local NGOs to discuss key issues and challenges they experience.

At the request of the WGEI, the LRC will travel to Zambia in June 2014 to meet with the Musele community and NGOs to report back on the preliminary findings of the WGEI. ■

LEGAL RESOURCES CENTRE

EXECUTIVE COMMITTEE'S RESPONSIBILITIES AND APPROVAL ANNUAL FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 2014

The organisation is required by its Constitution, to maintain adequate accounting records and its Executive is responsible for the content and integrity of the annual financial statements and related financial information included in this report. It is their responsibility to ensure that the annual financial statements fairly present the state of affairs of the organisation as at the end of the financial year and the results of its operations and cash flows for the year then ended, in conformity with its accounting policies. The external auditors are engaged to express an independent opinion on the annual financial statements.

The annual financial statements are prepared in accordance with our accounting policies and are based upon appropriate accounting policies consistently applied and supported by reasonable and prudent judgements and estimates.

The executive committee acknowledges that it is ultimately responsible for the system of internal financial controls established by the organisation and place considerable importance on maintaining a strong control environment. To enable the committee to meet these responsibilities, the executive committee sets out standards for internal control aimed at reducing the risk of error or loss in a cost- effective manner. The standards include the proper delegation of responsibilities within a clearly defined framework, effective accounting procedures and adequate segregation of duties to ensure that an acceptable level of risk. These controls are monitored throughout the organisation and employees are required to maintain the highest ethical standards in ensuring that the organisation's business is conducted in a manner that is above reproach.

The focus of risk management in the organisation is on identifying, assessing, managing and monitoring all known forms of risk across the organisation. While operating risk cannot be fully eliminated, the organisation endeavours to minimise it by ensuring that appropriate infrastructure, controls, systems and ethical behaviour are applied and managed within predetermined procedures and constraints.

The executive committee is of the opinion, based on the information and explanations given by management, that the system of internal controls provides reasonable assurance that the financial records may be relied on for the presentation of the annual financial statements. However, any system of internal financial control can provide only reasonable, and not absolute, assurance against material misstatement or loss.

The executive committee has reviewed the organisation's cash flow forecast for the year to 31st March 2015 and, in the light of this review and the current financial position, they are satisfied that the organisation has a reasonable expectation of or has access to adequate resources to continue in operational existence for the foreseeable future.

Although the executive committee is primarily responsible for the financial affairs of the organisation, it is supported by the organisation's external auditors.

The external auditors are responsible for independently reviewing and reporting on the organisation's annual financial statements. The annual financial statements have been examined by the organisation's external auditors.

The abridged annual financial statements set out on pages 46 to 47, were approved by the executive committee on the 13th February 2015 and were signed on its behalf by:

27-02-2015

Date

27 - 2 - 15

Date

LEGAL RESOURCES CENTRE **NPO NUMBER:** 023 - 004 **PBO NUMBER:** 930003292

ABRIDGED VERSION OF THE ANNUAL FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 2014

LEGAL RESOURCES CENTRE STATEMENT OF FINANCIAL POSITION AT 31 MARCH 2014

	2014 R	2013 R	2012 R
ASSETS			
Non current assets	**641 338**	**918 753**	**730 860**
Equipment	641 338	918 753	730 860
Current assets	**3 062 408**	**1 925 138**	**4 930 391**
Trade and other receivables	1 145 905	975 757	1 010 401
Cash and cash equivalents	1 497 532	535 399	3 189 490
Client trust bank accounts	418 971	413 982	730 500
TOTAL ASSETS	**3 703 746**	**2 843 891**	**5 661 251**
RESERVES AND LIABILITIES			
Reserves	**(2 157 617)**	**(2 146 199)**	**1 306 134**
Accumulated funds	(2 157 617)	(2 146 199)	1 306 134
Current liabilities	**5 861 363**	**4 990 090**	**4 355 117**
Trade and other payables	2 384 733	3 515 457	2 781 646
Provisions for leave pay	1 057 659	1 060 651	842 971
Distribution received on advance	2 000 000	-	-
Client trust funds	418 971	413 982	730 500
TOTAL RESERVES AND LIABILITIES	**3 703 746**	**2 843 891**	**5 661 251**

LEGAL RESOURCES CENTRE STATEMENT OF COMPREHENSIVE INCOME FOR THE YEAR ENDED 31 MARCH 2014

	2014 R	2013 R	2012 R
INCOME	**44 509 105**	**35 326 312**	**38 087 871**
Cost recovery	1 534 496	2 649 306	2 787 323
Distribution from Legal Resources Trust	42 216 592	31 464 631	34 724 648
Sundry income	712 073	1 134 684	532 145
Interest received	45 944	77 691	43 755
OPERATING EXPENDITURE	**44 520 523**	**38 778 645**	**34 906 751**
Salaries and contributions	9 885 411	8 720 616	8 172 452
Office expenses	7 044 481	7 007 185	6 228 928
Administrative costs	792 330	848 852	811 084
Books and periodicals	374 766	272 687	368 368
Computer expenses	629 955	485 110	445 704
Consulting and professional fees	247 624	694 960	312 612
Depreciation	282 833	243 579	339 188
Lease rentals on operating lease	3 645 909	3 177 296	2 750 146
Printing and stationery	252 319	236 355	204 965
Telephone and fax	519 924	537 338	584 383
Travel - local	298 821	511 008	412 478
Project expenses	27 590 631	23 050 844	20 505 371
(DEFICIT)/SURPLUS FOR THE YEAR	**(11 418)**	**(3 452 333)**	**3 181 120**
BALANCE AT BEGINNING OF YEAR	**(2 146 199)**	**1 306 134**	**(1 874 986)**
BALANCE AT END OF YEAR	**(2 157 617)**	**(2 146 199)**	**1 306 134**

LEGAL RESOURCES TRUST (TRUST NUMBER IT.8263)

TRUSTEES' RESPONSIBILITIES AND APPROVAL ANNUAL FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 2014

The trustees are required by the Trust Property Control Act, 1988, and the trust deed, to maintain adequate accounting records and are responsible for the content and integrity of the annual financial statements and related financial information included in this report. It is their responsibility to ensure that the annual financial statements fairly present the state of affairs of the trust as at the end of the financial year and the results of its operations and cash flows for the year then ended, in conformity with its own accounting policies. The external auditors are engaged to express an independent opinion on the annual financial statements.

The annual financial statements are prepared in accordance with the trust's own accounting policies and are based upon appropriate accounting policies consistently applied and supported by reasonable and prudent judgements and estimates.

The trustees acknowledge that they are ultimately responsible for the system of internal financial controls established by the trust and place considerable importance on maintaining a strong control environment. To enable the trustees to meet these responsibilities, the board of trustees sets out standards for internal control aimed at reducing the risk of error or loss in a cost - effective manner. The standards include the proper delegation of responsibilities within a clearly defined framework, effective accounting procedures and adequate segregation of duties to ensure an acceptable level of risk. These controls are monitored throughout the trust and employees are required to maintain the highest ethical standards in ensuring the trust's business is conducted in a manner that in all reasonable circumstances is above reproach. The focus of risk management in the trust is on identifying, assessing, managing and monitoring all known forms of risk across the trust. While operating risk cannot be fully eliminated, the trust endeavours to minimize it by ensuring that appropriate infrastructure, controls, system and ethical behaviour are applied and managed within predetermined procedures and constraint.

The trustees are of the opinion, based on the information and explanations given by management, that the system of internal controls provides reasonable assurance that the financial records may be relied on for the presentation of the annual financial statements. However, any system of internal financial control can provide only reasonable, and not absolute, assurance against material misstatement or loss.

The trustees have reviewed the trust's cash flow forecast for the year to 31st March 2015 and, in the light of this review and the current financial position, they are satisfied that the trust has or has access to adequate resources to continue in operational existence for the foreseeable future.

Although the board of trustees is primarily responsible for the financial affairs of the trust, it is supported by the trust's external auditors.

The external auditors are responsible for independently reviewing and reporting on the trust's annual financial statements. The annual financial statements have been examined by the trust's external auditors.

The financial statements set out on pages 49 to 51, were approved by the board of trustees on the 13th February 2015 and were signed on its behalf by:

Date

27/02/2015

Date

LEGAL RESOURCES TRUST (Trust no. IT 8263) **PBO reference no.** 93002175 **NPO registration no.** 029 - 336 NPO

ABRIDGED VERSION OF THE ANNUAL FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 2014

LEGAL RESOURCES TRUST STATEMENT OF FINANCIAL POSITION AT 31 MARCH 2014

	2014 R	2013 R	2012 R
ASSETS	**32 533 888**	**32 515 086**	**24 441 490**
Non - Current assets	**29 445 360**	**32 224 960**	**23 936 403**
Tangible assets	2 180 233	1 175 246	1 028 525
Investments	27 265 127	31 049 714	22 907 878
Current assets	**3 088 528**	**290 126**	**505 087**
Distribution in advance	2 000 000	-	-
Cash and cash equivalents	1 088 528	290 126	505 087
TOTAL ASSETS	**32 533 888**	**32 515 086**	**24 441 490**
RESERVES AND LIABILITIES	**32 533 888**	**32 515 086**	**24 441 490**
Equity and reserves	**22 295 161**	**21 096 690**	**18 683 216**
Initial trust capital	250	250	250
Revaluation reserve	2 272 206	1 175 246	1 110 979
Scholarship reserve	589 717	589 717	589 717
General reserve	19 432 988	19 331 477	16 982 270
Current liabilities	**10 238 727**	**11 418 396**	**5 758 274**
Deferred grant income	10 238 727	11 418 396	5 758 274
TOTAL RESERVES AND LIABILITIES	**32 533 888**	**32 515 086**	**24 441 490**

LEGAL RESOURCES TRUST STATEMENT OF COMPREHENSIVE INCOME FOR THE YEAR ENDED 31 MARCH 2014

	2014 R	2013 R	2012 R
INCOME	**42 960 704**	**34 054 401**	**33 046 624**
Grants and donations	40 049 219	32 848 845	31 601 510
Dividend revenue	311 960	119 252	436 075
Fair value adjustment on investments	(1 108 224)	(5 034 269)	(561 575)
Gain on disposal of investments	3 074 854	5 600 472	876 734
Interest received	632 895	520 101	693 880
EXPENDITURE	**642 601**	**391 996**	**1 264 244**
Investment managing fees (Investec)	71 023	33 245	208 971
Audit fees	67 383	72 701	79 063
Bank charges	8 439	9 710	6 690
BEE rating	36 245	34 097	29 895
Depreciation	91 973	68 980	59 895
StratAlign process	-	-	663 586
Printing, postage and stationery	11 662	7 616	2 930
Repairs and maintenance	11 869	-	-
Travelling and accommodation - trustees	344 007	165 647	213 214
Surplus for the year	**42 318 103**	**33 662 405**	**31 782 380**
Distribution to Legal Resources Centre	**(42 216 592)**	**(31 464 632)**	**(34 724 648)**
SURPLUS/(DEFICIT) FOR THE YEAR	**101 511**	**2 197 773**	**(2 942 268)**
NET TRANSFER FROM/(TO) RESERVES	**-**	**151 434**	**(42 101)**
BALANCE AT BEGINNING OF THE YEAR	**19 331 477**	**16 982 270**	**19 966 639**
	19 432 988	**19 331 477**	**16 982 270**

LEGAL RESOURCES TRUST DETAILED SCHEDULE OF GRANT AND DONATION INCOME FOR THE YEAR ENDED 31 MARCH 2014

	2014 R	2013 R	2012 R
Foreign funders	**35 042 299**	**23 648 568**	**23 868 663**
Anonymous	355 594	823 288	465 121
C S Mott Foundation	493 845	407 680	413 146
Canon Collins Trust	630 000	115 000	-
Comic Relief	6 750 611	4 463 019	4 775 531
EIDHR	375 461	-	-
Embassy of Belgium	-	402 360	1 900 020
Embassy of Finland	21 978	657 384	683 885
Evangelische Entwicklungsdienst (EED)	3 114 020	2 209 699	2 227 150
Freedom House	857 340	373 078	719 663
Stifstel Sen Svenska AM	-	166 959	-
Surplus People's Project - T.Amakhaya	162 053	380 921	38 279
The Atlantic Philanthropies	5 000 000	3 375 000	4 525 000
The ELMA Foundation	5 693 681	5 474 849	6 004 393
The Ford Foundation	11 587 716	3 654 491	947 313
The Sigrid Rausing Trust	-	1 072 805	1 169 162
US - (Julia Taft Fund for refugees)	-	72 035	-
Local funders	**5 006 920**	**9 200 277**	**7 732 847**
AULAI - DOJ	-	306 128	-
Bertha Foundation	-	1 268 175	1 000 000
Bowman Gillfillan Inc	-	-	100 000
Cape Law Society	-	-	190 412
Claude Leon Foundation	1 000 000	500 000	170 000
Cliffe Dekker Hofmeyr Inc	20 000	45 000	-
EU - Foundation for Human Rights	469 775	99 516	158 322
Former Chief Justice A Chaskalson	-	1 000	12 000
Johannesburg Bar Council	-	-	30 000
Legal Aid South Africa	173 875	985 292	1 043 250
Mones Michaels Trust	-	-	60 000
National Lottery Distribution Trust Fund	340 775	1 703 878	1 425 000
ND Orleyn	40 000	20 000	30 000
Open Society Foundation for Southern Africa	544 183	1 116 650	900 000
RAITH Foundation	2 107 339	2 229 234	1 184 092
Sir Sidney Kentridge	-	180 000	-
South Deep Education Trust	-	375 000	1 125 000
The Frank Robb Charitable Trust	110 000	110 000	100 000
Other donors	200 973	260 404	204 771
	40 049 219	**32 848 845**	**31 601 510**

CANDIDATE ATTORNEY DUMISANI FAKU

Grahamstown office

A sense of purpose, direction, determination for change, being inspired and greatly privileged would, at the very least, summarise the otherwise verbally inexplicable experience as an Article Clerk with the Legal Resources Centre.

When I first joined the LRC in 2012, I had a somewhat vague understanding of what it meant to be a human rights lawyer and having interacted with the attorneys and advocates within in the organisation, including friends of the LRC, I now see the need and value in investing in Public Interest Law.

Through the work done by the organisation, be it to protect the environment, to secure safe housing and / or alternative accommodation for the landless or social welfare for those in dire need, I have learnt valuable lessons, amongst others, being that each person has intrinsic human value, they are important and everyone deserves a chance to be heard and their rights protected and promoted regardless of their socio-economic status, sex and gender. These are also sound principles that are found in our Constitution and which should guide our daily interactions with one another and which we all should uphold.

At the Legal Resources Centre I met clients from all walks of life including persons from poor and secluded communities, people living in conditions not suitable for human habitation, minorities, and marginalised and vulnerable groups. I was taught not only to respect our clients but to ensure that I use my legal skills to the best of my ability in order to afford our clients the best legal services that money can buy; even if we do not charge our clients for the work we do. This is a moral, professional and, at times, legal duty that comes with enforcing and promoting the rights and freedoms that are enshrined in our Constitution. These are principles and lessons which I hold dearly in my heart, which I will take from the Legal Resources Centre and that I want to apply throughout my legal career.

I feel particularly privileged to have been in the Grahamstown branch; the office is small with only two attorneys, one paralegal and four supporting staff members, all are extremely hardworking and have a plethora of knowledge to impart and who are willing to assist at all times, and this has greatly enriched my professional development. I am deeply and forever indebted to Sarah Sephton and Cameron McConnachie for their patience, time and knowledge they have imparted to me and generally to the entire organization for investing in my development as an aspiring jurist.

Over and above the aforesaid, the Grahamstown office has a good informal yet conducive working environment and has a great tradition of caring and sharing; in Grahamstown one does not only become a stuff member but forms an indispensable part of the family.

I have enjoyed the long and tiring road trips to the former Transkei to meet clients; to investigate the state of their schools and also to assist them using the law to secure them relief from the previous condition and at the same time protecting their constitutionally entrenched rights. I found a great deal of personal satisfaction in seeing communities change and develop incrementally through the work that the LRC has and is continuing to do.

I would, at any given moment, recommend all bright and energetic prospective Human Rights Lawyers to choose the Legal Resources Centre for their Articles of Clerkship.

CANDIDATE ATTORNEY CHRISCENTIA BLOUWS

Cape Town office

I have been passionate and very active in social justice work and community work while still at university. I always had a sense of confusion while studying, as I was not sure how I would fit into a commercial law firm and those were the only options available while studying.

I commenced my articles on the 2nd of January 2013. Being employed at the LRC has been an invaluable and enriching experience. I have received so much exposure while serving my articles in the Cape Town office but also working closely with our other offices and spending time with colleagues at training or workshops or in meetings.

LRC provides an opportunity that is not readily available when working at other human rights NGO's and that is the exposure to almost every human rights issue there is. There are so many different departments at the LRC and the rotation system as a CA has proved to be insightful and educational. Not only do you learn about areas of human rights law you are not taught anywhere else, but you get to work with different personalities and styles of different attorneys and advocates and this only aids in your professional confidence and drafting skills as an attorney.

I have always been closely involved and mainly focused on gender work; specifically violence and discrimination against women and children, but through the rotation system I have found a deep passion for refugee law and the issues that many refugee clients face daily. I also found land and restitution work to be interesting and learnt so much about environmental law, customary law and extractive industries which is not something you get taught while studying.

I feel as if the LRC was a perfect start to my career as a human rights lawyer. It has become my family and I've had supervisors that have been so supportive. They have guided me and granted me the opportunity to provide insight into the work that I do and gave me the freedom to approach them with my own ideas or suggestions. I have learnt to think independently and have the confidence to conduct workshops and provide training on certain legal aspects we deal with at the LRC.

I have had the opportunity to do policy reform work, advocacy work and litigation at the LRC. I have worked in the gender, housing, land, extractive industries, refugee and environmental law departments. I have had exposure to education work and had the opportunity to draft pleadings for the high court and even the Constitutional Court. I have met some of SA's greatest legal minds, and made so many international connections by being a Bertha fellow.

I am just grateful for the opportunities I have been afforded through working for the organisation. I hope to stay a part of the LRC legacy, as it has contributed and motivated me to be the best Human Rights Lawyer I could be. ■

Chriscentia Blouws is one of the first Bertha Fellows. See their website for more: http://www.berthafoundation.org/justfellows.html

2013 CANDIDATE ATTORNEYS

Clockwise from L-R: Thabile Dlamini, Chriscentia Blouws, Sarah-Jane Frith, Yolisa Mfarse, Alexandra Robertson, Margaret Stride, Timothy Lloyd, Mabatho Molokomme, Winnie Ngubane, Dumisani Faku, Shean Rippenaar, Moegamat Davids

INTERN EXPERIENCE: SHONA GAZIDIS

Grahamstown Regional office

The experience I have had at the LRC has gone well beyond my expectations. As a lawyer from the UK, I was intrigued to gain an insight into the South African justice system. I also wanted to learn more about the country from which my father was forced to flee in the 1960s as a result of being an anti-apartheid activist. In working with the LRC, I have learnt that the law can be a powerful instrument in promoting the values that my father and so many others fought for in South Africa.

In particular, I have been involved in Education cases at the Grahamstown office, and have seen first-hand the changes brought about by the work of the LRC. For example, I was fortunate enough to visit a former "mud school" in a rural area which, through court action brought by the LRC against the department of education, had been transformed into a modern school with the facilities to enable learners to receive the level of education they are entitled to. I have also been involved in cases challenging the department for failing to provide sufficient teacher posts in schools, and was lucky enough to attend court on a case regarding the provision of desks and chairs, whereby a damning landmark judgement was made against the department.

The work done by the LRC truly is inspiring, and reflects the way in which lawyers can impact on society as a whole to change the lives of vulnerable and marginalised individuals. I hope

to work with the LRC again in the future, and would advise anyone given the opportunity to do so. ■

INTERN EXPERIENCE: LAUREN DANCER

Constitutional Litigation Unit

Over the 2013 long vacation, with the support of an Oxford Pro Bono Publico (OPBP) Internship Grant, I undertook a two-month internship in the Constitutional Litigation Unit of the Legal Resources Centre in Johannesburg, South Africa. Within the LRC, the CLU undertakes strategic litigation to ensure that the South African Government lives up to its human rights commitments under the Constitution.

I applied to intern with the LRC because I hoped to enhance my understanding of human rights enforcement and adjudication, by interning in a jurisdiction where human rights receive strong constitutional protection (unlike in Australia, my home jurisdiction). I also hoped to gain greater insight into the role strategic litigation can play in the enforcement of human rights.

As an intern with the CLU, I performed legal research, assisted in the drafting of legal documents, met with clients and attended court. In particular, I conducted legal research regarding:

- the scope of the right to access adequate housing under section 26 of the South African Constitution;
- the legality of candidate liability clauses in employment contracts;
- the procedures and standards applicable to the exhumation of graves, and the giving of compensation to affected community members;
- the principles of law applicable in land restitution cases;
- the extent to which the rights of children must be taken into account by the Constitutional Court in deciding whether or not to grant a discretionary remedy in a commercial dispute; and
- the procedural requirements which govern an applicant's ability to invoke sections 9 (the right to equality) and 33 (the right to justice in administrative action) of the Constitution.

In the final two matters, I was able to attend hearings in the Constitutional Court of South Africa to observe how my work contributed to the LRC's strategic litigation. This, together with the time I spent working with my colleagues, gave me great insight into both the potential and limitations of strategic litigation. On the one hand, strategic litigation can be used to powerful effect to ensure accountability for public actions. On the other hand, it requires a difficult balancing act to be struck between the need to ensure access to justice, and the desire to shape justice.

During my time with the LRC, I learnt a great deal about the work of NGOs generally, such as the importance of fund-raising, community liaison, and identifying opportunities to expand networks. I feel that my experience was an incredibly valuable one, for both myself and the LRC. I was able to draw on international and comparative materials to assist the LRC in researching human rights issues that confront many different jurisdictions. I was also able

to compare my experience and knowledge of indigenous recognition and land rights issues in Australia, with my colleagues' experience and knowledge of recognition and land issues in South Africa.

In the future, I hope to continue supporting the LRC's work through my continued involvement with OPBP. In particular, as one of the OPBP Internship Co-Coordinators in 2013-2014, I hope to set up a regular internship placement at the LRC for graduate students from the University of Oxford.

PROFILE: JASON BRICKHILL, DIRECTOR OF THE CONSTITUTIONAL LITIGATION UNIT

Jason Brickhill has recently been appointed as the Director of the LRC's Constitutional Litigation Unit. Jason joined the LRC in 2008 as an attorney. In 2010 he joined the Bar and started working as an advocate in the CLU.

Jason's commitment to social justice was largely inspired by his parents. Jason was born to a Zimbabwean father and a South African mother who was in exile. He attended government schools in Harare, in the newly independent Zimbabwe. In 1987, in his first year of primary school, agents of the apartheid regime attempted to assassinate Jason's parents by detonating a car bomb. The attempt injured them, Jason's father seriously, but they survived. The family moved to the United Kingdom for four years following the attack to recover, before returning to Harare. When he finished school, Jason was awarded a scholarship to study law at the University of Cape Town, graduating magna cum laude and as top student, after which he completed a master's degree in International Human Rights Law at Oxford University, graduating with distinction.

Jason clerked for Justice Kate O'Regan at the Constitutional Court, before completing his articles and practising as an attorney at a large commercial law firm in Johannesburg, where his practice was predominantly in public law and public sector labour law, under the mentorship of Tembeka Ngcukaitobi.

At the LRC he has served as counsel on a number of high-profile matters which have contributed to the advancement of human rights; particularly in the areas of socio-economic rights, rule of law and the right to education.

Jason has taught constitutional law at the University of the Witwatersrand and currently serves as external examiner in constitutional law. He has published widely on various subjects in constitutional law and public law. Together with Michael Bishop, Jason authors the constitutional law contributions towards Juta's periodical publications, the Annual Survey of South African Law and Juta's Quarterly Review. In the region, Jason has acted for the Namibian Government in constitutional law matters and advised the Law Society of Zimbabwe on constitutional reform.

Jason is married to Melanie Murcott, a law lecturer at the University of Pretoria. In his spare time he reads political biographies and fantasy novels, and plays soccer. He enjoys live music, and his extended family run a well-known jazz club in Harare, The Book Café.

INTERVIEW WITH PROFESSOR BARRY DWOLATZKY

The Joburg Centre for Software Engineering (JCSE) has been assisting the LRC with particular software-related needs. Tell us more about the JCSE and how it came to work with the LRC.

The JCSE is a Centre at Wits University. It was established in 2005 as a part of a collaborative agreement between Wits and the City of Johannesburg that aims to position Johannesburg as the centre of Africa's Information and Communication Technology (ICT) sector. The JCSE aims to support and grow Africa's ICT sector via 5 objectives:

- promoting the adoption of international best practices in Software Engineering;
- growing skills and employment;
- promoting transformation by encouraging more young people, women and previously disadvantaged to enter the sector;
- encouraging innovation, entrepreneurship and enterprise development;
- working with government and industry associations to expand investment in the local ICT sector.

Do you have a particular philanthropic aspect to your work?

The JCSE is a Centre within Wits University, one of Africa's top research-intensive academic institutions. JCSE is a non-profit organisation and exists only to support the ICT industry, grow skills, promote transformation and create employment.

What are the types of clients you generally work with?

We work with a broad range of companies and organisations. These include Government Agencies such as the State IT Agency (SITA), large corporates (eg. FNB, Vodacom, Microsoft), SMMEs and professional or community associations. We deliver training and specific programmes to school kids, students, unemployed graduates, working professionals and executives.

What was the particular project you worked on together?

We worked with LRC to develop a software system to support management of legal cases and campaigns.

Which parts of the project did you find to be particularly challenging or interesting?

The most challenging aspect was to ensure that the system satisfied the complex requirements specified by the LRC administrators, while making it sufficiently user-friendly for the LRC's legal experts. It was interesting to understand the way that cases were managed within the LRC (i.e. the very specific "workflow").

You often use students to undertake the software design. Tell us more about the benefits of this.

The project was run as part of an internship by the JCSE. Interns – some of whom are students – were supervised and mentored by experienced IT professionals. The benefits are that the interns worked within a real-world software development environment. They needed to understand how requirements are developed in consultation with real-world customers. They then saw their work deployed and used at the LRC. This prepares the interns to enter full-time employment.

Photo: youthvillage.co.za

Have you ever worked with similar organisations in the past and what makes them different to working with other clients?

We have worked with various NGO's in the past, but every organisation has its own characteristics and way of working. The attraction of working with the LRC is that they have bought into the concept of allowing interns to use this project as a way of enhancing and sharpening the Intern's skills, while expecting a top quality professional solution.

Is the software you design particular to an organisation or business?

All software is developed to meet the particular requirements of a specific organisation. This is certainly the case for the Case-management Software System developed for LRC.

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INTERVIEW WITH DIANA RODRÍGUEZ FRANCO FROM DEJUSTICIA

In 2014, the LRC hosted Diana Rodríguez Franco, a PhD candidate in Sociology from Northwestern University, who is coordinating the environmental justice unit at Dejusticia. Dejusticia is a Colombian human rights organization and think-tank that works regionally and internationally. Dejusticia protects and promotes human rights through research, advocacy and international exchanges. The environmental justice unit's focus is on extractives industries and conservation at the national and regional level and the relationship between environmental issues and human rights.

Together with the LRC, Dejusticia is one of the Ford Foundation Global Grant recipients. Through this grant, recipients are networking, as well as sharing their insights and expertise, with other international and regional organisations that are working towards justice and human rights.

Diana works in Colombia, where large, transnational mining operations are in the early stages of prospecting for new mineral reserves, and visited South Africa to learn from the challenges that our country faces and the consequences of decades of mining on communities who are affected by mining activities. Diana also wanted to gain insight into legal strategies and environmental litigation that has been undertaken against mining companies in South Africa. Diana also shared her own experiences of community organisations and activism in communities affected by land dispossession and mining activities.

The LRC spoke to Diana about what she had learned from her visit.

LRC: How long have you been in South Africa?

I have been in South Africa for exactly a week, I landed last Monday.

LRC: What places have you been to and what has been the most interesting to you?

It has been a fascinating trip, with a focus on extractive industries, human rights and the environment. I started with a trip to a gold mine, to what is now Gold 1's mine, where they are re-mining. I was on a mining tour with Mariette Liefferink (Federation for a Sustainable Environment). She took us on a mining tour because that mine is specifically facing the key problem of Acid Mine Drainage. This is a problem related to the closure of mines. In Colombia, we are nowhere close to understanding that as a problem we could face, but that's part of the things we want to start showing. If we follow this path of mining and extractive industries, but we don't take proper precautions, this will be what our future will look like. Acid Mine Drainage is one of the problems that we will eventually face.

LRC: What are some of the other problems you foresee occurring in Colombia, if you don't do anything about it now?

We're still at a stage in Colombia where we are still trying to hinder the advancement of extractive industries. We still believe in resistance; we still believe that there are communities that can pull it off and can eventually stop mines from entering their territories, whether it's using the right to free prior and informed consent, or whether it's using more novel strategies of public participation and popular votes, like something that has been happening in Latin America called popular referendums.

We still believe that there is resistance. But we are also aware that mining companies are

too powerful - that governments are fascinated by them, because of taxes and jobs and revenues. We are also aware that we can't expect them not to come at all.

So we fear many things, for instance; Acid Mine Drainage; labour conditions; three, the issue of rural-urban migration or the rural-rural migration. I think that is something we might face, people rushing into these towns with none of the proper infrastructure to hold these migrants.

For instance, in Colombia in the place where AngloGold Ashanti is planning its largest open pit mine, HIV rates have already started to increase and there is violence occurring. These are collegial communities that are being disrupted by a new form of gained revenue.

I think that if we don't anticipate and if we don't properly regulate, and if civil society doesn't work hand-in-hand with government, and especially with congress, to legislate in proper way, we could have a) health issues, like silicosis if not properly treated, b) environmental issues like Acid Mine Drainage, c) problems of migration, and d) the environmental impact overall.

The argument that the mines say, that they don't use that much water, that they don't pollute that much water…people cannot see that right now. Mining companies are so powerful that communities are convinced by them. I think we can face serious pollution issues.

LRC: Is there anything positive from the South African experience that you can take back to Colombia?

I definitely think the strength of civil society, and how you are working together, is a positive aspect. I was surprised to sit at a meeting at the Ford Foundation where there were several NGOs sitting there, holding a civil society legal strategy meeting to promote environmental compliance. And I think that is very powerful. I think the fact that you meet twice a year, update what cases you are following, the problems who are facing, the problems you are seeing that you don't have time to address…So clearly, civil society is a positive take-home message.

The fact that you have a working group before the African Commission, a working group on extractives and environment and human rights, is very powerful. The fact that the African group of countries at the Commission recognises the need for such a Commission, I think that is very important. I think that may be a strategy to try and implement, vis a vis the Interamerican system.

In terms of specific cases, we can learn from South Africa by trying to incorporate into legislation things that can prevent issues like silicosis. So, for instance, Sayi [Nindi, attorney at the Legal Resources Centre] was telling me that yes, some countries have completely eradicated silicosis, so it is a sign that it can be prevented. I think those tiny technicalities are important to keep in mind.

Social and labour plans is something that is very important, or the methodologies to evaluate the social and labour plans to see if they are comprehensive enough - those are also lessons from the South African case.

LRC: Once you have finished your research, what are you going to do to ensure that some of your recommendations are implemented?

We have had a relationship with government, based on another part of our work with the indigenous and afro-Colombian communities and our work with free prior and informed consent. We have accompanied these communities with prior consultation, sitting down with government officials. So hopefully that relationship can serve to channel key findings or raise some alerts.

The other channel is the media. Writing weekly op-eds in the newspapers, writing blogs, which people see and sometimes that can spark conversations.

There is a new congress recently elected. Maybe some senators are willing to listen to our stories.

LRC: What do you think Colombia can teach South Africa?

Colombia can teach South Africa the importance of consent and consultation mechanisms, not only related to free, prior and informed consent, but also thinking "out of the box" and thinking of new ways of taking communities into consideration and the community's voice into this whole process.

For instance, there are a few successful cases of free, prior and informed consent procedures taking place in Colombia. And the right has been recognised by our Constitutional Court, it has been recognised by law, it is being implemented, with clear problems in some cases; so I wouldn't say that free, prior and informed consent is a success in Latin America throughout; but it's been the continent where the rights of free, prior and informed consent and where Convention 169 of the IOL has been more widely ratified.

The other lesson is more related to participation in general. There is another tool in Colombia that is being used throughout Latin America, which is called popular consultation. It's a form of direct democracy through which communities hold elections to vote for a specific issue through a popular referendum. They recently did this less than a year ago, in July of 2013, in the small municipality of "Piedras" where AngloGold Ashanti plans to build its big tailings dam. The community went out and voted using a mechanism that is in the Constitution and that had been used to decide on other issues and has now

being brought into the realm of extractives industries. There is a whole debate right now whether those decisions are binding. At the core of the debate is who has the right to determine the use of the sub-soil – is it the national government or should it be the local government? Overall, what this shows is the importance of trying to protect and bring out ways that communities can participate and voice their concerns.

LRC: In the Colombian situation, in what circumstances do communities generally say yes to mining?

Up to now it is novel that they are saying "no". Before, companies were just arriving and communities were not mobilising against them. I mean non-indigenous communities, because indigenous communities have resisted for a long time. But I guess the risk is that these companies are very powerful and offer a lot to communities. For examples, two weeks ago AngloGold Ashanti just offered the municipal government where they plan to locate the big open-pit mine, half of the [municipality's] yearly budget. So that means a lot of money rushing into the municipality under the argument of development - better roads, better schools and better sewage systems. So I think that's the challenge.

LRC: Do you foresee an issue with those kinds of promises that the mines make?

I see several problems with mining companies offering that much money. The first is it sustainable? There is no guarantee. They might offer it for two years and then say, "Sorry, economic conditions have changed and we can no longer provide that same amount of money". But the mine is already built and the problems are already there. Secondly, the fact that you are giving so much money to a small municipality has a high risk of corruption. It is also the fact that in these areas are very rich in water and agricultural production. So it is basically a question of the model of development these communities want. Do they want to do agriculture or do they want to branch into mining?

LRC: Do you think your visit to South African has been successful for your learning?

Definitely! It has been one of the most enriching. On the civil society side, what are the issues that research centres and NGOs are dealing with? What are the problems that a country with 120 years of mining history is facing? What can our future look like if we don't do something? Cases of silicosis are unheard of in Colombia, or the acid mine drainage…. All of these are just ways of understanding how our future can look if we don't take the precautions. You really only understand that when you see that. It's not the same thing to read the legal brief of the case. You have to see it…seeing the water coming out completely contaminated. That has been interesting.

It is one thing to read a [strategy] report and, on the other hand, see it in action. What can you do, what strategies can come about, what are the topics that arise? For instance, one of the NGOs at the Ford Foundation meeting was talking about working on the issue of women and mining. The gender aspect is also fascinating, and we need to pay attention to that. How is mining going to disrupt these communities; are we going to be faced with miners going off to work and leaving women alone with the children – is this going to lead to split families? All of those social problems must be considered.

It does in a way remind you, if this is a country with 120 years of mining facing these issues, a country that is not prepared for that, because we haven't lived with it in the same intensity, really faces the challenge of anticipating and minimising these risks. ■

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What is the best part of your job?

As Founder and Director of the JCSE I think the best part of my job is having the opportunity to positively impact the lives of young people and to give them skills and experience that will allow them to become active professionals in the South African IT Sector.

What do you think Information and Communications Technology (ICT) can do for the people of Joburg?

ICT will allow the people of Johannesburg to become an integral part of the growing international "digital economy". By developing skills and promoting the growth of the local ICT sector, the JCSE is making a contribution to ensuring that Johannesburg and its people are not merely users and consumers of digital technology. Our City will become an internationally competitive producer and innovator of digital technology.

Tell us more about the JCSE's plans for the future.

The JCSE is developing a major Digital Technology Hub is Juta Street in Braamfontein. 5 buildings owned by Wits will be transformed into spaces that will support the growth of digital technology-based skills, employment and enterprise development in central Johannesburg. Our vision is that Braamfontein will become the "Silicon Valley" of Africa. ■

ALLIED ORGANISATIONS

CANON COLLINS EDUCATION AND LEGAL ASSISTANCE TRUST

Canon Collins Educational and Legal Assistance Trust (CCELAT) works to build a community of change agents across southern Africa who create and use research for social impact. Through its project grants, research funding and international events programme, it aims to cultivate a space where activism and research meet. The Trust has been supporting the work of the LRC for 24 years. In the past year, CCELAT has built on its long relationship with the LRC, particularly through grant funding from Comic Relief, support for candidate attorney positions in Grahamstown, and targeted research grants to underpin the LRC's advocacy and litigation. Visit http://www.canoncollins.org.uk

SALS FOUNDATION

The Southern Africa Legal Services Foundation, Inc. (SALS) – a U.S. § 501(c)(3) charitable organisation based in Washington, D.C. – was created in 1979 by concerned American lawyers to support and raise funds for public-interest legal services and for the development of legal education in southern Africa. SALS has long supported the LRC with its critical work in the areas of constitutional law, land and housing rights, environmental justice, constitutional obligations regarding the HIV and AIDS epidemic, and women's and children's rights. Visit http://www.sals.org

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SUPPORT THE LRC

There are many ways to support the LRC and we welcome your contributions. Please note that the LRC is a registered Public Benefit Organisation under section 18 A of the South African Income Tax Act and all donations are tax deductible.

DONATE

You can donate once-off, monthly or annually using a **stop order or direct deposit.**

You can make a secure payment via **GivenGain: lrc.givengain.org**

Alternatively, you can **deposit your donation to the following bank account:**

Account Name: Legal Resources Trust

Account Number: 2957333716

Bank Name: Nedbank

Account Type: Savings

Branch Code: 198765

SWIFT Code: NEDSZAJJ

Reference: Your Name and Contact Number

For Standard Bank clients, please use **Branch Code:** 19876500

SUPPORT

Gift in someone's memory or include the LRC in your will.

Alternatively, fundraise for the LRC, attend an event or join the "Ride for Justice" team.

For more information on these options, contact Ms Moleshiwe Magana at **moleshiwe@lrc.org.za**

ENGAGE

Become a volunteer or intern with the LRC. Contact Ms Delysia Weah at **Delysia@lrc.org.za**

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Visit us online at www.lrc.org.za

Like our Facebook Page – search for Legal Resources Centre

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RIDE FOR JUSTICE

In November 2013, a team of seven cyclists taking part in the Momentum 94.7 Cycle Challenge in Johannesburg joined the LRC Ride for Justice Campaign. Although a small team initially, their commitment has been the impetus to start a dedicated campaign in support of the LRC that will see a team of cycling enthusiasts ride the 94.7 Cycle Challenge every year. In 2014, the team grew to nearly 50 cyclists!

When you join the LRC Ride for Justice team, you become part of a group of spirited and engaged social justice campaigners who are committed to protecting and promoting the rights and responsibilities outlined in the South African Constitution. The campaign gives cyclists an opportunity to raise awareness about human rights and contribute financially to South Africa's largest independent, non-profit public interest law centre.

To become a member, you simply need to enter the 94.7 Cycle Challenge, commit to ride under the Ride for Justice campaign wearing our cycling shirt, and raise funds through monetary pledges from family, friends and supporters. Your financial contribution to the Ride for Justice Campaign will help continue the good work of the LRC.

To join the Ride for Justice team, please email Ms Moleshiwe Magana at moleshiwe@lrc.org.za or phone 011 838 6601.

We look forward to your support.

2013 Ride for Justice Cyclists

Christopher Willis

Michael Power

Timothy Lloyd

Chloe de Jager

Bongumusa Sibiya

Adv Alan Dodson SC

Adv Raylene Keightley

READY TO LEARN? A LEGAL RESOURCE FOR REALISING THE RIGHT TO EDUCATION

Book review by Chris McConnachie

Followers of South Africa's socio-economic rights case law will be familiar with the hard-fought legal campaigns over the rights to housing, healthcare, social assistance, water, and other goods. The Constitutional Court's judgments on these rights are studied around the world and the underlying legal strategies have been carefully dissected for lessons on how to litigate socio-economic rights effectively.

In contrast, the recent wave of education rights litigation has received limited attention outside of South Africa. Most of these cases have settled before going to court. Others have resulted in High Court judgments that have not been widely circulated. Some cases have reached the Constitutional Court, but none has resulted in an authoritative judgment on the right to a basic education. Education in South Africa still awaits its Grootboom[1] – the path-breaking judgment on housing rights that cleared the way for further litigation.

The Legal Resources Centre, South Africa's oldest and largest public interest law organisation, has been at the forefront of these efforts to secure the right to a basic education. In a series of cases, the LRC has achieved settlement agreements and court orders requiring the national and provincial governments to:

- Commit R8.2 billion to the eradication of 'mud schools' and the improvement of school infrastructure across South Africa;
- Fill 7,000 vacant teaching posts in the Eastern Cape Province;
- Complete a comprehensive audit of Eastern Cape schools' furniture needs and explain how each student will be provided with a desk and a chair;
- Publish binding norms and standards on school infrastructure – including adequate classrooms, electricity, water, sanitation, libraries, laboratories, sports and recreational facilities, and perimeter security – for all South African schools by November 2013.

Until now, information on these cases has not been easily accessible. In *Ready to Learn*? A Resource for Realising the Right to Education, a new book available for free download, the LRC offers the first consolidated account of its work, including summaries of the key cases; extracts from court documents, judgments, and orders; and candid discussions of the strategies informing past and future cases.

This is an important resource for understanding the development of education rights litigation in South Africa. It also offers lessons for lawyers and campaigners around the world in how to use courts to secure education rights. The LRC's work shows that litigation can achieve a great deal when it is properly planned and executed. It is also a reminder of courts' limitations in the face of government incapacity and intransigence. As this book details, South Africa's national and provincial governments have routinely failed to comply with court orders and settlement agreements, requiring the LRC and its partners to engage in patient negotiations, media campaigns and further litigation to secure compliance.

In his foreword to the book, Dr Kishore Singh, UN Special Rapporteur on the Right to Education, emphasises the need for lawyers and academics around the world to share their ideas and experiences in enforcing education rights. The LRC has benefited greatly from this shared knowledge in formulating its legal arguments and strategies. *Ready to Learn* more than returns the favour.

1 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46

CONSTITUTIONAL LITIGATION

MAX DU PLESSIS, GLENN PENFOLD AND JASON BRICKHILL (2013) JUTA

Book review by Geoff Budlender SC

In 1994 we entered upon a fundamentally new and different constitutional order. It was different from the old order in theory, in substance and in process. The new order had to be implemented by politicians, by an executive, by judges and by lawyers who for the most part had absolutely no training or experience in working with a Constitution of the kind that was introduced at that point. Even now, for the most part it is only lawyers who are under 40 years of age who have had systematic training in this field. Given those circumstances, it is one of the under-recognised miracles of the new Constitution that it worked at all, let alone that it worked so well.

The early years were not easy in the courts. Some judges from the old order regarded the Constitution as a strange and 'political' law, to be avoided wherever possible. (Ironically, in so acting they unwittingly adopted a doctrine of our constitutional law, which is somewhat unevenly applied, namely the doctrine of constitutional avoidance (38).) More than one judge of the old order took the view that if you raised a constitutional argument, it must be because you had no good 'legal' argument. It was not only some judges who took this view. In 2001, when I was an acting judge, during the course of argument I asked counsel for an organ of state whether there was not a constitutional issue in the matter, having regard to the content of the Bill of Rights. Counsel looked more than a little surprised. I saw one of the officials of the organ of state, who was sitting in court, roll his eyes. He then turned to one of his colleagues, and muttered something. I could not hear what he said, but I knew that its general import was: "Oh no, we've got a nutter here."

Constitutional law challenges our ideas about the classification of law. All law is subject to the Constitution, there is only one system of law (see ***Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others*** 2000 (2) SA 674 (CC) paras 44 and 49), and it must all work to give effect to the Constitution. Personally, I have always struggled with some of the classifications of our system of law. In particular, I have struggled with the distinction between public and private law. I was comforted when I learnt, from a penetrating article by Alfred Cockrell ('Can you paradigm? – Another perspective on the public law/private law divide' 1993 ***Acta Juridica*** 227), that even people who have actually studied and thought about the matter have concluded that the distinction is suspect. That has made me feel much better.

This book demonstrates that just as the public/private divide is elusive, so too is the divide between what is called substantive and procedural law – or sometimes more grandly, substantive and adjectival law. If there is one system of law, all of it is subject to the Constitution, and all of it having to give effect to the spirit, purport, objects and content of the Constitution, then that must apply to procedural law. The purpose of 'procedure' is to give effect to the 'substantive' constitutional purpose.

A welcome aspect of this book is that it recognises this fundamental principle. It brings constitutional practice together – the process and the substance. It does so in a manner which is coherent and seamless.

When I received this book, I tried the test of opening it at random, and reading a few sections. Each time I found an account of the law which told me the things that I thought I knew, in a concise and more coherent form; and which told me things that I ought to know, and did not know. Each time, I found a lucid, concise and current account of the law, and of the underlying reasons for it. One can hardly ask more of a practical text.

It is hackneyed to say that a book will be indispensable to the busy practitioner. In this instance, that is certainly the case. This is likely to become the most frequently used book in the libraries of many practitioners of constitutional law.

The quality of adjudication is almost always at least partly dependent on the quality of the advocacy (by the attorneys and counsel) through which litigation is presented to the judge or judges. This book will help all who conduct constitutional litigation to get it right. And it will enable judges to be confident about getting it right – particularly the over-40-year-olds, and

even the over-60-year-olds. During 2003 I argued a case before two judges in the high court, in which my clients contended that a section of an Act was inconsistent with the Constitution. I submitted that the remedy for the unconstitutionality was to read the words into the Act. The senior judge, a very experienced and able lawyer, burst out laughing: "You mean we can write the words which we think ought to be in the Act?" When I assured him that this was the case, he no longer looked amused. He then attempted to show how absurd the proposition was: "And I suppose the words we write into the Act will then be published in the Government Gazette?" He looked quite astonished when I assured him that this was indeed the case (see Constitutional Court Rule 4(7)).

This book will help to make exchanges such as this a thing of the past. It will enable all who conduct constitutional litigation to get the process right – and will enable judges to be more confident that they too are getting it right. It is a hugely valuable addition to the writing on the Constitution. Practitioners owe a debt to the authors for helping them to do their work more effectively. Clients too will be indebted, not only because their cases will be more accurately and persuasively presented, but perhaps also because the comprehensive, concise and accessible nature of this book will reduce the amount of time lawyers need to expend in order to get it right, and perhaps therefore some of the cost of doing so.

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