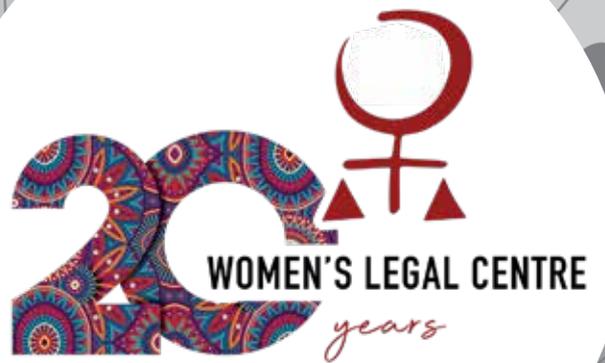


THE
20 ANNIVERSARY
PUBLICATION



FOREWORD

Since the opening of the Women's Legal Centres doors 20 years ago, many things have changed – at the Centre, in our country and in the broader global world that we occupy. This celebratory publication seeks to commemorate the 20 years that have passed and brings us into the present and future, where the Centre has positioned itself as the leading African feminist law centre in the country.

We could not have achieved everything that we have had it not been for the women who frequent our offices daily to seek advice, support and legal representation. To them belong the achievements and the accolades. We are because they have demanded of us to step forward and to unapologetically hold their hands in solidarity, and amplify their voices. The feminist jurisprudence (some of which is covered in this publication) was only possible because we were held accountable to address the lived realities of the women in our country. This lived reality of inequality and violence has stark and dangerous ramifications for the women of our country, of which black women lay at the coalface of poverty.

Our advocacy strategies and goals have been developed and achieved because of collaboration with many wonderful partners and supporters over the years. You have provided us with guidance, expertise, ideas, and comfort when needed. As we commemorate the Centre,

we also celebrate every woman who has played a role and touched our lives leaving a little bit of themselves with us. And, we also take the opportunity to say “thank you”, sincerely.

Through our work, we aim to achieve the impact of ensuring that vulnerable and marginalised women, particularly black women, lead lives free of violence and enjoy substantive equality and agency in their home, work and in the community at large.

The pages in this publication are insufficient to showcase all that has been achieved and cannot begin to reflect the gratitude that we have, but it is a small reflection to acknowledge our existence and the contribution and change that is possible when women join hands in feminist solidarity and revolutionary acts.

We hope you will enjoy reflecting on our cases and insights as much we enjoyed compiling them. Thank you for playing a part in our 20-year existence and may we continue to call upon you as the revolution continues.

Yours in feminist solidarity,

Seehaan Samaai

Director

August 2019





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TIMELINE OF LITIGATION AND IMPACT

PROGRAMME 1: Violence Against Women

Sexual offences and prescription in relation to sexual offences

2001

S V *Abrahams* JDR 0932 (SCA) - Centre intervening as *amicus curiae*

Just sentencing in rape conviction cases.

There was public outcry when a judge declined to hand down a minimum sentence for the rape of a girl under the age of 16, namely life imprisonment, in terms of the Criminal Law Amendment Act 105 of 1997. The legislation provides that the minimum sentence can be departed from in 'substantial and compelling circumstances.' One of the reasons given by the court not to impose the minimum sentence was that the accused did not present a danger to society since the complainant was his 14-year-old daughter.

The State appealed the sentence and the Rape Crisis Cape Town Trust, represented by the Women's Legal Centre, was admitted as *amicus curiae*. On appeal, the sentence was increased from seven to twelve years, but the departure from the maximum sentence was upheld.

The court's decision that the application of 'substantial and compelling circumstances' and departure of minimum sentence rests on the nature of the accuser and/or her relationship with the accused is problematic. Consequently, this case represents a victory for the rights of survivors of sexual violence in the legal system¹.

2001

S V *Krause* JDR 0532 (C) - Centre intervening as *amicus curiae*

Legal rights of sexual assault survivors.

This case was referred to the High Court by the magistrate hearing the matter in

the Regional Court in order to review his competence to act as a temporary regional magistrate because he did not have an LLB. The Centre was concerned that if the High Court held that the magistrate was not competent to act, the consequences would be enormous for survivors of sexual offences. The magistrate had presided in numerous cases in the Wynberg Sexual Offences Court and, had the magistrate been deemed not competent to preside, the complainants in all these cases would have to re-testify when the cases were heard again.

The Centre decided to intervene as an *amicus curiae* in the special review and argued that on a proper interpretation of the Magistrate's Court Act, temporary regional magistrates do not require an LLB degree. The only requirement is that such magistrates are competent, which would include having legal experience and understanding.

The submissions made by the Centre were successful. The judgment outlined textual, policy, and historical considerations for the conclusion that the Legislature has drawn distinctions between three categories of regional magistrates, and that the requirements for each category differ. This judgement prevented many sexual offence survivors from undergoing the trauma of re-testifying in court².

2003

Van Eeden V Minister of Safety and Security (1) SA 389 (SCA) - Centre intervening as *amicus curiae*

Police responsibility to contain dangerous perpetrators.

In this case, the applicant sought damages costs against the Minister of Safety and Security for a sexual offence committed by a person who had escaped from police

custody due to a security gate that was not closed. The escapee had a history of rape and indecent assault. The High Court held that in these circumstances the police did not owe a legal duty of support to the plaintiff to reasonably prevent the perpetrator's escape from custody, due to policy considerations. Subsequent to this judgment, however, the Constitutional Court found that, in a similar case, the Supreme Court of Appeal had failed to develop the common law legal duty of support in terms of the constitutional right to freedom and security of person, including the right to be free from all forms of violence and the right to bodily and psychological integrity. The Centre intervened as *amicus curiae* in the Supreme Court of Appeal and successfully made oral and written submissions.

The Constitutional Court ultimately held that the State owes a duty of care to a rape survivor who was raped by an escaped awaiting trial prisoner, and that the survivor did not need to show that there was a special relationship between herself and the State. The decision has a significant impact for the development of our common law in line with the Constitution. It is important that the court has recognized the duty of care in cases where the police fail to respond to calls for assistance from survivors of domestic violence³.

2005

Van Zijl / Hoogenhout (2) SA 93 (SCA)

The rights of child sexual abuse survivors to claim damages in adulthood.

The Centre represented the applicant in this matter to challenge the rule which placed a time bar on adult survivors of child sexual abuse from claiming damages from their abusers by virtue of a rigid application of the Prescription

1 Women's Legal Centre. *Centre List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005.
2 Women's Legal Centre. *Centre List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005. Originally mentioned in: Murray, Christina and Michelle O'Sullivan. *Advancing Women's Rights: The First Decade of Democracy*. Juta and Co Ltd, 2005.
3 Women's Legal Centre. *Centre List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005. Originally mentioned in: Murray, Christina and Michelle O'Sullivan. *Advancing Women's Rights: The First Decade of Democracy*. Juta and Co Ltd, 2005.

Act. The Act clearly defined the time periods in which appellants could bring civil claims for damages. The appellant brought a civil claim for damages in 1999 arising from sexual abuse perpetrated by her uncle, Imker Hoogenhout, from 1958 to 1965 when she was between six and fifteen years old. The Cape High Court ruled that her claim had prescribed as the Prescription Act provides that a minor has a three-year time limit once he/she attains majority (21 years) within which to sue for damages.

In 2004, the Supreme Court of Appeal handed down a landmark judgment holding that in cases of child sexual abuse, prescription is only applicable once the survivor has full knowledge of the abuse and who was responsible for it. This was an important decision which took into account the nature of the psychological damage suffered by survivors of childhood sexual abuse which often prevents full knowledge of the effects of the crime for many years⁴.

The case was referred back to the Cape High Court for a ruling on the quantum of damages in preparation for which the Centre obtained updated psychological and actuarial reports from expert witnesses. The Cape High Court handed down judgment in favour of our client on 25 May 2006, with an award of R450 000 as damages, including R200 000 as general damages. The court expressed the view that even this amount was conservative, given the serious nature of the crimes and the damage suffered by the plaintiff.

This case succeeded in amending the law to make it possible for adult survivors of child sexual abuse to institute action against their abusers. In this case, obtaining damages for our client proved to be a difficult and drawn-out process; however, the case set an important precedent for those with the same claims in future⁵.

2010

Bothma v Els (2)
SA 622 (CC)

Private prosecutions by survivors of child sexual abuse.

Ms Bothma was sexually abused by a family friend in her childhood, but only came to appreciate the consequences of the abuse later in adulthood. She sought to institute a private criminal prosecution

against her abuser, but the Kimberley High Court upheld the accused's opposition to this on the basis that it infringed upon his right to a fair trial and would accordingly cause him trial prejudice.

The Centre assisted Ms Bothma's legal team in their appeal to the Constitutional Court, providing access to expert testimony by a psychologist who explained the nature of the trauma linked to child sexual abuse, its consequences, and why the institution of legal proceedings had been delayed. We also assisted by providing research in relation to the case.

The Constitutional Court found in favour of Ms Bothma and extended the law in relation to the delay in instituting criminal proceedings to take into account the trauma associated with child sexual abuse. This case affirmed the legal rights of adult survivors of child sexual abuse⁶.

2012

Director of Public Prosecution, Western Cape v Prins (2)
SACR 183 (SCA) - Centre intervening as *amicus curiae*

Invalidity of certain sexual offences.

In May 2012, the Western Cape High Court handed down judgment in the matter of *S v Prins*. Mr Prins was accused of sexual assault but successfully objected to the charges laid against him on the grounds that the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 (SORMA) did not specify any penalty for the offence he was accused of. The Court found that since the SORMA did not prescribe a specific penalty, the offence of sexual assault was not punishable in law. This effectively called into question the existence of at least 29 other offences in SORMA which had repealed the common law sexual offences. This left the state in a position where it could not charge perpetrators with specific offences in accordance with SORMA, and thousands of convictions could be overturned.

The Centre embarked on a two-pronged approach to address these issues. First, calling for the amendment of the SORMA to close the penalty gap and second, calling on the Western Cape Director of Public Prosecutions (DPP) to appeal the

judgment. The DPP was granted leave to appeal the judgment in the Supreme Court of Appeal (SCA) on an urgent basis. At the same time, and in response to our correspondence to the chair of the parliamentary portfolio committee, the Centre (in conjunction with UCT) was asked by the Portfolio Committee on Justice and Constitutional Development to submit a draft "patch" clause for SORMA. Our proposal was accepted and passed by the portfolio committee and has since been signed into law by the President. However, while the amendment ensures that future perpetrators won't escape charges, the amendments could not be retrospective. The Constitution prohibits the conviction of an accused of an offence that did not exist at the time the act was committed. The Centre thus applied to be admitted as an *amicus curiae* in the SCA appeal proceedings. Our application was supported by the Tshwaranang Legal Advocacy Centre, the UCT Gender Health and Justice Research Unit, Lawyers Against Abuse, and the Sonke Gender Justice Network. Our submissions drew the court's attention to the implications of the judgment for women and brought statistical evidence on the many thousands of convictions under the SOA that would be vulnerable to being set aside.

On 11 June 2012 the SCA, expressly taking into account the high levels of sexual violence committed in South Africa against women and children, overturned the Western Cape High Court judgment. It found that on a proper interpretation of SORMA, the legislature did indeed intend to create offences, and that the existing provisions in SORMA, supplemented by those in the Criminal Procedure Act, provided sufficient clarity as to the nature of the penalties. The potential crisis was averted⁷.

2014

Maritz / Minister of Safety and Security and others Case
Number 2177/09 Western Cape High Court

The State's duty of care to protect women from repeat offenders.

This case illustrates how the justice system can fail women: our client was raped by the same man twice. The second rape happened while he was

4 Women's Legal Centre. *Annual Report 2006*. Cape Town, South Africa: Women's Legal Centre, 2006.
5 Women's Legal Centre. *Annual Report 2007*. Cape Town, South Africa: Women's Legal Centre, 2007.
6 Women's Legal Centre. *Annual Report 2009*. Cape Town, South Africa: Women's Legal Centre, 2009.
7 Women's Legal Centre. *Annual Report 2012*. Cape Town, South Africa: Women's Legal Centre, 2012.

servicing a suspended sentence for the first rape. We represented our client in a damages claim that sought to set due diligence standards in relation to state responsibility for known repeat offenders. The matter was launched in 2009 and set down for trial on 15 October 2014. On the date of the trial, an offer was made to our client to settle the matter, which she accepted.

We also represented the client at the Parole Board proceedings in November 2014, where we made submissions on her behalf against the perpetrator's release. As a result, the Parole Board extended the perpetrator's incarceration.

2018

*Levenstein and others /
Frankel and others (2) SACR
283 (CC) – Centre intervening
as amicus curiae*

Criminal prosecution prescription periods for sexual offences.

This case concerned the constitutionality of section 18 of the Criminal Procedure Act 51 of 1977, which prohibited the prosecution of sexual offences, other than rape or compelled rape, after a period of twenty years from the time when the offence was committed. The High Court declared this section of the Act to be

constitutionally invalid in June 2017. The Centre was admitted as an *amicus curiae* in the High Court matter and was cited as the Fourth Respondent in the Constitutional Court case. In 2019 the Constitutional Court confirmed the High Court order.

With the consent of the Constitutional Court, the Centre adduced additional evidence illustrating the reasons for delayed disclosure of sexual offences by victims, irrespective of whether they are children or adults. The Court acknowledged that it had no evidence before it on the effects of trauma and the reasons for delayed reporting by adults, and welcomed the Centre's submissions.

The Centre's evidence in respect of the impact of sexual offences on adult survivors placed the 'personal, structural and social disincentives for reporting, as well as the psychological and physical reasons for delayed disclosure' before the court. Based on the evidence presented by the Centre, the Court held that it was necessary to have information before it on the prevalence of sexual offences against women in South Africa and the percentage of female survivors of sexual offences who elect not to formally report the offences to the South African Police Service (SAPS), and why they do not do so. The Centre's evidence illustrated 'the systemic failures that enable violence and exploitation of them [women and children] to occur'.

The Centre supported the applicants in demonstrating to the Court that section 18's differentiation between rape and compelled rape on the one hand, and other sexual offences on the other, was irrational. The Court recognised the Centre's argument that the primary rationale for the differentiation of sexual offences in section 18 was the idea that certain sexual offences are more serious and therefore more traumatic than others. The Court ultimately found that the prescriptive periods in section 18, as they applied to sexual offences other than rape and compelled rape, to be irrational. The Court held that the section 'fails to serve to protect and advance the interests of survivors of sexual assault' and 'works against their interests instead of promoting them'.

The Court ordered that the declaration of the constitutional invalidity of section 18 made by the South Gauteng High Court be confirmed. The order was suspended for 24 months in order to allow Parliament to enact remedial legislation. During the period of suspension, section 18(f) is to be read as though it contains the words "and all other sexual offences whether in terms of common law or statute" after the words "the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively."⁹

8 Women's Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Women's Legal Centre, 2014.
9 Women's Legal Centre. *Annual Report 2019*. Cape Town, South Africa: Women's Legal Centre, 2019.



2004

S v Ferreira (2) SACR 454 (SCA)

Mitigating circumstances in domestic violence murder cases.

Ms Ferreira was convicted of murdering her abusive husband and sentenced to life imprisonment. The Court did not accept the circumstances of her case as being substantial and compelling, and accordingly refused to exercise its discretion to depart from the mandatory minimum life sentence prescribed by the Criminal Law Amendment Act 105 of 1997.

At the request of the Centre for the Study of Violence and Reconciliation, the Centre agreed to assist Ms Ferreira with an appeal against her sentence¹⁰. In 2004, the Supreme Court of Appeal ruled that the “the deceased’s gross physical and psychological abuse of the first appellant, coupled with her clean record and other personal circumstances, did constitute substantial and compelling circumstances so that the imposition of a sentence of life imprisonment was not mandatory”¹¹. This case was a victory for women who are victims of domestic violence whose ongoing abuse was recognised by the courts.

2006

Van Der Merwe v The Road Accident Fund (4) SA 230 (CC) - Centre intervening as *amicus curiae*

The right of domestic abuse victims to claim damages against their spouse.

The Centre intervened as *amicus curiae* in this case which was heard in the Constitutional Court at the end of November 2005. Mrs van der Merwe was in the process of divorcing her husband when he intentionally drove over her with a motor vehicle, causing her severe injury. The Road Accident Fund refused to pay damages on the grounds that the couple had been married in community of property and that Section 18(b) of the Matrimonial Property Act prohibits

patrimonial damages between spouses with that marital status. Mrs van der Merwe’s counsel successfully argued in the High Court that Section 18(b) discriminated against her on the basis of marital status and that it was unconstitutional. She then filed confirmatory proceedings in the Constitutional Court. The Road Accident Fund simultaneously appealed the High Court finding to the Constitutional Court. The Centre argued that although Section 18(b) appears to have a neutral cover, it has a disproportionately adverse impact on women. Due to gender power imbalance and the high prevalence of domestic violence, women are far more likely than men to be victims of domestic violence.

In March 2006, the Constitutional Court ruled unanimously that people married in community of property are entitled to claim patrimonial damages in respect of bodily injury caused by a spouse, either from the spouse or from the Road Accident Fund (RAF). As *amicus*, we sought to put before the Court the nature and extent of domestic violence, the unequal gender power relations in society and in marriages, the gendered nature of domestic violence, the effects of abuse on individuals, and the economic vulnerability of women. The Court’s ruling was a significant victory for the women who form part of the Centre’s constituency¹².

2014

Khayelitsha Commission of Inquiry

Effective policing against domestic violence.

The Centre was involved with the Khayelitsha Commission of Inquiry which was established in 2012 to specifically investigate allegations of police inefficiency and a breakdown in relations between SAPS and the community of Khayelitsha. The Centre aimed to demonstrate how failures in policing affect women, particularly highlighting the lack of service delivery to women victims of domestic violence and non-compliance with the Domestic Violence Act.

The Centre gathered, prepared and submitted community statements

regarding police failure to implement the Domestic Violence Act and Regulations in the area of Khayelitsha. These statements highlighted the lack of service delivery to women victims of domestic violence.

The Centre also led expert evidence on the shortcomings in the policing of domestic violence in general and highlighted recommendations for improving service delivery. Some of these recommendations were included in the final report of the Commission¹³.

2015

Naidoo v Minister of Police JDR 2107 (SCA) - Centre intervening as *amicus curiae*

Secondary victimisation by law enforcement.

Ms Naidoo sued the Minister of Police and others for damages arising from their negligent and inappropriate handling of her domestic violence matter which resulted in her unnecessary and unlawful detention and assault by a police officer. The Centre applied to be admitted as *amicus curia* in the Supreme Court of Appeal after the High Court had dismissed her claim. The Centre highlighted the failure of police to uphold their statutory duties in domestic violence cases. In the SCA judgment, the court expressed its dissatisfaction at both the South African Police and the High Court due to the way the matter had been managed, holding that the treatment of the complainant had resulted in increased secondary victimisation¹⁴.

To reach its findings, the court relied on the regional and international obligations to which South Africa is a signatory, and the Constitutional rights to equality and to be free from all forms of violence. It confirmed the legal duties placed on the police to provide immediate assistance to victims of domestic violence. The Court held that victims have the right to lay criminal charges with or without a protection order (in terms of the Domestic Violence Act), and that police treatment of the complainant should not further traumatise her. This was a significant victory for women who come forward to lay charges of domestic violence¹⁵.

10 Women’s Legal Centre. *Centre List of Cases With Addendum*. Cape Town, South Africa: Women’s Legal Centre, 2005.

11 *S v Ferreira and Others (245/03) [2004] ZASCA 29; [2004] 4 All SA 373 (SCA) (1 April 2004)*

12 Women’s Legal Centre. *Annual Report 2006*. Cape Town, South Africa: Women’s Legal Centre, 2006.

13 Women’s Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Women’s Legal Centre, 2014.

14 *Naidoo v Minister of Police (20431/2014) [2015] ZASCA 152; [2015] 4 All SA 609 (SCA); 2016 (1) SACR 468 (SCA) (2 October 2015)*

Discrimination in Violence Against Women

2014

Linden / SAPS and South African Revenue Services

Challenging discriminatory gender profiling in strip searches.

The Centre began representing Linden in 2012 for a matter where the client was subjected to an invasive body search by SAPS/ SARS airport officials at the O.R. Tambo International Airport because she was a "pretty girl travelling alone."¹⁶ This case considered the discriminatory nature of profiling in criminal matters based on race and gender. Proceedings were instituted at the time against the South African Police Service and the South African Revenue Service. In September 2014, the client received an offer of settlement which she instructed we accept on her behalf¹⁷.

2019

Social Justice Coalition and another / SAPS and others
(4) SA 82 (WCC) - Centre intervening as *amicus curiae*

Law enforcement discrimination against women.

The Applicants in this matter sought an order from the Equality Court to review

and remedy the system of "Theoretical Human Resource Requirement" (THRR) and "Resource Allocation Guide" (RAG) used by the South African Police Services to determine the allocation of police human resources. The basis of the application was that the effect of the current system is both irrational and discriminatory against black and poor people based on race and poverty. The Centre was admitted as *amicus curiae*, arguing that the current system being used by SAPS to allocate human and other resources to the Khayelitsha community also resulted in discrimination on the basis of gender, in that the resources allocated to policing violence against women and children were inadequate and inefficient. The Centre submitted that the declaratory orders sought by the applicants should include the preparation of a plan which addresses the lack of resources to police violence against women and children.

The Centre argued that the Equality Court would not be able to consider this matter comprehensively if it were not placed in a position to deal with the situation of a major segment of the population who bear the brunt on a constant basis of the ravages of crime. The Centre further argued that the system used to allocate resources influenced the functioning of and allocation of resources specifically to the specialised SAPS Family Violence,

Child Abuse and Sexual Offences Unit (FCS) which is responsible for policing violence against women and children.

The Centre addressed, among other things: the investigation of violence against women as a constitutional obligation; international law obligations; domestic legislation; the South African policy framework to address crime; testing the efficacy of the resource allocation system; and more. The Centre submitted that the re-evaluation of the resource allocation process would have to include the development of a resource allocation system that actively addresses violent and sexual offences. The revised allocation system will have a profound impact on policing of violence against women and children.

The Court found in favour of the applicants finding that the allocation of police resources unfairly discriminates against black and poor people on the basis of race and poverty, and that the system used by SAPS to determine the allocation of resources unfairly discriminates against black and poor people on the basis of race and poverty. The court ordered that a date for a hearing on remedy would be determined. The Court acknowledged the meaningful contributions by Centre towards the resolution of the issues before it¹⁸.

Impunity

2014

Mr Mduzuzi Manana (Member of Parliament) Dismissal

Violence against women in politics.

Mduzuzi Manana resigned from his position as the Deputy Minister of Higher Education and Training after he admitted publicly to physically assaulting at least one woman at a nightclub in Fourways, Johannesburg, on 6 August 2017. However, Manana did not resign from his position as a member of parliament following these events. Subsequently, the Centre submitted a complaint to Parliament's Registrar of Members' Interests in terms of clause 10.2.2.2 of the

Code of Ethical Conduct and Disclosure of Members' Interests, in which we argued that Manana had acted in a manner that is manifestly inconsistent with his oath of office.

We specifically outlined that he violated the standards of ethical conduct as set forth in the Code of Ethical Conduct Disclosure of Members' Interests for Assembly and Permanent Council Members. These transgressions were of a serious nature and could not be left unchallenged. To do so would be a violation to the constitutional principle of accountability¹⁹. In July 2018, Manana voluntarily resigned from his position as a member of parliament²⁰. This demonstrated that violence against

women will not be tolerated in our political spaces, and impunity is not an option.

2018

DA / Minister of International Relations and Cooperation
(6) SA 109 (GP) - Centre intervening as *amicus curiae*

Immunity in cases of violence against women.

In 2017 Mrs Grace Mugabe, the wife of the then President of Zimbabwe Mr Robert Mugabe, allegedly physically assaulted Ms Gabriella Engels, a South African citizen, while on a visit to South Africa. Before the criminal investigation was completed, Mrs

16 Women's Legal Centre. *Linden Settlement Agreement*. Cape Town, South Africa: Women's Legal Centre.

17 Women's Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Women's Legal Centre, 2014.

18 Women's Legal Centre. *Annual Report 2019*. Cape Town, South Africa: Women's Legal Centre, 2019.

19 Women's Legal Centre. "President dismiss Mduzuzi Manana – The WLC requests President dismiss Mduzuzi Manana, failing this, an urgent application will be launched before the courts." Cape Town, South Africa: Women's Legal Centre, 2019.

20 Herman, Paul. "I feel totally exonerated' - Mduzuzi Manana resigns as MP." News 24, July 2018. <https://www.news24.com/SouthAfrica/News/breaking-mdudzuzi-manana-resigns-as-mp-20180724>.

Mugabe left South Africa. Subsequent to her leaving the country, the Minister of International Relations and Cooperation recognised Mrs Mugabe's immunity from prosecution. The immunity was based on two grounds; firstly, that Mrs Mugabe is the spouse of Mr Mugabe and therefore enjoyed spousal and derivative immunity recognised in terms of international law; and secondly, the Minister contended that it was in the interests of South Africa that immunity was granted in terms of Section 7(2) of the of the Diplomatic Immunities and Privileges Act 37 of 2001.

The applicant approached the North Gauteng High Court for an order declaring the decision to recognise the immunities and privileges of Mrs Mugabe by the Minister as inconsistent with the Constitution and therefore invalid. The Centre was admitted as *amicus curiae* in the matter. We made submissions in relation to violence against women and the state's constitutional obligations in terms of section 12 of the Constitution, specifically section 12(1)(c) that everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources, and the relevance thereof to the question of diplomatic immunity.

The Centre highlighted and challenged the impunity on the part of government when acting in relation to violence against women, and argued that a finding that the Minister acted unconstitutionally and irrationally in recognising the immunity of Mrs Grace Mugabe would hold the government accountable in placing the rights of women to be free from violence above those interests of a citizen of another country. A finding of this nature would send a clear message that government cannot act with impunity and must act within the set parameters of international and constitutional obligations to effectively address violence against women. Furthermore, the Centre argued that the state was further acting with impunity by virtue of its failure to address the positive obligations on the government to prevent further violence by Mrs Mugabe and its failure to impose any conditions should Mrs Mugabe return to South Africa, notwithstanding her criminal and unlawful actions. The Centre contended that the conduct of the state led to distrust of the role of the law to obtain justice and as a tool for social



change, and that the state had failed in its constitutional, legislative, relevant regional and international legal obligations.

In its judgement, the Court reflected on the arguments put forward by the Centre, recognising the need for their participation in protecting the interests of women to be free from violence. The Court also recognised that because the Minister had opposed the matter, the Centre as *amicus*

had an obligation to enter the litigation to highlight the constitutional rights affecting women and protecting them from violence. Based on the value added to the matter by the *amici*, the Court ordered costs against the Minister in favour of the Centre. The costs order in favour of *amici* is unusual and is an affirmation of the importance of the role of *amici* in matters of this nature²¹.

21 Women's Legal Centre. *Annual Report 2019*. Cape Town, South Africa: Women's Legal Centre, 2019.

TIMELINE OF LITIGATION AND IMPACT

PROGRAMME 2: Relationship Rights

Customary law

2001

Phindile Queen Skosana and Others

Rights of women under traditional law.

The Recognition of Customary Marriages Act allows a customary marriage to be dissolved only by a court with a degree of divorce on the ground of irretrievable breakdown of marriage. The Mkobola tribal authority ordered the client to forfeit her house and custody of child because her marriage had been ordered as dissolved after she moved out of the house, following abuse from her husband.

The Centre brought a review application to set aside the tribal court's ruling on the basis that it did not have the jurisdiction to hear matters governing the dissolution of customary marriages. The Centre also wrote to all tribal authorities to advise them of the outcome of the case and to reiterate that since November 15, 2000, a tribal court does not have jurisdiction to hear matters involving the dissolution of customary marriages. This application was successful and the tribal court's ruling was set aside.

The case provided the Centre with an opportunity to bring customary practice in line with the new legislation and to help ensure that women are not arbitrarily subject to the jurisdiction of tribal courts¹.

2001

Dada **V** *Minister of Home Affairs*

Right to register a marriage without spouse.

The Centre represented a woman who wanted to register her marriage in order to divorce her abusive husband. The issue in this case was the Department

of Home Affairs refusal to register Mrs Dada's marriage under Section 4(2) of the Recognition of Customary Marriages Act without her husband being present. During 2001, Mrs Dada attempted to register her customary marriage four times.

The Centre had taken steps to notify the Department of Home Affairs that the practice was *ultra vires* the Act, or not within their authority. A letter was written on behalf of Mrs Dada requesting that her marriage be registered and that a general undertaking be given that the absence of one of the parties would not prevent the registration of a customary marriage. The Centre was successful on both requests. As a result of the Centre's intervention, the Ministry of Justice and Constitutional Development met with the Department of Home Affairs to further resolve the issue. This case impacted women whose husbands are reluctant to register their marriages because of benefits and rights conferred upon women by the Act².

2007

Gasa **V** *Road Accident Fund - Centre as amicus curiae*

Women's rights in polygamous marriages.

Mrs Gasa had been a partner in a polygamous marriage. After her husband was killed in a road accident, Mrs Gasa and her husband's first wife both applied to the RAF for compensation. Mrs Gasa was refused on the grounds that although the law now recognises polygamous marriages, her customary marriage was nullified because her husband had previously married another woman in terms of the Marriage Act. The RAF's ruling relied on the Black Laws Amendment Act, an apartheid-era law which remained on the statute books.

Mrs Gasa challenged this decision in the Cape High Court and lost, but on November 21, 2007, the Supreme Court of Appeal, by agreement between the parties, overturned the High Court judgment. The Centre, acting as *amicus curiae* at the request of the Supreme Court of Appeal, questioned the constitutionality of the fund's refusal to honour Mrs Gasa's claim and challenged the validity of the statutes relied on by the High Court. We asked the Court to consider the negative impact of the Black Laws Amendment Act (which refers to the now repealed Black Administration Act) on women married in terms of customary law who do not fall under the Recognition of Customary Marriages Act, which came into effect in 2000.

On November 21, the SCA handed down a favourable judgement and awarded our client damages of R54,086. The RAF was also ordered to compensate any other claimants who fell into the same category (in future) as Mrs Gasa. In addition, the Department of Home Affairs was ordered to review the Black Laws Amendment Act within 18 months.

This is an important case not only for Mrs Gasa but for all women in her position with claims for loss of support. It also laid the groundwork for future challenges to the discrimination against women inherent in a dual system where civil law enjoys primacy over customary law³.

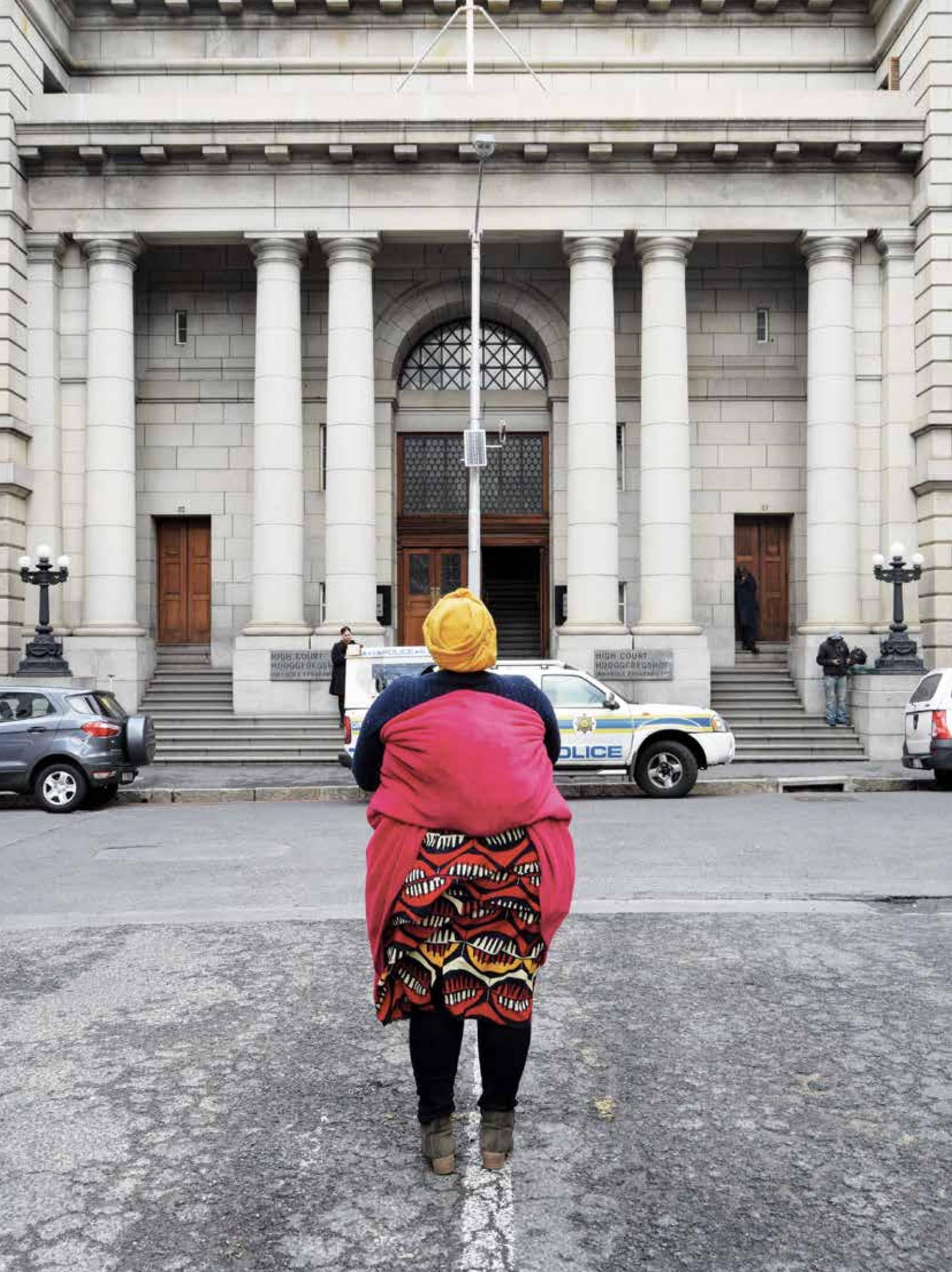
2008

Gumede (born Shange) **V** *President of the Republic of South Africa and Others - Centre as amicus curiae*

Rights to property in customary marriages.

Mrs Gumede was married according to customary law in Kwa-Zulu Natal before

1 Women's Legal Centre. *Centre List of Cases with Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005.
2 Women's Legal Centre. *Centre List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005
3 Women's Legal Centre. *Annual Report 2007*. Cape Town, South Africa: Women's Legal Centre, 2007.



1998, when the Recognition of Customary Marriages Act (RCMA) was passed. Section 7 of the Act considers all customary marriages after the passing of the RCMA, but not before, to be in community of property. During divorce proceedings, Mr Gumede claimed that Mrs Gumede was not entitled to any of the matrimonial property. This argument accords with section 7 of the Act, which created the provision for marriages entered into before the RCMA was passed, as well as the application of primogeniture, a system of inheritance which favours male children, under the KwaZulu Natal Code. The Centre was admitted as *amicus curiae* in this case in December 2006.

In a submission challenging the constitutionality of section 7 of the RCMA, the Centre argued that the divide between marriages entered into before and after 1998 is arbitrary and violates the constitutional rights to equality and dignity of women married before 1998. The provisions of the RCMA relating to marriages that are deemed to be in community of property should be extended to women married before its enactment whose marriages still exist. The Centre also argued that customary law should be developed to recognise all customary marriages as marriages in community of property.

The High Court handed down a

favourable judgment in May 2008, and we subsequently argued as *amicus* in the Constitutional Court in support of the judgment, citing in particular the international obligations on the State and the effect of the extension of property rights to women in polygynous marriages⁴. The Constitutional Court upheld the judgement of the High Court. This case established that all customary marriages were in community of property, therefore providing women in customary marriages with significant property rights⁵.

2015

Jezile V S and Others - the Centre as amicus curiae

Challenging harmful customary practices: abduction and forced marriage.

The Centre was invited by the Western Cape High Court as an *amicus curia* to make submissions on *ukuthwala* in a case where a man, Mr. Jezile, forcibly married a young girl. The Centre submitted that *ukuthwala* originated to encourage the parents of a bride to begin marriage negotiations through the staged kidnapping of the girl. In its original form, *ukuthwala* was completely consensual, involved no violence, and the woman remained with the bridegroom's female family members until after the marriage ceremony was agreed to and negotiated⁶.

The facts of this case do not conform to a traditional custom. The interpretation of *ukuthwala* presented in this matter is a harmful cultural practice that involves the forced abduction of women or girls. Those abducted girls are subjected to rape, violence, and non-consensual marriage. The appellant was appealing his criminal conviction on charges of human trafficking, rape and assault using the customary practice of *ukuthwala* as a defence.

The Centre made submissions about the impact of *ukuthwala* on women in the context of the Constitution, regional and international instruments. The consequences of this practice of *ukuthwala* are immense, including girl-children being required to fulfil the duties of a wife that are not age-appropriate, childhood pregnancy, and transmission of sexually transmitted diseases including HIV and AIDS. Women and girls are also subjected to continual physical and mental abuse as kidnapped brides. In March 2015, the Cape Town High Court unanimously decided to affirm the convictions for human trafficking and rape. The court declined to accept Mr. Jezile's argument that he was in a customary marriage through *Ukuthwala*. This was an important judgement in preventing men abusing traditional customs to mistreat women⁷.

Muslim marriages – Muslim Personal Law

2007

Daniels V Campbell NO and Others

Inheritance rights of women in Muslim marriages.

In this case, the applicant, Mrs Daniels, sought to be the heir of the estate of her late husband, who she was monogamously married to in a Muslim marriage. The Constitutional Court ruled that spouses married under Muslim rites were entitled to inherit in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act, and that our client was thus entitled to

inherit the house she had occupied with her husband until his death in 1994⁸. Additionally, the Centre arranged the transfer of the property into our client's name, as well as raised the funds to cover outstanding rates and other expenses. We also engaged the services of a conveyancer on a pro bono basis⁹.

2008

Hassam V Jacobs NO and Others - Centre as amicus curiae

Property rights in polygamous Muslim marriages.

This case centred around Mrs Gabie-

Hassam, whose claim with the executor of her late husband's estate was denied on the grounds that Muslim marriages which are polygynous were not legally recognised. The Centre acted as *amicus curiae* in this case, and argued that the provisions of the Maintenance of Surviving Spouses Act (MSSA) and the ISA violates the constitutional rights of women in such marriages.

The High Court, relying on the arguments of the Centre, ruled in favour of the applicant and struck down the relevant provisions of the MSSA and ISA¹⁰. The judgment was confirmed by the Constitutional Court and was important

4 Women's Legal Centre. *Newsletter March/April 2018*. Cape Town, South Africa: Women's Legal Centre, 2018.

5 Women's Legal Centre. *Annual Report 2008*. Cape Town, South Africa: Women's Legal Centre, 2008.

6 Women's Legal Centre. "Jezile v The State – Cape Town High Court Rejects Manipulated 'Customary' Practice of *Ukuthwala*." *Women's Legal Centre*, 24 Mar. 2015, www.wlce.co.za/jezile-v-the-state/.

7 Women's Legal Centre. *Annual Report 2015*. Cape Town, South Africa: Women's Legal Centre, 2015.

8 *Daniels v Campbell and Others* (CCT 40/03) [2004] ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) (11 March 2004)

9 Women's Legal Centre. *Annual Report 2007*. Cape Town, South Africa: Women's Legal Centre, 2007.

10 Women's Legal Centre. *Annual Report 2008*. Cape Town, South Africa: Women's Legal Centre, 2008.

COURT
HOOGSE HOF
EPHAKAMILEYO



in setting judicial precedent in terms of establishing the rights of women in Muslim marriages¹¹.

2008

*Sattar // Mowzer //
Minister of Justice*

Religious marriages in community of property

In this case, our client was married in terms of Muslim rites and claims that there was an express or implied agreement that the marriage was to be in community of property, although her ex-spouse disputes this. The Centre took on this case to gain recognition that religious marriages can be concluded in community of property by agreement, developing the principles established in the *Rylands v Edros* case which recognised the Muslim marriage as a valid contract. The matter was amicably settled between the parties with the agreement made an order of Court¹².

2009

Hendricks V Hendricks

Rights to matrimonial property in Muslim marriages.

During Ms Hendricks' marriage to her husband under Muslim rites, they purchased a home which was registered in both of their names. When Mr Hendricks divorced her, he discontinued payments on the bond over the house and refused to allow her to take over the bond. The Centre took on this case to develop the law on unjustified enrichment in such cases.

The Centre hoped to set a precedent for women in unrecognised marriages or relationships who purchase homes jointly with their partners, allowing them to obtain a court order to take ownership of the home. Alternatively, they should be able to seek a judgment in money against their partners which can be used as leverage to secure a new home. The matter was, settled in our client's favour and the agreement was made an order of Court¹³.

2010

Salie

Recognition of Muslim marriages.

Our client in this case was married to her husband under Muslim rites for many years, after which her husband divorced her by "talaq" and attempted to evict her from the family home.

The Centre sought an order that the Divorce Act is unconstitutional because it fails to provide women married in terms of Muslim rites with the same remedies that are available to women married in terms of civil marriages in community of property¹⁴. We also argued that the Muslim Judicial Council is covered by the Promotion of Administrative Justice Act, and that the talaq which ended the marriage amounted to an unjust administrative action. In the alternative, we argued universal partnership, unjust enrichment and breach of contract.

Ms Salie's former husband challenged our summons as not having a valid cause of action, but withdrew the exception shortly before the matter was set down for argument. The matter was settled between the parties¹⁵.

2014

Isaacs V Isaacs

Right to remain in marital home after divorce.

The Centre assisted a Muslim woman in opposing an application in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act, where her ex-husband sought to evict her from the marital home. They were married in accordance with Muslim rites for 13 years. The marriage was not legally recognised, and so the marital home was registered only in the husband's name, and he wanted to evict her in order to marry a second wife.

The Centre challenged the husband's right of ownership of the marital home, arguing that the home was bought with the proceeds from another home granted to them jointly by the City of Cape Town, and that it was not in the best interests of two minor children (the client was the

primary caregiver during the marriage and after the divorce) that the client be evicted. These arguments were placed in the context of how the failure to recognise Muslim marriages violates women's constitutional rights. The Centre was successful in opposing the application, and the eviction application was dismissed¹⁶.

2014 - 2019

*Women's Legal Centre Trust
V President of the Republic of
South Africa and Others*

Recognition of Muslim marriages.

In December 2014, the Centre launched an application in the Western Cape High Court in the public interest seeking relief aimed at providing women in Muslim marriages, and the children born of such marriages, with legal protections, primarily upon the dissolution of such marriages. In August 2018 (during women's month), a full bench of the Western Cape High Court handed down a judgment whereby they found in favour of Centre and the women that we represent.

They found that the President and Cabinet had failed in their obligation to introduce legislation that would recognise marriages performed in terms of the Islamic faith. The Court further ordered that the State draft and introduce legislation in relation to this, and that they should do so within 2 years of the order having been made. Interim relief, however, was only granted if the State failed to enact the legislation within the stipulated 2 years. This means that the women would still be left vulnerable and legally unprotected during this period.

In October 2018, the State parties (the President and the Minister of Justice) brought an application for leave to appeal to the Supreme Court of Appeal and therefore this matter unfortunately remains unresolved. The Centre has brought an application to cross appeal in respect of the interim relief in that we believe that women should not have to wait another 2 years for the State to fail protecting women in order to have their rights recognised and realised. In May 2019, the Centre was granted

11 "Media Summary: Fatima Gabie Hassam v Johan Hermanus Jacobs NO and Others (with the Muslim Youth Movement of South Africa and the Women's Legal Centre Trust as amici curiae)." Cape Town, South Africa: Constitutional Court of South Africa, 2009.
12 Women's Legal Centre. *Annual Report 2008*. Cape Town, South Africa: Women's Legal Centre, 2008.
13 Women's Legal Centre. *Annual Report 2009*. Cape Town, South Africa: Women's Legal Centre, 2009.
14 Women's Legal Centre. *Annual Report 2009*. Cape Town, South Africa: Women's Legal Centre, 2009.
15 Women's Legal Centre. *Annual Report 2010*. Cape Town, South Africa: Women's Legal Centre, 2010.
16 Women's Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Women's Legal Centre, 2014.

leave to cross appeal and the case will now proceed to the Supreme Court of Appeal¹⁷. We are confident that the

Supreme Court of Appeal will recognise the urgency of the matter and that Muslim women will soon have their marriages

efficiently and properly recognised.

Hindu marriages

2008

*Govender V Ragavayah
NO and Others - Centre as
amicus curiae*

The extension of spousal inheritance to women in Hindu marriages.

This case dealt with extending the right of spousal inheritance to women in Hindu marriages. The Centre acted as *amicus curiae* before the Durban High Court, arguing that the failure of the MSSA

and the ISA to recognise women in Hindu marriages as spouses violates the equality clause in the Constitution.

In its judgement, the Court interpreted the provisions of the MSSA and the ISA to include women in Hindu marriages, thus extending the right to inherit to Hindu women. This case was a significant victory for the rights of women in Hindu marriages¹⁸.

2009

Prag V Prag

The duty of spousal support in Hindu religious marriages.

Our client was married in terms of Hindu religious rites. After 15 years, during which she ran the family home and raised the children, her husband threw her out of their home with only her clothes. The Maintenance Court, however, awarded spousal maintenance to Ms Prag and she was no longer rendered homeless and vulnerable as a result of her husband's actions¹⁹.

Marital property: Pension fund access

2008

Paulse // Metropolitan

Rights to pension funds on divorce.

Our client was awarded half of her ex-husband's pension fund when they divorced. However, the provisions of the Divorce Act, in conjunction with the Pensions Act, prohibited women in our client's position from accessing their share of the pension interest until their ex-partners retired. In addition, the interest on the whole amount from the date of divorce to date of withdrawal accrued to the ex-partner only.

In the interim, the law has been amended to allow spouses to access pension interest, but the amendment does not apply retrospectively. The Centre thus made representations to the Pensions Ombudsman on our client's behalf to apply retrospectively as in her case, and she was awarded her share of the pension²⁰.

2014

*Ngewu and Another V
Post Office Retirement
Fund and Others*

Extension of the Pension Law Amendment Act to government pension funds.

The Centre launched an application on behalf of Ms Ngewu in the Cape High Court. She claimed that her ex-husband's pension fund, the Post Office Retirement Fund, is unfairly discriminating against her on the basis of her gender, by refusing to allow her immediate access to her share of the pension fund interest. The legal framework that compels women to wait until their spouses end their employment before they can have access to their share of the pension interest which accrues to them on the date of divorce, negatively impacts women as they are often adversely affected socially and economically by divorce. The law has been amended in relation to private pension funds in this regard²¹.

The High Court recently ruled that similar provisions in the Government Employees Pension Fund are unconstitutional and its order was referred to the Constitutional Court (CC) for confirmation. The Centre applied for direct access to the CC to have the Ngewu case heard jointly with that case in the last quarter of 2011. The state accepted that the principle is discriminatory (in both cases) and the CC, during 2012, postponed the matter for 18 months to allow time for the Post Office Pension Fund to amend its rules to provide for immediate payments to women on divorce. The State made an urgent application to the CC in November 2013, seeking an extension to make the necessary amendments. We argued that the state should not be allowed to unreasonably delay amending legislation to bring it in line with the Constitution. The Court accepted our arguments and refused to grant a postponement. The Court then read in the proposed amendment itself, giving effect to the "clean break principle". The result was that Ms Ngewu became entitled to receive her benefit immediately²².

17 Women's Legal Centre. *Annual Report 2019*. Cape Town, South Africa: Women's Legal Centre, 2019.
18 Women's Legal Centre. *Annual Report 2008*. Cape Town, South Africa: Women's Legal Centre, 2008.
19 Women's Legal Centre. *Annual Report 2009*. Cape Town, South Africa: Women's Legal Centre, 2009.
20 Women's Legal Centre. *Annual Report 2008*. Cape Town, South Africa: Women's Legal Centre, 2008.
21 Women's Legal Centre. *Annual Report 2011*. Cape Town, South Africa: Women's Legal Centre, 2011.
22 Women's Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Women's Legal Centre, 2014.

TIMELINE OF LITIGATION AND IMPACT

PROGRAMME 3: Land And Tenure Rights

2001

Ngqele **V** *Representative in the Estate Late Plaatjie and Others*

Inheritance rights of illegitimate children.

The Ngqele case was one of the first matters of the Centre, which dealt with the inheritance of property relating to children born out of wedlock in customary marriages. In terms of African customary law, illegitimate children could not inherit from their deceased father's estate. Based on customary law rules, the Executor in the deceased estate attempted to distribute the property in terms of the customary law, which was discriminatory and contrary to the provisions of the Intestate Act. The Centre brought an application seeking an interdict against the executor (family representative) to distribute the property in terms of the Intestate Succession Act, and not the discriminatory customary practice that excluded the children of Mrs Nqele from inheriting from the deceased Estate. Ms Ngqele resided in the home

of the deceased with her minor children, and the family representatives unlawfully evicted her and her children. The Centre instituted a second application seeking an order to re-instate Ms Ngqele and her family to the home. Ms Ngqele was re-instated, and a settlement was reached whereby she was allowed to purchase the house, and her children, together with the deceased's other minor children, would inherit from their father's estate. The settlement was made a Court Order.

Although the matter did not proceed to deal with the application of the Intestate Succession Act and the constitutionality of the customary rule relating to the primogeniture and rights of illegitimate children, the case highlighted the inconsistencies between customary law and the Intestate Succession Act and it recognized the development of customary law in relation to the rights of women and children as an area that requires urgent reform. The Centre further recognised that widows and children of the deceased are a particular vulnerable group. The Bhe case later became the seminal case, which took the arguments

developed in the Ngqele case further.

2005

Bhe and others **V** *Magistrate, Khayelitsha, and Others*
(Commission for Gender Equality as *amicus curiae*)

Constitutional challenge to the rule of male primogeniture & inheritance rights of girls and illegitimate children under customary law.

The customary law of succession in South Africa is based on the principle of primogeniture, which requires that only males may inherit from a deceased's estate. Generally, the heir is the eldest son, or failing that, the eldest grandson, of the deceased. If the deceased does not have any male children, then his father becomes the heir. The traditional rules of succession required that the male heir acquire all of the assets of the deceased, but also that he assumes all responsibilities that the deceased had towards his family. The heir is expected to continue to support the deceased's widow, children and other dependents.



Harris **V** Harris and Another

Unlawful Eviction of Muslim divorced wife from City of Cape Town allocated home

Ms Harris was one of the first clients who highlighted to the Centre the intersecting challenges which Muslim women faced in respect of tenure security and access to housing due to the lack of recognition of Muslim marriages and the consequent challenges relating to the dissolution of property purchased from the Cape Town Municipality. The client was married in terms of Islamic rites and she purchased a home with her husband, but due to the nature of the marriage, the house was registered by Cape Town Municipality in the name of her husband only. The parties divorced Islamically and the client's ex-husband brought an application to evict her from her home as an unlawful occupier.

The Centre defended the eviction application on the basis that the contract awarding the house solely to her husband was unconstitutional. The property was purchased from the municipality with a bond registered in favor of the municipality. The purchase price was not paid in full and the City had the responsibility to transfer the property in the name of both parties after the purchase price was paid in full. The Court dismissed the eviction application as client was not an unlawful occupier as she had a right to reside in the property based on the defenses raised.

Although this matter only related to the case of the client, the Centre developed a broad legal strategy to challenge the constitutionality of the municipalities housing policy as it relates to women married in terms of Muslim rights. The Centre embarked on a communication and information campaign by publicizing the judgment and developing a booklet on the housing and tenure rights of women in a similar position as Ms Harris². The challenge with the matter was that the City of Cape Town refused to transfer the property to Ms Harris without the consent of her ex-husband and this was a problem for many other women (who subsequently came forward). The latter allowed the Centre to start the process of developing a constitutional challenge against the City of Cape Town's housing policy which discriminated against Muslim women.

Solarie **V** Solarie and Others

Declaring the discriminatory Housing Policy of the City of Cape Town relating to Muslim women, as unconstitutional.

Building on the Harris case, our client Mrs Solarie challenged the housing policy of the City of Cape Town, which only allowed for the registration of houses in the name of the husband when spouses married according to Muslim rites even if the parties and applied for housing as a couple.

Mrs Solarie was married in terms of Muslim rites in 1983, and in 1990 the parties purchased a property from the City of Cape Town. During 1990, the City allocated them a site containing a foundation and a toilet. In accordance with its policy, the City entered into a written agreement with the first respondent, in terms of which it lent him the purchase price of the property, and sold the property to him on the basis that he would make monthly repayments, construct a dwelling, and take transfer of the property at a time determined in accordance with the agreement. The parties together built the house and after the divorce the applicant continued to live in the house and she contributed to the cost of building the house, and she paid the instalments of the house. After the divorce in 1998, the respondent repeatedly threatened to evict our client from what he refers to as "his" house. After the full payment of the house, the City required the consent of our client's ex-husband to be able to transfer the property on both parties' name.

Mrs Solarie brought an application in the High Court interdicting the City of Cape Town from passing transfer of the house to the first respondent, and directing that when transfer becomes due in terms of the agreement, the house is to be transferred to her and the first respondent in equal shares. The Centre argued that this position clearly discriminates against women on the basis of gender and religion. The application was launched in December 2009, and was granted by the High Court in 2011. The Court held that the policy was inconsistent with the Constitution, as it unfairly discriminated against women and limited women's ownership of property and constitutional right to access land. The policy created additional criteria

However, in practice, sometimes the heir would fail to carry out these responsibilities, and widows were left with little recourse. Although the heir is supposed to inherit the deceased's responsibilities to support and protect his family, sometimes the heir does not respect these obligations. This leaves women dependent, and without any means to obtain property, and therefore to produce food and support their children.

This changed with the landmark case of *Bhe* which came before the Constitutional court in 2004. The father of Ms. Bhe's two daughters had died without a will, and according to the laws of succession under customary law, the deceased's father was to inherit the house she lived in with her daughters. Ms. Bhe claimed that her daughters, as the deceased's children, should inherit the property.

The Women's Legal Centre argued on Ms. Bhe's behalf that the customary law of succession that allows only males to inherit was unconstitutional because it discriminates against women, and the Constitutional Court agreed. The court said that the customary law of primogeniture was a violation of women's equality and rights to dignity, which are protected under the

Bill of Rights in the Constitution. Ms. Bhe's daughters, as the children of the deceased, were allowed to inherit the property. As a result of the Constitutional Court's decision, the government introduced a new law, the *Reform of Customary Law of Succession and Regulation of Related Matters Act*. This law reforms the customary law of succession by finally prohibiting the principle of primogeniture.

The law recognizes that widows and children of a customary marriage were not adequately protected under the customary laws of succession. The practical effect of these recent amendments to the law are that the rights of women to inherit property under customary law are now governed by the Intestate Succession Act. The rules under the Act recognize and provide for polygynous marriages¹. This case was vital in establishing the inheritance rights of girl children.

¹ Women's Legal Centre Know Your Rights Booklet: Women's Property Rights under Customary Law
² Women's Legal Centre. *Annual Report 2009*. Cape Town, South Africa: Women's Legal Centre, 2009.

for our client (as a woman) to become a property owner, rendered her vulnerable to eviction, and failed to safeguard her right to security of tenure. The Judge also found that the agreement, insofar as it gave our client's ex-husband the sole right to ownership of the property, was contrary to the values enshrined in the Constitution and accordingly unenforceable. The Court found that the City's Policy discriminated against women and that the agreement, which gives effect to that Policy, is contrary to public policy and it would, therefore, be discriminatory for the City to give transfer of the house to the first respondent.

Consequently, the court interdicted the City from transferring the property solely into the name of our client's ex-husband, and ordered that the property be transferred to both in equal shares. The judgment set an important precedent for other women in our client's position³.

2011

Pieters v Pieters

Right to security of tenure

The financial and emotional challenges of divorce stops many women from properly defending their matters, with the resultant impact of many women losing and being evicted from their homes, bearing the financial brunt of the divorce. It is therefore important that Courts, before granting divorce orders in undefended divorce matters, must consider the consequence of forfeiture of property on spouses- particular on women. Mrs Pieterse came to the Centre for assistance as the divorce awarded her portion of the joint property to her ex-husband and he attempted to evict her from the joint property. The Centre applied for a rescission of the divorce order and attempted to develop the duty on the family courts to protect women's right to security of tenure in divorce matters where women (who are married in community of property) are unrepresented and the husband seeks an order that results in the woman losing the jointly-owned house. In April 2011, the court granted the application for rescission of judgment⁴.

The Centre considered the right to housing and the right of access to justice to be factors the court should take into account, which included the right of unrepresented parties to be made aware

of the implications of an order for the division of community property with respect to the right to adequate housing contained in s26 of the Constitution. The Court recognized that her lack of legal representation, her rights to housing in terms of section 26 and her indication that she intended to defend the case, were sufficient grounds to rescind the judgment taken in her absence⁵. The rescission allowed Mrs Pieterse to further defend her divorce and claim her half share in the property.

2016

Klaase and Another v van der Merwe N.O. and Others - Centre as amicus curiae

Right to housing equality.

This case addressed discrimination against women farmworkers with regards to property and security of tenure rights. The Centre represented the Women on Farms Project (WFP) as an *amicus curiae* to challenge the Extension of Security of Tenure Act, which excluded spouses of occupiers deriving their rights from the main occupant (employee). In this particular case, a woman was due to be evicted from her home because her husband had been dismissed from his employment on the farm where they lived. As a result of his dismissal, the entire family was to be evicted.

In this case, the land owner brought an eviction application against one of the applicants, which required that everyone occupying "under him" also had to vacate the premises. This led to the displacement of his wife and children, in addition to himself. The wife of the farm worker, the second applicant, contended the eviction under the argument that she was an ESTA occupier in her own right, due to her employment status and residence on the farm with the owner's consent. Therefore, her husband and children should be entitled to live with her under her right to family life.

The Women's Legal Centre (WLC) represented the Women on Farms Project (WFP) who was admitted as a friend of the court. Due to the reliance on the tenure of their partners, female seasonal workers face a variety of difficulties, i.e. a lack of knowledge about their rights,

economic dependence on their partners, violence in the home (domestic violence) and workplace discrimination (such as sexual harassment) due to the lack of tenure both in the work and home, and this often results in economic and social marginalization. The Court was called upon to come to the aid of female farm workers who are reliant on their spouses and who find themselves without a home if their spouses' no longer work on the farm.

The Constitutional Court held that the Land Claims Court's finding that Mrs Klaase occupied the premises "under her husband" subordinates her rights to those of Mr Klaase and that it demeaned Mrs Klaase's rights of equality and human dignity. Furthermore, the court found that it demeaned Mrs. Klaase's rights to equality and human dignity to describe her occupation of the land in those terms. As a result of this judgment, female farm workers are able to occupy land in their own name and not only in the name of their husbands. This decision impacts the lives of many women on farms around the country⁶.

2019

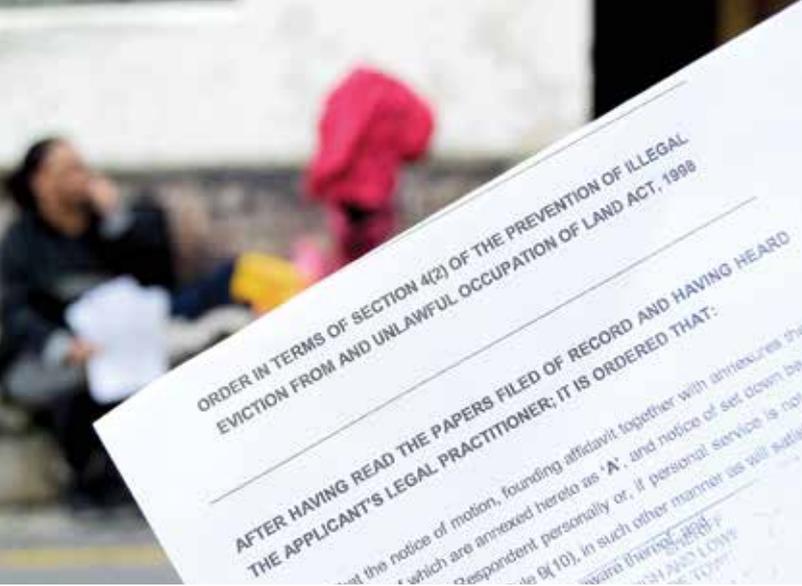
Amardien and Others v Registrar of Deeds and Others - Centre as amicus curiae

Housing rights for women.

The Centre intervened as an *amicus curiae* in this Constitutional Court case involving the Cape Town Community Housing Company (CTCHC). The 12 Applicants, of which eight are women, were all beneficiaries and purchasers of homes under a state-subsidised housing project administered via the CTCHC, which was set up to provide access to housing to disadvantaged persons in South Africa, and to give effect to the right to housing in South Africa. The Applicants thus applied, qualified for, and received housing in terms of the scheme established by CTCHC, and for which it was a requirement that they pay a certain instalment amount each month.

Unfortunately, due to deficiencies with the homes they occupied, and other financial constraints, they lagged behind with the instalments to the CTCHC. Instead of entering into a process of meaningful engagement that would recognise and

3 Women's Legal Centre. *Annual Report 2011*. Cape Town, South Africa: Women's Legal Centre, 2011.
 4 Women's Legal Centre. *Annual Report 2010*. Cape Town, South Africa: Women's Legal Centre, 2010.
 5 Women's Legal Centre. *Annual Report 2011*. Cape Town, South Africa: Women's Legal Centre, 2011 and Judgment handed down
 6 Women's Legal Centre. *Annual Report 2016/2017*. Cape Town, South Africa: Women's Legal Centre, 2016/2017.



accommodate the vulnerable positions of the Applicants, CTCHC opted to cancel the instalment sale agreements, failed to disclose to the Applicants the amounts owing in terms of the instalment sale agreements, and sell the Applicants' homes to a trust. Additionally, CTCHC chose not to have the homes remain within its social housing scheme.

The purported cancellation and failure to provide an amount in the notices issued to the Applicants of their outstanding debts became the subject matter of the application to the Western Cape High Court, and ultimately the Constitutional Court. The outcome of the initial application at the High Court was a negative one, which found no fault with the deficient notices issued by CTCHC, the cancellation of the agreements, or the immediate sale of the homes to the Trust. Even more, the High Court found that each Applicant, who had struggled to maintain their respective payments,

were responsible for paying their share of the costs of the application. The appeal of the High Court judgment was brought by the Legal Resources Centre, which first launched the initial challenge in the High Court in 2016. Aware of the highly technical approach adopted in the judgment of the High Court (per Judge Binns-Ward), and consequently its prejudicial consequences for families and particularly women in need of social housing, the Centre entered the matter as *amicus curiae* in the Constitutional Court.

We argued that the best interpretive approach for the Court to take in these proceedings was a gendered and feminist one. In South Africa, and in the application itself, the face of beneficiaries of social housing is a predominantly female one. Our arguments aimed to assist the Court in adopting an interpretive approach that would be mindful of the role of social housing in South Africa, in light of the right to housing in section 26 of the

Constitution, and that often it is women and women-headed households who benefit from social housing at reduced rates and are impacted by decisions made in terms thereof. We believed it was necessary to place before the Court an interpretation that would best protect the rights of women who access social housing, especially where they do not qualify for private financing or free social housing schemes.

The decision of the Constitutional Court set aside and replaced the order of the High Court, which upheld the cancellation of instalment sale agreements between CTCHC and the Applicants, and the sale of their homes. Had the matter not come before the Constitutional Court, the High Court decision would have opened the Applicants, along with their families, up to eviction and the loss of their homes⁷.

7 Women's Legal Centre. *Annual Report 2019*. Cape Town, South Africa: Women's Legal Centre, 2019.

TIMELINE OF LITIGATION AND IMPACT

PROGRAMME 4: Vulnerable Workers

Sex workers

2000

De Bruin and Others **V**
*Minister of Safety and Security
and Others*

Police harassment against sex workers.

Three police officials from the Claremont Police Station were assaulting and harassing sex workers in the area. The Centre brought an urgent application to the High Court against the officers. The Independent Complaints Directorate (ICD) investigated the matter and recommended that the three officers face internal disciplinary charges as well as criminal charges. The case was settled out of court on the basis that the Minister of Safety and Security granted an undertaking that the three officers would be redeployed to other areas, and not perform any duties relating to sex workers until the findings of the internal inquiry and criminal charges had been finalized.

The case is significant for adult commercial sex workers because when sex work is criminalized, sex workers have no recourse to justice when they are assaulted in the course of their work¹.

2002

S **V** *Jordan and Others*

Decriminalisation of sex work.

The appellants in this case were a brothel owner, a brothel employee, and a sex worker. They were all convicted by the Magistrate's Court for contravening the Sexual Offences Act of 1957. They appealed to the High Court, in which they argued that the relevant provisions were unconstitutional. The High Court found that the section of the Act which criminalises carnal intercourse for

reward (the 'prostitution' provision) was unconstitutional but dismissed the appeal around the sections of the Act which criminalises keeping or managing a brothel.

The appellants appealed to the Constitutional Court and argued that the brothel provisions should be found to be unconstitutional. They also argued that the High Court order invalidating the prostitution provision should be confirmed. The Centre served as the attorneys for three *amici curiae*, including the Sex Worker Education and Advocacy Task Force (SWEAT). We argued that the criminalisation of sex work was biased on the grounds of gender because it primarily affects women and was therefore unconstitutional.

The Constitutional Court agreed with the High Court's finding that the brothel provisions are valid. But the judges were divided on the prostitution provisions. However, all the judges conclude that the 'prostitution provision' does not infringe the rights to human dignity, economic activity, and that if it does limit privacy, the limitation is justifiable².

The majority of the Constitutional Court judges decided that the section criminalises both male and female sex workers and is therefore not directly discriminatory; nor does it constitute indirect discrimination because there is a difference between the person who conducts business as a sex worker and a client. Also, under the common law and statute the customer is liable to prosecution as an accomplice³.

Considering this unfavourable result, the Centre sought out other avenues with which to advocate for the rights of sex workers. This was, however, important in highlighting the issues which sex workers face.

2010

Kylie **V** *CCMA and Others*

Employment rights of sex workers.

Our client worked as a sex worker for 13 years, after which her contract was terminated by the brothel she worked for. She was given a letter dismissing her and requiring her to vacate the premises (where she lived as well as worked) with immediate effect. No disciplinary hearing took place and she disputed the reasons given by the brothel owner for her dismissal. In 2009 the Centre assisted Kylie to bring a claim against her former employer for unfair dismissal with the Commission for Conciliation Mediation and Arbitration (CCMA) and the Labour Court⁴.

The Centre helped the client to bring a claim for unfair dismissal with the CCMA. Although some aspects of sex work are criminalised, our client also undertook legal work during her employment, and we believe her dismissal was both substantially and procedurally unfair.

Due to the Kylie case, sex workers who work in brothels have the same rights as any other employee, which includes decent working conditions and fair treatment. The Labour Appeal Court confirmed that sex workers are employees for the purposes of the remedies in the Labour Relations Act, which means that sex workers will be able to challenge exploitation in the workplace, unfair working conditions and unfair dismissal.

Following the rights granted by this case, the Centre assisted three different sex workers who were all unlawfully dismissed and we successfully settled more than R60 000 worth of damages claims⁵.

1 Women's Legal Centre. *Centre List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005
2 Murray, Christina and Michelle O'Sullivan. *Advancing Women's Rights: The First Decade of Democracy*. Juta and Co Ltd, 2005.
3 Women's Legal Centre. *WLC Paralegal Manual*. Cape Town, South Africa: Women's Legal Centre, 2016.
4 Women's Legal Centre. *Annual Report 2006*. Cape Town, South Africa: Women's Legal Centre, 2006.
5 Women's Legal Centre. *Annual Report 2016/2017*. Cape Town, South Africa: Women's Legal Centre, 2016/2017.

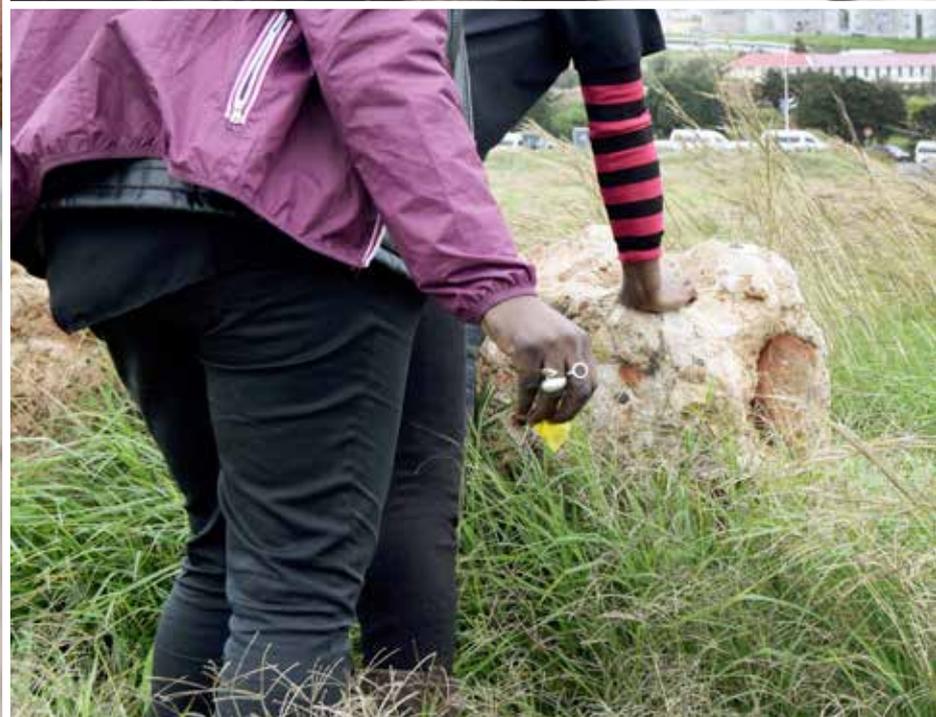


Sex work: A story

There are common misconceptions and stigmas about sex workers, and little knowledge about what their lives entail. This photo project was shot in collaboration with 3 sex workers that the WLC is connected to through its partners. It aims to show the lived realities and experiences of sex workers, and was a joint creative project with the sex workers themselves.







2002

*Beetge // Seagram Africa
(Pty) Ltd*

Sexual harassment in the workplace.

The client in this case was sexually harassed at work by two fellow employees and the company failed to take adequate steps to address the harassment. Although an internal disciplinary enquiry was held, there were several procedural and substantive difficulties with the enquiry. The outcome of this enquiry was that the employees were found guilty merely of unprofessional conduct. The Centre acted as Attorney for the applicant and the matter was successfully settled on behalf of the client in late 2002⁶.

2003

Ntsabo V Real Security

Liability for sexual harassment in the workplace.

The Centre represented a female security guard who was sexually harassed by her superior in December 1999. She reported the instance to her office but felt that nothing was done in response to her complaints, and this compelled her to resign from her position.

In 2003, the Centre successfully held her employer liable under the Employment Equity Act under the grounds that the employer had failed to properly respond to her allegations of sexual harassment⁷. The Labour Court ordered her employer to pay R12,000 as compensation for unfair dismissal, R20,000 for medical costs, and R50,000 for general damages⁸. This case was a victory for the rights of women who are sexually harassed in their workplaces.

2012

*Zaranyika // Rafiq Jaffer t/a
Nice and Sweet Bakery*

Sexual harassment in the workplace.

In the case of Zaranyika, our client's employer attempted to rape her, and

subsequently constructively dismissed her. This case highlights the miscarriage of justice often present in small enterprises where there are few staff members and where the employer himself is the perpetrator. An award for unfair dismissal was obtained from the CCMA, certified as an order of the Labour Court, and executed⁹.

2018

Equal Education

Sexual harassment in the social justice sector.

The Centre represented 19 complainants in a sexual harassment enquiry convened by Equal Education (EE). The enquiry was not conducted in terms of any existing legislative framework as the individual accused of the sexual harassment was no longer employed at EE.

The enquiry process allowed the Centre to further its objective of ensuring that vulnerable workers' human rights are recognised, protected, promoted and fulfilled. At the outset we advised that the way the enquiry had been conducted was not victim centered and was overly focused on the vindication of the perpetrator. One of the panelists distanced herself from the processes adopted by the remaining panel members, citing that the process was not victim friendly and it did not lend itself to addressing the systemic discrimination present within the organisation. The two remaining panellists produced their own report in which they exonerated the alleged perpetrator. They did not take the evidence of the 19 complainants into account as they, the complainants, would not submit themselves to a trial process of cross examination. To participate in a trial-like process, the complainants would have needlessly submitted themselves to gruelling cross examination and secondary victimization in a process where the alleged perpetrator could not be held accountable for his actions. The second report compiled by the third panellist recognised the experiences of the 19 complainants within a larger framework of inequality and discrimination and made

recommendations to ensure that a culture and environment exists that encourages a safe and conducive working environment, free of violence.

The matter also demonstrated the vulnerability of young women in the social justice sector to patriarchal values and practices. There is a definite need for organisations such as the Centre to continue our work towards transformation of the social justice sector¹⁰.

2010

Mabie // Koeberg Fisheries

Discrimination based on HIV status.

In this case our client's employer disclosed her HIV status to her work colleagues, and was dismissed for taking sick leave related to her HIV status. We represented the client before the Commission for Conciliation, Mediation and Arbitration (CCMA) in respect of unfair discrimination and unfair dismissal disputes. The matter was settled during conciliation and the client received compensation¹¹.

2014

*Nomasomi Gloria Kente V
Andre van Deventer (EqC)*
(no EC 9/13, 24-10-2014, Cape
Town Magistrates Court) -
Centre as *amicus curiae*

Rights of domestic workers.

In June 2014, we instituted proceedings in the Cape Town Equality Court to intervene as *amicus curiae* in a case of a domestic worker who has alleged unfair discrimination on the grounds of race, harassment, and hate speech by her employer's partner. Our application was granted on 8 July 2014, and we made submissions to the Court highlighting the plight of domestic workers and the discrimination they face on multiple and intersecting grounds, including that of gender¹². The Court found in Ms Kente's favour, awarding her R50 000 in compensation¹³.

6 Women's Legal Centre. *Centre List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005
7 Murray, Christina and Michelle O'Sullivan. *Advancing Women's Rights: The First Decade of Democracy*. Juta and Co Ltd, 2005.

8 *Ntsabo v Real Security* (2003) 24 ILJ 2341 (LC)

9 Women's Legal Centre. *Annual Report 2012*. Cape Town, South Africa: Women's Legal Centre, 2012.

10 Women's Legal Centre. *Annual Report 2019*. Cape Town, South Africa: Women's Legal Centre, 2019.

11 Women's Legal Centre. *Annual Report 2010*. Cape Town, South Africa: Women's Legal Centre, 2010.

12 Women's Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Women's Legal Centre, 2014.

13 Etheridge, Jenna. "Domestic Worker Rejects Apology For K-Word | IOL News." *Independent Online* 2019, <https://www.iol.co.za/news/domestic-worker-rejects-apology-for-k-word-1779805>.

TIMELINE OF LITIGATION AND IMPACT

PROGRAMME 5: Sexual And Reproductive Health And Rights

Abortion Rights

2004

Marie Stopes **V** *African Christian Action Group (Advertising Standards Authority of South Africa Final Appeal Committee)*

Right to advertise safe and pain free abortions.

The African Christian Action Group made several complaints to the Advertising Standards Authority (ASA) that advertisements for safe abortions by Marie Stopes clinics were offensive and misleading. At the time, the clinic was advertising "pain free" abortions, which allowed women to have abortions under sedation. The Centre took to representing Marie Stopes in front of the ASA's Appeal Committee, arguing that abortion was a medically safe procedure.

The Centre warned that the implications for public health in this case are very serious, as many women in South Africa at that time were still unaware that abortion had been legalised and did not know where to access safe abortions¹. The Centre argued that there is a real need for such advertising to guard against women accessing back-street abortions. Advertising safe abortions is an integral part of every woman's constitutional right to reproductive autonomy because if women have no knowledge of safe abortions, legally this right becomes meaningless.

This defence was accepted by the committee, who ultimately ruled that Marie Stopes had evidence which demonstrated that the abortions they offered were safe or pain free procedures.

The committee also determined that the advertisements were only offensive to a sector of the population and therefore could not be banned on those grounds. Marie Stopes was thus allowed to continue to advertise safe and pain free abortions, claiming a significant victory in ensuring that women are educated about the reproductive options available to them².

2003

Christian Lawyers Association **V** *Minister of Health and Others - Centre as amicus curiae*

Rights of minors to have an abortion without parental consent.

An application was brought by the Christian Lawyers Association (CLA) to challenge the provisions of the Choice on Termination of Pregnancy Act dealing with minors. The CLA allege that the fact that minors do not have to obtain consent of their parents in order to terminate pregnancy and also that the state does not provide mandatory counselling, violates a child's right to personal care.

The Centre brought an application to the court to be admitted as *amicus curiae* on behalf of the Reproductive Rights Alliance, which was subsequently granted. The matter was postponed indefinitely in 2002, and eventually argued in April 2003. The Centre argued that there are situations where requiring parental consent would endanger teenage girls and that there are compelling reasons for why a teenage girl would be unable to seek parental consent³.

In May 2004, the Pretoria High Court gave their judgement in favour of the State, confirming that the reproductive choices and autonomy of minors in context of the Choice of Termination and Pregnancy Act - which does not require parental consent in order for a minor to obtain a termination of pregnancy, provided they are able to provide informed consent for the procedure - was not unconstitutional, and that the section upholds. It is therefore not in conflict with a child's right to personal care. This was an important case in establishing the abortion rights of minors⁴.

2006

State **V** *LK*

Criminalisation of concealment of birth.

Our client was criminally charged with the offence of murder, or in the alternative, "concealment of birth". Women are often charged with concealment of birth when the State is unable to prove a case of murder following the death of a new born. The Centre prepared a High Court challenge to the constitutionality of Section 113(2) of the General Law Amendment Act 46 of 1935, which criminalises concealment of birth⁵.

We believe that the provision is overly broad and contains a reverse onus, contravening the constitutional fair trial rights of an accused person, including the right to be presumed innocent. The Centre ultimately negotiated a plea bargain with the state on behalf of the interests of our client and was therefore unable to bring to matter to litigation⁶.

1 Schroeder, Fatima. "Marie Stopes May Advertise Safe Abortions." *IOL News*, 4 Nov. 2016, www.iol.co.za/news/south-africa/marie-stopes-may-advertise-safe-abortions-211388.
2 Women's Legal Centre. Centre *List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005. Originally mentioned in: Murray, Christina and Michelle O'Sullivan. *Advancing Women's Rights: The First Decade of Democracy*. Juta and Co Ltd, 2005.
3 Staff Reporter. "Court Rules Girls Can Abort without Parental Consent." *The M&G Online*, 2004, mg.co.za/article/2004-05-28-court-rules-girls-can-abort-without-parental-consent.
4 Women's Legal Centre. Centre *List of Cases With Addendum*. Cape Town, South Africa: Women's Legal Centre, 2005.
5 General Law Amendment Act 46 of 1935. Cape Town, South Africa: Union Gazette Extraordinary, 1935, https://www.gov.za/sites/default/files/gcis_document/201505/act46of1935.pdf.
6 Women's Legal Centre. *Annual Report 2006*. Cape Town, South Africa: Women's Legal Centre, 2006.

Charles and Others **V**
*Gauteng Department of
 Health and Others - Centre
 as amicus curiae*

**Balancing freedom of conscience
 and religion with access to safe
 abortion services.**

This case was initiated by a nursing sister, assigned to the operating theatre at the Kopanong Hospital, who had religious objections to working on emergencies arising from abortions and subsequently resigned, claiming unfair discrimination and constructive dismissal. The Centre's interest in this matter was in developing the law around how one balances the right of freedom of religion with that of access to safe abortion services. We have argued that the Termination of Pregnancy Act and its regulations justifiably limit the freedom of conscience of health workers. They are required to inform women requesting terminations of pregnancy of their rights, provide non-mandatory and non-directive counselling and not prevent lawful terminations or obstruct access to facilities. Furthermore, they must perform emergency medical treatment when a patient requires a termination on an emergency basis⁷.

The Centre intervened as *amicus curiae* in this matter in the second half of 2004, initially to argue that the matter should be heard in the Labour Court rather than the Equality Court. In June 2006, we received a favourable judgement from the Labour Court. This has clarified an important issue of jurisdiction, namely that the matter should be heard in terms of the Employment Equity Act and not the Equality Act. Therefore, it should have been referred to the CCMA and, or the Labour Court rather than the Equality Court. Sister Charles successfully applied for leave to appeal against this judgment, however the Labour Appeal Court (LAC) found that employees who are discriminated against in the workplace need not rely on the Equality Act (EA) for a remedy⁸. The LAC ordered that the court a quo be set aside and that the matter be referred to the CCMA for an expeditious hearing⁹.

*Osler - Centre as
 amicus curiae*

**Minors' rights to consent
 to abortion.**

Ms Osler and her parents, supported by Doctors for Life, sued her former high school, a teacher and a private clinic in a damages claim resulting from an abortion. It is alleged that the abortion was unsuccessful and a premature baby was born and died. The Centre was granted permission to intervene as *amicus curiae* and intended to make submissions on the importance of minor's rights to termination without the consent of their parent or guardian. However, the parties settled the matter in April 2007¹⁰.

Maries Stopes Clinics **V**
*Western Cape Department
 of Health and Others*

**Conflict between national and
 provincial abortion regulations.**

In May 2007, the Western Cape Department of Health notified the Marie Stopes Clinics that it intended to require the organisation's reproductive health clinics to comply with provincial licensing regulations. In particular, the clinics were ordered to register as Private Health establishments in terms of Provincial Notice 187 and Regulation 158 of the Health Act, failing which criminal sanctions would be imposed.

The effect of this would be to make clinics already operating in Wynberg and Cape Town illegal, and new clinics planned for George and Mossel Bay would be unable to commence operations. As the Marie Stopes clinics provide 35% of terminations nationally, the result of closing four clinics in the Western Cape would seriously undermine the constitutional right to reproductive health of a large group of women¹¹.

The Centre believes that the Department was acting *ultra vires* (beyond their legal scope) by imposing this regulation. The Clinics were designated under the Choice on Termination of Pregnancy Act and therefore should comply with the

regulations under that Act. The Act as amended says that if a Provincial Minister wants to introduce regulations, they should do so in consultation with the Minister, which the Department failed to do.

The High Court was due to review the Department's decision in February 2008 but, at the request of the judge, the matter was settled. The Department granted the clinics exemption from the regulations and they are still operating. This was important in terms of ensuring that there are safe and accessible abortion facilities available to women seeking termination of pregnancy¹².

*Voice of the Unborn Baby NPC
 & another* **V** *Minister of Home
 Affairs and another* (Centre and
 Cause for Justice intervening
 as amici curiae)

**Ensuring access to
 abortion services.**

The applicants in the matter have approached the North Gauteng High Court seeking to declare that expecting parents who have experienced pregnancy loss have the right to bury the foetal remains irrespective of the gestational age of the foetus. It is common practice that where a woman has miscarried (and the pregnancy loss occurs before 26 weeks of gestation) she will not receive the remains for burial; however, where a stillbirth has occurred (pregnancy loss on or after 26 weeks of gestation) one has the right to bury the remains of the foetus. The applicants therefore seek to extend the right to bury to instances of miscarriage. They also seek to extend it to instances of induced pregnancy loss, also known as abortions.

The Centre and Legal Resources Centre have intervened as *amici curiae* to place argument before the court that seeks to protect the right to a safe and legal abortion in South Africa. The relief sought by the applicants, if extended to the context of abortion services, would most likely serve as a barrier of access to safe and legal abortions for women. This is based on the current implementation of The Choice on Termination of Pregnancy Act in South Africa, in which women still

7 Women's Legal Centre. *Annual Report 2006*. Cape Town, South Africa: Law Library of South Africa, 2006.
 8 Women's Legal Centre. 2007 Media Release. Cape Town, South Africa: Law Library of South Africa, 2007. http://www.lawlibrary.co.za/notice/updates/2007/issue_19.htm.
 9 Charles and Others v Gauteng Department of Health and Others Case No.: JA 67/06. <http://www.saflii.org/za/cases/ZALAC/2007/18.pdf>
 10 Women's Legal Centre. *Annual Report 2007*. Cape Town, South Africa: Women's Legal Centre, 2007.
 11 Women's Legal Centre. *Annual Report 2007*. Cape Town, South Africa: Law Library of South Africa, 2007.
 12 Women's Legal Centre. *Annual Report 2008*. Cape Town, South Africa: Law Library of South Africa, 2008.

experience refusal of services, less than 7% of the country's medical facilities provide abortion services, and the service is still stigmatised.

The Centre and LRC have requested that, if granted, the relief does not apply to abortion services so as to protect a woman's freedom to choose and to

safeguard her limited access to safe and legal abortions in terms of the Choice on Termination of Pregnancy Act¹³.

Sterilisation Rights

2014

Sithole // The MEC for Health and Social Development Gauteng Provincial Government and Others

Rights against coerced sterilisation.

We represented a client who was coerced into being sterilised at a state hospital. We held the MEC for Health in Gauteng, in his capacity as custodian of all public health care facilities in the province, liable for damages suffered by the client as a result of the coerced sterilisation. On the eve of trial, the Department admitted liability and offered our client a financial settlement. This was a landmark settlement, as the Department was compelled to concede that a signature alone does not constitute free and

informed consent for a sterilisation¹⁴.

According to the law, 'consent' can only be given if the patient has a clear understanding of what sterilisation involves, knows that it might be permanent, understands what the risks are, and is aware that their consent can be withdrawn at any time before the sterilisation is carried out. Because sterilisation is a surgical procedure, it is critical that a medical doctor provides this explanation to a patient. Nurses and other health care professionals may discuss contraception options with patients, but are not the appropriate personnel to obtain informed consent for a surgical sterilisation¹⁵.

2014

Sitamile

Forcible sterilization in state hospitals.

Our client was a refugee from Congo (DRC) who was sterilized without her informed consent at a state hospital. The hospital's employees failed to discuss the sterilisation procedure with our client in a language that she understands, or to ensure that she understood the nature and consequences of the procedure.

The Centre subsequently instituted a claim against the Premier of the Western Cape Provincial Government for damages as a result of the coerced sterilisation. In this matter we aimed to set due diligence standards in obtaining patient informed consent and the matter was settled favourably for the client¹⁶.

Additional cases

2010

Acting Head of Department of Environmental Affairs and Development Planning, Western Cape Province // Stellenbosch Municipality and Others

Provision of adequate sanitation in informal settlements.

Langrug is an informal settlement of about 1,500 households in Stellenbosch. It is home to about 5,000 peoples, a large percentage of whom are women and children. The settlement has only

94 toilets, of which more than 50 are not working. Families are forced to defecate in buckets and have nowhere to dispose of the waste, creating severe health and environmental risks. An application was brought by the Western Cape Provincial Department of Environmental Affairs to compel the municipality to provide sanitation facilities to Langrug. The municipality refused on the basis that it was planning to upgrade the settlement, although it did not provide any timeline for the upgrade.

The Centre intervened as a friend of the court to argue that the municipality's

failure to provide adequate sanitation is a breach of women's constitutional rights to equality, dignity, health and a clean environment. The case clearly illustrates the intersection between women's rights to equality and dignity, and their socio-economic rights. The Centre was admitted as a friend of the court in October 2009, and the matter was due to run during the first court term of 2010. However, the parties reached a settlement in terms of which the municipality capitulated¹⁷. In 2013, a new common wash facility was built in the area which improved the sanitation conditions¹⁸.

¹³ Women's Legal Centre. *Annual Report 2019*. Cape Town, South Africa: Law Library of South Africa, 2019.

¹⁴ Women's Legal Centre. *Annual Report 2012*. Cape Town, South Africa: Law Library of South Africa, 2012.

¹⁵ Women's Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Law Library of South Africa, 2014.

¹⁶ Women's Legal Centre. *Annual Report 2014*. Cape Town, South Africa: Law Library of South Africa, 2014.

¹⁷ Women's Legal Centre. *Annual Report 2010*. Cape Town, South Africa: Law Library of South Africa, 2010.

¹⁸ Tshabalala, Thandeka. "The Langrug Wash Facility: a new common space for the community." Urban Africa Organization, 2013. <https://www.urbanafrika.net/urban-voices/langrug-wash-facility-new-common-space-community/>.

Intersectionality as a tool to **ADVANCE FEMINIST JURISPRUDENCE**

Charlene May & Zukiswa Qwabe

Intersectionality is a term commonly used within scholarly spaces, but one which many argue hosts ambiguity in terms of its definition and open-endedness in its application. Many believe that it is a circular concept which brings no pragmatic solutions to social issues. However, this term has sparked great interest and successful application, particularly within modern feminism.

The term was originally coined by Kimberle Crenshaw and was intended to address the fact that the experiences and struggles of women of colour fell between the cracks of the anti-discrimination doctrine, radical feminist theory and anti-racist politics¹. Crenshaw proposed this term as a prism of analysis and critical evaluation which would remove the margins normatively associated with understanding social identity, individual identity and social life.

Intersectionality can thus be defined as the interaction between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies, and the outcomes of these interaction in terms of power. Since there have been differences in terms of whether the concept of intersectionality is a theory, a reading strategy for feminist analysis or a methodological approach – it is best understood as a conceptual framework from which to understand and articulate the multiple oppressions that all marginalised groups face.

Crenshaw unpacks this statement by expressing that treating race and gender as mutually exclusive categories of experiences and analysis is problematic. She advocates using black women's multidimensionality as her subject matter and states that the single-axis analysis distorts their experiences and essentially erases black women from the movement leaving them to suffer in virtual isolation. Without frameworks such as intersectionality that allow us to see how problems such as racism, sexism, xenophobia intersect within and upon an individual's identity, impacting them in a multi-layered fashion, social justice

problems such as these will continue to create multiple levels of injustice.

Intersectionality stimulates creativity in looking for new and unorthodox ways of doing feminist analysis as it reacts to static conceptualisations of identity, compelling one to grapple with the fluidity and complexity of identity. When implemented in a legal environment, it requires that the law and its impact is used in a new manner where substantive equality is pitted at the foundation. A gender lens is applied not only to the fact of the case, but the law itself and its impact as a result.

The Women's Legal Centre pursues an intersectional approach to our advocacy and litigation. We consider vulnerable and marginalised women to include black women, poor women, vulnerable workers (sex workers, farm workers, domestic workers), lesbian, bisexual and transgender women. These are groups of people who reside on the margins of South African society and are burdened by a multilayer of identities which are not accepted or normative enough to exist within the corridors of power.

Gender discrimination exists whenever any distinction, exclusion or restriction happens (or is attempted) that impairs or eliminates the recognition, enjoyment or exercise of anyone's human rights because of their gender or sex. Discrimination within the South African context often hinders women's access to opportunities, resources and societal and cultural recognition. It cannot be denied that South Africa is a deeply patriarchal society where women face discrimination. Since women are diverse and live under diverse conditions, other factors in addition to gender influence make the experience of discrimination more complex. In other words, gender intersects with other social conditions whether in the home, the community or the workplace. When we become aware of how these factors influence the experience of discrimination, we see reality through the lens of intersectionality.

Understanding intersectionality demonstrates that the layers of its impact can be

devastating on women who already fall into categories of various vulnerabilities, and it therefore leads to disadvantages for women in terms of societal priorities, as well as access to institutions, services, education, economic sectors and decision-making spaces. Recognition and access to power is limited due to the material realities they exist within.

The WLC's role is thus to bridge the gap that exists between marginalised groups and attaining substantive equality through justice. Practically, we do this by taking cases which make visible the different grounds that shape discrimination and the way in which those grounds negatively impact women, in terms of recognition and access to opportunities and resources.

The manner in which courts frame and interpret claims made by black women has previously shown that the boundaries of the sex and race discrimination doctrine are defined by white women's experiences in terms of gender and black men's experiences in terms of race². Crenshaw provides an analogy of a basement which contains all disadvantaged people on the basis of race, sex, class, sexual preference, age and physical ability who are stacked feet standing on shoulders. Those at the bottom being disadvantaged by the full array of factors and the ones at the top being disadvantaged by a singular factor which can be ameliorated but-for the existence of the ceiling above them. In efforts to correct some aspects of domination, those above the ceiling admit from the basement only those who can say that "but-for" the ceiling, they too would be in the upper room. This analogy resonates with the justice system and the way it reasons and understands the plight of marginalised groups.

The role which intersectionality plays is thus imperative within the justice system in order to propel the voice of women as close to power as possible. If justice is properly to be achieved for women, their intersectionalities and its impacts must be duly recognised by the courts, the State, and society.

¹ Kimberle Crenshaw – De-marginalising the Intersection
² Crenshaw – De-marginalising the intersection

Litigating through a feminist lens on **LIVING CUSTOMARY LAW: UKUTHWALA**

Introduction

Ukuthwala¹ is a harmful cultural practice which constitutes the forced abduction of women or girls who suffer gender-based violence (including rape), resulting in non-consensual marriage with severe consequences. These consequences include the girl-child being required to fulfil duties as a wife which are not age-appropriate, childhood pregnancy with

related life-long health consequences, the transmission of sexually transmitted diseases and even HIV/AIDS and continual subjection to abuse.²

The Centre has a specific interest in customary law and Ukuthwala, as it addresses women's rights and gender equality within the context of living African customary law. There has been a

steady stream of women who have come to the WLC's offices for advice regarding their rights in the context of customary law relating *inter alia* to relationship rights and the consequences arising therefrom in terms of dowry, marital obligations, property and inheritance rights; cultural practices that impact on health, and the like.

Ukuthwala contrary to South African law

The practice of Ukuthwala is unconstitutional with reference *inter alia* to sections 9 (Equality), 10 (Human dignity), 12 (Freedom and Security of the Person, which incorporates the right to be free from all forms of violence), 13 (Slavery, Servitude and Forced Labour), 28 (Children) and 29 (Education) of the Bill of Rights.

Section 3(1) of the Recognition of Customary Marriages Act³ stipulates the requirements of consent of both parties to a customary union and the minimum age of 18 year. These requirements are mirrored in the Marriage Act.⁴ The Promotion of Equality and Prevention of Unfair Discrimination Act⁵ prohibits unfair discrimination on the grounds of gender, including gender-based violence and any practice, including traditional, customary, or religious practice, which impairs the dignity of women and men, including the undermining of the dignity and well-being of the girl-child.

The Children's Act⁶ provides that the best interests of the child are paramount. It is contravened by the practice of Ukuthwala *inter alia* when girls are kidnapped, removed from school, subjected to harsh conditions and abused, married without their consent and to much older men, suffer ill health by bearing children at a young age and/or contract sexually transmitted disease. The South African Schools Act⁷ further provides for compulsory education for children, boys and girls. Any parent or other person (including for example a husband under a customary marriage) who, without just cause, fails to allow a child access to schooling is guilty of a criminal offence.

Certain aspects of Ukuthwala would constitute criminal offences *inter alia* in the following respects:

The Criminal Law (Sexual Offences and Related Matters) Amendment Act⁸

provides that sexual intercourse without consent constitutes the crime of "rape"⁹, and for one person to compel another to have sexual intercourse with a third person without her consent constitutes the crime of "compelled rape";¹⁰ sexual violation without consent constitutes the crime of "sexual assault"¹¹ and for one person to compel another to sexually violate a third person without her consent constitutes the crime of "compelled sexual assault".¹² Insofar as any of these acts, notwithstanding consent, is committed on someone under 16 years of age it is criminal.¹³

The Prevention and Combating of Trafficking in Persons Act¹⁴ provides that:

Any person who sells or receives another person for the purposes of exploitation (which includes all practices similar to slavery) by means *inter alia* of abduction, kidnapping, the abuse of vulnerability, the abuse of power, giving or receiving

1 The Women's Legal Centre has over the past 20 years consistently been engaging with law reform process and through litigation to address forced and child marriage in South Africa. This is a summary of the Centre's position as put before the South African Law Reform Commission as well as the Courts on the issue of *ukuthwala* and forced marriage.

2 Including physical, emotional, psychological and economic abuse; see also the WLC's submissions to the South African Law Reform Commission on the practice of *Ukuthwala* dated 27 November 2009.

3 120 of 1998 ("Customary Marriages Act").

4 25 of 1961 ("Marriage Act").

5 4 of 2000 ("Equality Act").

6 38 of 2005 (Children's Act), with similar provisions in its predecessor the Child Care Act 74 of 1983.

7 84 of 1996 ("Schools Act").

8 32 of 2007 ("Sexual Offences Act").

9 Section 3.

10 Section 4.

11 Section 5.

12 Section 6.

13 Chapter 3.

14 7 of 2013 ("Trafficking Act").

of payments or benefits to obtain the consent of a person having control or authority over such other person, is guilty of a criminal offence.¹⁵

Any person involved in the facilitation

of trafficking in persons is guilty of an offence,¹⁶ as is anyone who participates in, instigates, aids, incites, encourages, procures, or conspires with any other person to commit the act of trafficking.¹⁷

Any person who knows or ought reasonably to have known or suspected that a person (child or adult) is a victim of trafficking must immediately report this to the police, failing which such person is guilty of an offence.¹⁸

International comparators

Internationally, there are similar cases of forced abduction, marriage and abuse. Below we illustrate cases from around the world where we find the human rights framework, and the feminist lens of litigation, has succeeded in preventing harmful cultural practises.

Australia

In *R v GJ*¹⁹, a 55-year old man pleaded guilty to unlawfully assaulting and having sexual intercourse with a 14-year-old. The accused believed that his traditional law permitted him to strike her and to have intercourse with her because she had been promised as his bride when she was 4 years old. The law of the Northern Territory forbids such conduct. The judge's comments condemn the traditional belief that it is permissible to assault and have intercourse with a child, stating that change is necessary to reconcile traditional beliefs with statutory law.

Canada

In *S.(A.) v S.(A.)*²⁰ the applicant, at 16 years old, was forced to marry a man she did not know to facilitate his immigration. Pressure was exerted by her mother and stepfather who consented to the marriage and received \$500 payment from the groom. On the finding that she

had not exercised free will, the court granted a decree of nullity.

Europe

In *Hirani v Hirani*²¹ the English Court considered the case of a woman forced into a marriage by her parents. The court found the test for duress was simply whether the mind of the person had been overborne, howsoever that was caused. It granted a decree of nullity of the marriage.²²

In *Re KR (A Child) (Abduction: Forcible Removal by Parents)*²³ a girl of 17 years old was removed from the UK to India by both her parents. The English Court held that child abduction remains abduction, even when both parents are abductors and the child is nearly an adult.

In *P v R*²⁴ a 20-year-old woman British citizen of Pakistani origin was forced, by emotional pressure and threats of force, to marry a man she did not know. The court held that she had not consented and granted an annulment.

The United Nations division for the Advancement of Women published an expert paper, in May 2009, on forced and early marriages.²⁵ The paper states that few countries have criminalised forced marriage, however, in most countries

criminal offences that occurred as a part of the forced marriage can be used to punish perpetrators. Such crimes include rape, sexual violence, assault and kidnapping.²⁶

By way of legal reform in Norway, the first country to introduce legislation to criminalise the practice of forced marriage, there had been two cases convicting someone of forced marriage as at 2008.²⁷ A city court in Drammen sentenced a girl's father and brother to jail for forcing her to marry a man from Northern Iraq.

Africa

In May 2004, the Special Court for Sierra Leone included forced marriage in its statute as a crime against humanity. It saw its first conviction in 2009 against three former leaders of the Revolutionary United Front.²⁸

In Tanzania, in May 2000, a 45-year-old villager who has forcefully and illegally married a 13-year-old girl was sentenced to five years by the Babati District Court. In addition, the girl's father was sentenced to three years for marrying off his daughter for the price of 20 head of cattle.

15 Section 4.

16 Section 8.

17 Section 10.

18 Sections 18 and 19.

19 2005 *NT Supreme Court* [unreported].

20 (1988), 15 R.F.L. (3d) 443 (Ont. U.F.C.).

21 [1983] 4 F.L.R. 232.

22 Similarly, in Scotland the Courts granted decrees of nullity on the basis that duress, whether physical, emotional, psychological or economic, to a sufficient extent vitiates consent – see *Mahmood v Mahmood* [1993] S.L.T. 589; *Mahmud v Mahmud* [1994] S.L.T. 599; and *Sohrab v Khan* [2002] S.C.L.R. 663.

23 [1999] 2 F.L.R. 542.

24 [2003] 1 F.L.R. 661.

25 Thomas, Cheryl (May 2009) *Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws from Other Countries*.

26 Thomas *ibid* p.14.

27 Thomas *ibid* p.15, also explaining that Belgium is the second country to have done this.

28 Thomas *ibid* p.16-17.

Conclusion

Bringing it back home, it is clear that ukuthwala is not an isolated practise around the world – rather, it just presents in different forms and names. In South Africa, inequality presents on many intersecting levels, and ukuthwala negates the consent and freedom of the most vulnerable groups in our society; the African, rural woman and girl child. As we have seen, similar practises happen worldwide, and the human rights framework is used as a basis from which

to prevent harmful cultural practise.

While the Bill of Rights and the various domestic laws prohibit harmful cultural practices, marriage without consent, underage marriage and any form of abduction, the framework in place does not deal with the practice holistically or coherently.

The existing law can be used in a piecemeal fashion to deal with aspects

of the practice, but this is inadequate and does not satisfy the constitutional and international obligations on the State, nor does it take into account the cultural context of the practice and the intersecting discrimination that women suffer as a result of their race, gender and socio-economic circumstances. It is in these cases that it is important to apply a feminist lens in litigation, advocacy and activism on the issues in order to sufficiently affect change.



Launch Of Marriage & Relationship Rights



The Bhe Case 2008



Zolisa March 2009

ADVANCING WOMEN'S RIGHTS IN RELATIONSHIPS: Recognition of Polygynous Muslim Marriages

Introduction

The struggle for the recognition of Muslim marriages¹ has been a key focus of the WLC since its inception, and continues to be one of the areas of work that demands the most capacity and resources. Over the years, the WLC has often been approached for legal advice about the impact of recognition and regulation of marriages in South Africa under our Constitution. In some instances, we have litigated on behalf of clients. In other instances, we have participated in law reform processes through the South African Law Reform Commission and various government departments legislative development processes. The WLC has also actively participated in engaging various parliamentary portfolio committees as they have grappled with law reform and the adoption of legislation related to marriage and family.

The cases that we have undertaken have highlighted the vulnerability of women married under Muslim personal law,

and the vulnerability of their children, when those marriages are dissolved or upon the death of a spouse. As recognised by the Court in *Daniels v Campbell NO and others* 2004(5) SA 331 (CC) and by Mahomed CJ in *Amod v Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)* 1999(4) SA 1319 (SCA), much of the vulnerability can be understood as "an artifice of prejudice" (Daniels at para 19) in light of the fact that South African law has not accorded legal recognition to Muslim personal law. This can be explained by the fact that the law only protected parties in marriages "solemnised and recognised by one faith or philosophy to the exclusion of others" (Daniels at para 24), and by the historical legal intolerance of marriages which were potentially polygynous in nature.

The work in this area has been driven by the women who seek assistance from the WLC daily. The position of women

married according to religious rites, such as Muslim and Hindu personal law, has therefore developed organically as a focus of the WLC.

In addition, the WLC participated in the Recognition of Muslim Marriages Forum, an initiative of the Commission on Gender Equality, which advocated for the recognition of marriages concluded in terms of Muslim Personal Law. The WLC therefore has a rich history of developing feminist jurisprudence in the field of family law and expanding women's rights in marital relationships. Over the years the WLC has engaged robustly with the issue of polygyny within religious marriages and Muslim marriages. This article summarises some of the key arguments that the WLC has placed before Court to ensure that women have their rights to housing, land and property protected when they have opted to enter a polygynous marriage.

Submissions to advance recognition and protection of women

Early cases presented an opportunity to engage with the legal recognition and rights realisation in polygynous marriages and the Intestate Succession Act 81 of 1987 ('the ISA') provided fertile ground for litigation. In *Gabie Hassam* we sought to advance the rights of women who had entered a polygynous marriage. The Constitutional Court *inter alia* declared (as a matter of interpretation) that the word "spouse" in the ISA includes a surviving partner to a polygynous Muslim marriage in *Gabie Hassam* in a case where both marriages were solemnised according to Muslim rites.

The issue of recognition, but also polygyny, is an issue that is in the public interest because it affects many South African women's lives. Failure of the legislature to address this issue by way of law reform has served to confirm and entrench pre-existing imbalances that

deny women substantive equality.

In *Daniels*, the Court had already held that the ISA applies to parties to a *de facto* monogamous marriage solemnised under Muslim rites but expressly left open the question whether parties to polygynous marriages are also protected. Moreover, although parties to polygynous *customary* law marriages are afforded the protections of the ISA as a result of the order made by this Court in the *Bhe* case, this was not because this Court held that the Constitution required this, but rather as a just and equitable *remedy* granted when the Court declared invalid aspects of the customary law of succession and more particularly its principle of primogeniture which precluded women from inheriting property. That order expressly applies only to parties to marriages that were governed by section 23 of the Black Administration Act 38 of

1927. (See *Bhe*, para 136, item 6).

The exclusion of widows in polygynous marriages from the ISA protections breached their rights to dignity and equality, on the intersecting grounds of gender, sex, marital status, religion, belief or culture. In respect of the right to dignity, the ISA devalued women in polygynous marriages by treating them as unworthy of its protection. By doing so it stigmatised an already vulnerable group of women who are not (always) able to exercise any power over decisions of their spouses whether to marry again, and who continue to participate in family life as spouses within such marriages.

The indirect discrimination was therefore abundantly clear, and its unfairness, based on sex and gender. The purpose of the ISA is, as Sachs J recognised in *Daniels*, primarily to benefit vulnerable widows

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The Women's Legal Centre has advanced the need for our Courts to recognise polygamous marriages to enable women to benefit from their rights in marriage and to ensure that where women have made informed decisions to enter polygamous marriages their rights are protected.

and because the people who carry the burden of exclusion are primarily women. As indicated above, the excluded women are women who are not (always) able to determine whether their husbands will conclude polygynous marriages or not.

The question before the Courts in WLC's

opinion was therefore not whether the Constitution requires polygynous marriages to be recognised but whether, in view of the protective purposes of the ISA, the affected group of women can, in view of the rights to equality and dignity, lawfully be excluded. This approach, the WLC contends, is in line with the

findings of the Court in *Daniels*, where it was held, at para 25, that the question is "not whether the applicant was lawfully married to the deceased, but whether the protection which the Acts intended widows to enjoy should be withheld from relationships such as hers."

Conclusion

The institution of polygyny raises complex constitutional questions relating to deeply held perceptions and beliefs about culture and religion. It also raises complex questions about gender equality in our communities and homes. This Court emphasised in the *Daniels* case, at para 124, that it made no pronouncement about the constitutional validity of polygynous marriages. The legislature has now of course enacted legislation regulating the circumstances in which a customary law polygynous marriage will be recognised (the Recognition of Customary Marriages Act 120 of 1998). However, no such legislation has yet been enacted in respect of religious marriages where the

practice is also followed. It has therefore been left to the Courts in the cases of Muslim marriages to extend recognition and protection of rights.

The institution of polygyny conflicts with certain international human rights instruments including the Convention on the Elimination of All Forms of Discrimination Against Women. However, whatever the impact of those international norms on the constitutional validity of polygyny under the South African Constitution, the WLC submits that international law supports the principle that women in polygynous marriages must be afforded equal protection of the law.

That the issue of polygyny is contentious is not in dispute. There is however a continued need to recognise and respond to the vulnerabilities of women in polygynous marriages-whether the vulnerability stems from the polygynous nature of the marriage itself or whether women are left particularly vulnerable because there is a lack of legislative recognition. The developments within our communities religious or custom requires a response. The WLC's position has been that a shift in legal policy and law reform is required in order to ensure the equality and dignity of women in such relationships.



Mrs Daniels



Women's housing, land and property rights - **FROM A GENDERED LENS TO A FEMINIST APPROACH**

In January 2017, the World Economic Forum reported that women own less than the 20 percent of the world's land. In South Africa, women have similar struggles in respect of women's ownership of, and control, over land. Women have different relationships throughout their lives, through which issues of land, housing and property rights intersect. It is an area of rights which is of critical importance for the livelihood and survival of many women. The Women's Legal Centre's work in this area has specifically been focused on these rights as they intersect with marriage, inheritance and cohabitation.

One such example is the *Awardien* matter, which involved the Cape Town Community Housing Company ('CTCHC'). The 12 Applicants, of which eight are women, were all beneficiaries and purchasers of homes under a state-subsidised housing project administered via the CTCHC, which was set up to provide access to housing to disadvantaged persons in South Africa, and to give effect to the right to housing in South Africa. The Applicants thus applied, qualified for, and received housing in terms of the scheme established by CTCHC, and for which it was a requirement that they pay a certain instalment amount each month.

Unfortunately, due to deficiencies with the homes they occupied, and other financial constraints, they lagged with the instalments to the CTCHC. However, instead of entering into a process of meaningful engagement that would recognise and accommodate the vulnerable positions of the Applicants, the CTCHC opted to cancel the instalment sale agreements, failed to disclose to the Applicants the amounts owing in terms of the instalment sale agreements, and sought to sell the Applicants' homes to the S&N Trust. Additionally, the CTCHC

chose not to have the homes remain within its social housing scheme. The purported cancellation and failure to provide an amount in the notices issued to the Applicants of their outstanding debts became the subject matter of the application to the Western Cape High Court, and ultimately the Constitutional Court.

The outcome of the initial application at the High Court was a negative one, which found no fault with the deficient notices issued by CTCHC, the cancellation of the agreements, or the immediate sale of the homes to the Trust. Even more, the High Court found that each Applicant, who had struggled to maintain their respective payments in terms of their instalment sale agreements, were responsible for paying their share of the costs of the application.

Aware of the highly technical approach adopted in the judgment of the High Court (per Judge Binns-Ward), and consequently its prejudicial consequences for families and particularly women in need of social housing, the WLC entered the matter as *amicus curiae* in the Constitutional Court.

In its submissions, the WLC highlighted that women are not a homogenous group who need and use the land for the same purpose and reason. Women are diverse from different backgrounds, races, ages and come from varying economic and educational backgrounds. Any legislative or policy provisions must consider the intersecting way women engage with and use land.

Practical considerations must inform legislative and policy development in order to effect substantive change in the lives of women. South Africa's legal framework aims to promote women's rights to equality and dignity and to

provide legal protection for women in formal marriages (civil marriages, civil unions, and customary marriages). At present there is a vacuum in terms of the protection of women in unregistered religious marriages, and in domestic partnerships. It is within this vacuum that women's constitutional rights are being violated in that they struggle to access their right to land, housing and property at the dissolution of their marriage or cohabitation (whether by death or divorce).

In South Africa there is no legislation that regulates the recognition of Muslim Marriages and the proprietary consequences thereof. Similarly, there is no legal framework regulating cohabitation and protecting proprietary consequences in relationships where parties choose not to enter a legally recognised marriage but cohabit.

In these instances, where the relationship breaks down either because of death, divorce or mutual separation, women are left with little to no legal recourse in respect of the house they may live in, the land which they occupy or farm on, or the property which were jointly accumulated during the subsistence of the relationship.

Statistics South Africa has recently released the marriage statistics in our country and recorded only 3978 registered customary marriages¹ in South Africa in 2016, which clearly indicates that there is a crisis in protecting women's property rights even under a legislative framework. Based on our experience, couples have not stopped getting married in terms of custom. However, they have stopped registering their marriages, which leaves women at a disadvantage as they cannot claim their matrimonial property without going to Court to obtain recognition of their marriage.

¹ In 2016 Stats SA recorded 3 978 customary marriages registered with the Department of Home Affairs, which is an increase of 14.7% based on 3 467 in 2015, but which is still nowhere close to 20 301 registered marriages in 2004.

Recognizing vulnerability in terms of women's rights to land, housing and tenure

Women in South Africa are not experiencing discrimination and evictions for the first time. The legacy of the 1913 Land Act has a rich history of how women were subjected to physical, social and economic plundering. It is from this legacy that we need to build a foundation to ensure that women are no longer left behind. Women continue to bear the brunt of discrimination based on past injustices. Legislation, policy and the presence of customs and cultures seeped in patriarchy has supported women's ongoing discrimination in respect of access to land, housing and tenure security and ownership.

In terms of natural resources, access to resources such as land is critical for vulnerable rural women as well as urban women, to improve their living conditions, food security and livelihood. Women's access to land and housing remains peripheral at best even though the state has enacted several key strategic laws and policies to provide for equal treatment of women.

Women in both rural as well as urban centres struggle with tenure security and often find themselves bonded to paternalistic policies which bind their tenure rights to that of the head of their households ("men"). Similarly, and increasingly, we are witnessing women in urban environments being vulnerable to evictions. The urban environment has for many years attracted women to cities in order to get work and improve their and their families living conditions. Access to land and housing in urban centres have increasingly become problematic in cities such as Cape Town where apartheid spatial planning and development continue to keep women from enjoying access to housing which is near their places of employment.

In the inner city where many of our

most vulnerable clients work, the value and prices of property has increased exponentially to the point where ordinary women can no longer afford to purchase property or rent property in close vicinity to places where they work. Thousands of women make use of public transport daily in order to reach places of employment in areas which are still considered white neighbourhoods. Housing subsidies and access to state linked finance schemes make access to housing a reality for the vast majority of working-class women

Poor and working-class women historically found it extremely difficult to access housing and are still currently recognised as a vulnerable group. The Constitutional Court has accepted and recognised the vulnerable position of women in South African society, and the difficulties they face in realising their rights in terms of access to housing.

Sachs J, in *PE Municipality v Various Occupiers*², discussed what is meant by 'considering all the relevant circumstances' in terms of the Prevention of Illegal Evictions and Prevention of Unlawful Occupation Act,³ stated that the '*particular vulnerability*' of those occupiers referred to in section 4 of the Act could constitute a relevant circumstance. Women constitute one such vulnerable occupier.⁴ As he then was, Moseneke DCJ recognised at para 147 of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*⁵ that women were of South Africa's most vulnerable groups, which also included the unemployed and children.

In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*⁶ Van der Westhuizen J recognised that the City's assessment as to whether emergency accommodation should be made available excluded

the individual situations of the persons at risk of eviction. Van der Westhuizen J noted that '*affected individuals may include children, elderly people, people with disability or women-headed households, for whom the need for housing is particularly great or for whom homelessness would result in particularly disastrous consequences.*'⁷

Quoting Anna Pellat, Amanda Spies supports her thoughts on the relevance of a feminist voice in litigation, that:

*In order to make law conscious of, and responsive to, gender oppression in all of its manifestations, it is necessary to challenge signifying rules and conventions that denigrate and erase the difference that women represent and, at the same time, to find ways of re-working the discourse in order to represent who women are and what they experience in palpably real and full terms.*⁸

These acknowledgements bring light to the fact that gender inequality, in respect of issues of land and housing, are critical as it lies at the heart of poverty, exclusion and insecurity of women worldwide. Protecting and strengthening women's access and rights to land and natural resources helps to ensure that women can provide for their material needs, as well as the needs of their families and communities.⁹ Research indicates that when women have equal control over land, housing and property, they can better address challenges including HIV/AIDS and its devastating impact on women's lives.¹⁰ As the courts have done in the cases mentioned above, it is crucial to recognize a feminist approach when it comes to women in terms of land, housing and property rights. A failure to do so continues to render women, as well as in many instances, their children, vulnerable.

2 *PE Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

3 Act 19 of 1998.

4 *PE Municipality v Various Occupiers* at 30.

5 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454.

6 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at 92.

7 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* at 92.

8 Amanda Spies 'Considering the impact of amicus curiae participation on feminist litigation strategy' *SAJHR* (2015) 136 at 139.

9 *The State of Food and Agriculture: 2010 – 2011* (UN Food and Agriculture Organisation, Open Society Foundation *Securing Women's Land and Property Rights: A Critical Step to address HIV, Violence and Food Security*).

10 Caroline Sweetman, *How Title Deeds make Sex Safer: Women's Property Rights in an era of HIV* (Oxfam International).



ACTIVISM IN FEMINIST LAWYERING – 20 years of Strategic Litigation to advance women’s rights

by Chriscentia Blouws and Zamantungwa Khumalo

Intro

Many applaud South Africa¹ for its progressive Constitution. In particular, it's Bill of Rights which contain provisions in relation to socio-economic rights and protections. However, these progressive laws on paper have not found their way into substantive change and equality for women who live in poor, working-class communities. Many of these communities are still in a state of poverty, experience high levels of violence and have a lack of access to basic health and sanitation

services. Over the past 24 years, under our Constitutional dispensation, we have seen the social justice sector launch landmark cases in relation to human rights and the advancement of social justice through the courts and advocacy movements.

The Women's Legal Centre, looking back on the past 20 years of its existence, has realigned its identity as an African Feminist law centre. This identity translates to activist feminist lawyering,

which is the theme of its 20-year anniversary celebration. This moment allows us an opportunity to engage with the role that litigation has played in transforming women's lives in South Africa and whether feminist activism can form part of strategic litigation in a meaningful way.

This article also allows us to reflect on activism and feminist lawyering as two young feminists practicing law in the public interest sector.

Context

We are in an era of Constitutional democracy and supremacy, with our Constitutional Court sitting at the apex of legal decisions and precedents. Activism has played a critical role in the history of our country and the democracy which we currently enjoy. In many ways, however, activism at the time and within the space of apartheid was against the legal framework and justice system that prevailed. The Courts were not instruments of justice, but rather injustice. Progressive lawyers were often called upon to assist activists to escape or bypass the discriminatory laws of our past. The Courts were places of oppression where the apartheid laws of the time were strictly enforced, and black bodies were the victims of the justice system.

Our constitutional democracy has provided us with a unique opportunity and space in time. The early years of the adoption of our Constitution and the

recognition of our rights-based framework provided fertile ground for the creation of human rights-based jurisprudence. It also provided a unique opportunity to combine rights-based activism and litigation to give normative content to the rights contained in the Constitution. During our studies in preparation for joining the legal profession, our lecturers could not make the connection between activist-inspired and led litigation and the Court. We were taught to view these two as separate tools from our legal system, and this is what one is taught as a young lawyer in training. Perhaps this was because there was an impression that under the Constitution we would no longer need to take to the streets and that there would be no need for activism. It was, after all, during the time when many believed in the dream of the rainbow nation.

Through our lived experience, we have found this to be untrue. As feminist

lawyers we realise that using the law and our courts to highlight the intersectionalities of women, and casting a gendered lens onto litigation, is a form of activism itself. Over the past 20 years, we have seen progressive judgements from the Constitutional court. Many of these judgements related to the normative content of socio-economic rights contained in the Bill of Rights and focused on the State's obligation to recognise, realise and protect these rights. Not too many of these cases, however, have focused on women and the impact of discrimination and patriarchy on their rights realisation and enjoyment. When lawyers litigate and use the law in a normative manner, they set progressive human rights precedents, whilst at the same time these very judgments fail to provide any form of substantive equality for the women who are right holders in respect of the judgments.

¹ This reflective piece was written by Chriscentia Blouws and Zamantungwa Khumalo for the 20th Anniversary publication.

Land and Housing

The *Grootboom*² judgement is remembered as one of our landmark judgements, where the Constitutional Court ordered the state to provide access to housing, healthcare, sufficient food, water and social security to those who are unable to support themselves and their dependants (in an eviction). This judgement also confirmed that persons who will be rendered homeless due to an eviction are entitled to emergency housing. Although this case set what was to be a life-changing precedent, it lacked a specific gendered lens which would have highlighted the position of the applicant, Mrs Grootboom, as a single mother within a specific context of being homeless in South Africa. The case itself does not speak to the effects of emergency housing or standards of alternative accommodation which is considerate of women similarly placed as Mrs. Grootboom³. We all know that for her, the judgement was not life altering as she died without ever having set foot in her state subsidised home.

The judgement has however had impact in the lives of many other women in the manner in which it has been implemented by our municipalities. It has created further spatial segregation and a continuation of communities who live in poverty, crime and are subjected to gender-based violence. The City of Cape Town, for example, have continued to

provide emergency housing to evictees on the urban periphery and outskirts of the Western Cape where the community is geographically removed from access to transport and basic services such as health care and proper sanitation.

The case of *Baron v Claytile*⁴ is another illustration of when a court did not consider the impact its judgement would have specifically on women and their lived realities when evicted to *Wolverivier*⁵.

Women make up a key population in our society, having been identified as a vulnerable group in respect of poverty, violence and HIV/AIDS. In this case however, the Constitutional Court confirmed an eviction to *Wolverivier* as suitable alternative accommodation that fell within the available resources of the State. The Court here balanced the rights of the owner to enjoyment of its property and the States obligation to provide alternative accommodation. The apex court confirming the suitability of *Wolverivier* lacked a gendered lens as it did not fully interrogate the effect the order would have on the women and the precedent this would set in lower courts ordering the eviction of women headed households. No evidence was led to the suitability of *Wolverivier* for women and girls in relation to violence, distance to work and school, as well as how it would perpetuate women and girls being

trapped in cycles of poverty and violent sexual crime.

The case presents an opportunity to further speak to the issue of how and when presiding officers become more involved in cases to interrogate whether rights are in fact being protected when agreements are reached between parties in litigation. The adversarial system requires the presiding officer to play the position of a referee to ensure a just and fair outcome. But what does one do when it is evident that the outcome, even when agreed to by settlement, will not be just or fair as the impact on all parties within their own circumstances have not been assessed? Instead the case has set a precedent which will have a negative effect on a broader class or group of women going forward.⁶

Of particular risk are those women who appear in eviction matters unrepresented facing eviction in our lower courts. We have too often seen how Magistrates in the lower courts consider personal and relevant circumstances in a manner which plays a role in the adjudication only to finalise the matter and not to truly consider the implications of the eviction on the women. Personal circumstances become a formality for landlords obtaining an eviction order as opposed to serving as motivation as to why an order should not be granted.

Sexual offences against women

A gendered lens is, of course, not only required in litigation related to socio-economic rights realisation. Such a lens and feminist view is critical to women who are survivors of sexual violence in sexual offences cases. The Case of *Omoso*⁷ is an illustration of the consequences when a presiding officer steps into the playing field and adjudicates a matter with a victim-centred approach. In this matter,

the judge took heed of the victim's state of trauma during the trial and would allow her time to compose herself when she would break down or become too emotional. He also interjected in the cross examination to ensure that the record reflected what happened in court as opposed to what the record could hear. In doing so the presiding officer's aim was to ensure that a fair and just

outcome was reached. The defendants accused the presiding officer of being biased and favouring the State and its witness. The presiding officer responded with the following "*...presiding officers rely heavily in their function on the assistance of legal practitioners who are first and foremost officers of the court. Adjudication of cases is not a game. It is not about who wins and who loses. It*

2 Government of the Republic of South Africa and Others v Irene Grootboom and Others (11) BCLR 1169 (CC)
3 The High court which first heard the case of Mrs Grootboom in fact established all of these rights and principles based on the best interest of the child in the Constitution and established its position linked to the rights of children's right to access housing, healthcare, sufficient food and water, and social security.
4 Isak Baron and Others v Claytile (Pty) Limited and Another CCT 241/16
5 *Wolverivier* is a community on the outskirts of Cape Town where communities who have been evicted are placed.
6 *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet N.O.* [2017] ZACC 18
7 *Omoso and Others v S* (CC 15/2018) [2018]

is about doing justice. The primary and ultimate duty of each officer of the court is to see to it that justice is not only seen to be done but is done.” In our opinion, this was an impressive and progressive approach taken by a presiding officer which showed a victim-centred approach towards a woman who had experienced sexual violence.

In South Africa, over 100 women are reported to be raped per day⁸. This is a harsh reality for all women who live in fear of sexual violence within their public and most intimate spaces. Often, the reality of sexual violence is underplayed and not painted as the violent and intrusive act which it is. Pumla Gqola states that ‘women’s stories of rape are believed or doubted based on the relationship between plausibility and credibility. This is true inside and outside the court.’⁹ Gqola argues that if rape looks like and sounds like what the hearer wants to hear, then the rape is plausible. However, should the story be far removed from the hearers preconceived ideas about rape, then the person who is raped is less likely to be believed.

The “believability” of a survivor of sexual violence depends on several preconceived ideas. These ideas exist within the South African Police Services, the National Prosecuting Authority as well as with the judiciary. We have seen these institutions paint the norm and idea of an ideal survivor, what this survivor looks like, and how the sexual offence should have occurred. Should the rape not meet this criterion, the survivor is not believed, and the charge or case is not taken forward.

Over the last three years, movements such as the #MeToo, #TimesUp ‘RememberKhwazi’ and #Totalshutdown movement have shone the light on rape,

sexual harassment and violence globally in public and private spheres. They have provided womxn with the platform to openly disclose and report sexual offences. They have also provided a much-needed support system for womxn who have chosen to come forward. These movements have demonstrated that there is no ideal complainant of rape nor is there a less or more severe form of rape or any sexual offence and they have illustrated that womxn continue to be victimized, bullied and tortured in different spaces.

Movements, however, cannot work alone. As mentioned above, they need all the actors in the criminal justice system to play their role effectively and efficiently. A recent study¹⁰ conducted by the Gender Health and Justice Research Unit¹¹ has shown that dedicated Sexual Offences Court staff members are overworked and untrained. The court rooms have not been built as per the requirements of the MATTSO¹² blueprint and the required equipment has not been fitted into the court rooms to make the courtroom survivor friendly. The study has also revealed that court staff and presiding officers are not provided with mental health support and complain of working in stressful environments which are centred on meeting departmental targets. This results in prosecutors and presiding officers working to meet targets, and in turn creates a working environment and pressure which does not allow them to apply themselves in a manner that is victim-centred.

Here, the judiciary plays an important role and is the only hope for the complainant to find justice. In the case of *Mudau v S*¹³, the court was asked to set aside the conviction and the sentence of a 47-year-old man who was accused of raping his 13-year-old niece. In coming to its

decision to set aside the life sentence the court stated “It must also be accepted that this was not the most severe form of rape and that the appellant desisted when he realized that the child was crying. There is also no evidence that the child suffered any ongoing trauma, over and above the trauma that she would inevitably have experienced as a result of what had happened...” The wording used in the judgement supports the argument advanced by Gqola above. If a rape does not meet the criterion of the hearer, then it is not considered a severe rape. The court in this case uses language such as “not the most severe form of rape” as a mitigating circumstance and justification for deviating from the life sentence. This is a desensitized approach which is not conscious of the victim’s circumstances.

Hoffman-Wanderer argues that the courts practice of departing from the mandatory sentence has created a precedent which ‘minimises the inherent violence of rape’¹⁴. Hoffman-Wanderer correctly argues and concurs with Gqola that the act of rape is not considered a violent act on its own and needs to happen within another violent act such as kidnapping or gang rape for it be considered particularly violent and thus warrant the life sentence conviction. This approach does not place the complainant at the centre but rather looks for behaviour conducted by the complainant, such as their sexual history, lack of physical injuries or psychological harm¹⁵ which should mitigate the sentence of the perpetrator. This perception has contributed to the already violent society that women live in where women’s bodies bear the brunt of violence, poverty, socio-economic discrimination.

The case of *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others*¹⁶ had a different outcome to the views illustrated above, and shows

8 Africa Check Fact Sheet: South Africa’s crime statistics 2017/2018

9 Gqola P ‘Rape A South African Nightmare’ (2015)

10 Gender Health and Justice Research Unit ‘Improving Case Outcomes for Sexual Offences Cases Project : Pilot Study on the Sexual Offences Courts’ (2018)

11 Based at the University of Cape Town, South Africa

12 Ministerial Advisory Task Team on the Adjudication of Sexual Offences Matters (2013)

13 *Mudau v The State* (764/12) [2012] ZASCA 56 (9 May 2013)

14 Hoffman-Wanderer ‘ Sentencing and Management of Sexual Offences’ in Smythe & Artz ‘Should We Consent?: Rape Law Reform in South Africa’ Juta & CO (2008)

15 *S v Mahomotsa*, unreported judgement dated 28 July 1999, case no 29/99, Free State provincial division

16 *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC) (14 June 2018) para 53-” Personal circumstances of the survivor may change; with time comes maturity and an ability to process the trauma suffered as a result of the violence. She may seek out psychological help, such as counselling, which empowers her to enter the criminal justice system. The WLC points out that survivors develop resilience over time, and together with resolution of the trauma are able to report the matter to the police or the survivor may change communities with which she engages which may be more accepting of women who are sexually abused. She may have a supportive partner later on in life who believes her and supports and encourages her to report to the police. Someone else may report a sexual offence committed by the same perpetrator which may give the survivor courage to report.”



The Women's Legal Centre, looking back on the past 20 years of its existence, has **realigned its identity as an African Feminist law centre.** This identity translates to activist feminist lawyering, which is the theme of its 20-year anniversary celebration.

that the court could be a progressive platform for victims of sexual violence when a court moves away from their archaic understanding of rape and sexual violence against women. In this case, the Constitutional Court relied on Section 12(2) of the Constitution when it stated that "sexual abuse in all forms, not only rape, infringes on the survivor's right to bodily and psychological integrity". The Court went further and acknowledged that there are several reasons why a survivor would not report the sexual offence against them after a long period of time. The Court in this case decided to abolish the statute of limitation on the reporting of all sexual offences. The Women's Legal Centre intervened as *amicus curiae*¹⁷ in this matter and made submissions to support and highlight

the above mentioned, as well as the intersectionality of race, class and personal circumstances in the reporting of sexual offences.¹⁸ The understanding of rape and its psychological effect on the complainant played a vital role in the court's decision. The court understood that there is no ideal complainant and there is no ideal time for a complainant to report the case. This was an instance of a court applying a victim-centred approach which resulted in a progressive judgement.

The Constitutional Court's approach is a far-removed response from the 2006 *S v Zuma*¹⁹ case which saw the presiding officer deliberating on the application to adduce evidence of the complainant's sexual history. The application, as

brought by the defence, was granted by the presiding officer and saw the complainant being cross examined on her sexual history. In granting this application, the presiding officer did not consider that due to the doctrine of precedence, his decision would be binding on lower courts which hears most rape cases. Allowing the sexual history of the complainant which is not "in respect of the offence being tried"²⁰ violates the complainant's right to dignity, privacy and equality and is not centred on the survivor's rights. This is like several decisions made by both lower and higher courts where the complainant is reduced to a witness and not placed at the centre of the process for whom justice is sought.²¹

Conclusion

The WLC has realized the importance of using the law as a form of activism by casting a specific gendered lens onto every case it has undertaken, in order to highlight the vulnerabilities of women and the violations of their human rights. A feminist approach to litigation recognizes that no one woman is the same, and looks at the intersectionality of race, class, age and socio-economic circumstances.

The WLC has had some success in combining feminist activism and litigation as powerful tools to shift patriarchy and the discrimination which it leads to. We as young feminist litigators, are hopeful that our courts will build on some of the progress that has been made, and will present themselves as places of transformation. We also realise, however, that all actors, including the judiciary

and legal practitioners, need to be adequately trained on using a feminist lens in relation to litigation - in particular - how to frame and advance arguments which are sensitive to the lived reality of women, in order to truly seek to attain substantive justice and accountability.

¹⁷ The WLC was amicus in the High Court and was joined as Respondents in the Constitutional Court
¹⁸ *Levenstein and Others v Estate of the Late Sidney Lewis Frankel and Others* (CCT170/17) [2018] ZACC 16; 2018 (8) BCLR 921 (CC); 2018 (2) SACR 283 (CC) (14 June 2018) – Women's Legal Centre Heads of Argument
¹⁹ 2006 (2) SACR 191 (W)
²⁰ Section 277 of Criminal Procedure Act 51 of 1977
²¹ *S v Njikelana* 2003 (2) SACR 166 (C) and *S v G* 2004 (2) SACR 296 (W).

Accountability through **INTERNATIONAL MECHANISMS:** Engaging the Commission on the Status of Women to advance women's rights to be safe from violence.

This is an extract from the Women's Legal Centre communication to the United Nations Commission on the Status of Women in 2014. This extract contains the submissions specifically on violence against women, although the content of the submissions was broader. It highlights key issues in the area of Violence Against Women, and provides valuable insights from our work.

Introduction

1. This communication reports on the status of women in South Africa in relation to the following aspects:
 - Violence against women (including sexual violence, domestic violence, sexual harassment, and the failure of the State to adequately investigate, prosecute, and punish perpetrators of violence against women)
 - Virginity testing
 - Child abductions, including forced marriage and the practice of "ukhutwala"
 - Refugee women
 - Forced sterilisations
 - Adult sex work, including arbitrary arrests of women, deaths and torture of women in custody, violation of the rights of female human rights defenders to freedom of expression and assembly and threats or pressure exerted on women not to complain or to withdraw complaints
 - Violations of the right of women to own and inherit property
 - Stereotypical attitudes towards women
 - Human trafficking
 - Unfair employment practices based on sex, including unequal pay
2. South Africa signed and ratified the Convention on the Elimination of All forms of Discrimination against Women ("CEDAW") on 15 December 1995 and acceded to the Optional Protocol to CEDAW in March 2005.
3. The 1995 Beijing Platform for Action (BPFA) issued by the United Nations Fourth World Conference on Women and signed by South Africa contains key commitments that governments all over the world should comply with. The Platform places the empowerment of women at the centre stage and it also recognizes that women's rights and empowerment are necessary for the advancement of all humanity. South Africa has ratified the Beijing Platform for Action (BPFA).
4. South Africa has a progressive Constitution, which guarantees equality for women as well as the right to freedom from violence, and access to socio-economic rights such as housing, land, fair labour practices, and health. Unfortunately, there is a vast chasm between the rights contained in the constitution and the everyday lives of the majority of South African women.
5. By providing statistical data, case studies and an analysis of the impact of laws and policies on women, this communication will illustrate that the government has failed to exercise the political will and invest the necessary resources to ensure the realisation of women's equality in South Africa. There are instances where the state has failed to meet its international obligations, contained in the aforementioned and other treaties that South Africa has ratified. In addition, where the laws and policies are in place, the state has failed to implement and deliver, thus undermining the human rights of women.

We briefly set out the socio-economic conditions of women in South Africa below.

General Socio-economic Context

South Africa has one of the widest income disparities in the world. The divide between the rich and poor has steadily increased since the year 2000, with approximately half of all South Africans living below the poverty line. Poverty and inequality in South Africa are characterised by race and gender, with the per capita income of black households only 13% of that of white households, and female headed households only 46.2% of that of male headed households. It is estimated that 60% of black South Africans remain

poor and live in deteriorating socio-economic conditions. Female-headed households are the poorest households in South Africa with rural women headed households bearing the brunt of poverty. According to the South African Institute on Race Relations (2013), the unemployment rate for women is 28.3%, excluding those women who are unemployed and have not yet worked, compared to 23.4% for men. Including those women, the unemployment rate is 41.2%, compared to 32.8% for men, with

black African women having the highest unemployment rate at 30.8%. The same survey shows that 55.3% of discouraged work seekers are women, translating into 1,310,000 in real people terms. African women make up the bulk of these discouraged work seekers at 94%. The 2013 General Household Survey shows that 41.2% of households are headed by women and 34.6% are headed by black African women. The dependency ratio for African people (not disaggregated by gender) is 3.3, which means that 7,335,700

African dependents are impacted by African people's unemployment. It is evident from these statistics that the most vulnerable members of our society are black women.

1. When women are employed, they earn less than men do. According to Statistics South Africa, the annual average income of a female in 2011 remains only slightly higher than the annual average income of a male in 2001. Women are generally employed in highly vulnerable job sectors, such as domestic, casual or seasonal employment and in the informal sector. With more women than men living in informal settlements, women have less access to basic services such as sanitation, refuse collection and electricity in urban and semi-urban areas as compared to their male counterparts. More women than men live in rural areas, far from schools, courts, public administration and health services.

Women are further economically disadvantaged by the discriminatory application of customary law, lack of access to land rights and the failure to recognise religious marriages and domestic partnerships.

2. The General Household Survey of 2013 found that women made up the bulk of those without any formal education, with 6.7% of women over the age of 20 having no formal education compared to 4.1% of men. Black African women make up the majority of uneducated women at 95%. By the age of nineteen, 23% of black African women are mothers and 27.3% have been pregnant at least once. When asked why they did not further their education, a staggering 14% of women indicated pregnancy as a factor. Women whose children live with them spend 10 times as much as men do on childcare and even women with no children of their own tend to spend

more time on childcare than men who have their own children living with them. Moreover, although approximately 11.7 million children have benefited from the child support grant since 1998, women are still three times more likely to participate in caring for other people, spending an average of 80 minutes a day on child care. Overall, women are 21.1% more likely to take care of others than men. Women headed households usually include children and 46% of African children live only with their mothers.

3. The aspects of customary law that rely on a gendered hierarchy further economically disadvantage women. Considering their vulnerable circumstances, and important social function, it is of particular importance that family law rules be carefully crafted to cater for black, women headed families.¹

Violence Against Women

Sexual violence

In South Africa violence against women has reached epidemic proportions, one of the highest rates in the world of countries collecting such data.² It exists in millions of households,³ in every community, in every institution, in both public and private spaces. Violence against women cuts across race, class, ethnicity, religion and geographic location. The history of the country is a violent one, including slavery, imperialism, colonialism and apartheid, and then the armed struggle for self-determination. All these have left in their wake social and gender relations of a militarised society that have nurtured extremely violent masculinities to the detriment of women.⁴

1. Official police statistics, fraught with problems of under-reporting, corruption, codification of crimes

and lack of disaggregated data only paint part of the picture. Even with these limitations, South African Police Services (SAPS) statistics for reported sexual offences were 63 818 in 2007/8, 71 500 in 2008/9, 64 514 in 2011/2012, and 66 387 in 2012/2013, with women consistently making up over half of the victims.⁵ The reality is that only 1 in 9 sexual offence survivors report the crime to the police.⁶

2. The Treatment Action Campaign reported in 2008 that one in three South African women would be raped in her lifetime. The National Institute of Crime Rehabilitation estimates that in actuality there are 494,000 rapes each year.⁷ The same study indicated that one woman is

raped every 17 seconds in South Africa and that between 28% and 30% of first sexual encounters are forced.

3. Many women live in housing and communal environments that place them at risk of violence⁸ as they are reliant on walking or public transport in environments characterised by the absence of lighting in the night. In one study, 29% of women reported having been gang raped when they were walking to or from particular destinations⁹. Other studies have shown multiple perpetrator involvement in 25-55% of rapes, with the number of perpetrators ranging from 2-30.¹⁰

1 Bonthuys and Albertyn, Gender, Law and Justice, Juta 2007 at page 198

2 Some statistics: For rape statistics as reported by the South African Police Services see: <http://www.saps.gov.za/statistics/reports/crimestats/2008/march_april_2001_2008/category/rape.pdf> (accessed 20 Sept 09); Ursula Lau Intimate Partner Violence Fact Sheet, research undertaken by the Medical Sciences Research Council reveals that 1 in 4 women in the general South African population has experienced physical violence at some point in her life and a national study of female homicide reveals that every 6 hours a woman is killed by her intimate partner. <<http://www.mrc.ac.za/crime/intimatepartner.pdf>> (accessed 10 Sept 09). According to People Opposing Women Abuse, 1 in 2 women have a chance of being raped during her lifetime <<http://www.powa.co.za>> (accessed 10 Sept 09)

3 Vetten, L, Kim, J., Ntlemo, E., Mokwena, L. (2009) From Paper to Practice: Lessons in the Implementation of Health and Victim Empowerment, Policy Applicable to Rape Survivors. Tshwaranang Legal Advocacy Centre, Policy Brief 2.

4 Above note 106

5 Above note 106

6 Id.

7 Rape Statistics-South Africa & Worldwide, 09 January 2008. Available at: www.rape.co.za/index2.php?option=com_content%do_pdf=1&id=875

8 Foundation for Human Rights (2009) Violence Against Women: A Study of Women's Experiences and Views of Men Post 1994.

9 Vetten, L. & Haffeejee, S (2005) „Urban predators: an analysis of gang rapes reported at six inner-city Johannesburg police stations. CSVR Gender Programme Policy Brief 1.

10 Rape in South Africa, Rape Crisis Cape Town Trust <http://rapecrisis.org.za/rape-in-south-africa/>

4. Amnesty International (AI) found, when interviewing women in relation to the 2008 report on rural women and HIV, that the majority of the women interviewed had experienced, witnessed or were aware of incidents of violence in the home or rapes occurring in the wider community, including in schools or while en route to school, or on farms. ¹¹ This report finds that "many South African women live in a general environment of high levels of crime, including rape, which affects their lives at home, in the community and wider society, placing them at risk of HIV infection in an accompanying context of high HIV prevalence levels". Medical researchers are in agreement that rape is the main reason why HIV/AIDS is at such a high level in South Africa.¹² A 2009 study found that 19.6 % of men who had committed rape were HIV positive.¹³ In addition, the highest rates of infection are found among women under the age of 30, who make up the highest percentage of rape survivors.¹⁴
5. South Africa continues to have the highest number of recorded child-rapes in the world.¹⁵ Each day at least 50 children are victims of rape.¹⁶ The South African Human Rights Commission concluded after hearings on school based violence in 2006 that schools were "the most likely place where children would become victims of crime, including crimes of sexual violence".

Domestic violence

1. The Medical Research Council reported that the levels of domestic violence reported in various research studies are also cause for concern:
 - Thirty-one percent of pregnant women surveyed in KwaZulu-Natal reported domestic violence¹⁷.
 - One study conducted in three South African provinces found that 27% of women in the Eastern Cape, 28% of women in Mpumalanga and 19% of women in the Northern Province had been physically abused in their lifetimes by a current or ex-partner and 51% of women in the Eastern Cape, 50% in Mpumalanga and 40% in Northern Province had experienced emotional and financial abuse in the year prior to the study¹⁸.
 - Interviews conducted with 1,394 men working for three Cape Town municipalities found that approximately 44% of the men were willing to admit that they abused their female partners¹⁹.
 - Intimate femicide research found that every six hours a woman is killed by her male partner, revealing one of the highest rates ever reported in research anywhere in the world²⁰.
2. The problems experienced by women in relation to protection orders are similar to those that present in the criminal justice system. The courts lack capacity and training is often insensitive and un-cooperative. The police are reluctant to arrest violators, often hiding behind the lack of legal clarity around the definition of "imminent harm" contained in the legislation and the delays in obtaining a warrant of arrest from the courts.
3. Equally frustrating is the lack of policing capacity in rural areas to deal with domestic violence cases, the lack of legal aid offices. Where legal aid is available, the perpetrator qualifies for representation and not the complainant.
4. According to the preliminary research findings on the implementation of the Domestic Violence Act (DVA);
 - Most women in rural areas remain uninformed about the DVA.
 - Lack of persons to assist women in filling out required forms for protection orders.
 - Police are unhelpful and insensitive to women who report domestic violence and they often place more value on privacy and family considerations than on a survivor's right to access justice. There have been increasing allegations of women being ridiculed and discouraged by police to lay charges.
5. Women further experience difficulties with the Internal Complaints Directorate of the police, who are often reluctant to investigate matters in which the police are perpetrators.
6. The systemic failures in the justice system illustrate the lack of political will to implement laws that have been designed to protect women from violence and discrimination. There has been a constant call by civil society to reform law and improve implementation, yet these seem to fall on deaf ears.

11 Amnesty International Document – South Africa: 'I am the lowest end of all' Rural women living with HIV face human rights abuses in South Africa chapter 2.
 12 Adriana Stuljt, "Half of South Africa's Young Have AIDS From Rape," Digital Journal, 8 January 2009, available at <http://www.digitaljournal.com/print/article/264771> (last accessed 5 February 2009).
 13 *Supra* note 14.
 14 *Id.*
 15 South African Press Association, June 2005 (quoted from The Oprah Winfrey Show, "Shocking Rape Statistics," available at http://www.oprah.com/article/oprahshow/tows_past_20060420_b) last accessed February 6, 2008.
 16 South African Press Association, June 2005 (quoted from The Oprah Winfrey Show, "Shocking Rape Statistics," available at http://www.oprah.com/article/oprahshow/tows_past_20060420_b) last accessed February 6, 2008.
 17 Hoque, ME., Hoque, M., Kader, SB. (2009). „Pravalence and experience of domestic violence among rural pregnant women in KwaZulu-Natal, South Africa. Available online at: <http://www.sajei.co.za/index.php/SAJEI/article/view/106/209>
 18 Jewkes, Rachel, Penn-Kekana, Loveday, Levin, Jonathan, Ratsaka, Matsie and Schriber, Margaret (1999). *He must give me money, he mustn't beat me.: Violence against women in three South African Provinces*. Pretoria: CERSA (Women's Health) Medical Research Council
 19 Abrahams, N., Jewkes, R. and Laubsher, R. (1999). "I do not believe in democracy in the home" *Men's relationships with and abuse of women*. Tygerberg: CERSA (Women's Health) Medical Research Council
 20 Mathews, Shanaaz, Abrahams, Naeemah, Martin, Lorna J., Vetten, Lisa, van der Merwe, Lize and Jewkes, Rachel. (2004). *Every six hours a woman is killed by her intimate partner.: A National Study of Female Homicide in South Africa*. MRC Policy brief no. 5, June 2004.

Lack of due diligence by the State to adequately investigate, prosecute and punish perpetrators of violence against women.

7. Several studies have shown that the State suffers from a lack of proper resource allocation, poor management of the extent of budgets and how budgets are spent, a lack of accountability for poor performance by departments and by officials, a lack of collaboration between departments, a lack of coordination between service providers, a lack of access to information for service users, and a lack of services, all of which contribute to the failure on the State's part to adequately investigate, prosecute and punish perpetrators of violence against women.²¹
8. Similarly, our studies have shown that in a substantial number of cases, police use poor discretion when making decisions; they do not always comply with instructions and directives; they deal with victims of sexual offences inappropriately; the quality of their investigations is often poor; they do not always have sufficient resources at their disposal, resulting in unacceptable

delays; they do not always have the necessary documentation to allow them to be better informed and to inform survivors; and their Victim Friendly Rooms are often poorly managed.²² As a result, some women reported feeling unsafe reporting a rape to the police, and some felt they were not respected by the police.²³ This type of police service further disempowers survivors of violence.²⁴

9. As is evident from the statistics cited above, the criminal justice system in South Africa fails to respond adequately to incidents of violence against women. The system is structured in a way that seems to place more value and consideration on the rights of the accused resulting in an almost non-consideration of the rights of the survivor. A woman who has been raped has to go through a tedious process just to access justice- filing a police report, completing a medical examination, giving evidence, and

facing stigmatization only to have the rapist acquitted/given a lenient sentence. The legal process in itself tends to be traumatic to rape survivors.

10. The Constitutional Court in *S v Baloyi*²⁵ summed up the situation as follows: *"The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of individual victims is thus compounded by a sense that domestic violence is inevitable. Patterns of systemic behaviour are normalised rather than combated."*²⁶
11. Therefore, the failure of the Government to address the problems of backlog and delay in many court systems could constitute denial of access to justice.²⁷

21 Sanja Bornman et. al, "Protecting Survivors of Sexual Offences: The Legal Obligations of the State with Regard to Sexual Offences in South Africa," 15, 2013, available at <http://www.shukumisa.org.za/wp-content/uploads/2010/11/Protecting-Survivors-of-Sexual-Offences-Legal-Obligations-of-the-State-with-Regard-to-Sexual-Offences.pdf>
22 Id. at 25.
23 Id.
24 Id. at 26.
25 *S v Baloyi* 2000 (1) BCLR 86 (CC)
26 *S v Baloyi* 2000 (1) BCLR 86 (CC) at para 12)
27 H Chodosh, S Mayo, F Naguib, & A Sadek "Egyptian civil justice modernisation: A functional and systematic approach" (1996) Michigan Journal of International law 24.



16 Days Of Activism Paarl Workshop - 2010



Using South Africa's regional and international obligations to argue a case for realising **SEXUAL AND REPRODUCTIVE HEALTH RIGHTS FOR WOMEN**

South Africa has ratified a number of human rights treaties informing the right to access safe and legal abortion.¹ These instruments include the International Covenant on Civil and Political Rights ('ICCPR'); International Covenant on Economic, Social and Cultural Rights

('ICESCR'); the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'); and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('Maputo Protocol').

A survey of these instruments as outlined below makes clear that South Africa has an international obligation to create legal, economic and social conditions that enable and encourage women to freely and voluntarily exercise their sexual and reproductive right.

International Covenant on Economic, Social and Cultural Rights

Article 16(1)(c) provides that State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, including the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

In a joint statement,² the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) and the Committee on the Rights of Persons with Disabilities (CRPD) highlighted that access to safe and legal

abortion, as well as related services and information, are essential aspects of women's reproductive health.

"Access to such services is a prerequisite for safeguarding women's human rights to life, health, equality before the law and equal protection of the law, non-discrimination, information, privacy, bodily integrity and freedom from torture and ill treatment."

CEDAW further emphasized that protecting women's rights to sexual and reproductive health requires that *"all health services [...] be consistent with the human rights of women,*

including the rights to autonomy, privacy, confidentiality, informed consent and choice." Accordingly, State parties should ensure non-interference, including by non-State actors, with the respect for autonomous decision-making by women, including women with disabilities, regarding their sexual and reproductive health well-being; adopt effective measures to enable women, including women with disabilities, to make autonomous decisions about their sexual and reproductive health; and should ensure that women have access to evidence-based and unbiased information in this regard.

International Covenant on Economic, Social and Cultural Rights

Women's reproductive health and rights receive broad protection under the ICESCR, which recognizes *"the right of everyone to the enjoyment of physical and mental health"* under Article 12(1).

Article 12(2)(a) directly addresses the right to maternal, child and reproductive health. The Committee on Economic, Social and Cultural Rights (CESCR) defines *"reproductive health"* to include *"the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning services that will, for*

example, enable women to go safely through pregnancy and childbirth".³

Article 3 obligates States to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights. The CESCR has characterized the duty to prevent discrimination in access to health care as a *"core obligation"* of the State.⁴

CESCR General Comment 14 also specifically states that *"[t]he realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of*

*sexual and reproductive health."*⁵ This receives support in General Comment 22 of the CESCR⁶.

In General Comment 22, the CESCR stipulates that the right to sexual and reproductive health is an integral part of the right to health enshrined in article 12 of the International Covenant on Economic, Social and Cultural Rights.⁷

General Comment 22 recommends that in giving effect to Article 12, and particularly the prevention of unintended pregnancies and unsafe abortions, State parties are required to adopt legal and policy measures to guarantee access to

1 Section 39(1)(b) of the Constitution requires that "[w]hen interpreting the Bill of Rights, a court...must consider international law when interpreting the Bill of Rights, and when interpreting any legislation."

2 Joint statement by the Committee on the Rights of Persons with Disabilities (CRPD) and the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) Wednesday, 29 August 2018

3 Committee on Economic, Social and Cultural Rights, Gen. Comment 14, The Right to the Highest Attainable Standard of Health, 8, U.N. Doc. E/C.12/2000/4 (2000) footnote 12.

4 CESCR General Comment 14, supra note 3, para 19.

5 CESCR General Comment 14, para 21.

6 General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights).

7 CESCR General Comment 22, para 1.

safe abortion services and quality post-abortion care. This would be done by

respecting the right of women to make autonomous decisions about their sexual

and reproductive health.

Convention on the Elimination of All Forms of Discrimination Against Women

Article 16(e) of the CEDAW provides for the protection of women's rights to decide on the number and spacing of their children, and to have access to information and means to give effect to this right.

The Committee on the Elimination of

Discrimination against Women has noted the growing concern surrounding the economic consequences for women of marriage, divorce, separation and death. Despite women's contributions to the economic well-being of the family, their economic inferiority permeates all stages

of family relationships, often owing to their responsibility for dependants.⁸

The Committee has consistently concluded that the elimination of discrimination against women requires State parties to provide for substantive as well as formal equality.⁹

Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Under Article 14(2)(c) of the Maputo Protocol, State Parties are called upon to take all appropriate measures to "protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus".

In General Comment 2 of 2014, the African Commission on Human and Peoples' Rights explains the ambit of Article 14 of the Maputo Protocol.¹⁰ The Comment emphasizes the State parties' duty to remove impediments to the health services reserved for women by putting in place administrative laws, policies and procedures of health systems and structures that do not restrict access to family planning.

The Comment explains that State parties should provide a legal and social environment that is conducive to the exercise by women of their sexual and reproductive rights. As such, Article 14 imposes four general obligations on State parties:

The obligation to respect rights requires State parties to refrain from hindering, directly or indirectly, women's rights and to ensure that women are duly informed on family planning/contraception and safe abortion services, which should be available, accessible, acceptable and of good quality;¹¹

The obligation to protect requires State parties to take the necessary measures to prevent third parties from interfering with the enjoyment of women's sexual and reproductive rights;¹²

The obligation to promote obliges State parties to create the legal, economic and social conditions that enable women to exercise their sexual and reproductive rights with regard to family planning/contraception and safe abortion, as well as to enjoy them;¹³

The obligation to fulfil rights requires that State Parties adopt relevant laws, policies and programs that ensure the fulfilment *de jure* and *de facto* of women's sexual and reproductive rights.¹⁴

The Maputo Protocol recognises socio-economic limitations of women and girls to access family planning. Article 14 therefore places various obligations on State parties to eliminate all forms of limitations to access to safe abortion services, including in cases where abortion is legalized.

8 CEDAW General Recommendation 29 (CEDAW/C/GC/29), 26 February 2013 at para 4.

9 Ibid at para 8 - *Formal equality may be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally. Substantive equality can be achieved only when the States parties examine the application and effects of laws and policies and ensure that they provide for equality in fact, accounting for women's disadvantage or exclusion. As to economic dimensions of family relations, a substantive equality approach must address matters such as discrimination in education and employment, the compatibility of work requirements and family needs, and the impact of gender stereotypes and gender roles on women's economic capacity*

10 The African Commission adopted General Comment No. 2 on Article 14 (1)(a),(b),(c) and (f) and Article 14 (2) (a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa at its 55th Ordinary Session held from 28 April – 12 May 2014 in Luanda, Angola.

11 Para 42.

12 Para 43.

13 Para 44.

14 Para 45



A HUMAN RIGHTS BASED APPROACH to sex worker rights

This extract forms part of a research report commissioned by the WLC and was researched and authored by Busisiwe Deyi

Sex worker rights under international law

Sex work and prostitution in international law has always been regulated through a paradigm of sexual impropriety, morality informed by conceptions of women as property and thus lacking in agency and autonomy¹⁵. The first recorded consideration and attempts at criminal regulation of the trafficking of women for “immoral purposes” was enacted in 1904 under the *Agreement for the Suppression of the “White Slave Traffic”*.

The Convention was more a collection of mutually agreed upon protective measures ensuring the protection and repatriation of women who had been trafficked across borders for immoral purposes. The Convention obligated state actors to “establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad”¹⁶. Furthermore, each State undertook to keep “watch, especially in the railway stations, ports of embarkation, and en route, for persons in charge of women and girls destined for an immoral life...”¹⁷

Implicitly embedded within the Convention was an understanding that the measures were for the protection of the moral virtue of white women only. The measures were directed towards the protection of women and girls, further, as the title of the Convention indicates, the criminal conduct being targeted was the trafficking in “white women”. Allain notes that “[a]s for the racialized element of the term ‘white’ slave traffic, it was not happenstance; rather it was evident throughout the deliberation of the 1902 International Conference ...that the harm sought to be addressed was in regard to women of European stock...”¹⁸

A hallmark of the Convention was its understanding of “prostitution”, which it defined as “*bringing women across borders for purposes of prostitution and*

was enacted into many national systems”. The systemic adoption of the Convention’s definitions and understandings of sex work as inherently exploitative into national systems has meant that sex work at the national level is still systemically criminalised through the prism of morality and paternalistic understandings of women’s bodies.

Understanding the colonial and patriarchal mores within which the Convention was anchored helps us understand the pervasive prohibitionist and “abolitionist” approach which has been the foundation of international human rights work since the 1950s.

The Convention has influenced contemporary understandings of sex work as inextricably linked to trafficking. Furthermore, it characterised sex work as involuntary and criminal, requiring abolition and sanctioning through heavy state intervention and violence. This approach disregarded sex worker’s bodily autonomy and their rights to consent to transactional sex or that sex can be a transactional experience.

The convergence of morality, a proprietary construction of womanhood, and a disregard of consensual transactional sex acts resulted in the regulation of sex work through criminalisation rather than labour law as part of the right to work. Although the *Suppression of “White Slave” Traffic* was agreed upon before the international recognition of human rights through the *Universal Declaration of Human Rights* (UDHR), its lack of distinction between consensual and involuntary prostitution and trafficking of women birthed a legacy of regulation through criminalisation of sex work.

States have traditionally justified the regulation of sex workers through a variety of reasons, including preserving morals, public order and containing disease and contamination¹⁹. These justifications can

be seen through the suite of regulation instruments at international level limited only through the human rights entitlements of sex workers.

1. *Evolving international human rights approaches to sex work*

The regulation of sex work through criminalisation at the international level culminated in the adoption of the *UN International Convention for the Suppression of Traffic in Persons and of the Exploitation of Women, (Suppression of Traffic in Persons Convention)* 1950.

The *Suppression of Traffic in Persons Convention* superseded and consolidated a number of international instruments regulating trafficking and prostitution including the *International Convention for the Suppression of the White Slave Traffic, 1910*; *International Convention for the Suppression of the Traffic in Women and Children*, as amended by the Protocol, 1921/1947 and the *International Convention for the Suppression of the Traffic in Women of Full Age, 1933*.

The *Suppression of Traffic in Persons Convention* adopted its predecessor’s strong prohibitionist approach of regulation through criminalisation. It further disregarded consensual transactional sex acts thus negating sex worker’s right to bodily autonomy. To this point the *Convention* declared in its preamble.

The *Convention*, in Article 1 further criminalised all aspects of prostitution. Article 6 of the *Convention* further sought to obligate states to take all necessary steps to,

From these two sections, the legal principles animating international regulation of prostitution and trafficking where criminal regulation, protection of societal mores and conceptions of family

15 International Agreement for the Suppression of the “White Slave Traffic,” 18 May 1904, available at <http://hrlibrary.umn.edu/instreetree/whiteslavetraffic1904.html>, accessed February 2018.
16 Above, Article 1
17 Above, Article 2
18 Jean Allain “White Slave Traffic in International Law” *Journal of Trafficking and Human Exploitation* Vol 1, 1-40 (2017), page
19 Joyce Outshoorn “The Political Debates on Prostitution and Trafficking of Women” (2005) Vol. 12(1) *Social Politics: international Studies in Gender, State and Society* 141-155.

and a disregard of the bodily anatomy of sex workers have resulted in a negation of their ability to consent. In other words, the sex worker in the international human rights space is constructed as a criminal who threatened the order and well-being of society²⁰.

However, it was only in the 1970s onwards when the *Suppression of Trafficking in Persons Convention* received political attention and backing. Outshoorn argues that it was the increase in international tourism; the discovery of the AIDS epidemic in the early 1980s; a growing liberalisation of sexual mores; and an increased migration by citizens of third world countries that pushed prostitution onto the international political agenda.

However, unlike before, the objects for regulation were not “helpless young girls and women of European stock”. Rather the economic “supply-push” factors in “third world” countries, such as “bad economic conditions, political instability, and social breakdown” resulted in increased migration of women into states perceived as more affluent like the Organisation for Economic Co-operation and Development (OECD)²¹.

a) Impact of Suppression of Traffic in Persons Convention – The Prohibitionist/Abolitionist Approach

The *Suppression of Traffic in Persons Convention*, 1950, has had a considerable influence on how states have regulated sex work and sex worker’s rights. It further cemented the prohibitionist/abolitionist approach to the regulation of sex work at the national levels.

Prohibitionist legislative frameworks use similar regulatory frameworks. They

do not differentiate between forced or coerced sex work additionally they criminalise all aspects of sex work including sex workers themselves. However, prohibitionist/abolitionist legal models are often implemented through two disparate approaches.

The first is the “public nuisance” approach. This approach accepts sex work as a social reality which needs to be regulated and removed from public spaces. Such regulation tolerates sex work provided that it is removed from residential areas, churches, schools and hospitals²². This approach understands sex work through the normative framework of heterosexual marital purity. In other words, sex work is understood as undermining the family unit and is therefore undesirable in residential areas. Lastly this framework assumes that sex work has negative impacts on health. However, this regulatory approach imposes less severe penalties. Countries which utilise this framework include Namibia²³, India²⁴ and Zambia²⁵.

The second regulatory sex work prohibition legal framework is the “exploitation” approach. This approach understands sex work and the sex trade as an unequal power dynamic which is characterised by victims and perpetrators. States which adopt this approach pose severe penalties, particularly to those who have been found to have coerced or forced participants into sex work and those trading in under-aged workers.

This approach understands sex work as a serious form of male violence against women “and that in any context it is a breach of civil and political human rights as either a form of ‘modern day slavery’ and/or an institutionalised practice of sexual violence and gender inequality.

This regulatory approach of criminalisation of sex work has manifested through the “client criminalisation” model adopted by Sweden in 1999.

South Africa²⁶ has adopted the “exploitation” approach in their legislative frameworks criminalising not only sex worker’s themselves but clients too.

b) Towards a partial decriminalisation approach in international law – CEDAW

In 1979 the *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*²⁷ was signed in 1979 and came into effect in 1981. Globally considered the international women’s Bill of Rights, CEDAW sought to address inequality and discrimination against women at the international level.

However, opinions differed in relation to the obligations imposed by CEDAW on states with respect to sex work and sex worker’s rights. Article 6 of CEDAW has been the subject of contentious debate. Article 6 tasks governments to “take all appropriate measure, including legislation, to suppress all forms of traffic in women and exploitation of women.”

Although still firmly embedded within the prohibitionist approach, Article 6 seems to implicitly recognise the difference between consensual or non-coercive transactional sex acts versus coerced & exploitative sex work. Further read within the objectives of CEDAW it can be argued that Article 6 obligates states to remove legislative enactments which expose sex workers to exploitative and discriminatory actions by state actors such as the police and health workers. The Preamble supports this interpretation of Article 6 through its recognition that;

20 Above, Outshoorn.

21 Above, page 143.

22 Jaya Sagade and Christine Forster “Human Rights of Female Sex Workers in India: Moving from Prohibition to Decriminalisation and Pro-work Model” 25(1) 2008 Indian Journal of Gender Studies, 30-31.

23 Namibia adopts a “public nuisance” regulatory approach through Section 21 of the Combating of Immoral Practices Act 1980. The Act outlaws the “pandering or procuring and operating of a brothel”; and “[s]oliciting for prostitution in public places”. Additionally “[l]aws such as public disorder, vagrancy, loitering and state recognised religious provisions are used to prosecute women who sell sex.”, see <http://spl.ids.ac.uk/sexworklaw>, accessed February 2018.

24 In India sex work is criminalised through the Immoral Traffic (Prevention) Act 1956 which criminalises brothel keeping (Section 3), living on earnings of a prostitute (Section 4), procuring, inducing or detaining a person for sex work (Section 5&6), prostitution in areas near public places and notified areas (Section 7), and soliciting (Section 8). Public order offences are used to arrest and detain sex workers. See <http://spl.ids.ac.uk/sexworklaw>, accessed February 2018.

25 Zambia regulates sex work through its Public Order Act Chapter 87 which bans nuisance, idling and disorderliness which carries jail sentences as well as fines. However the buying of sex is not illegal.

26 Section 20(1)(aA) of the Sexual offences Act, 1957 makes it a criminal offence to have unlawful carnal intercourse or commit an act of indecency with any the person for reward. The Act further prohibits brothel-keeping, procurement and facilitating sex work, living off the earnings of sex work, soliciting and indecent exposure. In 2007, the Sexual Offences and Related Matters Amendment Act 32 of 2007 criminalised the demand side of sex work, making it illegal to pay/reward another for a sexual act. Available at <http://spl.ids.ac.uk/sexworklaw>, accessed February 2018.

27 Signed 18 December 1979 and enacted on 3 September 1981.



“discrimination against women violates the equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries...”²⁸

CEDAW further recognises the interconnected impact on women of multiple networks of vulnerability which can result in socio-economic and political vulnerability by recognising that “in situations of poverty women have the least access to food, health, education, training and opportunities for employment...”²⁹

It becomes clear that a contextual reading of Article 6 leans strongly towards a partial criminalisation model which acknowledges that consensual sexual transactional acts are acceptable and should not be criminalised or at the very least that criminalisation exposes sex workers to a network of vulnerabilities which violate their human rights. A partial criminalisation approach does not criminalise all aspects of the sex trade but rather criminalises coercive practices, including under-age sex work.

Partial discrimination is primarily anchored in a pro-work model as it acknowledges that sex workers have agency to consent to sexual acts in exchange for sex. Thus in countries which utilise this model “selling sex, soliciting, keeping brothels and procuring are not criminal offences if the sex worker is adult and is working voluntarily.”³⁰

Rather than constructing the sex worker as criminal, a partial discrimination approach seeks to reduce criminal activity and corruption associated with the industry enabling sex workers to access law enforcement agencies and legal remedies.³¹

Partial discrimination further allows sex workers to health services without fear

and by decreasing their risk to physical and sexual violence. Lastly a partial discrimination approach allows sex workers to negotiate conditions with their clients and employers.³²

This approach to the regulation of sex work has been recognised by a variety of international bodies and human rights monitoring bodies.

An interpretation which accords with the partial discrimination seems to be the one which most accurately reflects the overall value framework of non-discrimination and equality and human dignity which undergird the CEDAW.

The CEDAW is animated by the rights to non-discrimination, equality and human dignity³³. Article 2 concretises these rights by obligating states to, without delay, take appropriate measures and policy of eliminating discrimination against women.

To this end Article 2 obligates states to take the following actions;

- a) To embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- c) To establish legal protection of the rights of women on an equal basis with men and to ensure through

competent national tribunals and other public institutions the effective protection of women against any discrimination;

- d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- e) To take all appropriate measure to eliminate discrimination against women by any person;
- f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- g) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

Article 6, which appears prohibitionist in nature, can be interpreted in light of the obligations contained in Article 2 which obligate state actors to implement legislative enactments which protect ALL women against discriminatory treatment.

The UN CEDAW Committee, a human rights monitoring body tasked with ensuring state adherence and fulfilment to the obligations contained in the CEDAW has interpreted Article 6 similarly.

In General Recommendation 19³⁴, the UN CEDAW Committee concluded that “[t]he full implementation of the Convention required States to **take positive**

28 CEDAW, Preamble.

29 Above.

30 Note 8 Above, Sagade & Foster, page 31.

31 Above.

32 Above.

33 CEDAW, Preamble “Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.”

34 General Recommendation No.19 (11th session, 1992), Violence Against Women, see <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> , accessed February 2018.



measures to eliminate all forms of violence against women (emphasis added). The Committee further emphasised, in respect to Article 6, that “[p]rostitutes are especially vulnerable to violence because of their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence.”³⁵

Although the tone undergirding the General Recommendation 19 was protective and prohibitionist, the Committee recognised that the continued criminalisation of voluntary and non-coercive sex work and the sex industry in general exposed sex workers to a variety of vulnerabilities. This recognition has resulted in the Committee noting in several of its concluding observations the need for “measures taken to guarantee the rights of women engaged in prostitution.”³⁶

Other human rights monitoring bodies and international human rights furthering documents have acknowledged the role of criminalisation and the exposure of sex workers to a multiplicity of vulnerabilities and human rights violations.

c) Acknowledgement of partial decriminalisation model outside of CEDAW

Other international human rights agreements and human rights monitoring bodies have also acknowledged and endorsed a partial decriminalisation regulatory model towards sex work.

Article 2 of the *Declaration on the Elimination of Violence against Women*, 1993 understands violence against women to include;

b) “Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and **forced prostitution.**” (Emphasis added)

The *Elimination of Violence against Women* Convention makes a clear distinction between forced sex work and consensual sex work and requiring the criminal regulation of only those aspects of the sex industry which render women vulnerable to coercion and exploitation.

In a similar breath the *Special Rapporteurs on Violence against Women* in her country report on Namibia acknowledged that “[t]he criminalization of sex work in Namibia lies at the foundation of a climate of stigma, discrimination and violence surrounding sex work.”³⁷

The Special Rapporteur further made an important link between the continued criminalisation of sex work and the denial of their rights to equal protection of the law.³⁸

Lastly, the Special Rapporteur acknowledged the multi-focal ways in which criminalisation impacted on sex worker’s rights to access health and reproductive serves; their access to education and employment and their increased vulnerability and exposure to violence at the hands of law enforcement officials.

In a report examining the “relationship between the right to the highest attainable standard of health and the criminalization of, amongst others, sex

work, the *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health* made similar observations. The Rapporteur noted that criminalization formed a direct barrier against the ability of sex workers to obtain access to health services³⁹. They further noted that criminalisation meant that the sex industry, particularly sex workers, restructured activities away from official sources of health services⁴⁰.

The report further made strong observations on the link between decriminalisation/partial legalisation and access to the right to health⁴¹. Additionally the report stated “[a]ny regulation of the sex sector should be implemented in accordance with a right-to-health framework, and should satisfy the requirement of safe working conditions as incorporated into the right to health.”⁴²

International human rights implementation mechanisms have moved towards an implicit recognition that criminal regulation of sex work should be limited to only the exploitative and coercive aspects of the sex industry. In defining the term “violence against women”, the *Beijing Platform for Action 1995* included “forced prostitution”⁴³. The delinking of consensual sex work away from coercive sex work is a leap forward in acknowledging the right to bodily integrity of women in general and sex workers.

35 Above, para [14].
 36 Namibia/India/Fiji
 37 Human Rights Council “Report of the Special Rapporteur on extreme poverty and human rights, Ms. Magdalena Sepulveda Carmona”, [para] 50.
 38 Above.
 39 Human Rights Council, Rapporteur Anand Grover “Report on the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” 2010, [para] 27-50.
 40 Above.
 41 Above, [para] 46.
 42 Above.
 43 Beijing Platform for Action 1995, para [113(c)].



This further buttress the move away from prohibitionist approaches to sex work and sex worker rights at the international level. Importantly it acknowledges the interconnected networks of vulnerability and insecurity fostered by criminalisation. This is unsurprising, as human rights discourse expanded in the late 90s, the international human rights community has had to acknowledge that an intersectional reading of the right to human dignity includes previously marginalised communities particularly those whose voices had been erased.

With the influence of materialist feminist approaches, international human rights has moved towards a "sex work is work" legislative framework. In other words, feminist scholars have argued that sex work and the regulation of sex work should be approached through a pro-work model.

2. **Pro-work regulatory approach to sex work – international law**

As illustrated from the above, the *Suppression of Traffic in Persons* Convention was critiqued for its lack of a human rights-based approach. The Convention further went on to outlaw domestic sex work and to obligate states to outlaw all forms of sex work even if regulated by the state⁴⁴. Further pro-sex work activists argued that the Convention and its predecessors negated sex worker's agency and choice as "[a]ny notion of 'a right to prostitute oneself' is absent."⁴⁵

The Convention failed to effectively suppress trafficking and sex work because of its abolitionist perspective and its failure to protect the rights of women who were trafficked and sex workers. Lastly and perhaps significantly,

the Convention ignored the underlining socio-economic causes of trafficking and sex worker⁴⁶.

The advent of the *CEDAW* brought about nuance in the human rights discourse around sex work and sex worker's rights. As illustrated above, *CEDAW* brought about a distinction between forced/exploitative prostitution and consensual sex act.

This is reflected in the various changes in language and understanding of sex workers as a heterogeneous and differently socio-economically positioned group. The *Special Rapporteur on Violence Against Women*⁴⁷ noted in her report;

" An understanding of sex work as a legitimate labour activity places sex work within a worker's rights human rights framework thus broadening the human rights entitlements sex workers can claim."

The construction of sex work as an economic income generating activity placed it within the public sphere, removing it within the private sphere which erased possibilities of being a legitimate labour activity. An understanding of sex work as a legitimate labour activity places sex work within a worker's rights human rights framework thus broadening the human rights entitlements sex workers can claim.

Inspired by material economist feminists, the pro-work regulatory approach to sex work understands that sex work can be freely entered into even when the driving force is economic necessity.

A pro-work regulatory model to sex work can take two approaches. The first approach regulates sex work and

the sex industry through social control legislation.⁴⁸ The sex industry is actively regulated through zoning restriction laws which confine sex work activities within designated zones. Thus, sex work is kept away from schools, hospitals and places of worship. Regulations can impose mandatory licensing requirements and the imposition of public health measures such as mandatory health checks and sometimes identification cards. The second approach places sex work within the framework of labour law rights and entitlements of workers. Thus, sex workers are entitled to the full protection of employment laws, occupational health and safety legislation, and have access to the justice, labour and health systems without fear⁴⁹.

Although there are no international human rights agreements explicitly recognising sex work as work within a labour rights paradigm, one can, through a reading of *CEDAW* and other human rights conventions, argue that states are obligated to enact legislative measures for the protection of sex workers against exploitation and exposure to violence.

Further various international human rights bodies⁵⁰, including the *CEDAW* Committee, have recognised the impact criminalisation has on the continued exploitation of sex workers. There are clear links between the continued criminal regulation of sex work and the denial of sex worker's rights to equality and non-discrimination⁵¹; to liberty and security of person⁵²; access to health⁵³; freedom from torture and cruel, and

44 Article 6.

45 Francine Pickup "Deconstructing Trafficking in Women: the Example of Russia" *Journal of International Studies* Vol. 27 (1998) page 1004.

46 Above.

47 Radhika Coomarasamy "Special Rapporteur on violence against women, its causes and consequences" 1994/45, [para] 205, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G94/148/72/PDF/G9414872.pdf?OpenElement>, accessed February 2018.

48 Note 8 above, Sagade and Forster.

49 Above Sagade and Forster.

50 The World Health Organization, UNAIDS and the United Nations Development Programme, the United Nations Population Fund and Amnesty International have found criminalisation of sex work in and of itself contributes to the exploitative conditions in which such work can occur. See also Phoebe J Galbally "Playing the Victim: A Critical Analysis of Canada's Bill C-36 from an International Human Rights Perspective" Vol 17(1) *Melbourne Journal of International Law* page 25.

51 International Convention on Civil and Political Rights (ICCPR), Articles 3 and 26; See also the European Convention on Human Rights, Article 14.

52 ICCPR, Article 9.

53 International Convention on Economic, Social and Cultural Rights (ICESCR), Article 12; CEDAW article 12; see also ECHR, Article 14.

degrading treatment⁵⁴; to the highest attainable standard of health⁵⁵; freedom from slavery and forced labour⁵⁶; freedom of movement⁵⁷ and their rights to freedom from unlawful interference⁵⁸.

Thus the continued use of criminal regulation violates a network of human rights contained in various human rights instruments. A pro-work model addresses

these violations and affirms sex worker's rights to self-determination.

It is clear that although the existing human rights framework does not support an entirely pro-work, labour rights centred model on sex work, it does recognise that the continued criminalisation of consensual sex work fosters a network of vulnerabilities exposing sex workers to a

multiplicity of human rights violations by state actors. Thus, only those aspects of the sex industry which are coercive and exploitative should be regulated and criminalised. More states are recognising the intimate link between criminalisation and human rights violations and are slowly moving towards regulation models that do not centre criminalisation.

54 ICCPR, Article 7; See also ECHR, Article 3.
 55 ICESCR, Article 12; CEDAW Article 12.
 56 ICCPR, Article 8; see also ECHR, Article 5.
 57 ICCPR, Article 12; See also ECHR Protocol 4, Article 2.
 58 ICCPR, Article 17.



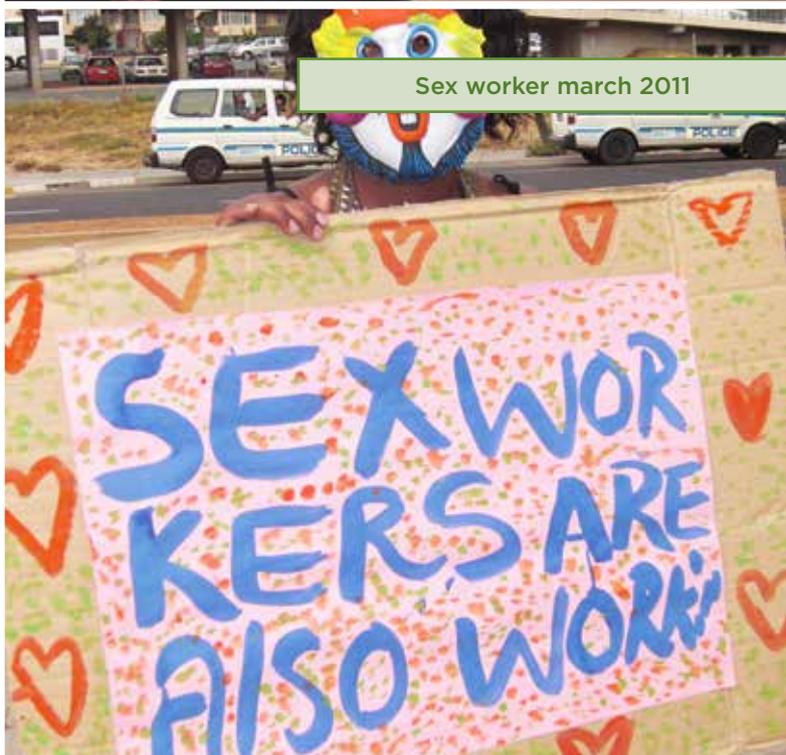
Sex work case and workshop 2011



Sex work case and workshop 2011



Sex worker march 2011



Sex worker march 2011

SEXUAL HARASSMENT AND POWER

at play within the workplace

⁵⁹Sexual harassment is about power.⁶⁰ The Labour Appeal Court recognised that 'at its core, sexual harassment is concerned with the exercise of power.' The exercise of power is at the heart of all the incidents, contexts, and accounts of sexual harassment which take place within the workplace.

Sexual harassment and similar misconduct which takes place over an extended period and involves several victims, does not take place in isolation from an environment, culture and climate that nurtures and allows it to take root and flourish. Those who perpetrate sexual violence in their workplace cannot be viewed in silos and in isolation from the conditions and circumstances under which they work and engage with women who they come across as a result of their work environment.

The Code of Good Practice, encouraging and promoting the development of policies and procedures that 'will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity,' defines sexual harassment as:

Unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, considering all the following factors:

*whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; whether the sexual conduct was unwelcome; the nature and extent of the sexual conduct; and the impact of the sexual conduct on the employee.*⁶¹

Section 2 of the Code discusses its application, recognising that it applies to the working environment, and predominantly so to employers,

employees and applicants for employment. However, it notes further that perpetrators and victims may include those who fall into broader categories, and may include clients, suppliers, contractors, and 'others having dealings with a business'.⁶²

This was confirmed by the Labour Appeal Court in *Campbell Scientific*,⁶³ where the facts of the case involved an employee of Campbell Scientific sexually harassing the employee of another company. The two companies worked together on a project in Namibia. The Labour Appeal Court found that Campbell Scientific was entitled to discipline the perpetrator for the misconduct as it both related to and impacted on his employment relationship with the company.⁶⁴ The Court found this was so as the misconduct took place at a work-related event, and the perpetrator was able to engage in the misconduct by virtue of his employment and position.⁶⁵

The Labour Appeal Court did not hesitate to recognise and stress that even though the perpetrator did not hold an employment position senior to the complainant, or that they were not co-employees at the same company, this did not have the result that no power disparity existed between the two. To hold otherwise would undermine and ignore the existing pervasive power differential that exists between men and women in our society, which the Court found his behaviour to be based on.⁶⁶

The rights the Code seeks to protect, and give effect to, are entrenched in our Constitution in the Bill of Rights and given further effect to by the underlying values of human dignity, equality, the advancement of human rights, and freedom. These underlying values dictate the objective normative value system of our society and guide public policy.⁶⁷ In the matter of *PE v Ikwezi Municipality and another*,⁶⁸ the Court correctly noted that

there has been 'growing realisation and appreciation of the prevalence and the devastating effects of sexual harassment in the workplace both in South Africa and in other jurisdictions.' In quoting from a series of cases dealing with the insidious effects of sexual harassment, the Court highlighted the sentiments expressed in *Campbell Scientific Africa (Pty) Ltd v Simmers and others*,⁶⁹ that what is '[c]entral to the transformative mission of our Constitution is the hope that it will have us re-imagine power relations within society so as to achieve substantive equality, more so for those who were disadvantaged by past unfair discrimination.'

It bears emphasising that women have suffered discrimination in both the private and public spheres of society for time immemorial. Our Constitution behoves us to approach issues with inherent power imbalances, due to the past institutional and social structures that reified inequality, with the necessary degree of awareness and sensitivity for the experiences of those disadvantaged and oft-marginalised sections in our society. The Court in *Campbell Scientific (Pty) Ltd*, at paragraph 20, goes further to stress that:

At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often 'less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor'.

To further underscore the undue power balance that exists in our society, and the

59 This article is based on an extract from the legal submissions before the Equal Education Inquiry into Doron Isaacs in 2018.

60 *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* (2016) 37 ILJ 116 (LAC).

61 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, section 4.

62 *Ibid* at sections 2.1.7; 2.1.8; 2.1.9; and 2.1.10, respectively.

63 *Supra* note 1 at 33.

64 *Ibid* at 21.

65 *Ibid* at 26.

66 *Campbell Scientific Africa (Pty) Ltd v Simmers* at 33.

67 Minister of Education and another v Syfrets Trust Ltd NO and another 2006(4) SA 205 (C) para 24.

68 [2016] 7 BLLR 723 (ECC) at para 57.

69 (2016) 37 ILJ 116 (LAC) at para 58 of *PE v Ikwezi Municipality* quoting paras 18 to 21 of the Labour Appeal Court judgment.

continuous discrimination experienced by women, whether overt or covert, the Court in *PE v Ikwezi Municipality* quotes from *F v Minister of Safety and Security and others* 2012 (1) SA 536 (CC), stated that:

Many men of our society, not unlike the policeman who raped Ms F, continue to force themselves on women and on girl-children. Often, with impunity, men forcibly violate women's bodies, privacy, dignity and self-worth, freedom, and the right to be treated with equal regard. The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women."⁷⁰

In *PE v Ikwezi Municipality*, reiterating that sexual harassment has devastating effects on the victim, the Court found that it has 'become, in effect, a systemic and recurring harm'⁷¹ – one which only further entrenches the above discrimination experienced overwhelmingly by women.

It is not only our Courts that have argued about the inherent power differential that is exploited when men engage in sexual harassment. MacKinnon argues

that sexual harassment is 'an expression of dominance laced with interpersonal contempt, the habit of getting what one wants, and the perception (usually accurate) that the situation can be safely exploited in this way – all expressed sexually.'⁷²

The power perspective thus views sexual harassment as the result of power inequality, which our Courts have recognised unequivocally. It enables harassers to sexually coerce and objectify those below them in the hierarchy, which may exist within and beyond the confines of the workplace. It manifests in various forms, which can often operate alongside one another in the broader structure of power. Cortina and Berdahl recognise the following forms power may take and be exercised by men:⁷³

Economic power: this allows for domination to occur both in and outside of work; that when women enter the workplace, their existence is sexualised and monetised, and when they reject this stripping of their agency by those in power, they may place themselves in a vulnerable position. This leads to loss of work, which then makes them dependents upon men in their private homes. They are then forced to choose

between being economically dependent in private or at work. Men hold the power to make either space unsafe.

Social power: this is upheld by entrenched social values assigned to binary gender roles. It occurs beyond economic and organisational power and may serve to reinforce the occurrence of either.

Organisational power: the power given to men by virtue of their position in the workplace. It is limited to and derived from the workplace.

Physical power: there is the ever-present reality for women than men can physically dominate them. Cortina and Berdahl argue that this may be the dominant source of organisational and economic power.

Women enter the workspace and interact with men constantly cognisant of the power differential that continues to pervade the structures within our society, and the discriminatory effect it has on their lived experiences. Our laws and policies must be implemented in a manner which recognises the power at play within the women's workplace environment. Failure to do so will continue to lead to a failure of women's rights within the workplace.

70 PE v Ikwezi Municipality and another para 59.

71 PE v Ikwezi Municipality para 78.

72 R B Siegel & C MacKinnon (eds) *Directions in Sexual Harassment Law* (Yale University Press, 2004).

73 Cortina, L.M., & Berdahl, J.L. (2008). *Sexual Harassment in Organizations: A Decade of Research in Review*.



Zolisa march 2009

ACKNOWLEDGMENTS

Michelle **O SULLIVAN**

Founder of the Women's Legal Centre

The Women's Legal Centre has grown up. I am so proud to have been associated with her in her formative years, and to have watched her mature through the years, and to witness her continuing to fulfill such an important role in the legal space in South Africa, and more broadly on the continent. The role that the WLC has to play in the legal terrain and in civil society has become even more significant with the resurgence of conservatism, placing the rights and freedoms of women at risk. I am sure that the Centre will continue to go from strength to strength, and am so looking forward to celebrating this momentous occasion.

William **CHAFE**

Alice Mary Baldwin Professor of History, Duke University Director, DukeEngage Cape Town

Dear Colleagues and Friends,

On behalf of Duke University and our DukeEngage-Cape Town program, I want to congratulate the Women's Legal Centre on the extraordinary work you have done over this past 20 years. For the last 12 years, our women students have been so enriched by the seven weeks they have spent working with the WLC each year in June, July and August. From the beginning, they have come back to our group singing the praises of their colleagues at the WLC, the friendships they have made, and all they have learned.

So congratulations on two decades of extraordinary accomplishment.

Sincerely,

William H. Chafe

Shreya **MONUTH**

Previous intern at the WLC

"The Women's Legal Centre is an exemplar in developing and supporting strategic feminist litigation not only in South Africa, but for all of the global South. My association with WLC has immensely helped me in my practise as a human rights lawyer in India. The litigation, strategy, and practical skills that I learnt during my time at WLC has been transformative in my approach to human rights litigation from a feminist perspective. My heartiest congratulations to WLC, Seehaam and the entire team on the 20-year anniversary and I am certain that they will continue to inspire and lead feminist litigators across the world in the years to come!"

Sibongile **NDASHE**

Executive director of ISLA

"My engagement with WLC began in 2002 when I joined the centre as a lawyer. It was a space that provided an opportunity to grow and see that the law can indeed be a tool for social change and that the courts can be a site for the advancement of women's rights. Seeing the fulfilment of a constitutional promise where the constitutional court struck down laws which violated women's rights and extended under-inclusive statutes to provide protection to women who had once lived on the margins of the law was an exciting phase in my legal career. Over the years, parliament has moved from having some of the most industrious legislators that passed progressive legislation on women's rights to what it is now, but the centre is still defending the gains and leading the way for women's rights. Over the twenty years a lot has changed and a lot has not changed, the deeply embedded patterns of inequality remain, poverty remains extremely gendered and levels of violence against women are still extremely high. We now understand that the social change that we yearn for is not going to come from legal and policy change in the courtrooms. The centre's strategies have also evolved to work with other civil society formations to build new alliances

in order to co-create and reimagine how the law can be used to advance women's rights. We look forward to the next twenty years of WLC as it expands its focus to work across the continent and in the African human rights systems in particular. South African feminist jurisprudence is indebted to the contributions made by the Women's Legal Centre. Knowing that there is an organisation like WLC is a pleasant reminder that the State will be held accountable"

Prof Amanda **GOUWS**

SARChI Chair in Gender Politics Department of Political Science, Stellenbosch University

It gives me great pleasure to congratulate the Women's Legal Centre on its 20th anniversary. As a member of civil society and an academic I have been liaising with the WLC throughout my academic career as a feminist academic, as well as during the time I was a Commissioner for the South African Commission for Gender Equality from 2012 to 2014. During this time the WLC in collaboration with myself and the Shelter Network of the Western Cape prepared a report on shelter funding. As a women's organization the work of the WLC has been invaluable in developing feminist litigation, to mobilize women for feminist activism and to collaborate with state structures. Its role as a feminist legal organization has contributed to enrich and deepen the work of civil society and the legal profession. My liaison with the WLC has contributed in important ways to my research as well as my teaching. I wish the WLC well with its future work and look forward to more fruitful collaboration.

Jessica **WEKALAM**

Previous intern at the WLC

Last year I was lucky enough to volunteer with the team at the Women's Legal Centre and I have to say, it was an absolute privilege being able to work with them. They have real passion for the work they do and they work tirelessly to achieve

their objectives. Case by case and action by action the ladies at WLC are advancing women's rights to equality and dignity. I can't wait to see what they accomplish in the next 20 years!

Melanie JUDGE

Feminist activist and scholar, and adjunct associate professor at the University of Cape Town

Amidst the realisations and reversals that have marked the journey towards gender rights and justice over the last 20 years, WLC has been a steady and vital force in the South African landscape. Driven by successive generations of phenomenal lawyers and activists, the Centre has come to epitomise the values, ethics and practices of a vanguard organisation for African feminist struggles. Now, in times of both postfeminist and patriarchal backlash against the gains of women's and LGBTI movements, WLC is more crucial than ever. As we dare to imagine a just and equitable future in a South Africa beset by uncertainty, we can be certain of one thing – that WLC is part of making that future real.

Nicolette NAYLOR

International Director: Gender, Racial & Ethnic Justice Ford Foundation [Attorney at WLC 2002-2005]

The critical role of feminist public interest lawyer centres in South Africa

I have always believed that feminist lawyers have the ability to transform not only lawyers' views of gender justice but also how to use the law to bring about social change. Feminist lawyers are reformers who seek not only to win cases under the existing law but to correct the law and change the way it is applied in relation to women's realities. In this respect the feminist lawyers who have inhabited the corridors of the WLC since its early days and who currently work tirelessly for gender justice have had a profound impact on substantive areas of constitutional law in South Africa and across the continent. The feminist lawyers at WLC are critical to the social justice infrastructure in Southern Africa because they have attempted to redefine legal roles, to reject masculinist standards of lawyering and they have

advanced feminist positions that have pushed boundaries of the law in relation to sexual harassment, rape, child abuse, women's property rights, Muslim personal law and many other areas of gender justice.

If we accept that unitary feminist perspectives misrepresent a world of experiences that are actually diverse and intersectional it requires us to get comfortable with the fact that womxn's experiences are plural, complex and difficult and this means that feminist lawyers have to adapt their lawyering methods and push themselves in terms of what they have been taught or what conventional lawyering may require of them. The WLC's approach to public interest law has allowed for a deeper, more visible and participatory process for womxn and girls in legal spaces without treating all womxn and girls as being the 'same.' Instead, the WLC has really grappled with different womxn based on where they find themselves in terms of space, time and context. The feminist lawyering that they practice recognizes that womxn's experiences vary along axes that are fundamentally shaped by race, class, sexual orientation, ability, citizenship, ethnicity, religion etc. The WLC needs to be celebrated for this. Their work has required a range of perspectives that does not perpetuate hierarchies and power between and among the voices of diverse womxn and between lawyer and client.

The South African public interest law space needs to find ways to ensure that contexts where legal processes are carried out are emancipatory spaces for womxn and girls. We need to open those spaces for justice to be felt and seen to be done. The human rights legal fraternity has not always adequately represented the needs and diverse priorities of womxn and girls. Lawyers have to do better to represent womxn and girls – by putting forward the complexities of womxn's characters when we represent and purport to speak for them. We must think differently about the ethics of representation because law has cultural power – when we represent people in legal cases or advocacy we also create representations or depictions of persons. These representations take on cultural reality – they can confirm patriarchy or challenge stereotypes or they can create re-imagined spaces or worlds. The powerful testament of work in this space has been most apparent in the way in which WLC represented the survivors and a survivor-centered approach to sexual

harassment during the Equal Education Commission of Inquiry recently.

The WLC has had a profound impact on the public interest law space and social justice space in South Africa and also the donor landscape. They have challenged donors to rethink the way we support womxn's rights from a feminist perspective and embrace feminist principles in not only the work we fund but the way we do our work.

The WLC has also shaped who I am at a personal, professional and political level. I joined the WLC as a lawyer in its Violence Against Women Project in January 2002 and remained with the Centre until 2005. I came on board on the understanding that I would support the dynamic Violence Against Women attorney, Deborah Quenet, who would tragically commit suicide during that year. During my short time at WLC I worked on some of the most challenging cases that would attempt to change the way the law child abuse survivors, sexual harassment survivors and young girls who had been raped by their teachers. This was at a time when self-care and concepts of healing justice were not common in the feminist legal space, where burn-out, PTSD and suicide were words I often heard amongst violence against women lawyers and our clients. It was a time when I did some of my meaningful work that had a profound impact on not only jurisprudence but also my personal journey and for this I am eternally grateful. The precedent setting case law before the Constitutional Court and Supreme Court of Appeal from that era will stand the test of time and speaks to the importance of feminist focused lawyering. In more recent years the work of WLC has evolved to be much more explicitly grounded in the politics of race, class, gender and sexual orientation and this has been a critical turning point for the Centre under the leadership of its new Director, Seeham Samaai.

Over the last 13 years, in my role as a funder, I have seen the WLC re-invent itself, challenge itself and go through some challenging times. I have remained a steadfast supporter of the work that this institution does in South Africa and I continue to admire the womxn leaders, lawyers and clients that inhabit the corridors of WLC and work tirelessly to improve access to justice for womxn and girls in South Africa.

Aluta Continua WLC!

POEMS: As part of our 20th anniversary celebrations, we opened calls for submissions for feminist poetry based on our work. From the submissions, these ones stood out and spoke to us.

Thobeka Kenene Sinxo **FOR NTSUNDU**

You ask I walk backwards
You ask I walk backwards
Put one step towards
My stumbling down a quick sand
Of your blood spent in time

A time locked in a clock
Ticking one dawn to the next
Of me waking to the texts of this
Tongue twisting that bent
Waves and stole continents
And bought the brilliance you
ask of me now

You ask of me now
To chase after your lost cows
and be black
But what is black in this graded age
Bathed in the sun that rises
from the West
Where was black in the grains
of your past

It wasn't and its not
But a foot towards my
Stumbling down a quick sand
Of your blood spent in time
A time lost in its clock
Frozen and only right once upon a time

Once upon a land
When people lent a hand
To raise me
And I move forward
I move forward

THE TEACHER Tanveer Jeewa

Sometimes, I look in her eyes.
They gaze back, full of despise.
Trying to learn,
What's left to burn?
Letting go,
Of what held her so.
Inhibitions, wrong intentions.
Millions of untamed passions.
I try to tell her,
I have nothing much of a teacher.
But she saw the ticket,
Knows I've been through hell.
So she hopes and under that effect,
Seeks that I get her well.
I look again,
A fierce lioness with her mane.
But soon she lets go of her pride,
Begs me to put the pain aside.
There is not much to say,
Yet, I will try to my dismay.
You will not get over it,
You will learn to live with it.
So cliché she thinks,
Oh but I can see, the phrase
sinks and sinks.
Her mind is opening up,
She's a fighter, she has not given up.
She is a warrior queen,
She has seen the unseen.
Heard the unspoken,
Rejected the pathway to heaven.
She learns and learns,
Yet, sometimes she stops and yearns.
Asks me to come back,
Without me, her world is black.
I will listen,
But that is all I can do, if even.
I cannot learn, nor can I teach,
But surely if you talk, you'll hear
yourself preach.
Words of affirmation,
Has to be from one who
shares affection.
So let it begin from yourself,
For you are after all, all but bereft.

THE MERX Prosper Dumani

You too partook of the sin
Or you thought you'll not be seen
You set on the table
Negotiated the price of your product
You boasted about how upgraded
and genuine it was
Yet you gave her away for money and
beasts
You ate of the lobola
Away you sent her - like a
slave to a trade
Her cries were swallowed
up in the ululations
The bellowing of the beasts too
The swelling pride too
You were pleased about the
selling price too
You had tied new ties too
The expense - her pride and
melancholic cries
You celebrated - she mourned
Still she kept a smile on her face
For the sake of traditions
Filthy randitions!

Abused and bruised she stayed
Her plight upheld your right
Now death embraced her
Death set her free
She served a purpose -
that of a sacrificial lamb
Mourn her not now - for
she died when you sealed the
deal I do not lay blame on you
For you too are a slave of tradition
You follow-and-question not
Behold this has brought
you unto nought
Your heart prosecutes you
Your own mind imprisons you
Not even your traditions
can bail you out

RAISIN GIRLS

Amy Shelver

A man talks and a girl wishes

She could die.

After sampling a memoir,
biography of biographies.

Cool winter rain

Soaks the cracking lumps of soil
that have forgotten the sun.

As the tiny shards of
mirror tinker

from the sky glass,

a hand is poised

to capture these reflections

– a hand, a fist.

A prelude and a second act;
and the shadow of blood.

BREAKING THE SILENCE

Primrose Mrwebi

We speak words into loud silences

We break fears that are
synonymous with spaces

We shed off emotional baggages
that seem to be settled in our bodies

We blow off the steam that is making
our lungs claustrophobic

We not only break the unspoken
agreement that we should be silent
about our problems

That we should not be speaking about
our elders even when they wrong us,

about our religion and political leaders,

to be sexual predators and dispensing
diseases on young and vulnerable
people.

We are breaking the silence

about committed husbands who
think they have a right to their wives'
bodies anytime they want

To the old men that marry 8-year olds
and still think its normal behaviour

To the boys in the corners of our streets

that abuse and correct women
from their sexual choices

To construction workers

that whistles and name calling us
each time we walk pass

We break the silence

to the teachers that date our daughters

while they are 3 times their age

We break silence

to the men who put work contracts on
boardrooms

and offer their penises as the sacrifice

We break silence for the subliminal
racists

that create unbearable workplaces.

For the gossiping shits that spy for the
bosses,

for the corrupt officials that take
kickbacks

We break the silence for all of you, your
time is Up!

FEMINISM.

-BZA

4 murders per day,

4 minutes and there's a rape,

4 assaults to a womxn and all 4 get
away.

4 too long things have stayed this way.

But speak up and oou "it's not
happening to us or you anyway"

So, you're just gonna have to look angry
alone okay?

No.

I will be angry but no I am not alone,

For every word I have screamed for my
sisters who have not been heard and
every notion I've preached that has
seemed too absurd and,

Every intersectional life I've reached
might have hit a nerve,

But I was never alone I was always with
her.

The hers who were told to never speak
up to a man.

The she who was told to stay
subservient and,

The girl who wanted to walk to school
but was catcalled and harassed at every
corner and,

The bruised mother who slept on her
children's bed figuring out an escape
plan.

And you,

The other who watched and withered,

But didn't understand the need for
feminism.

Feminist.

A person who believes in the equality of
the sexes.

Nobody is left out or has more
preference.

A person - therefore man and womxn
can,

Fight together for common ground and
yes feminism has a feminine touch,

But why wouldn't it when womxn have
been the ones which patriarchy seeks to
crush and hush?

The movement started from womxn and
so we must remember, but has evolved
so all could be treated better,

So, if you don't include race, sexuality,
ethnicity and all genders,

Your feminism isn't one for any to
become a member!

Men can complain we're too political,
emotional... like we haven't heard it all.

But they cannot deny how heavily
womxn have had to fall.

To their feet, to their needs and men
don't even have the balls,

To recognize their role in our struggles,

But it's okay we're here to fix the
puzzles.

And don't puzzle up the pronouns and
identities of our LGBTQI community.

They are a part of feminism just as much
as hegemonic men deny femicide.

We will continue to be on the side of
the disabled and mentally ill for we will
forever be their ride or dies even when
society tells them their stories are lies.

Feminists are here for all the hoers, sluts
and ratchet folk men prey on but reduce
to be a joke.

It isn't a joke that black womxn are
being intersected with social pains that
restrict their power and gain.

Feminism acknowledges these crossroads and together we must make sure no victim of patriarchy stands alone.

Yes, I am a feminist,
and I meant it.

I am an angry womxn but that doesn't give you way to disrespect me.

I am for equality and equity,

But first we gotta destroy this messed up system of male hegemony.

Men are not the problem, misogynists are.

Men are not the problem, rapists and violent men are.

So stop accusing us feminists of being unfair, if you don't get the issues by now it means you've never cared.

Don't complain we speak up when you're not even looking down,

At the facts, the stats on paper and all the problems running around.

Don't tell us what it is to be a feminist when your only belief is sex is a man's benefit.

Female mutilation.

Dress code regulation,

Burnt bodies and young female bodies in morgues decaying away.

But speak up and oou "it's not happening to us or you anyway"

Well shut up and listen because millions of us have something to say -

Feminism is needed and it's here to stay.

BZA

REVISITING THE BODY

Mlicent Yedwa

Where I come from, a certain woman's story has grown into legend

A woman, who threw bones in the midst of flaring bullets.

It is said she saw into bones

That she was part spirit

That she was directed by the ground
Caught bullets with her vocal chords

It is said, before a war mighty men thronged her shrine for interpretations of the soil.

That her voice was shield.

Nehanda, the bones woman,
When she appears in my history book
Has a cloth to cover her body

Her body, seeming to swerve,
slowly with the wind

Hanging on a tree.

That was my introduction to a female body

Caught by a pursuing armed battalion

Closing the nose against the strong stench of death

And saying

"my bones will rise"

Female body, dancing in surrender

To the music of death

What else is the body besides dying?

Besides slow movements on a rope dangling off a tree?

Besides bones?

The day my Uncle almost hit my grandmother with a rusty steel bar, was also the day he became a man.

Was the day grandmother grew safest from him.

Silence attacked the room quicker than the speed of light,

steel bar in air,

grandfather in motion,

faster than light,

catching the bar before the abominable thing,

blood.

The good kind, under the circumstances.

a non relatives blood was the kind to be feared.

Had the steel bar touched grandmother's skin

It is said her spirit would rise

Years later

Brandishing a sweeping vengeance & amnesia.

Forgetting her own chromosomes

-To wipe out everything

with grandfather's

blood in it

As hungry for blood

As outsider

As fucking angry spirit

What else is this body when not an abode for the celestial?

When it is not Nehanda

Not dangling on a tree

When its bones will not rise

Is it anything at all?



Thank you

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