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Foreword by Justice Zak Yacoob

In this issue

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DARE TO KNOW

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Foreword

ZAK YACOOB

I am privileged to have been given the opportunity to write the foreword to this, the first edition of the *People's Law Journal*. Some may think this title presumptuous and even a contradiction in terms. They may say that law journals are food of practising and academic lawyers alone. This cannot be true and makes no sense. All people are governed by the law and affected by it in a good and often bad way. All of us need to understand how the law affects us, whether a law is good or bad, and, if it is bad, what we can do about it. This journal is, in my view, a wonderful start to this process.

These eight articles are all an effort to write as simply as possible (though I believe greater strides can be made in this direction in the future). They are wide-ranging, dealing with various issues including the right of vulnerable gay people to be treated equally, the importance of freedom of speech and protest, as well as the need to ensure access to courts for poor people in need. The editors need to be particularly applauded for securing the article on the judgment in Kenya concerned with making medicine more affordable.

Almost all the articles graphically go back to apartheid and its evils in a way relevant to ordinary people: the bad way in which judges were appointed, how clamping down on freedom of speech and demonstration were ruthlessly used to protect authority and apartheid practices, the horrendous plight of gay people and migrant mineworkers, and the way in which the law limited access to courts by limiting actions by classes of people in the same position. It has become fashionable in some quarters to suggest strongly that apartheid is gone now and that we should not continue to go back there. Most of these articles refute that point and make it plain how important it is to remember our history and to build on it.

They also show the courage and sense of sacrifice of people of all races in this country in the process of the struggle to attain a new society. And they speak poignantly of how law was used to protect and defend people who were victims of some of these evil measures and how, in many cases, the people succeeded because some apartheid judges came to the rescue by responding to imaginative arguments in interesting ways. These judges said, for example, that it was not an offence to speak out against the royal monarch, that apartheid on trains was no good unless there was a law that allowed it, that an order by a magistrate prohibiting protest was invalid, and that contracts of mineworkers renewed yearly were not to be seen as separate from each other. Built within this theme in all

these articles about past cases is the hope that our judges do not let us down now.

This brings me to the article which carefully and simply tells us what we need of our judges now and suggests judge qualifications that are interesting to say the least.

The articles taken together express the hope that our judges will be as sensitive and responsive as the judges of Kenya in ensuring that the rights of people to make money from medicine are appropriately balanced with the right of people to their health. Our judges have already made important contributions in this direction, as shown by the articles on the judgments decriminalising consensual sodomy and endorsing class action as a way in which poor people might get some benefit.

The Constitution and the society contemplated also receive some prominence. The rights to equality, freedom of expression, and demonstration are rightly emphasised and the hope expressed that they will be appropriately respected and protected. The message conveyed ultimately is that, to get to the society promised by our Constitution, we need committed people like those who struggled and sacrificed in the past: the lawyers who brought cases that challenged racist laws; the judges who gave just decisions in those days. We also need a government that is more sensitive and caring than those of apartheid South Africa.

I trust that this is the beginning of a series that will be read and understood by many people in our country and that it will contribute to the achievement of the constitutional project.

Introduction

ZACKIE ACHMAT

Ndifuna Ukwazi chose "dare to know" as its motto as a challenge to activist leaders to seek and use knowledge. Reading, study, research, and writing must inform activist leadership and our struggles for equality and justice. This is nowhere truer than in the study of law. The *People's Law Journal* is a small contribution to making law visible and allowing it to become a tool, and not the object, of our struggles. Two contemporary examples related to the mineworkers' struggle for justice and equality illustrate this point.

The Marikana massacre drew the world's attention to work and suffering in mining, South Africa's most dangerous industry. Our country's wealth (like those of its giant conglomerates Anglo American, De Beers, and Goldfields) has been built up over more than a hundred years on the back of mainly black migrant workers from South Africa's rural areas, particularly the Eastern Cape, and many of our neighbours including Mozambique, Lesotho, and Malawi.

Defending black workers against exploitation became a critical task under apartheid — one necessary to defeat minority rule. The National Union of Mineworkers (NUM), the strongest union in our history, was born out of this struggle. One of the major gains was the Mineworkers Provident Fund, which changed its name to the Living Hands Umbrella Trust. However, the gains need to be protected — as became evident when Fidentia, the company responsible for investing these provident funds, embezzled more than R1.1 billion allocated to the children, wives, and other family members of deceased mineworkers.

Workers and their unions, including NUM and the new Association of Mineworkers and Construction Union (AMCU), conduct their battles largely on the terrain of labour law. Yet there is so much more. Company law and laws pertaining to safety in the mining industry, financial services, fraud and corruption, police conduct, and commissions of inquiry; all maintain the unequal power relations between mineworkers, global corporations, and the state. These laws affect every aspect of all our lives but remain invisible to those most affected by their operation.

To realise the fundamental rights of mineworkers, these laws must be laid bare. Equality must be based on equitable access to public goods, including wealth and income. Laws such as company law must become visible; and their transformation is imperative.

Law is present everywhere but remains invisible and concealed with its own language and practice. It is steeped in formalism and a code designed to

intimidate, which prevents most people from understanding it — not only in South Africa.

We assume that the law is reserved for those who know, make, and interpret the law — the police and a caste of intellectuals such as parliamentarians, lawyers, judges, magistrates, prosecutors, and government functionaries.

Law is also based on ensuring that only the state has the right to use violence and only in limited circumstances such as war and when protecting society from violent crime. Under very limited circumstances the state is empowered to arrest, detain, and imprison people, although it must do so without violence and give everyone a fair trial. While law is used to defend inequality and property, as in the deaths of Marikana mineworkers, Andries Tatane, and others, this is not the whole story. The law also ensures a limit on the exercise of arbitrary power. Working-class and poor communities can often use the law and our Constitution to protect and advance rights.

Over 2,500 years ago working people of the Roman Republic struggled against land owners and the aristocracy to make law visible and fair. They demanded that the Roman Senate send a delegation to study the Constitution of Greece, one of the first in the world. Roman law was codified into 12 Tablets, which were publicly displayed so that all people in Rome could see and know them. These laws codified a list of private rights and fair legal procedures for all Roman citizens. Regrettably these laws continued to define people classified as slaves in terms of property, rather than human beings with rights. Nevertheless it was an advance based on the collective struggle of poor people.

The rights to freedom, human dignity, equality, and the right to life existed before the law did. The struggle of people makes these rights visible in law, as the Romans did and the Constitution of South Africa does.

The establishment and growth of the democratic state based on struggle, and the creation of an independent judiciary, most often enforces the privileges of the powerful over the rights of the vulnerable. But it can also be used to contest those privileges. The codification of law created individual subjects or citizens with duties and rights. Law can only be changed systemically in favour of the poorest through collective struggle.

The articles in the *People's Law Journal* travel back into British colonial times. The case of communist leaders Edward Roux and Josiah Ngedlane shows the necessity of freedom of expression to working-class struggles. The people of Cape Town who resisted apartheid on trains did so by successfully challenging the enforcement of the law. The case of Tom Rikhotso, who won the right to be recognised as a worker with residence rights despite apartheid labour and pass laws, shows how working people can use law to oppose unjust laws.

In our constitutional democracy, the case of the National Coalition for Gay and Lesbian Equality decriminalised sex between men and established equality on the basis of sexual orientation. This was the first time the Constitutional Court ruled on the rights of a marginalised and vulnerable minority.

As the Farlam Commission of Inquiry into the Marikana shootings shows,

law is often denied most people due to justice being unaffordable. The article on class actions demonstrates how the poorest people can combine to defend and advance their rights. The case ensuring that Kenyan people living with HIV had a right to generic medicines that trumped the profits and patents shows that law can be used to challenge global corporations.

The first article on the judiciary will illustrate that transformation is about more than race and gender — judicial transformation is equally about understanding class relations.

In future, resources permitting, the *People's Law Journal* will also publish extracts of these judgments (as we do online) to liberate law from the confines of academic and legal journals. Thank you to everyone who contributed, especially Jacques van Heerden.

Transforming the Judiciary
Who should judges be?

GREGORY SOLIK

The Pulitzer prize-winning novel *To Kill a Mockingbird* was written in 1960 by then-unknown author and law graduate, Harper Lee, and has remained popular ever since. It is an allegory about class and racial injustice that takes place about three years after the start of the 1929 Great Depression.

Atticus Finch, a widower, lives in the conservative community of Maycomb, Alabama with his son Jem and daughter Scout. Atticus, a lawyer, is asked to defend Tom Robinson, a black man (or "negro") who has been falsely accused of raping a white woman. Because Atticus does not refuse the case, some of the racist townspeople start harassing him and his family.

The book portrays Atticus as the model of integrity for the legal profession. In explaining to his six-year-old daughter, who sat curled up in his lap, why he has to defend Tom Robinson, he explains that the case goes to the essence of his conscience. "Scout," he says, "I couldn't go to church and worship God if I didn't try to help that man" (*To Kill a Mockingbird*, chapter 11).

Courts and the administration of justice

In terms of the Constitution of South Africa, when a judge takes office, she or he promises to be faithful to the Republic, to uphold and protect the Constitution, and to administer justice to all persons without prejudice, fear, or favour. Section 174(1) of the Constitution provides a qualifying threshold: to become a judge, you must be "appropriately qualified" and "a fit and proper person".

Independent-mindedness is regarded as an important part of being fit and proper. When people say someone is "independent minded", they may mean "stubborn", but in legal terms it refers to how you respond to pressure. To be a judge, you need to be able to form your own opinions despite pressure — regardless of whether this pressure is external or internal (for example, political pressure from the state, particularly the executive, or a personal desire for popularity). This is what Atticus tries to explain to his daughter when he explains why he chose to defend Tom Robinson:

> "Atticus, you must be wrong...." said Scout.
>
> "How's that?"
>
> "Well, most folks seem to think they're right and you're wrong...."
>
> "They're certainly entitled to think that, and they're entitled to full respect for their opinions," said Atticus, "but before I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority rule is a person's conscience." (*To Kill a Mockingbird*, chapter 11)

In all respects this bent towards fairness and impartiality makes Atticus fit and proper. In addition, judicial candidates must be "appropriately qualified" to be judges. Here we do not simply mean having a legal qualification or legal knowledge, but also practical experience with rules and procedures, particularly aligned to an area of law, like family law, criminal law, commercial law, or competition law.

Transformation of the judiciary

Because the hallmark of a constitutional democracy is the independence and composition of the courts, it is easy to see the importance of putting the right kind of people on the bench. During apartheid, the State President appointed judges from a limited pool of lawyers, mostly white, male advocates, who tended to apply the law without considering what it would be like to be the person on trial. That's not dissimilar to the people who were in charge of Tom Robinson's fate: the jury was not representative of Maycomb County. Scout remarks: "Sunburned, lanky, they seemed to be all farmers" — confirming what history tells us about the composition of juries in the US at that time: they were all white men. (See the article by judge Royal Ferguson, "The Jury in *To Kill a Mockingbird:* What Went Wrong?".)

This lack of representation is a serious problem. As Atticus explains, you never really understand another person until you consider things from their point of view. How could these jury members imagine being Tom Robinson?

At the time of writing, it has been reported that there are just four senior black female advocates in South Africa. Black female advocates make up 4% of the profession compared to the 57% of white males (89 and 1,367, out of a total of 2,384 advocates respectively) with 69 Indian and just 37 coloured female advocates in the entire country.1 The attorney's profession is similarly problematic. A recent survey of large corporate law firms showed the disparity not only between racial composition but also between race, position, and influence.

The *Project Law: Demographic Survey of Large Corporate Law Firms, South Africa* was commissioned by the Cyrus R. Vance Center for International Justice, the Law Society of South Africa, the Mail & Guardian, the South African Legal Fellowship Network, and the Wits School of Law.

The researchers "examined the gender, race, and disability distribution across various levels of employment from candidate attorney level to managing partner/CEO level" at 12 firms who chose to participate (Plus 94, p. 4). Some key findings were that: women make up 53.4% of the employees, but overall there are more than double the number of white women as compared to black women; there tend to be more white women in more senior positions; and senior positions seem to be dominated by white men: 45% of all salary partners, 53% of all equity partners, 72% of all managing partners, and 80% of the CEOs at participating firms are white men.

This means that the pool of candidates from which we must select potential judges is very shallow. In this context, when we talk about "transfor-

1 See "JSC lashed for slow pace of gender transformation", and South African Institute of Race Relations, *South Africa Survey 2012*, p. 761.

mation" of the judiciary we tend to place a strong emphasis on gender and racial transformation. We call this the "diversity rationale" and it is a constitutional requirement (Cowen, "Judicial Selection in South Africa").

In tackling the lack of "different views" on the bench, South Africa's top judge — Chief Justice Mogoeng Mogoeng of the Constitutional Court — recently said, "Merit does count but it is not all about merit. Transformation is just as important." This statement suggests that merit and transformation may be mutually exclusive; that in promoting transformation we may have to sacrifice quality in the hope of speeding up the process of redress.

What kind of woman are you?

There are serious problems with an unthinking application of the diversity rationale, which seems to dominate mainstream legal debate about transformation of the judiciary. This essay tries to argue why, and make suggestions as to what can be done.

Firstly, the diversity rationale must be understood in terms of class and other socioeconomic factors if we are serious about addressing inequality and "representivity" of society. A failure to do so perpetuates the deep structural inequality that exists in the profession, always through race, but also, through geography, education, language, and financial exclusivity. In "The Transformation of the Judiciary", Wesson and Du Plessis quote Geoff Budlender, one of South Africa's most renowned human rights lawyers:

> "As we move towards a more clearly class-based society, there will be a growing class of people who are black, but have not lived experience of deprivation or of being discriminated against, and who have only limited contact with people who do have that experience."

Therefore, although race and gender will for a long time be two important factors, we must be critical in understanding the problems and trends of power and inequality in South Africa and the world generally. Increasingly, we see a world divided disproportionately by wealth, not by race — although there is of course a strong overlap.2

Class inequality creates two societies — much like Maycomb in 1935 — living side by side, but hardly knowing each other, hardly imagining what life is like for the other. Those who do rise to positions of influence are a small percentage who often share the same privileges traditionally reserved for whites — privileges of education, health, and access to services — while the vast majority of South Africans continue to be trapped by poverty and lack of opportunity.

Secondly, the problem with the current thinking about merit is that it perpetuates legal myth. It assumes that people who have spent time in a courtroom fussing over procedure and legal technicalities have a better grasp of justice.

This goes to the heart of how we should interpret section 174 of the Constitution.

"Appropriately qualified" can mean many things. Traditionally it has meant being technically skilled in adjudicating

2 See for example Joseph Stiglitz, *The Price of Inequality*. W. W. Norton & Company, 2012.

between rights and duties, reasoning, argument, writing, and analysis, which is important. But the combined effects of both our history and the challenges of living in a hyper-connected, globalised, and complex world, mean that we are compelled to reassess "judicial qualities" and "appropriately qualified" if the legal profession is to maintain legitimacy.

Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910–1950 is a classic text by one of South Africa's most renowned professors, Hugh Corder. It provides a fascinating insight into the early years of what is now the Supreme Court of Appeal (SCA). The judges' performance and path to the judiciary are illuminating: a politician, a private secretary, a parliamentary draftsman, and a very average advocate (who went on to become one of South Africa's most revered judges).

The idea that judges are surgeons of the law has been compounded by a century of judicial and legal thought that focuses on what judges do, instead of asking who they should be.

Ronald Dworkin, one of the world's greatest legal thinkers, insists that the law is whatever follows from a constructive interpretation of the institutional history of the legal system.

He also argues that lawyers — the insiders — are best placed to grasp the questions of legal practice by "struggling with the issues of soundness and truth participants face" (Dworkin, *Law's Empire*, p. 14). Especially in difficult cases, he says, judges reach a decision "by trying to find … the best constructive interpretation of the political structure and legal doctrine of their community", using "some coherent set of principles about people's rights and duties" (*Law's Empire*, p. 255).

Let's assume for the moment that this is what judges do; who apart from the legislature is best placed to struggle with issues of soundness and truth, taking into account South Africa's very own history — not just legal, but economic, political, social, and so on — within the context of a complicated and integrated world?

There is precedent for thinking that people do not need judicial training to make decisions about rights. Jeremy Waldron observes that John Locke, an important English philosopher, rejected the idea that legal reasoning was superior to any other kind of reasoning:

Corder notes that Lord De Villiers was appointed Chief Justice of the Cape Colony at the age of 31 and was forced to administer the oath of office himself as other judges refused to do so. Sir James Rose Innes was deeply involved in politics before he went to the bench. Sir William Solomon had not been a great success at the bar, but was nevertheless appointed at the age of 34 and would go on to be regarded as one of the soundest lawyers and best judges ever produced. Although James Stratford built a great career as an advocate, he was not considered a learned man and as Blackwell comments, "it is noteworthy how many of his judgments have since been dissented from". B A Tindall was a former private secretary to Innes in the Transvaal. And Albert v d S Centlivres, after a slow start at the bar, became a parliamentary draftsman before going to the bench.

> "Certainly Locke rejected out of hand the view — very common today — that on issues of rights the reasoning of judicial officers (Supreme Court Justices and their clerks) is to be preferred to reason and judgment of ordinary men and women. The reasoning of legal scholars on matters of rights he regarded as 'artificial Ignorance, and learned Gibberish'" (p. 331).

Indeed, what makes the skill of "administering justice" a legal one?

In the United Kingdom, the Judicial Appointments Commission published new criteria for what makes a good judge in a discussion document entitled, "Qualities and Abilities". According to the authors, there are five requirements to be a judge:

(a) intellectual capacity;
(b) personal qualities;
(c) an ability to understand and deal fairly;
(d) authority; and
(e) communication skills and efficiency (Judicial Appointments Council, 2013)

Cowen provides a similar list:

> "[A] high level of expertise in a chosen area or profession, ability quickly to absorb and analyse information, and appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge." ("Judicial Selection in South Africa", p. 28)

We have seen recently America's Supreme Court (SCOTUS), the top court in the United States, apply its understanding of politics, law, and society in an affirmative action case. *Fisher v The University of Texas Austin* (2013) not only ignores hundreds of years of racial inequality but is completely unresponsive to the day-to-day reality of geographic, linguistic, and class inequality in the United States.

A proposed solution

Major changes in society, increasing caseloads, more complex laws and legal issues have surely increased the demand and need for a more sophisticated approach to judging. If Atticus Finch is a model of integrity for the legal profession, his young daughter Scout might be an example of who lawyers should be and what kind of relationship they should have with the law.

I would like to suggest that it is our definition of merit that needs to be transformed so that the pool of candidates can be deepened and the judiciary strengthened and legitimised. Framing transformation and merit in a limited way simply mirrors the formulaic and doctrinal conception of law. By asking who the judiciary should be and then looking for qualities in judges that enable them to carry out that duty, we can become more creative in finding "fit and proper" candidates.

In a diverse society, judges are likely to encounter situations, attitudes, and values outside their personal experience. So, more than just walking around in other people's shoes, we need smart, highly capable, analytical, and respected people from a wide range of communities on the bench. The Helen Suzman Foundation recently brought litigation where they argued that we need to appoint people who know the "social, political, and economic reality". These people may be poor, intersex or gay, in-between jobs, unemployed, an ex-convict, unable to pay rent, or with no place

to stay.3 They would also need to know a great deal about the world, and business, and government.

Because this is such a big and difficult task, it is not enough to collect small practical ideas about how to transform the judiciary; it is important to insist on big ideas about the direction in which we should change it.

One way might be to approach a small group of exceptional people who have experience "with the law" — our most outstanding community leaders, social justice activists, public intellectuals — and prepare them by sending them off to a highly regarded judicial school where their legal skills are refined, and then introduced to the bench through a programme that is incremental. Or we may also want to think about igniting the debate about career jurists. We might for example, through the Office of the Chief Justice, initiate a programme that competitively selects young and mid-career legal professions to become magistrates, preparing them for a life on the bench, in a slightly accelerated way. Or we might develop a programme for more inclusive part-time judges. Or we might create opportunities for judges to sit *en banc* more frequently. Specialist courts will enable this kind of transformation, and increase efficiency.

Presumably, this will allow the judiciary to be much more representative of its intended constituency, and create new trajectories for regulating public life.

Conclusion

In *To Kill a Mockingbird*, Tom Robinson is found guilty and jailed. Shortly after, he dies when he is shot 17 times while trying to escape. More recently, a US court's exoneration of Travyon Martin's killer is yet another stark reminder of the limitations of our judicial systems and the choices we make about the laws under which we live.

> In a must-read article on the verdict, Andrew Cohen writes: "Criminal trials are not searches for the truth, the whole truth, and nothing but the truth. They never have been. Our rules of evidence and the Bill of Rights preclude it. Our trials are instead tests of only that limited evidence a judge declares fit to be shared with jurors, who in turn are then admonished daily, hourly even, not to look beyond the corners of what they've seen or heard in court" ("Law and Justice and George Zimmerman").

Despite a prolific acceleration of the growth and intricacies of laws globally, no profession has seen as little innovation as the legal profession. And so imagining the possibilities of reconstruction is no child's play. In fighting for equality and justice it is worthwhile remembering the advice Harper Lee left us in the inscription of the inside cover of *To Kill a Mockingbird*, quoting Charles Lamb:

"Lawyers, I suppose, were children once."

References

"JSC lashed for slow pace of gender transformation." *Mail and Guard-*

3 We want the development of critical thinking skills, i.e., the ability to think independently and actively, to analyze, to construct reasoned arguments and explanations, to evaluate the arguments and explanations of other people, to ask the right questions, to encourage diverse benches.

ian. 21 Apr 2013. http://mg.co.za/article/2013-04-21-jsc-lashed-for-slow-pace-of-gender-transformation. Web.

Cohen, Andrew. "Law and Justice and George Zimmerman." *The Atlantic*. 13 Jul 2013. http://www.theatlantic.com/national/archive/2013/07/law-and-justice-and-george-zimmerman/277772/. Web.

Corder, Hugh. *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary 1910–1950*. Kenwyn: Juta & Co, 1984.

Cowen, Susannah. "Judicial Selection in South Africa." *Democratic Governance and Rights Unit*. 2010. http://www.dgru.uct.ac.za/usr/dgru/downloads/Judicial%20SelectionOct2010.pdf. Web.

Dworkin, Richard. *Law's Empire*. Harvard: Harvard University Press, 1986.

Ferguson, Royal. "The Jury in *To Kill a Mockingbird:* What Went Wrong?" 73 *Texas Bar Journal* (Jun 2010): 488–490.

Fisher v The University of Texas Austin and Others 2013 570: 11–345. Supreme Court of the United States.

Judicial Appointments Council. "Qualities and Abilities." Accessed Jul 2013. http://jac.judiciary.gov.uk/application-process/112.htm. Web.

Lee, Harper. *To Kill a Mockingbird*. NP: Heinemann New Windmills, 1966.

South African Institute of Race Relations. *South Africa Survey 2012*. Ed. John Kane-Berman. Johannesburg: SAIRR, 2012.

Waldron, Jeremy. "Participation: The Right of Rights". *Proceedings of the Aristotelian Society* 98 (1998): 307–37.

Wesson, Murray and Max du Plessis. "The Transformation of the Judiciary: Fifteen Year Policy Review." http://www.thepresidency.gov.za/docs/reports/15year_review/jcps/transformation_judiciary.pdf. Web.

Free Speech and Communism in Colonial South Africa
Rex v Roux and Ngedlane (1936)

ZACKIE ACHMAT

On 12 March 1936, a South African court heard a case on free speech, the king of England, and communism. *Rex v Roux and Ngedlane* is a criminal case against two leaders of the Communist Party of South Africa (CPSA), Edward Roux and Josiah Ngedlane. Roux and Ngedlane were charged with the crime of insulting King George V in their capacity as editors of the Communist Party newspaper, *Umsebenzi*. (*Umsebenzi* means "Worker" in Xhosa.)

In his autobiography, Edward ("Eddie") Roux explains:

> "In 1935 Josiah Ngedlane and I were jointly charged with the crime of *lese majeste* for publishing an article in the communist newspaper urging Africans to boycott the (segregated) celebrations of King George V's silver jubilee" (x–xi).

They had written:

> "Who is King George anyway?
>
> "Who is this King George?
>
> "Remember the blood that was shed at Cartwright's Flats. We the Bantu people and workers of Durban have been asked to celebrate the Silver Jubilee of King George V on May 6th, the 25th anniversary of his accession to the Throne.
>
> "Who is this King George and why should we celebrate his jubilee?
>
> "King George is the figure-head of the English and Boer Imperialists whose local representatives are Hertzog and Smuts. These oppressors are robbing and exploiting the poor people and workers of South Africa, in particular the Bantu people.
>
> "The soldiers of King George's father (King Edward VII) killed Bambata and cut off his head because he led the struggle against the poll tax in 1906.
>
> "It was the police of King George's lick-spittle South African Government who shot down the people of Durban in the [Industrial and Commercial Workers' Union] ICU riots in 1929.
>
> "It was the police of Durban Borough Council which is calling upon you to celebrate King George's Jubilee that murdered

The Union of South Africa had been created as a dominion of the British Empire in 1910, the same year George V became the king of England. In 1931, the United Kingdom passed the Statute of Westminster which gave all of its dominions "legislative equality". This meant that the United Kingdom could no longer legislate on behalf of South Africa and other dominions. However, until 1950 lawyers could appeal legal disputes to the Judicial Committee of the Privy Council in London. George V died shortly before *Rex v Roux and Ngedlane* came to trial.

> Johannes Nkosi, brave leader of the Communist Party, on these very Cartwright's Flats at the pass-burning on Dingaan's Day, 1930.
>
> "Workers and oppressed people of Durban: do not be bluffed by this King George nonsense. Do not kiss the boot that kicks you. Refuse to worship King George, he is not our king but the king of our oppressors. Unite in protest against pass-laws, liquor laws and all other forms of oppression. Demand freedom in our land of your fathers. Refuse to go to Cartwright's Flats, the place where our martyrs were murdered in 1929 and 1930" (quoted in *Rex v Roux and Ngedlane*, para. 3).

The state complained that they published words that scandalously injured and dishonoured "the dignity and power" of the King and his government (quoted in *Rex v Roux and Ngedlane*, para. 1). A magistrate in Durban sentenced Roux and Ngedlane to hard labour for this crime.

Roux and Ngedlane unsuccessfully appealed the case to the Supreme Court (Natal Provincial Division). Afterwards they appealed to the Appellate Division of the Supreme Court based in Bloemfontein — then the highest court in South Africa.

On 17 April 1936, in a unanimous judgment, Appeal Judge Curlewis quashed the conviction with these words:

> "…[W]e under the conditions of our modern civilisation and development, and of our political liberty and freedom of thought and speech, cannot be expected to accept the narrow and restricted views of the 16th to the 18th centuries as regards criticism of the Monarch, as applicable in the present state of our political advancement.
>
> "We have travelled a long way on the road of freedom of speech and of political criticism since the days when it was a crime *laesae majestatis* to enter a house of ill fame or a latrine with money in one's possession or a ring on one's finger, bearing the image of the *Princeps*" (*Rex v Roux and Ngedlane*, para. 17–18).

In his judgment, Judge Curlewis traced the right to free speech derived from Roman times and from Roman-Dutch law. He explains how the Emperor Augustus tried to limit the Roman people's right to free speech by criminalising language that insulted the ruler. He did not succeed for long because later emperors and jurists dismissed the crime as an unjustified limitation of free speech.

Appeal Judge Beyers (writing in Afrikaans and concurring with the majority) pointed out that in the Roman Republic, words alone could not be punished — crimes were only recognised on the basis of deeds. Writing of the Communist editors, Judge Beyers wrote (my translation):

> "The Union is a democratic state, and one could understand such a prosecution under military rule, or, in an autocracy, but not in an enlightened century or generation where the state is based on the free and unimpeded will of the people (*onbelemmerde volkswil*), and, where every citizen is free to express their opinion on the state of public affairs or politics freely. Naturally, if legislation went out of its way to criminalise certain expression which would not otherwise be punishable, then the courts would have to give effect to it. However, here we are being asked to use the obsolete rubric of *crimen laesae Majestatis* … of centuries bygone to cover the offending words.
>
> "Were we to do so, then anyone who writes similar words about the Senate or Parliament (and possibly of Senators and Members of Parliament) could be criminally prosecuted and exposed to punishment" (*Rex v Roux and Ngedlane*, para. 55–56).

Judge Beyers pointed out that if the Court upheld the convictions of Roux and Ngedlane, any person who advocated for a republic or independence from Britain (including at least two parties in Parliament) would be breaking the law. For him, sovereignty and majesty lay with the people and the courts should not violate citizens' common law right to freely criticise King, Cabinet, or Parliament.

These words were spoken by a colonial court in defence of freedom of speech and expression. Today, they are codified in our Constitution after their erosion under apartheid. Regrettably, ANC and government leaders have forgotten the rich history of South Africa's freedom struggle and the role of newspapers, including those of the liberation movement.

Further reading

Wikipedia. "George V." Accessed Aug 2013. http://en.wikipedia.org/wiki/George_V. Web.

—. "Statute of Westminster 1931." Accessed Aug 2013. http://en.wikipedia.org/wiki/Statute_of_Westminster_1931. Web.

—. "Union of South Africa." Accessed August 2013. http://en.wikipedia.org/wiki/Union_of_South_Africa. Web.

References

Rex v Roux and Ngedlane 1936 (AD) 271.

Roux, Edward. *Time Longer Than Rope: The Black Man's Struggle for Freedom in South Africa*. London: University of Wisconsin Press, 1978.

Train Apartheid in Cape Town
Rex v Abdurahman (1950)

MAX TAYLOR

In 1948, when the National Party took power on its apartheid ticket, District Six in Cape Town could still be described as multicultural and relatively tolerant. Despite impeding crackdowns by the apartheid government, it was to remain a multiracial community until 1966 when BJ Vorster's government declared it a Whites Only area.

One family who made District Six its home was that of Abdullah and Margaret May Abdurahman. Dr Abdurahman was Cape Town's first black city councillor, as well as the leader of the African Political Organisation (APO). Cissie (Zainunnisa) Gool, Dr Abdurahman's daughter from a previous marriage, became the first black woman lawyer to graduate from law school in South Africa. Cissie was also elected to the Cape Town City Council, where she represented District Six from 1938 to 1951.

Dr Abdurahman's nephew, AE ("Sonny") Abdurahman, later became the secretary of the APO and played a part in resisting the implementation of apartheid on trains (Richard Dudley, p. 202).

See the Wikipedia articles listed under Further Reading for more information.

During the First World War, under Louis Botha's government, Parliament passed the Railways and Harbours Regulation, Control, and Management Act (1916). This gave the state's railway authorities the power to make regulations that allowed train companies to reserve railway premises or coaches for the exclusive use of particular genders, races, or "different classes of persons or natives". By making regulations under this Act, South African railway authorities enforced policies of racial segregation on trains and in railway stations throughout the 1920s and 1930s.

By 1948, racial segregation on South African trains and in railway stations was already going full steam. Metropolitan Cape Town was the notable exception to this norm.

More and more "Whites Only" signs had appeared around railway stations in Cape Town over the course of the 1940s, but racial segregation had not yet been enforced. After the National Party's 1948 election victory, however, Capetonians did not need to wait long for the wheels of train apartheid to start turning.

In early August 1948, the Railway Administration issued a designation declaring that from 16 August, certain first-class train carriages on Cape Town railway routes would be reserved for "Europeans only" (in other words, whites only). The Administration took this designation to be a lawful exercise

of its powers under amended railway regulations, which had been in force since 1937.

Accordingly, on 15 August "Whites Only, Slegs Blankes" signs were erected on designated first-class train carriages on the Cape Town–Simonstown, Cape Town–Bellville, and Cape Flats routes, with the new rules initially supposed to come into effect the next day.

The new policy caused shockwaves in Cape Town, particularly among the coloured community — people were unsurprisingly infuriated by the state trampling on what little freedom and dignity it still allowed them. On 18 August 1948 a broad coalition of political actors formed the Train Apartheid Resistance Committee (TARC).

The Railway Administration ended up waiting three weeks before enforcing the new rules. On Sunday 5 September, TARC held a rally at the Grand Parade in central Cape Town, aiming to galvanise outraged citizens into implementing a campaign of mass civil disobedience. The 6 September edition of the *Cape Times* declared: "Plan to Oppose Apartheid: Volunteer Force of Resisters: Lively Scenes in Station". As many as 4,000 so-called "Non-Europeans" attended, an unprecedented figure for a rally of its sort.

AE ("Sonny") Abdurahman addressed the crowd in his capacity as the secretary of TARC. He urged those who had gathered: "Go home now. *Use the whole train*; but do it quietly." Needing little encouragement, hundreds of protesters marched towards the central station and streamed into the "Europeans only" carriages of a train bound for Fish Hoek.

Although police began to flood the platform, the majority of those who had entered the carriages stood their ground until the train left the station, to much excitement and cheering. Police reinforcements then began cordoning off the "Europeans only" carriages of other trains waiting for departure and very few further protesters entered these carriages. The crowd eventually thinned out and no arrests were made on the day (*Cape Times*, 6 September 1948).

Following the protest, however, Abdurahman and nine other TARC committee members were prosecuted for incitement to commit a breach of the peace, as well as for breaching section 36(b) of the Railways and Harbours Regulation, Control and Management Act. All were acquitted from the charges with the exception of Abdurahman, who was convicted and ordered to pay a fine. The conviction was upheld in the Cape Provincial Division. Abdurahman was then granted leave to appeal to the Appellate Division.

In its judgment, delivered on 22 May 1950, the Appellate Division unanimously upheld Abdurahman's appeal, setting aside his conviction and sentence. The judgment was delivered by Judge Centlivres, who had been at the Appellate Division for 11 years.

The Court found that although the regulation under whose authority the Railway Administration had implemented train apartheid was valid, the policy itself constituted an unauthorised *application* of that regulation, in that it authorised unequal discrimination — that is, it applied racial apartheid "on a footing of partiality or inequality". Because the reservation of carriages for

"Europeans only" was unauthorised, Judge Centlivres held that non-Europeans ignoring the reservation could not be deemed to have committed an offence. Consequently, although Abdurahman had indeed incited such behaviour, his incitement, too, did not amount to an offence.

The facts of the case were not in dispute: Abdurahman acknowledged that he had encouraged non-whites at the Grand Parade to defy the new apartheid policy and enter designated "Europeans only" carriages.

In coming to his decision, Judge Centlivres applied a common law principle found in existing case law, namely that the Court should find a regulation or by-law invalid on the ground of unreasonableness if it is "partial and unequal" in its operation between different classes of persons. (An exception allowed the Court to ignore this principle but only if the enabling Act specifically authorised such partiality and inequality.) Judge Centlivres later clarified that such inequality must be "substantial", although it did not need to pass the stronger test (as the state had contended) of being "in all the circumstances manifestly unjust or oppressive."1

The relevant regulation to this case specified that where part of a train was reserved for passengers belonging to a particular race (in this case white people), "the other coaches forming part of that train … shall not be deemed to be reserved for the exclusive use of persons of any particular race".

This meant that if some carriages were marked "Europeans only", white people could use those carriages *or* any other carriages of the train as they pleased. This was indeed how train apartheid operated on Cape Town trains: although black people could not enter "Europeans only" carriages, white people were allowed to travel in any carriages they wanted to. The question, then, was: did this sanction partial and unequal treatment as between members of difference races, rendering the regulation invalid?

The Court found that the regulation could in principle be applied impartially and so the regulation was not invalid. Judge Centlivres reasoned as follows:

> "For instance, a train may bear notices indicating that certain coaches are reserved for the exclusive use of Europeans and the next train may bear notices indicating that certain coaches are reserved for the exclusive use of non-Europeans, and so on alternately in rotation."

However, the apartheid government had not applied the regulation in this way. There were of course no trains with carriages (first-class or otherwise) exclusively designated for non-Europeans; the train apartheid policy had the effect of restricting the movement of non-Europeans, while leaving white people free to enter any carriage they desired. Judge Centlivres therefore stated:

> "… as an invariable practice, *all* trains bear notices that certain coaches are reserved for the exclusive use of Europeans and in *no* case are any coaches reserved for the exclusive use of non-Europeans. Consequently the manner in which the regulation has been applied results in a partial and unequal treatment of one section of the com-

1 In this part of his ruling, Judge Centlivres relied on two previous cases: *Kruse v Johnson* (1898) and *Rex v Carelse* (1943).

> munity as compared with the treatment meted out to another section."

Only "Non-Europeans" were prevented from using any portion of running trains, and they were the only group liable to "criminal sanction" for disobeying this regulation. While the Court did not find Regulation 20 to be invalid in principle, it did find that the apartheid authorities had applied it improperly, because it resulted in substantial partiality and inequality between members of different races.

On this basis, the Court found that the train apartheid policy was void, because it went further than it was allowed to by either Parliament or the 1946 amended regulations. Those non-Europeans who had defied the restrictions had therefore committed no offence and Abdurahman, consequently, could not be guilty of criminal incitement. His conviction and sentence were thus set aside.

R v Abdurahman can be seen as a very small victory for those resisting apartheid in its early days. John Dugard, in *Human Rights and the South African Legal Order*, describes the case as an example of the Appellate Division's "commitment to the principle of equality before the law" in the early 1950s (p. 318).

The Malan government would certainly not have liked the judgment of the Appellate Division. However, as Ian Loveland notes in *By Due Process of Law?*, we should not overstate the potential emancipatory effect of the case. For one thing, the Court's requirement that racial segregation not result in "substantial" inequality seemed to implicitly sanction segregation on the basis of *minor* inequality.

Furthermore, as Judge Centlivres noted in his judgment, all the apartheid government needed to do to override the effect of judgments they disliked was to pass legislation explicitly conferring the power on state organs to discriminate as they pleased.

Indeed, this was precisely what the legislature did by passing the Reservation of Separate Amenities Act (1953). Sections 2 and 3 of this Act expressly allowed authorities to provide separate facilities for different races and removed the courts' power to intervene when such segregation resulted in substantial inequality. This was a stark reminder that without a set of constitutionally-guaranteed rights, the legislature could quite easily trample progressive judicial decisions.

Further reading

Wikipedia. "Abdullah Abdurahman." Accessed Aug 2013. http://en.wikipedia.org/wiki/Abdullah_Abdurahman. Web.

—. "District Six." Accessed Aug 2013. http://en.wikipedia.org/wiki/District_Six. Web.

—. "Zainunnisa Gool." Accessed Aug 2013. http://en.wikipedia.org/wiki/Zainunnisa_Gool. Web.

References

Dudley, Richard. "Forced Removals — The Essential Meaning of District Six." *The Struggle for District Six: Past and Present*. Ed. Shamil Jeppie & Crain Soudien. Cape Town: Buchu Books, 1990.

Dugard, CJR. *Human Rights and the South African Legal Order*. New Jersey: Princeton University Press, 1978.

Kruse v Johnson 1898 (2) 91 (QB)..

Loveland, Ian. *By Due Process of Law? Racial Discrimination and the Right to Vote in South Africa, Africa, 1855–1960*. Oregon: Hart Publishing, 1999.

Rex v Abdurahman 1950 (3) SA 136 (AD).

Rex v Carelse 1943 (CPD) 242.

BJ Vorster's War against White Students
NUSAS and the 1956 Riotous Assemblies Act

BRUCE BAIGRIE AND ZACKIE ACHMAT

Why have we forgotten the importance of the 5 June 1972 protest at St George's Cathedral in our struggle for freedom? And why do we only remember 16 June 1976 through the words of politicians?

Oppressive regimes and their policies have often been overcome through mass unarmed resistance, including symbolic protests, civil disobedience, and economic or political non-cooperation, and the youth have often been at the centre of modern revolutions.

During the Arab Revolutions, which were led by youth, millions of people mobilised across the Middle East and North Africa to topple tyrannical dictators. Palestinian youth join Israeli comrades to resist occupation and apartheid daily in the Occupied Palestinian Territories. Chilean youth have creatively mobilised on an impressive scale. Students in Montreal, resisting higher university fees through non-violent struggle, were met by police brutality and the declaration of a state of emergency.

The regimes under threat often respond with violence. During the 1970s and 1980s, government forces in Central and Latin America met student mobilisation with violence, by arresting, detaining, torturing, and "disappearing" high school and university students.

South Africa has a rich history of youth and student rebellion dating back to the 1930s, with hunger-strikes at schools and universities. After the crushing of liberation movements in the early 1960s, students and youth

Student protests and youth revolutions

There are numerous examples of famous youth and student protests, dating back as far as the University of Paris strike of 1229. Possibly the most famous recent examples happened in May 1968, when French student protests made headline news across the world; another series of uprisings with youth as a major part happened during 2010, over the course of what became known as the Arab Revolutions or the Arab Spring.

See the Wikipedia articles listed in the Further Reading section for more information about these and other youth revolutions.

were led by people such as Steve Biko, Mamphela Ramphele, Abraham Tiro, Geoff Budlender, Cheryl Carolus, Sheila Lapinsky, and Paula Ensor. Few people know this history. Almost every young person who wants to rebuild our country, continent, and the world will build their future struggles on the example of their parents and grandparents.

The apartheid government responded to youth in the same brutal way used by oppressive governments today: through state-sanctioned violence. Abraham Tiro, Rick Turner, Steve Biko, and Neil Aggett were murdered in apartheid jails. Apartheid security forces mowed down Hector Pietersen, Bernard Fortuin, and hundreds of others in the 1970s and the 1980s. Racist and oppressive laws allowed the state to "legally" crush resistance through the police and the army.

Most of the historical information in this article comes from personal recollection. For more information about the activists mentioned, including examples of student resistance to apartheid, visit South African History Online (see the Further Reading section).

Every June, people in South Africa celebrate Youth Month in a democratic South Africa. This public celebration (driven mainly by political leaders) has obscured our youth and student history with myths, partial truths, and fairy tales.

Learners in South African schools know and learn a little about the leadership and struggles of black African youth. However, they are taught almost nothing about the struggles of white, coloured, and Indian youth and students. This version of our history leaves out vital elements, including facts contained in legal judgments.

One example of a story that has been ignored is that of white students who mobilised thousands of people on June 5, 1972.

The State v Turrell and Others (1972) ("*Turrell*") is a landmark case where Prime Minister BJ Vorster attempted to convict 14 students and 2 clergymen who protested outside St George's Cathedral on Wale Street in Cape Town (*Turrell*, para. 1). The students were members of the National Union of South African Students (NUSAS), who had organised a march to defend their right to peaceful protest. NUSAS started as a mainly white liberal student organisation, but it later became radicalised and helped to build the workers' movement.

Vorster feared the actions of NUSAS, largely due to the effectiveness of student protests in the United States and Europe. The students were attempting to focus international attention on the injustices of apartheid, which was beginning to face serious opposition abroad. Vorster's other fear was the spread of communism, known as the "Rooi Gevaar" ("Red Danger"), as many of the NUSAS students were illegally distributing communist and socialist literature.

Vorster orchestrated a campaign against the students with police forces disrupting their protests, intimidating students, and attempting to infiltrate NUSAS with spies. The latter often involved police threatening students with criminal records if they did not cooperate, or promising to clear their existing records if they did. Craig Williamson, the apartheid spy who sent the

parcel bombs that killed Ruth First and NUSAS Deputy Chairperson Jeanette Schoon, also infiltrated NUSAS and later the ANC. Students conversations were recorded, their letters opened, and in some cases their passports were confiscated.

The ultimate action of the state was to ban all the NUSAS student leaders after they started trying to mobilise workers by stimulating wage commissions.

Before the *Turrell* case, NUSAS students held protests after various black students were expelled from universities for criticising the racist Bantu education system. Police violently broke up a protest at UCT with batons and teargas. NUSAS was not cowed and organised another protest in the centre of Cape Town on the corner of Wale and Adderley streets, next to Parliament, on the steps of St George's Cathedral (*Turrell* para. 3). The theme of the protest was police brutality (*Turrell* para. 8).

Ironically but predictably, the police responded to the protest with extreme violence (*Turrell* para. 7–8). Professor Patrick Harris, who attended the protest as a student, said that police beat him and two women next to him with plastic batons. Paula Ensor, who was an executive member of NUSAS and later became Dean of Humanities at UCT, described how police came into the church from behind the altar to viciously beat students. Even a pregnant woman was thrown to the ground.

In court the state tried to convict the protestors under the despotic Riotous Assemblies Act of 1956 ("the Act") (*Turrell* para. 1) but they hardly got the outcome they were hoping for.

The Act made it an offence for more than 12 people to assemble if a magistrate had issued a notice declaring the gathering unlawful. This allowed the state to prohibit anti-apartheid gatherings and authorised the police to use brute force to disperse protesters.

The Truth and Reconciliation Commission (TRC) heard many stories of apartheid oppression, which included acts targeting young white anti-apartheid and anti-conscription activists.

In Volume 6 of the *Final Report*, the TRC notes:

> "An unidentified security policeman … admitted to arson, damage to property, intimidation and conspiracy during the early 1990s, and carrying out actions … targeted [at] white activists such as members of the End Conscription Campaign (ECC) and the National Union of South African Students (Nusas) affiliates and involved the creation and distribution of Stratcom-style pamphlets in the name of the Wit Wolwe ['White Wolves']." (Sec. 3, ch. 6. subsection 6, para. 61–63)

NUSAS was investigated by the Schlebusch Commission (1972–73): "This Commission laid the groundwork for a clamp-down on these organisations. Numerous Cape-based people refused to testify and consequently faced legal action and banning orders" (*TRC Final Report*, vol. 3, ch. 5, subsection 5).

The transcript of Craig Williamson's amnesty hearing, where he discusses infiltrating NUSAS and his relationships with other young white activists, is available from the Department of Justice and Constitutional Development website:

http://www.justice.gov.za/trc/amntrans/1998/98090829_pre_2pretor7.htm

Although the students were convicted in the regional court, they appealed to the Cape Provincial Division. Judge Van Zijl found that the notice was *ultra vires* in that the acting chief magistrate had exceeded his authority and prohibited the assembly of a *class* of gathering — that is, any protest meetings (*Turrell* para. 58). In other words, the magistrate had attempted to ban all public gatherings on that day, whereas the Act only authorised him to prohibit a clearly identified and particular gathering (*Turrell* para. 35 and 37).

Furthermore, the magistrate's notice failed to indicate with reasonable certainty which gathering it was supposed to prohibit (*Turrell* para. 45). He also did not promulgate the notice in accordance with the provisions of the Act, which demanded that the magistrate give the public sufficient notice of the banned gathering (*Turrell* para. 39 and 41–44).

The Court also found that the accused had committed no offence because the Act required the acting police officer to repeat the order to disperse three times (*Turrell* para. 53); the police were also required to warn those assembled that force would be used if they failed to comply with the order to disperse (*Turrell* para. 52). The officer failed to do so and so the charge fell away because it was a requisite for the commission of the offence. The appellants won on all their cases of appeal (*Turrell* para. 65).

In an otherwise conservative judgment, Justice Van Zijl wrote:

> "Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic *and Parliament guards these rights jealously for they are part of the very foundations upon which Parliament itself rests*. Free assembly is a most important right for it is generally only organised public opinion that carries weight and it is extremely difficult to organise it if there is no right of public assembly." (*Turrell* para. 4, emphasis added.)

Of course it was exactly this kind of protest that Parliament under BJ Vorster had attempted to suppress through the Riotous Assemblies Act.

Consequences of the police reaction

The extreme hatred and violence of the police, although ignored by the Court during the trial, was certainly not ignored in the press. For the first time, middle-class white people were exposed to the brutal tactics of the police that had previously been used only against black protestors.

Condemnation came from many sectors, even by some members of the Nationalist Party. Predictably, Vorster responded to the incident by saying he was proud of his police and issuing a warning to English-speaking universities. However, the protest did lead to internal pressure on the police, whose actions were more closely monitored and who lost public sympathy as a result of the violence, particularly in Cape Town.

Although NUSAS was crippled for a time after the government banned its leaders, these bans backfired because they further invigorated student protests during the 1970s. Radicalised by Steve Biko, Strini Moodley, and other members of the South African Students Organisation (SASO), white students played a significant role in the liberation movement.

SASO split from NUSAS in 1968. See Steve Biko, "SASO — Its Role, Its Significance and Its Future".

During this period they embarked on many campaigns, including the "Free Political Prisoners" campaign in 1974, and contributed to the campaign to get international boycotts of apartheid South Africa. In the 1980s, NUSAS also joined forces with mass anti-apartheid groups such as the United Democratic Front (UDF) and the Azanian Students Organisation (AZASO), which was formed after SASO was banned. A major contribution to our liberation movement was the creation of student newspapers such as SASPU, journals such as Work in Progress, and political literature often banned for public use but allowed for use by academics.

The *People's Law Journal* pays tribute to the students of 5 June 1972 and their legacy.

References

Biko, Steve. "SASO — Its Role, Its Significance and Its Future." *I Write What I Like: A Selection of His Writings*. Ed. Aelred Stubbs. NP: Picador, 2012.

S v Turrell and Others (1973); SA 248 (C).

Truth and Reconciliation Commission. *Final Report*. Department of Justice and Constitutional Development. Accessed Aug 2013. http://www.justice.gov.za/trc/report/. Web.

Further reading

South African History Online. http://www.sahistory.org.za. Web.

—. "Anti apartheid activist Dr. Richard Turner is assassinated." http://www.sahistory.org.za/dated-event/anti-apartheid-activist-dr-richard-turner-assassinated. Web.

—. "Banning orders served on NUSAS leaders." http://www.sahistory.org.za/dated-event/banning-orders-served-nusas-leaders. Web.

—. "National Union of South African Students (NUSAS)." http://www.sahistory.org.za/topic/national-union-south-african-students-nusas. Web.

—. "NUSAS President Ian Robertson is banned." http://www.sahistory.org.za/dated-event/nusas-president-ian-robertson-banned. Web.

Wikipedia. "2011 Israeli border demonstrations." http://en.wikipedia.org/wiki/2011_Israeli_border_demonstrations. Web.

—. "2011 Palestinian protests." http://en.wikipedia.org/wiki/2011_Palestinian_protests. Web.

—. "2011–12 Chilean student protests." http://en.wikipedia.org/wiki/2011_student_protests_in_Chile. Web.

—. "2012 Quebec student protests." https://en.wikipedia.org/wiki/2012_Quebec_student_protests. Web.

—. "Arab Spring." http://en.wikipedia.org/wiki/Arab_Spring. Web.

—. "May 1968 events in France." http://en.wikipedia.org/wiki/May_1968_uprisings. Web.

—. "Student protests." http://en.wikipedia.org/wiki/Student_protests. Web.

History of South African Law

Development from 1652 to the present (excluding customary law)

GREGORY SOLIK (TEXT) • ROGER LANDMAN (GRAPHICS)

1652
The Dutch bring Roman-Dutch law to South Africa when they occupy the Cape of Good Hope.

1827
After 1827, all legal processes had to be held in English and documents prepared in English. Slowly English judges and authorities find ways to incorporate English rules and procedures which they were more familiar with.

1948
The National Party comes to power, institutionalising apartheid in legislation.

1996
South Africa's Final Constitution is passed, after being certified by the Constitutional Court.

1795
The Cape Colony comes under British rule. This is where things get a little mixed, but Roman-Dutch law continues to be in force.

1843
Natal is annexed by the British but continues to use Roman-Dutch law.

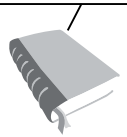
1910
The Union of South Africa is formed and the law is standardised.

1961
The Republic of South Africa is declared and its constitution written; this does not contain basic rights.

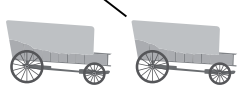
1993
South Africa passes the Interim Constitution.

1600 1650 1700 1750 1800 1825 1850 1875 1900 1910 1920 1930 1940 1950 1960 1970 1980 1990 2000 2010

ROMAN DUTCH LAW | BRITISH LAW | UNION OF SOUTH AFRICA LAW | NEW CONSTITUTION

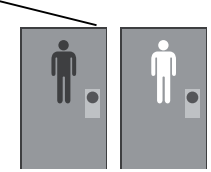


15th to 19th century
Roman-Dutch law is developed in the Netherlands. The most important legal rules from 1075-1795 are recorded in the *Groot Placaetboek*.



1830s and 1840s
The Great Trek: Boers migrate away from British control in the Cape Colony. The Boer Republics (the Orange Free State, Transvaal, and Natal) continue to use Roman-Dutch law.

1880–1881 and 1899–1902
The Anglo-Boer Wars. The British win the second Anglo-Boer War.



1948–1994
Apartheid.

A Permanent Space for Justice
Rikhotso v East Rand Administrator Board (1983)

WANDISA PHAMA AND LISA DRAGA

In loving memory of legal legend Arthur Chaskalson, on the 100th anniversary of the 1913 Land Act and the 30th anniversary of the Rikhotso victory.

> Since the other day,
> At the pass office,
> When I went to get employment,
> The officer there endorsed me to
> Middleburg,
> So I said, hard and with all my might,
> "Shit!"
> I felt a little better;
> But what's good, is, I said it in his face,
> A thing my father wouldn't dare do
> That's what's in this black "Shit".
>
> — Mongane Wally Serote
> "What's in This Black Shit"

Tom Rikhotso began working as a machinist for Hargram Engineering in Katlehong, in the area of Germiston, Johannesburg, in August 1970 (*Rikhotso* 1982, p. 283). By this time, apartheid laws and policies were already firmly in place. This included the Land Act, the Group Areas Act, the Bantu Authorities Act, and the Separate Amenities Act. These segregationist laws aimed to ensure that white and black South Africans would not share common spaces or use the same facilities.

Apartheid spatial and legal engineering

Rikhotso's story is the story of millions of black workers of the time. The apartheid system sought to divide South Africa into a number of separate areas, first "reserves" and later "homelands", with each area designated for a specific ethnic group.

White people lived in the urban parts of the country and black people were expected to live, work, and raise families in "reserves", "homelands", and townships designated to them by the National Party government. Pass laws were an attempt to enforce the racial divide by making it difficult for black people to move in the cities. They allowed police officers to stop any black person and demand to see their pass book.1

Despite this legally created divide between black and white South Africans and the areas each racial or ethnic group would occupy, large numbers of black men came to urban areas in search of

1 See Callinicos, *Vol. One*, p. 41.

The 1913 Land Act divided South Africa into separate areas that were designed as "whites only" or "Africans only" areas. This meant that "no whites could own land in African areas, and no Africans could own land in white areas, except in the Cape. If Africans lived on white-owned land, they [had to] work for the landowner. Otherwise, they [had to] live as farmers in the tribal areas" (Callinicos, *Vol. One*, p. 25).

Additional laws passed afterwards further restricted people's ability to use and own land, aimed at forcing more black South Africans to enter the workforce, thereby providing cheap labour for white farmers, industrialists, and mine bosses (see for example Luli Callinicos, *Vol. One*, ch. 5–9). The Bantu Authorities Act of 1951 replaced the reserves with a system of homelands, which "were subsequently granted independent status by the central government" (South Africa History Online, "Apartheid Legislation 1850s–1970s").

For a description of the lives and working conditions of migrant workers up to 1940, see for example the two volumes of *A People's History of South Africa* by Luli Callinicos, listed under Further Reading. The Worker's Museum in Johannesburg focuses on the lives of migrant workers on the mines.

work. In the cities these men were classified as "migrant labourers".

Men like Tom Rikhotso were forced to experience the hardship and pain of leaving their wives and children behind because the law did not permit their families to move to the urban areas with them. If a woman was found in the area where her husband worked and lived, she would face immediate arrest for being in the city illegally; her husband could also be arrested or fined.

This apartheid system forced migrant labourers to travel great distances and live far away from their families in order to secure work.

The government also created rigid laws designed to restrict the kind of employment that black migrant workers could get, as well as their terms of residence in urban areas.

The Natives (Urban Areas) Consolidation Act of 1945, also known as the Black (Urban Areas) Consolidation Act or simply the Urban Areas Act ("the Act") was one such law. This was the law Mr Rikhotso would challenge to achieve a semblance of justice.

The Act allowed black urban workers to obtain permanent residence status and therefore live permanently with their families in the areas in which they worked. However, the Act's strict requirements prevented many black workers from qualifying for permanent residency status. To get permanent residence, Mr Rikhotso would have to show that he had "worked continuously in that area for one employer for a period not less than 10 years" (*Rikhotso* 1982, p. 279).

Always a migrant

In an effort to make it more difficult for Mr Rikhotso and many other migrant workers to get permanent residence, the South African authorities required black migrant workers to conclude new contracts with their employers every year and to have it approved by a labour officer. In this way it would be impossible for a black migrant worker to remain in one contract of employment for ten years.

As a result, towards the end of every year for a period of ten years dating back to when he first started working for

Hargram Engineering, Mr Rikhotso was compelled to enter into a fresh 11-month contract with his employer. Thus at the end of every period of employment, during what was considered by both employer and Mr Rikhotso as his "annual leave", he made his way back to his wife and children in the Ritivi district of the area of Gazankulu (*Rikhotso* 1982, p. 283). (Gazankulu was a Bantustan or apartheid homeland in Limpopo/Mpumalanga.)

After working for the same employer for ten years, Mr Rikhotso approached a municipal labour officer to obtain permission to reside in Germiston on a permanent basis and to have his pass book endorsed to that effect. The labour officer refused to sign Mr Rikhotso's pass book. The labour officer reasoned that Mr Rikhotso had not worked for one employer for a continuous period of at least 10 years because he did not have one contract of employment but several separate contracts. His yearly trips to Gazankulu were considered a break in employment, making it impossible for Mr Rikhotso to qualify for permanent residence (*Rikhotso* 1982, p. 286–87).

Mr Rikhotso visited a Black Sash advice office seeking legal assistance, where his case was referred to one of South Africa's greatest human rights lawyers, advocate Arthur Chaskalson.

Mr Chaskalson and Mr Rikhotso headed to the High Court, seeking an order that he was entitled to permanent residency. Mr Chaskalson would argue that the apartheid state had conspired to prevent black people from ever qualifying for permanent residence status.

The High Court and the Appellate Division

Given the predominantly conservative make-up of the bench at that time, this was by no means a guaranteed legal victory, but the Witwatersrand Local Division found in Mr Rikhotso's favour.

Judge Brian O'Donovan stated that the case turned on the meaning of the words "worked continuously". To determine the meaning of the words, he looked at the purpose of the Urban Areas Act and concluded:

> "Its purpose is to exempt from the prohibition against remaining in a prescribed area for more than 72 hours a small category of persons of proved character 'who can usefully or satisfactorily be absorbed in the economic life of the urban community in question'." (*Rikhotso* 1982, p. 285)

Judge O'Donovan concluded that it could never have been the intention of Parliament that a migrant worker would have to stay in one physical area for the entire ten years to qualify for permanent residence status (*Rikhotso* 1982, p. 285).

Judge O'Donovan reasoned:

> "although [Mr Rikhotso's] services were rendered under a series of separate contracts, he and the company had a common and continuing intention that he should remain in employment; that the arrangements for the renewal of his contract were made each year before he went on paid leave; that he attended to the formalities of renewal of his contract during his annual leave period; that he worked for no one other than the company; and that his absences from work for other causes have occurred on isolated occasions only. On these facts the applicant has … satisfied the requirement of continuity in his work for a period of at least 10 years. The question is one of substance, and not of form. In real-

> ity there were no breaks in the applicant's employment. At most what was created was the semblance of a series of breaks." (*Rikhotso* 1982, p. 285–86)

To bolster his reasoning, the judge pointed to a far more "fundamental" flaw in the state's case: the government had imposed the contract renewal system on black migrant workers with the aim of ensuring that they would not qualify for permanent residence status. This was a misuse of power for an ulterior aim, which was not allowed in law (*Rikhotso* 1982, p. 286).

Although the High Court judgment was a splendid victory for Mr Rikhotso, celebrations were placed on hold when the state appealed the decision to the Appellate Division, then South Africa's highest court.

On 30 May 1983 the Appellate Division in Bloemfontein agreed with the High Court decision. Mr Rikhotso and his family could now live as permanent residents in Katlehong, Germiston (*Rikhotso* 1983).

The effect of the Rikhotso decision

What Mr Chaskalson did in this case was to use the apartheid state's own laws to bring attention to the injustices of the pass law system. With this case he exposed an unlawful aspect of the state's actions: it was breaking its own racist law by searching for loopholes to prevent this hard-working labourer from living with his family in an urban area. The effect of the Appellate Division's decision was to peel away a layer of the unjust apartheid practices.

Sadly, the immediate benefit of the Rikhotso judgment was short-lived. Dr Piet Koornhof, the Minister overseeing the implementation of the pass laws, introduced an amendment to the law aimed at limiting the effect of the court decision. The idea was simple: if migrant workers' families had not yet taken up permanent residence in an urban area, they would only be allowed to live together in a house or plot where their husband or father could show that he held leasehold rights. The chronic shortage of housing at the time rendered this virtually impossible.

Koornhof's amendment took effect on 26 August 1983.

Fortunately, we now live in a constitutional democracy where unlawful action by the state — that violates people's constitutional rights such as the right to be protected from unfair discrimination — cannot be made legal simply by amending a law.

But while Tom Rikhotso's story played out under an oppressive, unjust system, similar stories continue to play out 30 years after the Rikhotso decision. In a democratic South Africa, rural black fathers and husbands are still compelled to leave their families for work, only to suffer exploitation and to receive a wage not capable of decently sustaining their families.

It is for this and many other injustices that South Africa's new generation of lawyers should follow in the footsteps of Chief Justice Arthur Chaskalson and continue the fight for freedom. Indeed, everyone living in South Africa should follow the example of Tom Rikhotso and continue the battle against injustice, including the geographic and income inequality that persists in our townships,

informal settlements, and other poor and working-class communities.

Further reading

Callinicos, Luli. *A People's History of South Africa, Vol. One: Gold and Workers 1886–1924*. Johannesburg: Ravan Press, 1985.

—. *A People's History of South Africa, Vol. Two: Working Life: Factories, Townships, and Popular Culture on the Rand 1886–1940*. Johannesburg: Ravan Press, 1987.

Davis, Dennis and Michelle Le Roux. "The Challenge to the Pass Laws: The beginning of the end." *Precedent and Possibility: The (ab)use of law in South Africa*. Juta and Co., 1990, p. 60–80 (esp. 75–76).

South African History Online. "Apartheid Legislation 1850s–1970s." Web. http://www.sahistory.org.za/politics-and-society/apartheid-legislation-1850s-1970s. Web.

References

Rikhotso v East Rand Administration Board 1983 (4) 278 (AD).

Rikhotso v East Rand Administration Board and Another 1982 (1) SA 257 (W).

Decriminalising Sodomy
NCGLE v Minister of Justice (1998)

DANIEL HOFMEYR

Sodomy has meant different things at different times and under different circumstances, but people generally use it to refer to anything they consider "an unnatural sex act". Over the years and across the world, this has been used to refer to a variety of activities, including some between men and women. In South Africa sodomy was a common law crime although it was never a crime under the Criminal Procedure Act.

Queer is a broad term for people whose sexual orientation and/or gender identity differs from the norm. This includes people who are gay, lesbian, bisexual, transgender, or intersex, as well as transvestites. For more information, see the Further Reading section.

A *custodial offence* is one that is subject to imprisonment: if someone is found guilty of a custodial offence, the Court must send them to jail.

In the development of South African law, the decriminalisation of sodomy after apartheid was monumental. It confirmed South Africa's commitment to human rights and paved the way for other litigation supporting equal rights for queer people. This would lead to many changes to criminal and civil law, eventually leading to the Civil Union Act, which allows gay marriages.

In highly conservative societies, gay men and other members of the queer community are often portrayed as a threat to society, as paedophiles, or as predators. This was also true in apartheid South Africa. As Mark Gevisser wrote in "A Different Fight for Freedom":

> "By the mid-1950s, the public image of homosexuals swung between two stereotypes: the child molester and the drag queen". (Gevisser and Cameron, p. 18)

As a result, queer people in this country were forced to move underground.

Mark Gevisser gives an overview of varieties of South African queer culture and communities in his essay, "A Different Fight for Freedom: A history of South African lesbian and gay organisation from the 1950s to 1990s" (Gevisser and Cameron, p. 14–86). And Glen Retief's essay, "Keeping Sodom out of the Laager: State repression of homosexuality in apartheid South Africa" (Gevisser and Cameron, p. 99–111) details the National Party government campaigns against queer people.

Gay men were especially targeted and harassed by the police, who would raid houses and parties. In 1966 police raided a gay party in an affluent Johannesburg neighbourhood where more than 300

men were present. This was highly publicised and a number of people were arrested. ("'Mass sex orgy' in Forest Town!" read one headline.) Although homosexuality was already a crime, this raid led BJ Vorster, then the Minister of Justice, to complain that more stringent measures needed to be taken against homosexuals, and that the current legislation did not allow for this. (See Gevisser and Cameron, especially p. 30–47.)

This led to amendments to the Sexual Offences Act (originally called the Immorality Act) in 1967 and 1969. One of these — Section 20A of the Immorality Amendment Act, 1969 — specifically targeted gay men. It was known as the "men at a party" clause, and essentially made it a crime for men to do anything that a judge could interpret as being intended "to stimulate sexual passion". In this case, a "party" meant any event where three or more people were present.

In 1985 the President's Council launched an investigation to determine whether the existing laws against homosexuality was sufficient to "curb the practice". This led to further amendments to the Sexual Offences Act to ensure that lesbians were also targeted.

Section 20A of the Immorality Amendment Act, 1969

"A male person who commits with another male person at a party an act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence."

The Immorality Amendment Act of 1950 raised the age of consent for gay males to 19. This was seen as another step to protect the youth from "predatory men".

Edwin Cameron's article, "Unapprehended Felons: Gays and lesbians and the law in South Africa", describes how legislation in 1993 continued to discriminate against queer people (Gevisser and Cameron, p. 89–98).

Apart from legislation aimed at "punishing" offenders, queer people were also targeted in the media. Any queer films or other material were banned from the country. In the 1980s especially, media reporting on queer "sex scandals" and arrests were sensationalised and hysteric. The reports seemed to confirm that South Africa was being overrun with immorality and perversion. The media indulged in the frenzied stereotype of the teenage victim and the older monster, regardless of whether these relationships were consenting and non-exploitative.

This was at a time when police brutality was at its high point, and the police were facing a crisis of mistrust by the South African public. Gay men were easy targets. The police could arrest these "child molesters" and look like heroes instead of villains.

However, in the 1990s the official sentiments regarding homosexuality began to change. In the case of *S v M,* the Court called for the judiciary to take notice that social acceptance of homosexuality was increasing. At its National Conference in 1992, the ANC stated that the anti-discrimination clause in the Bill of Rights should protect people from unfair discrimination based on their sexual orientation. In *S v H*, the Court stated that although sodomy was still an offence, it "can rarely, if ever, justify a custodial offence" if referring to acts committed in private by consenting adults.

The decision to explicitly include sexual orientation in the Constitution's

Precedents cited in *NCGLE v the Minister of Police*

In *S v M* (1990), the appellant was convicted in a Regional Magistrates' Court of six counts of sodomy involving boys of 11 and 12 years of age and four counts involving adult males. He was sentenced to imprisonment on all counts.

On appeal, the Eastern Cape Division held that imprisonment was no longer an appropriate sentence for sodomy committed in private between adults. The appellant was thus only sentenced to imprisonment on the counts of sodomy involving the underage boys.

In *S v H* (1993), a 23-year-old man was accused and convicted of sodomy committed with another adult male in private. The accused was sentenced to 12 months' imprisonment, which was totally suspended.

On review, the Cape Provincial Division held that public attitudes to homosexual relationships had changed and that publicly the opinion was growing that discrimination against homosexuality should be eliminated. It held further that consensual adult sodomy committed in private can hardly ever justify a custodial sentence. In the circumstances the Court set aside the sentence and replaced it with one of a caution and discharge.

anti-discrimination or equality clause was, predictably, a heated issue in the run-up to the constitutional debates. However, by the time the Interim Constitution was being discussed, almost every political party supported the proposal to include sexual orientation in the anti-discrimination clause. (The only party who objected was the ultra-conservative African Christian Democratic Party.) Section 9 of the Final Constitution explicitly protected sexual minorities from discrimination — either by the state or by private people or organisations.

In December 1994, the National Coalition for Gay and Lesbian Equality (NCGLE) was founded (Hoad et al, *Sex and Politics in South Africa*, p. 212). The NCGLE brought a number of cases to the Constitutional Court, the first of which focused on decriminalising sodomy. In common law up to 1994, sodomy was technically a crime although it was seldom prosecuted.

The Equality Clause — Section Nine of the Constitution

"9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

"(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

"(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

"(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

"(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

One such case was *National Coalition for Gay and Lesbian Equality and Another v the Minister of Justice and Others* (1998) ("*NCGLE*"). Here the Constitutional Court found that the common law offence (sodomy) and the "men at a party" clause infringed people's rights to equality, human dignity, and privacy. Accordingly, it confirmed the ruling of the Witwatersrand High Court, where Judge Heher declared that the "men at a party" clause was unconstitutional and that it was unconstitutional to include sodomy in Schedule 1 of the Criminal Procedure Act and the schedule to the Security Officers Act.

At the same time, the Court found that the concept of "sexual orientation", as used in the equality clause, should be interpreted in the most "generous" way possible, to apply equally to people who are bisexual or transgender, regardless of whether or not they identify primarily as non-heterosexual (*NCGLE*, para. 21).

In its judgment, the Constitutional Court confirmed that, after apartheid, South Africa's legal system would no longer try to impose a specific way of life on all members of society. In his concurring judgment, Judge Albie Sachs wrote that this realisation has two consequences:

> "The first is that gays and lesbians cannot be forced to conform to heterosexual norms. Second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs …
>
> Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs … into dogma imposed on the whole society" (*NCGLE*, para. 137).

The Court agreed that respect for difference is at the heart of equality and that South Africa should be measured on how it treats its minorities. In the majority judgment, Judge Lourens Ackermann

The Constitutional Court judgment describes some of the effects of including sodomy as a Schedule 1 offence:

- Police officials could take fingerprints from anyone who had received a summons on an accusation of sodomy;
- Peace officers and any private citizen could arrest anyone if they had a reason to "reasonably suspect" them of having committed sodomy, with or without a valid warrant;
- Anyone authorised to arrest someone suspected of sodomy could kill the suspect if, upon attempting to arrest them, they could not arrest the suspect, or if the suspect fled and there was no other way to arrest the suspect or stop them from fleeing;
- Courts could refuse bail to an accused who was likely to commit sodomy and, in determining whether that will happen, the Court could take into account that the accused had a disposition to do so or had previously committed sodomy while released on bail;
- Anyone who had given or who was likely to give material evidence in a case of sodomy could be given witness protection;
- Members of the South African Police Service had wide powers to erect roadblocks in the prevention, detection, and investigation of sodomy;
- Anyone convicted of sodomy was disqualified from receiving or continuing to receive a pension; and their surviving spouse or other dependents would not receive their pension after they died. (*NCGLE*, para. 7)

quoted the judgment of the Canadian Supreme Court in *Vriend v Alberta* (1998):

> "It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy" (quoted in *NCGLE*, para. 22).

Vriend v Alberta related to a teacher who had been fired from his job at a religious college because of his sexual orientation. The Canadian judge in that case, Peter Cory, also argued that it demeans the whole of society to say that any group is "less deserving and unworthy of equal protection and benefit of the law". Judge Cory wrote:

> "It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy" (quoted in *NCGLE*, para. 22).

Judge Ackermann agreed, pointing out that the European Court of Human Rights has "recognised the often serious psychological harm" that gay people suffer as result of discrimination (*NCGLE*, para. 23). Judge Sachs cited similar case law from the United States,1 and summarised the principle broadly:

> "In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, and that impinges on the dignity and self-worth of a group" (*NCGLE*, para. 127).

The judgment confirmed that privacy also includes the right to make your own decisions and find your own identity, and should not be limited to "sealing off from state control what happens in the bedroom". Judge Sachs argued that, like the equality clause, the right to privacy should be interpreted broadly. Citing another judgement from a US court, Sachs stated that privacy is not only "the right to be left alone", "a negative right of occupying private space free from government intrusion". Instead, it is the right "to get on with your life, express your personality and make fundamental decisions about your intimate relations without penalisation" (*NCGLE*, para. 116).2

This judgment confirmed the need to bring South Africa's common law in line with the Constitution's protections for queer rights. It also promised us that the state would never again try to govern our personal lives by prohibiting us from forming personal relationships — either with someone of a different race or religion, or of the same sex.

References

Bowers, Attorney General of Georgia v Hardwick et al 1985 478 US 186. United States.

City of Cleburn Text. v Cleburn Living Center 1985 473 US 432. United States.

1 Judge Sachs was citing *City of Cleburn Text. v Cleburn Living Center* (1985), para. 473; the judge in that case, in turn, was quoting the earlier judgment of Holmes in *New York Trust Co. et al v Eisner* (1921), para. 349.

2 Judge Sachs was citing Blackmun in *Bowers, Attorney General of Georgia v Hardwick et al* (1985).

Gevisser Mark, and Edwin Cameron (eds.) *Defiant Desire: Gay and Lesbian Lives in South Africa*. Johannesburg: Ravan Press, 1994.

Hoad, Neville, Karen Martin and Graeme Reid (eds.) *Sex and Politics in South Africa*. Cape Town: Double Storey Books, 2005.

National Coalition for Gay and Lesbian Equality and Another v the Minister of Justice and Others 1998 CCT 11/98.

New York Trust Co. et. al. v Eisner 1921 256 US 345. United States.

S v H 1993 (2) SACR 545 (C).

S v M 1990 (2) SACR 509 (E).

Vriend v Alberta 1998 File No: 25285. Supreme Court of Canada.

Further reading

For a look at various aspects of queer culture before and after apartheid, see the collection of essays edited by Mark Gevisser and Edwin Cameron, *Defiant Desire: Gay and Lesbian Lives in South Africa*.

For more information about the drafting of the Final Constitution, including the Equality Clause, see Lauren Segal and Sharon Cort, *One Law, One Nation: The Making of the South African Constitution*. Auckland Park: Jacana Media, 2012. Alternatively, visit South Africa History Online, http://www.sahistory.org.za/constitution.

Human Rights Watch is a respected international organisation that focuses on human rights research and advocacy. In 2011 they published a report that contains good definitions of a range of terms related to sexual orientation and gender identity. See "We'll Show You You're a Woman: Violence and Discrimination against Black Lesbians and Transgender Men in South Africa" (available from http://www.hrw.org/reports/2011/12/05/we-ll-show-you-you-re-woman).

Gender DynamiX is an organisation that works with transgender people across Africa. Visit http://www.gender-dynamix.org.za/document-categories/general-information/.

Class Action Litigation
An avenue to justice

DANIEL LINDE

"The law is a scarce resource in South Africa … justice is even harder to come by." These are the words of Judge Edwin Cameron in the 2001 Supreme Court of Appeal (SCA) case of *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others* (2001) ("*Ngxuza* SCA", para. 1). Judge Cameron, then a judge on the SCA, was emphasising the importance of class action litigation as a means of protecting and furthering the rights of the most marginalised in our society, who may otherwise have no access to legal redress.

The class action standing provision of the Constitution has been relatively underused. But a lawsuit currently underway against South Africa's largest mining companies seeks to bring redress, by means of the class action mechanism, to thousands of miners infected with silicosis. The few class action cases to date have targeted both commercial profiteering and government maladministration. They illustrate the great potential of this form of litigation to provide redress to a large number of people and, to lesser extent, to create an incentive for companies to make systemic changes.

Silicosis is an incurable and progressive lung disease that people get by inhaling crystalline silica dust. Miners are particularly vulnerable to the disease because of the nature of their work. It is associated with tuberculosis, respiratory infection, massive fibrosis, and lung cancer. See Roberts, *The Hidden Epidemic Among Former Miners*, p. 11 and Callinicos, *A People's History of South Africa* Vol. One p. 77.

What is class action litigation?

Any claimant that litigates in a court of law must have standing, or *locus standi*

Notable class action lawsuits in South Africa

The provision for class action lawsuits was successfully invoked in *Beukes v Krugersdorp Transitional Local Council and Another* (1996), as well as *Trustees for the Time Being of the Children's Resource Fund and Others v Pioneer Food and Others* (2013) ("*Pioneer Food*"). However, in *Maluleke v MEC, Health and Welfare, Northern Province* (1999) ("*Maluleke*"), the Court held that class action standing was absent.

This article refers to two cases relating to Pioneer Food: the first ("*Pioneer Food*") was brought on behalf of a broad group while the second, *Mukaddam and Others v Pioneer Food (Pty) Ltd and Others* (2013) ("*Mukaddam*"), was brought to certify a class of distributors.

in judicio, to do so. Before South Africa adopted its post-apartheid Constitution, the rules of standing were narrow and restrictive: only those claimants who could show a sufficient, personal, and direct interest in a case were allowed to litigate it (Hoexter, *Administrative Law in South Africa*, p. 435). This meant you could not generally bring a case on behalf of someone else alleging that their rights had been infringed. South African law only permitted third parties to participate in existing proceedings if they received a formal joinder in terms of the procedural rules of court (*Ngxuza* SCA, para. 4).

All this was fundamentally changed by the Final Constitution, adopted in 1996. The provisions of section 38 — and the purposive interpretation given to those provisions by our courts — demand a broad and generous approach to standing.1 Integral to this broad approach is section 38(c), which allows "anyone acting as a member of, or in the interest of, a group or class of persons" to approach a court to allege an infringement or threat to a right of that group or class contained in the Bill of Rights. South Africa's courts have also used section 38(c) to develop the common law, allowing class actions to be brought even in cases where a right contained in the Bill of Rights has not been infringed (*Pioneer Food*, para. 21).

In class action litigation, one or more claimants litigate on behalf of all claimants in a similar position to their own. In "opt-out" class actions, other members of that class are not joined themselves, but benefit from (and are bound by) the outcome of the litigation unless they choose to opt out of it. This poses the danger that if members of a class fail to opt out, they will be prevented from pursuing the claim in their individual capacity in the future. Because of this risk, certain requirements must be met before anyone may litigate on behalf of a class.

Opting out means that the members of a class must be informed of the pending class action case and given the opportunity not to be part of it. This will ensure that they are allowed to bring their own claims later. See Currie and De Waal, *Bill of Rights Handbook*, p. 88, and *Ngxuza* SCA, para 4.

Note that the recent *Mukaddam* case recognized the existence of "opt-in" class actions.

Where a prospective representative brings litigation on behalf of a class who allege the infringement of a right *not* contained in the Bill of Rights, they must first make a preliminary application to have the class action certified, allowing them to act on behalf of the class (*Pioneer Food,* para. 23).2 Then, in order for the certification application to succeed, the court must be satisfied that:

- the class is defined precisely enough;
- a common claim or issue has been identified;
- there is evidence of the existence of a valid cause of action;

1 See in particular *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (1996), and *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others* (2013).

2 The Constitutional Court in *Mukaddam* left open the question whether certification is required where a breach of a right contained in the Bill of Rights is alleged.

- the representative's claim is typical of the claims of the rest;
- the representative will adequately protect the interests of the class; and
- a class action is the most appropriate procedure in the circumstances.3

It is not necessary, when defining the class, to identify all of its members. Indeed, this will often be impossible; but it is vital to identify the class with enough certainty so that an individual member of the class can be identified according to objective criteria. If this is not the case, it will be impossible to notify the members of a class of the action, and such members will not be given the opportunity to opt out (*Pioneer Food,* para 29).

Why class action litigation?

Why do individual litigants not simply bring their own claims individually? There are at least three advantages to litigating as a class.

The first is that class actions provide legal redress to a large number of people, many of whom would otherwise be without remedy. Therefore where people's claims are too small to pursue individually, or where individuals cannot afford to pursue their own claims, they are nevertheless granted access to court (Hoexter, *Administrative Law*, p. 449; *Ngxuza* SCA, para. 5–6).

A person is *without remedy* if they cannot claim compensation for a wrong they have suffered, either because they cannot afford it or for some legal reason.

Secondly, by allowing for similar facts to be dealt with in one case, class actions may reduce the number of cases which South Africa's already overburdened courts are required to hear (Hoexter, p. 449).4

Thirdly, because the threat of a consolidated claim looms larger for potential targets of class action lawsuits, and because class actions regularly arise from instances of systemic wrongdoing, it is a form of litigation that creates a strong incentive for a degree of positive systemic change.

This final point deserves careful qualification. Although class action litigation does a better job of remedying a widespread problem than piecemeal, individualised litigation, it is often equally ill-suited to addressing the root causes of a widespread problem. It is generally aimed at providing mere monetary compensation to the members of the group. Therefore, although class actions incentivise change more than piecemeal litigation, they do not mandate the formulation of new policies, nor future compliance with the law, in the sense that other forms of litigation and coordinated social mobilisation might.

The shortcomings of individualised claims were palpably illustrated by the case of *Vumazonke v MEC for Social Development, Eastern Cape* (2004) ("*Vumazonke*"). In this case, Judge Plasket heard 102 matters in a single week in motion court. Each application claimed essentially the same relief against the MEC. The

3 See *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* (2000), para. 16, and *Pioneer Food,* para. 26.

4 Hoexter cites para. 2.3.1 of the South African Law Reform Commission draft Bill in its 1998 report, *The Recognition of Class Actions and Public Interest Actions in South African Law.*

judge noted that the recalcitrant Department of Social Development, subject to thousands of court orders, was willing to "pay the costs of those applications rather than remedy the problem of maladministration and inefficiency … which was the root cause of the problem" (*Vumazonke*, para. 10). He observed that in the absence of class action litigation, the Court was "forced to watch impotently while a dysfunctional and apparently unrepentant administration continues to abuse its power at the expense of large numbers of poor people." The real crisis, he found, was that the cases represented only "the tip of the iceberg." In other words, it was a case crying out for class action.

Permanent Secretary v Ngxuza (2001)

In the *Ngxuza* SCA case, the Eastern Cape provincial authorities unlawfully revoked the disability grants of almost 100,000 grant recipients. The authorities' motive was not malicious — to the contrary, it was part of an attempt by the province to verify and update its pensioner records to purge fraudulent records that cost millions every year. However, the authorities' method was extreme and, by failing to distinguish between the fraudulent and the truly disabled, proved devastating to many people in need (*Ngxuza* SCA, para. 7).

It was also patently unlawful, as the entitled grantees were not given any notice or the opportunity of a consultation before their grants were revoked. Their source of income and livelihood was unilaterally severed, despite attempts by the Human Rights Commission to persuade the provincial government to implement fair procedures.

The three applicants, assisted by the Legal Resources Centre, brought an application on behalf of all those affected, in terms of the class-action standing provision of the Constitution. They asked the Court for an order declaring that the cancellation of their own grants and the grants of all those in a similar position to their own had been unlawful, and requested an order reinstating those grants retrospectively.

Judge Froneman, in the Grahamstown High Court (HC), noted the difficulties that the affected class of people experienced in accessing justice ("*Ngxuza* HC", p. 609).5 Many lived in rural areas far from access to lawyers. And when they did eventually reach lawyers, they would often be told that the legal aid system was overburdened, or that no financial assistance was available. Essentially, many people in the applicants' position simply could not pursue their own claims (*Ngxuza* HC, p. 621).

Judge Froneman held that the class was clearly identified and specified because, although the applicants did not know exactly whose grants had been unlawfully suspended, the provincial government did (*Ngxuza* HC, p. 623). He therefore ordered that the applicants were entitled to litigate as representatives of the class, defined as anyone whose grant had been cancelled between 1 March 1996 and 28 September 2000 (*Ngxuza* HC, p. 633).

There were two further aspects to the order apart from certifying the class action. Firstly, the judge ordered

5 *Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another* (2000).

the provincial government to give the applicants' attorneys information about the members of the class from its own records. Secondly, he ordered the applicants to publish and widely distribute a notice, in English, Afrikaans, Xhosa, and Sotho, containing information about the class action (*Ngxuza* HC, p. 633–34). This allowed people to opt out and not be bound by the litigation if they wished.

The provincial government appealed to the SCA. Judge Cameron, upholding the decision of the lower court, noted that the case was "pattern made" (that is, ideally suited) for class proceedings (*Ngxuza* SCA, para. 11). This was because the class the applicants represented was of the very poorest in our society, its members had the least chance of vindicating their rights through the courts, and the action was made up of many small individual claims scattered throughout the Eastern Cape. The Court therefore dismissed the provincial government's appeal, and upheld the applicants' authority to institute proceedings.

Pioneer Food (2013)

In the *Pioneer Food* case, the SCA considered the certification of a class action where the largest bread producers in the Western Cape — Pioneer Food ("Pioneer"), Tiger Brands ("Tiger"), and Premier Foods ("Premier") — had engaged in conduct amounting to price fixing, thereby contravening the Competition Act (1998).6 Following an investigation by the Competition Commission ("the Commission"), Premier came forward to volunteer information regarding the alleged conduct, and was granted corporate leniency. Tiger entered into a settlement agreement with the Commission and paid an administrative penalty of nearly R 99 million. The Competition Tribunal adjudicated the complaints against Pioneer and imposed a penalty of close to R 196 million.

So much for punishment; but what about compensating ordinary consumers of bread, the price of which was artificially and unlawfully increased?

The nine applicants represented a broad cross-section of society. Three were NGOs that worked with children, the poor, and the disadvantaged. The fourth was the Confederation of South African Trade Unions (COSATU). The remaining five were individual consumers of bread.

The applicants sought to certify two separate consumer classes on whose behalf they could claim damages for the increased price of bread, which resulted from the bread companies' unlawful collusion. (As noted earlier, a separate application was brought for the certification of a class of distributors.)

The first class consisted of all persons who purchased, for personal consumption, bread produced by any of the three bread producers in the Western Cape during the period of collusion ("the Western Cape complaint"). The second class consisted of all such persons in Gauteng, Free State, North West, or Mpumalanga ("the national complaint") (*Pioneer Food*, para. 12).

On appeal, the SCA noted that class actions are "a particularly appropriate way in which to vindicate some types of constitutional rights, but they are

6 *Trustees for the Time Being of the Children's Resource Fund and Others v Pioneer Food and Others* 2013 (2) SA 213 (SCA).

equally useful in the context of mass personal injury cases or consumer litigation" (*Pioneer Food*, para. 21). In determining whether it was appropriate in the circumstances to certify the class action, the Court noted (similarly to the SCA in *Ngxuza*) that:

- the group upon whose behalf the appellants sought to bring the claims was large and generally poor;
- the claims themselves were not large enough to warrant being pursued individually; and
- in all likelihood, if the claims were not capable of being pursued by way of class action, they would not be capable of being pursued at all (*Pioneer Food*, para. 19, 65–68).

In respect of the Western Cape complaint, the Court held that insufficient evidence of a valid claim had been adduced, and the class was defined too broadly, but that it would be inequitable and unjust to quash the applicants' case.

In addition to granting the members of the potential class access to courts as outlined above, this was important because it meant the class was *capable* of definition; nor could it be said that the action — a delictual claim for damages caused by deliberate breach of the Competition Act — was without basis. But insufficient evidence had been placed before the Court for it to determine these questions.

Judge Wallis, writing for a unanimous SCA, therefore sent the matter back to the High Court so that the applicants could file further affidavits in accordance with the requirements for certification set out in his judgment.

A *delictual claim* is a claim for compensation by person A for harm inflicted by person B in breach of a legal duty that person B owes to person A.

When a court *remits* a matter to another court, it orders that court (usually a lower court) to reconsider the merits of a matter, often in light of the guidance provided by the higher court.

The application for certification is still pending before the Western Cape High Court, but at this stage that application appears likely to succeed.[7]

In a separate matter, the Constitutional Court held that the representatives of a class of bread distributors — allegedly harmed as a result of the same collusive conduct in *Pioneer Food* — should also file further affidavits in the High Court to comply with the *Pioneer Food* certification requirements. Justice Jafta held that the very same requirements for certification exist where the members of a class are required to "opt in" rather than "opt out" of it (*Mukaddam*).

In the absence of private damages claims, what prevents profit-seeking companies from weighing up the likely costs of administrative penalties with the significant financial benefits of price-fixing, and then determining that colluding with competitors is the most profitable approach? The ubiquity of collusive practices suggests that this sort of callous arithmetic is commonplace. And so the additional threat of private claims for

7 The Institute for Accountability in Southern Africa argues that applicants have reformulated their claims in compliance with the SCA's requirements to the extent that "Pioneer now pleads 'no contest' to the certification" ("Casting bread upon the water").

damages — though in theory targeted at compensation rather than deterrence — will surely serve to change commercial behaviour for the common good.

Looking forward: the silicosis class action

Currently underway is perhaps the most significant, and — for mining bosses — most calamitous class action matter yet in South Africa's history. A class action is sought to be certified on behalf of more than 17,000 miners against 30 mining companies, including AngloGold Ashanti, Gold Fields, Harmony Gold Mining Company, and Anglo American South Africa. The applicants claim to represent the class of miners that have contracted silicosis due to their employers' negligent failure to prevent the spread of silicosis in their mines.

The recent decision of the Constitutional Court in *Mankayi v AngloGold Ashanti* (2011) has opened the way for mining companies to attract significant liability for their negligence. Here the Constitutional Court decided that, in cases where mineworkers suffer occupational injury or disease, such as silicosis, due to the fault of their employer, they may claim compensation. The Court affirmed that section 35(1) of the Compensation for Occupational Injuries and Diseases Act (COIDA) of 1993 does not extinguish the common law rights of mineworkers to recover damages. AngloGold Ashanti had argued that this section prevented such compensation unless done through COIDA.

The South African Department of Labour estimates that as many as a quarter of all miners in South Africa suffer from silicosis (*National Programme for the Elimination of Silicosis*, p. 4). This is despite clear evidence that the disease can be prevented by introducing measures to reduce silica dust levels; early diagnosis; educating miners about the risks; and providing proper treatment. (See South African Department of Labour, p. 49–50, and Richard Spoor, "Founding affidavit".)

While it is difficult to anticipate at this stage whether it will be a case "pattern made" for class action litigation, it is clear what questions this will revolve around. Do the applicants represent the poorest in our society? Do its members have the least chance of vindicating their rights through the courts in the absence of representative class action litigation? Is the class made up of many small individual claims, scattered throughout the country? On its face, the answer to many of these questions appears to be "yes".

Although the monetary amount of some claims may in fact be quite significant, the poverty of the class, and the extent to which the formal procedures of joinder may in this case be insurmountable, mean that class action is the most, if not only, suitable means of pursuing an appropriate remedy for the miners and their families. And if this is indeed the case, and the mining companies' negligence is found to have caused the miners' illnesses, then a claim of massive proportions seems probable. So too, one hopes, does the timely introduction of measures to prevent this patently preventable illness.

References

Beukes v Krugersdorp Transitional Local Council and Another 1996 (3) SA 467 (W).

Callinicos, Luli. *A People's History of South Africa, Vol. One: Gold and Workers 1886–1924*. Johannesburg: Ravan Press, 1985.

Currie, Ian, and Johan De Waal. *Bill of Rights Handbook* 5th ed. Cape Town: Juta & Co, 2008.

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1995 ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995). CCT 5/95.

Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others 2013 (3) BCLR 251 (CC).

Hoexter, Cora. *Administrative Law in South Africa*. Cape Town: Juta & Co, 2010.

Institute for Accountability in Southern Africa. "Casting bread upon the water — how to deter delinquent corporate conduct". www.ifaisa.org/Casting_bread_upon_the_water.html. Web.

Maluleke v MEC, Health and Welfare, Northern Province 1999 (4) SA 367 (T).

Mankayi v AngloGold Ashanti 2011 (3) SA 327 (CC).

Mukaddam and Others v Pioneer Food (Pty) Ltd and Others 2013 ZACC 23.

Ngxuza and Others v Secretary, Department of Welfare, Eastern Cape Provincial Government and Another 2000 (12) BCLR 1322 (E).

Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA).

Roberts, Jaine. *The Hidden Epidemic Among Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa*. NP: Health Systems Trust, 2009.

South African Department of Labour. *National Programme for the Elimination of Silicosis*. https://www.labour.gov.za/downloads/documents/useful-documents/occupational-health-and-safety/Useful%20Document%20-%20OHS%20-%20National%20Programme%20for%20the%20Elimination%20of%20Silicosis.pdf. Web.

Spoor, Richard. "Founding affidavit". http://goldminersilicosis.co.za/wp-content/uploads/2013/01/Silicosis-Notice-of-Motion-and-Founding-Affidavit-6.pdf. Web.

Trustees for the Time Being of the Children's Resource Fund and Others v Pioneer Food and Others 2013 (2) SA 213 (SCA).

Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases 2005 (6) SA 229 (SE).

Amayeza eNziwe aFana nawoMenzi wokuQala, amaLungelo awoDwa abeNzi mveliso ne-HIV eKenya

U-Ochieng and Others v iGqwetha Jikelele (the Attorney General) (2012)

ZENANDE BOOI

[*This is a Xhosa translation of an English article. The original appears afterwards.*]

Ngo-2012, iNkundla ePhakamileyo yaseKenya e-Nairobi ("iNkundla") yachophela umceli mngeni malunga nomthetho ocetywayo wamalungelo omenzi wemveliso obungaba neziphumo ezibi ekukwazini kwabantu ukufikelela kumayeza anokusindisa ubomi enziwa afana nawomenzi wokuqala angabizi mali ininzi kodwa anyangayo.

Ityala eli libandakanya amacandelo athile omThetho oChasene nokuKhohlisa ka-2008 ("umThetho"). Ityala elicela umngeni kumthetho laye lafakwa ngabaceli abathathu ii-antiretrovirals (ARVs) ze-HIV/Aids. Ababini kubo bafumana ii-ARVs ngenkqubo edityanelweyo eqhutywa yi-Doctors Without Borders (i-Médecins Sans Frontières okanye i-MSF) kunye norhulumente waseKenya, omnye ufumana ii-ARVs ngeprojekthi karhulumente.

Abaceli babanga ukuba umThetho umisela umda ekukwazini kwabantu ukufikelela kumachiza kunye namayeza afikelelekayo nayimfuneko, ingakumbi loo mayeza enziwe afana nawomenzi wokuqala, ngaloo ndlela kugxojwa amalungelo asisiseko kubomi, isidima somntu kunye nawempilo akhuselwe nguMgaqo-siseko waseKenya. Bafuna umyalelo wenkundla obhengeza ukuba amalungelo achaphazelekayo aquka nelungelo lokufikelela kwiyeza elenziwe lafana nelomenzi walo wokuqala.

INkundla iphinde yeva kwakhona kubameli be-NGO, i-Aids Law Project, ethe yona ixhasa abaceli. Ityala eli laye lakhatywa liGqwetha Jikelele laseKhenya kunye nayi-Arhente eChasene neNkohliso. EKenya, iGqwetha Jikelele ngumcebisi ongundoqo karhulumente; likwayintloko ye-Ofisi yomThetho kaRhulumente yaseKenya.

INkundla kwafuneka ukuba icacise inkcazo yomThetho ye "nkohliso" ngokunxulumene neyeza. Amatshantliziyo ezempilo abanga ukuba umThetho ulichaze igama eli ngokubanzi kakhulu, ngendlela enokutolikwa njengequka amayeza enziwe afana namayeza enziwe ngumenzi wokuqala.

INkundla yaye yacelwa ukuba ithelekise ilungelo leenkampani zamayeza lokukhusela amalungelo azo akhethekileyo emveliso zawo kwezo mveliso ziyinkohliso, kunye nelungelo labantu abahluphekayo nabazizisulu ekubeni bafikelele kumayeza ekulula ukufikelela kuwo, asindisa nobomi.

Kwisigwebo sayo, iNkundla yaye yaqinisekisa umahluko obalulekileyo phakathi kwamayeza "enziwe afana nalawo abenzi bokuqala" kunye nalawo "enkohliso". INkundla yacacisa imida ebalulekileyo kumalungelo akhethekileyo abenzi bemveliso, ixela ukuba ilungelo labaceli kubo lihamba phambili ukodlula umdla wezoqoqosho wabanini malungelo awodwa emveliso. INkundla yafumanisa ukuba umThetho uyakuba neempembelelo ezimbi ekukwazini kwabantu ukufikelela kumayeza enziwe afana nabenzi bawo bokuqala angabizi mali ininzi kodwa abe esebenza, kuba zange yenze umahluko phakathi kwamayeza enkohliso kunye namayeza enziwe afana nawabenzi bawo bokuqala.

Ababini kubaceli, u-Patricia Asero Ochieng no-Joseph Munyi, bafumana amayeza abawasebenzisayo ngokwabo. U-Joseph uphile ne-HIV iminyaka esi-8. Omnye umceli, u-Maurine Atieno, unonyana oneminyaka emi-5 owazalwa ene-HIV. Nakuba naye osulelekile, ngunyana wakhe kuphela ofumana unyango kwi-MSF/iprojekthi kaRhulumente. Njengo-Patricia no-Joseph, u-Maurine akaphangeli kwaye ngeke akwazi ukuzithengela amayeza ngokwakhe.

Ababodwanga. Kumanani axeliweyo kwisigwebo, baphakathi kwe-1.3 ukuya kwi-1.6 lezigidi abantu abaphila ne-HIV eKenya. Kwelo nani, i-184,052 ngabantwana. INkundla kwakhona ixele amanani abonisa ukuba malunga nesi-

Amayeza enziwe afana nawabenzi bawo okuqala ayasebenza kodwa kaninzi aziintlobo ezingabizi mali ininzi lamayeza asele ekhona kwaye esetyenziswa, athengiswa phantsi kwegama elahlukileyo. Amayeza enkohliso, kwelinye icala, ngamayeza enziwe ukuba afane namachiza anamalungelo awodwa abenzi bawo, kusetyenziswa iipakethe, iimpawu kunye nemathiriyeli yokuthengisa enxulunyaniswa namachiza okwenyani enziwe kuqala.

Owona mahluko ubaluleke kakhulu phakathi kweyeza lenkohliso kunye neyeza elenziwe lafana nelomenzi walo wokuqala ulula kuba iyeza elenziwe lafana nelomenzi walo wokuqala lona liyasebenza; amayeza enkohliso wona awasebenzi. Amayeza enkohliso anokungasebenzi, okanye kwenzakalise ukusebenza kwawo, nokuba akukho nto ayenzayo. Amayeza enkohliso anokubanga ukwenzakala okumandundu ebantwini abanomhlaza okanye i-HIV/Aids kuba kubalulekile kubantu abanezi meko ukuba bathathe amayeza abo ngaphandle kokuphazanyiswa.

Ngokuchaseneyo, amayeza enziwe afana nawomenzi wawo wokuqala enziwe ukuba abe neziphumo ezifanayo nezamayeza anamalungelo awodwa omenzi wawo, kwaye avavanywa aze agunyaziswe ziziphathamandla ezilawulayo. Nangona eneziphumo zokusebenza ezifanayo njengamachiza enziwe ngabenzi bawo bokuqala, amayeza enziwe afana nawomenzi wawo wokuqala awabizi mali ininzi.

qingatha seenkedama eziyi-2.4 sezigidi zelizwe zilahlekelwe ngabazali bazo ngenxa ye-HIV/Aids. Uninzi lwabantu abaphila ne-HIV luvela kwiindawo ezihluphekayo nezingakhathalelwanga zoluntu. (*Ochieng*, umhlathi wama-44 ukuya kuma50.)

Akukho mntu uziphikayo iziphumo ezibi zokuzinganiki unyango izigulane ze-HIV, okanye ukuba zinokufumana usulelo olungenelelayo ukuba ngaba luphazanyisiwe unyango lwazo. I-Aids Law Project yaye yavuma eNkundleni ukuba unyango lwe-anti-retroviral lunxulunyaniswa nama-90% okwehla ekuswelekeni okubangwa yi-Aids, ukuba nje la machiza asathathwa rhoqo njengoko kumiselwe. Abaceli babange ukuba ukubekwa kwamacandelo athile okudidayo kuyakukhokelela kwiimeko ezo abantu baye banyanzelwa ukuba balindele amayeza ngenxa yeziphathamandla zisazama ukumisela ukuba ingaba amachiza asaphandwayo asemthethweni na okanye awekho mthethweni.

Into eyayiyingxaki yaba kukuba umThetho ubeka abanini malungelo awodwa abenzi bemveliso kwimeko ebenza bazuze ngokungamkelekanga. Ukufumaneka kwamachiza enziwe afana nawomenzi wawo okuqala kuya kumiselwa umda omkhulu kwaye iindleko zonyango ziyakunyuka, ngoko ke abo bosulelwe yi-HIV bazakunyanzeleka ukuba basebenzise iibhrendi ezinamalungelo awodwa ezibiza imali eninzi.

Nangona abaceli babengakuchasanga ukukhuselwa kwamalungelo awodwa abenzi bemveliso, basathi abantu abaphila ne-HIV/Aids baludidi olukhethekileyo kwaye umthetho mawungachasi izibophelelo zikarhulumente ngokubhekisele kubo. Ukusebenzisa kunye nokunyanzela umThetho ngale ndlela kunokugxobha amalungelo angundoqo njengoko eqondwa ngumthetho wamazwe ngamazwe kunye noMgaqo-siseko waseKenya ngokumisela umda kufikelelo lwabo kumachiza enza ukuba loo malungelo asebenze.

Kulo mxholo iNkundla ichaze ngokucacileyo ukuba:

> "U kuba ngaba amanyathelo anjalo [omthetho] anokuba neempembelelo zokumisela umda kufikelelo, elo nyathelo lo [mthetho] linjalo ke liyakusongela ngokwesiphumo salo ngqo ubomi kunye nempilo yabaceli kunye nabanye abosulelwe yi-HIV ne-Aids, kwaye liyakugxobha amalungelo abo phantsi kwalo Mgaqo-siseko" (umhlathi wama-52).

INkundla ke yaye yathathela ingqalelo intsingiselo kunye neempembelelo

Ilungelo lomenzi mveliso lilungelo elilodwa elinika umenzi walo ilungelo elikhethekileyo, kwimeko yamayeza, phezu kweyeza okanye inkqubo yokwenza iyeza. Linika umenzi walo ukuba axhamle yedwa ekwenziweni kunye nasekuthengisweni kwemveliso. Isiphumo samalungelo omenzi kukuba kaninzi iinkampani ziye zibize imali ephezulu ngokugqithisileyo ukuze zibuyise imali ekwenziwe ngayo utyalo-mali kwaye benze nenzuzo.

Ukubaluleka kwenkqubo yamalungelo abenzi ngeke iphikiswe: Inika isizathu okanye umtsalane wokuba iinkampani zivelise okanye ziphuhlise ubuchwepheshe obutsha. Ngeke kuphikwe kwakhona ukuba iinkampani ziyisebenzisa kakubi lenkqubo yelungelo lomenzi kwaye ke oku kuye kukhokelele kwimeko leyo abantu abafuna kakhulu amayeza baye bangakwazi ukuwafumana eyimfuneko enjalo.

zelungelo kwimpilo, ukuza kuthi ga ngoku ekubeni oku kumisela izibophelelo zikarhulumente ngokoMgaqo-siseko kunye nomthetho wamazwe ngamazwe, ingakumbi izibophelelo zaseKenya ngokweNgqungquthela yama-Zwe ngamaZwe kumaLungelo oQoqo-sho, iNtlalo neNkcubeko. INkundla yagqiba ekubeni umsebenzi karhulumente unamacala amabini. Okokuqala, unomsebenzi omhle wokuqinisekisa ukuba abemi bawo banofikelelo kwiinkonzo zokhathalelo lwempilo kunye namayeza kwaye, okwesibini, unomsebenzi ombi wokuba ungenzi nantoni ezakuchaphazela ngayo nayiphi na indlela iinkonzo zokhathalelo lwempilo ezinjalo kunye namayeza ayimfuneko.

Njengoko iNkundla iye yaqhuba yathi:

> "Uninzi lwabo bosulelweyo yintsholongwane, njengabaceli, abaphangeli kwaye ke ngoko abanayo imali yokuzifumanela ngokwabo amayeza eebhrendi zee-anti-retroviral abawadingayo ukuze bahlale besempilweni. Ke ngoko ke baxhomekeke kumayeza e-anti-retroviral enziwe afana nawabenzi bawo bokuqala angabizi imali eninzi kwaye ekulula ukufikelela kuwo" (umhlathi wama-50).

Yiloo nto ke, nawuphi na umthetho onokwenza ukuba amachiza ayimfuneko angabi nakufikeleleka ebantwini uyakuthetha ukuba urhulumente wophula isibophelelo sakhe phantsi koMgaqo-siseko, ngalo ndlela ke ugxobha amalungelo abantu. Kweli tyala, umbuzo yayingowokuba ingaba umThetho ngohlobo olulo ngoku wenze ukuba urhulumente ophule izibophelelo zakhe na. Inkundla yagqiba kwelokuba,

> "ilungelo lobomi, isidima kunye nempilo yabantu abafana nabaceli abosulelwe yintsholongwane ye-HIV ngeke ibanjwe sisiqendu esingacaciswanga kakuhle kwimeko leyo abo bantu banoxanduva lokunyanzelisa umthetho onokungawuqondi kakuhle umahluko phakathi kweyeza elenziwe lafana nelomenzi wokuqala kunye nelo yeza lenkohliso" (umhlathi wama-84).

Ukuba ngaba kufunyaniswa ukuba umba ongundoqo karhulumente kufuneka ibe kokusemdleni wabantu abosulelwe yi-HIV/Aids, abo urhulumente "anoxanduva kubo lokuqinisekisa ukuba bafikelela kukhathalelo lwempilo olufanelekileyo kunye namayeza ayimfuneko" (umhlathi wama-84). Kumisela ukuba urhulumente ngeke aphumelele kumsebenzi wakhe ukuba uquke "amagatya ambhaxa" ayekela "kubanini bamalungelo akhethekileyo emveliso kunye namagosa ezerhafu" ukuba batolike amagatya omThetho kwaye benze izigqibo ngoko nangoko ezinokwenza ukuba abantu bangakwazi ukufikelela kumayeza ayimfuneko ukuze baphile (umhlathi wama-84).

Amatshantliziyo empilo ne-HIV/Aids basincomile isigwebo ngokubeka amalungelo omgaqo-siseko abantu baseKenya ngaphezulu kwamalungelo eenkampani okwenza inzuzo kwintlekele yempilo eqhubayo. UMlawuli weSigqeba we-UNAIDS, uMichel Sidibe, usincomile esi sigqibo, exela ukuba simisela indlela ebalulekileyo ekuqinisekiseni ukuba lukhona ufikelelo kumachiza asindisa ubomi kwihlabathi jikelele.

Uloyiso kweli tyala lulele kwisigqibo senkundla sokunyanzelisa amalungelo

abantu abahluphekayo nabangakhathalelwanga ngokubhekisele kumdla wezoqoqosho wenkampani ezinkulu zoxubo-mayeza.

Ngolwazi oluthe vetshe malunga namayeza enziwe afana nawabenzi bawo okuqala, iimveliso ezinamalungelo abenzi, umthetho wamazwe ngamazwe wemveliso, ne-HIV/Aids, jonga ku "Lungisani imiThetho ukuze niSindise uBomi beThu" (imagazini ye-Equal Treatment, Uhlelo lwama-41 — Novemba 2011). Ungadawunloda oku kwiwebhusayithi ye-TAC ku-www.tac.org.za/community/node/3216 nges-iNgesi, IsiXhosa, IsiZulu, nesiTsonga. Olu hlelo kunye namanye amahlelo e-Equal Treatment anokudawunlodwa ku: www.tac.org.za/community/equaltreatment

Iireferensi

Ochieng and Others v the Attorney General (2012). INombolo yama-409 ka-2009. INkundla ePhakamileyo yaseKenya e-Nairobi.

Generics, Patents, and HIV in Kenya

Ochieng and Others v the Attorney General (2012)

ZENANDE BOOI

In 2012, the High Court of Kenya at Nairobi heard a challenge to a proposed patent law that would have had serious consequences for people's ability to access cheap but effective, life-saving generic medicines.

The case concerned certain sections of the Anti-Counterfeit Act of 2008 ("the Act"). The case challenging the legislation was brought by three petitioners who take antiretrovirals (ARVs) for HIV/Aids. Two of them accessed ARVs through a joint programme run by Doctors Without Borders (*Médecins Sans Frontières* or MSF) and the Kenyan government; the other received ARVs through a government project.

The petitioners argued that the Act limited people's access to affordable, essential drugs and medicines, particularly generics, thereby violating the fundamental rights to life, human dignity, and health protected in Kenya's Constitution. They sought an order declaring that the affected rights included the right to access generic medication.

The Court also heard from representatives of an NGO, the Aids Law Project, who argued in support of the petitioners. The suit was opposed by Kenya's Attorney General and the Anti-Counterfeit Agency. In Kenya, the Attorney General is the government's main legal adviser; he is also the head of the Kenyan State Law Office.

The Court had to pronounce on the Act's definition of "counterfeiting" in relation to medicine. Health activists argued that the Act defined the term much too broadly, in a way that could be interpreted to include generic medications.

The Court was asked to balance the right of medicine companies to protect their intellectual property from counterfeiters, and the right of poor and vulnerable people to have access to affordable, life-saving medication.

In its judgment, the Court confirmed the crucial distinction between "generic" and "counterfeit" medicines. The Court confirmed important limits to intellectual property rights, stating that the petitioners' right to life must take precedence over the economic interests of patent holders. The Court found that the

Act would have serious consequences for people's ability to access cheap but effective generic medicines, because it did not distinguish between counterfeit medicine and generics.

Generic medicines are effective but often much cheaper versions of established medications, which are marketed under a different name. *Counterfeit medicines*, on the other hand, are substances that are made to resemble patented drugs, using packaging, trademarks, and marketing material associated with the original drugs.

The most important difference between counterfeit medicine and generics is simply that generic medicines are designed to work; counterfeit medicines are not. Counterfeit medicines may be ineffective or actively harmful, even if they do nothing. Counterfeit medicines can cause serious harm to people with cancer or HIV/Aids because it is important for people with these conditions to take their medication without interruptions.

By contrast, generic medicines are designed to have the same effect as the patented medicine, and are tested and authorised by regulatory authorities. Even though they have the same effect as the patented drugs, generics are much cheaper.

Two of the petitioners, Patricia Asero Ochieng and Joseph Munyi, receive medicine they use themselves. Joseph has been living with HIV for 8 years. Another petitioner, Maurine Atieno, has a 5-year-old son who was born with HIV. Although she is also infected, only her son receives treatment from the MSF/Government project. Like Patricia and Joseph, Maurine is unemployed and would not be able to afford the medication on her own.

They are not alone. In numbers cited in the judgment, between 1.3 to 1.6 million people in Kenya live with HIV. Of that number, 184,052 are children. The Court also cited figures that showed about half of the country's 2.4 million orphans lost their parents due to HIV/Aids. Many of the people living with HIV are from poor and marginalised parts of the community (*Ochieng*, para. 44–50).

No one disputed the negative effects of denying HIV patients medical treatment, or that patients could get serious opportunistic infections if their treatment was interrupted. The Aids Law Project submitted to the Court that antiretroviral therapy is associated with a 90% reduction in deaths caused by Aids, so long as these drugs are taken regularly as prescribed. The petitioners argued that the confusing wording of some sections would lead to situations where people were forced to wait for medication while the authorities tried to determine whether the drugs under investigation were legal or illegal.

What was most problematic was that the Act put the patent owners at an unacceptable advantage. The availability of generic drugs would be severely restricted and the cost of treatment would increase, so those infected with HIV would be forced to use the more expensive patented brands.

Although the petitioners were not opposed to the protection of intellectual property rights, they argued that people living with HIV/Aids were a special class and legislation should not contradict the state's obligations towards them. Applying and enforcing the Act in this way

would violate their fundamental rights as recognised in international law and Kenya's Constitution by limiting their access to the drugs that give effect to those rights.

In this context the Court clearly stated that:

> "If such [legislative] measure would have the effect of limiting access, then such [legislative] measure would *ipso facto* threaten the lives and health of the petitioners and others infected with HIV and Aids, and would be in violation of their rights under the Constitution" (para. 52).

The Court then considered the meaning and implication of the right to health, in so far as this determined the state's obligations in terms of the Constitution and international law, particularly Kenya's obligations in terms of the International Covenant on Economic, Social and Cultural Rights. The Court concluded that the state's duty was two-fold. Firstly, it has a positive duty to ensure its citizens have access to health care services and medicines and, secondly, it has a negative duty not to do anything that would in any way affect the access to such health care services and essential medicines.

As the Court further pointed out:

> "Many of those who are infected with the virus are, like the petitioners, unemployed and therefore financially incapable of procuring for themselves the anti-retroviral branded medication that they need to remain healthy. They are therefore dependent on generic anti-retroviral medication which is much cheaper and therefore more accessible to them" (para. 50).

Thus, any legislation that would cause essential drugs to become unaffordable to citizens would mean the state was in breach of its obligation under the Constitution, thereby violating citizens' rights. For this case, the question was whether the Act in its present form rendered the state in breach of its obligations. The Court concluded that:

> "the right to life, dignity and health of people like the petitioners who are infected with the HIV virus cannot be secured by a vague proviso in a situation where those charged with the responsibility of enforcement of the law may not have a clear understanding of the difference between generic and counterfeit medicine" (para. 84).

It found that the state's primary concern should be the interests of the people who are infected with HIV/Aids, to whom the state "owes the duty to ensure access to appropriate health care and essential medicines" (para. 84). It determined that the state would fail in its duty if it included "ambiguous provisions" that left it up to "intellectual property holders and customs officials" to interpret the Act's provisions and make on-the-spot decisions that could deny people

A *patent* is an intellectual property right that gives its holder the exclusive right, in the case of medicines, over the medicine or the process to produce a medicine. It gives the holder a monopoly over the manufacture or sale of a product. The effect of patents is that companies often charge exorbitant prices to make back the money invested and to generate profit.

The importance of the patent system cannot be disputed: it gives companies a reason or incentive to innovate and develop new technologies. It also cannot be denied that companies abuse this patent system and that this results in situations where the people who need it most cannot afford essential medication.

access to medicines essential for their survival (para. 84).

Health and HIV/Aids activists have praised the judgment for placing the constitutional rights of Kenyan citizens above companies' right to profit from an ongoing health crisis. The Executive Director of UNAIDS, Michel Sidibe, applauded the decision, stating that it sets an important precedent for ensuring access to life-saving drugs worldwide.

The victory in this case lies in the Court's decision to reinforce the rights of poor and marginalised people against the economic interests of large pharmaceutical companies.

Further reading

For more information about generic medicines, patents, international property law, and HIV/Aids, see "Fix the Laws — Save Our Lives" (*Equal Treatment* magazine, Issue 41 — November 2011). You can download this from TAC's website at www.tac.org.za/community/node/3216 in English, IsiXhosa, IsiZulu, and Tsonga. This and other issues of *Equal Treatment* can also be downloaded at: www.tac.org.za/community/equaltreatment.

References

Ochieng and Others v the Attorney General 2012, 409 of 2009. High Court of Kenya, Nairobi.

Ndifuna Ukwazi pursues social justice issues through its Fellowship Programme (which is aimed at developing young leaders), through the Mymoena Achmat and Thelma Lewis Activist Library, by providing legal and research support for its partner organisations, and by hosting public talks, seminars, and lectures.

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