African Law Review

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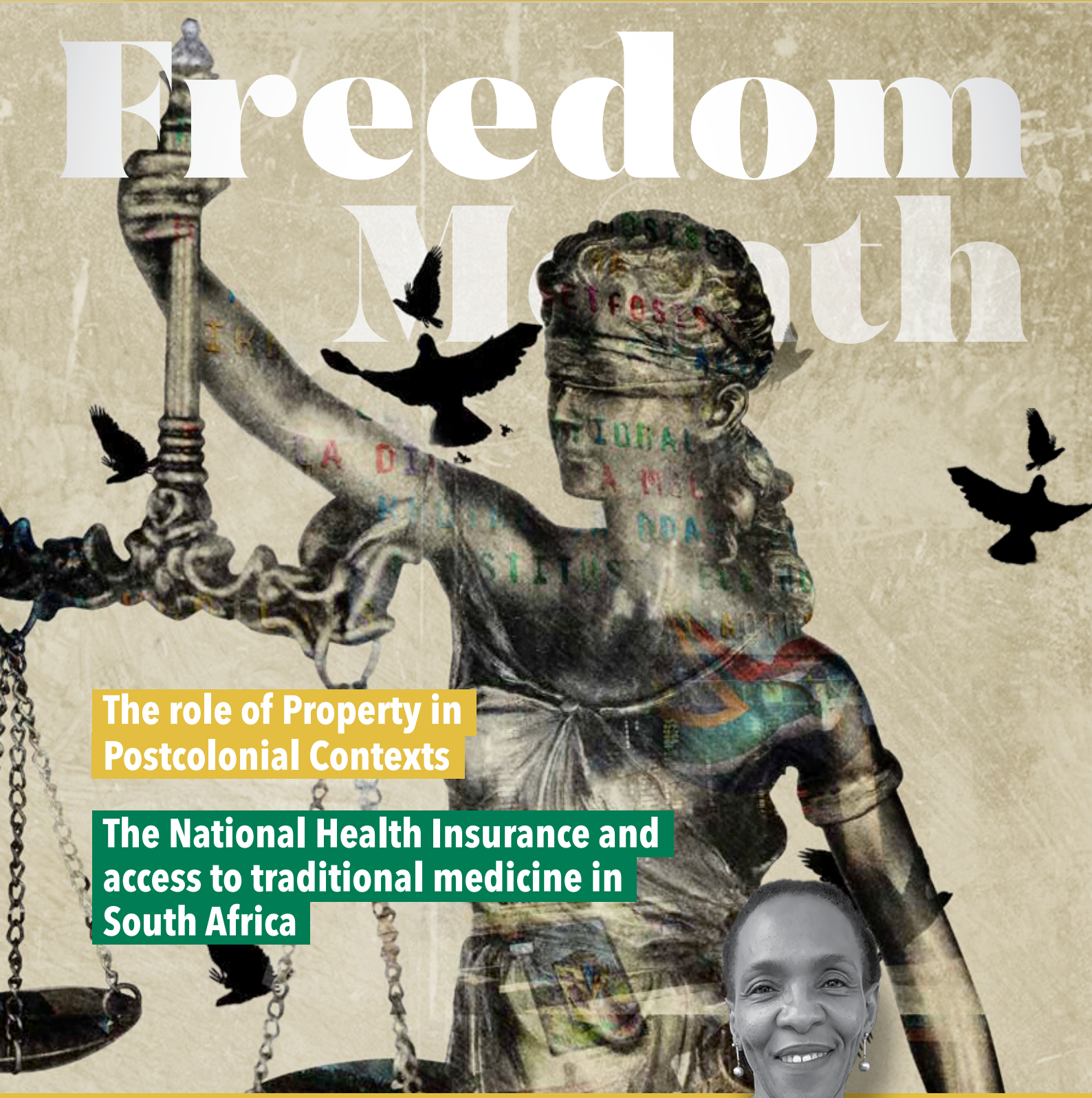

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info@blalec.co.za

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Working in a post pandemic justice system

The COVID-19 pandemic that has gripped the world for the past two years is slowly coming to an end. Even with the looming threat of another wave of infections, the world is slowly readjusting to the "new normal" of life after a pandemic. The legal profession, just like the rest of the world also needs to adjust to working under the conditions of the new normal.

The profession has lost many of its members to the pandemic and many legal practitioners are out of work or have had to close shop because of the ravaging side effects of the pandemic. Added to that in the month of April 2022, KwaZulu-Natal was affected by devastating floods that have claimed many lives and destroyed infrastructure. Now is the time for the profession to rebuild and ensure that the rule of law is adhered to in the country. The profession can also play a critical role in helping those in need if they are in a position to do so. As the profession moves forward, it should bear in mind its importance in society and how it fits in the ecosystem of how things work in the world to achieve a just society.

The role of legal practitioners in society should not only be felt when things go wrong, legal practitioners should also be a force for change in the country to make sure the country moves in the right direction.

While readjusting to the new normal, the same issues tackled before the pandemic, still need to be dealt with. As the former president of the Black Lawyers Association (BLA), Mashudu Kutama encapsulated this point in his speech at the 6th Pitje Memorial Lecture on page 12 of this issue. Mr Kutama noted that:

> "The BLA has achieved tremendous results in the transformation of the legal profession and the judiciary. We participate in all

> **"As the legal profession navigates its way through the challenges faced by the country, it should remain mindful of the challenges faced by the profession."**

structures of governance in the profession and our members are regularly appointed to various Divisions of the High Court, Lower Courts and tribunals. These we achieved through a detailed and meticulous programme of action intended to transform these structures. It is not by coincidence that we boast to be the only organisation that has its past members respectively as Chief Justice (Mogoeng Mogoeng) and Deputy Chief Justice (Dikgang Moseneke) at the same time.

We have in the recent past years produced and recommended a new generation of judicial officers to the bench namely Judges Brian Mashile, Babalwa Mantame, Lebogang Modiba, Leicester Adams, Nomsa Khumalo, Thoba Poyo-Dlwati, Daphney Mahosi, Nelisa Mali, Mpostoli Twala, Martha Mbhele (now elevated to the position of Deputy Judge President, Free State Division) Lester Nuku, Mandla Mbongwe, to name but a few. This is a tremendous achievement and we must be proud of these former BLA members for their elevation to the bench. The BLA must intensify the transformation of the judiciary and recommend more black women to the bench. Through the BLA Legal Education Centre (the BLA-LEC), we must introduce judicial skills training for our members and be biased towards black female legal practitioners within our ranks."

While delivering the GM Pitje memorial lecture, Justice Tshiqi reiterated the need for transformation, she said:

"For my part, I am a fervent believer in the potential of the BLA's Legal Education Centre. After all, targets and statistics are just numbers. True transformation can only occur through genuine upliftment that overcomes the vast racial disparities that have been created in our society through prolonged patterns of systemic disadvantage. We need to focus our efforts on educating, developing and supporting young people, so that they are ready to enter the legal profession and flourish, notwithstanding any past disadvantage they may have encountered" (see page 14 of this issue).

It goes without saying that the judiciary plays a critical role in the justice ecosystem and therefore its impartiality and adherence to the rule of law is important. This fosters and reinforces the notion that our justice system works and instils confidence in the public. It is even more important that judges know when there are instances where they could be compromised when presiding over a case and therefore they should be able to voluntarily recuse themselves when such an occasion arises. Sbusiso Dimba's article on page 44 interrogates judicial recusal and the demands of due process. The article explains that:

"Judicial recusal is to disqualify or remove oneself as a judge over a particular proceeding because of one's conflict of interest. A judge must review the general facts of the case assigned to determine whether she or he has any conflict of interest. If a conflict of interest exists, the judge may recuse herself on her own volition and accord".

The health system also plays a vital role in ensuring that the ecosystem of the country functions well. In a country such as ours where the line between the have and the have nots is so glaringly obvious, the destitute people run the risk of not getting the best medical service. Could the answer in bridging the gap to accessing the best medical service lie in the implementation of the National Health Insurance? On page 18 of this edition Pritzman Busani Mabunda and co–author Dr Llewellyn Gray Curlewis write about the National Health Insurance and access to traditional medicine in South Africa. The article notes that:

"The withdrawal of the National Health Insurance Bill (NHI) at the end of 2019 posed a question as to whether the Bill would be promulgated into an Act in the foreseeable future. The reintroduction of the Bill in parliament at the beginning of 2020 brought hope on the future of NHI in the republic of South Africa. The NHI Bill has become one of the most debated pieces of legislation in the country. The NHI is intended to bring about transformation that will improve service provision and health care delivery. It aims to promote equity and efficiency to ensure that all South Africans have access to affordable, quality health care services and access to medicines or drugs regardless of their employment status and ability to make a direct monetary contribution to the NHI Fund. The mandate of ensuring that medicine or drugs are more affordable should include the use and acceptance of Traditional Medicine to enhance and provide for transparency in the pricing of medicines in South Africa. Traditional medicine should act as an alternative for western medicine, in enabling the society at large to attain adequate access to medicine thereto. In the quest for universal health cover under the ambit of the NHI, the government needs to address the inability to develop a unifying framework for the use of both traditional medicine and western or biomedicine in human health-care practice. If government does not develop such a framework, it will further impact government's ability to accomplish comprehensive health and medical coverage in South Africa".

Our first issue for the year 2022 has an array of articles that will pique the interest of any avid reader. As the legal profession navigates its way through the challenges faced by the country, it should remain mindful of the challenges faced by the profession. There is no doubt that the profession has ability to make a change in the country that they serve. The legal profession has done well so far under immense pressure of working during the pandemic and have learned useful lessons that will assist in making a better legal profession, which will in turn lead to a better justice system.

Ethical leadership and strong state institutions

By Adv. Mc Caps Motimele SC: BLA-LEC Chairperson

In 2019 on volume 1, Issue 1 of the African Law Review, I penned an article for this column which is still relevant today. Not much progress has been made on the front of ethical leadership and building strong state institutions. The events of the past few years; which include the COVID-19 pandemic, the 2021 unrest and more recently the report of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State are instructive. Below is the full article on this issue:

The country cries out for a functional democracy permeated by a culture of human rights. Ethical leadership and strong state institutions is a precondition to achieving this ideal. South Africa has emerged from a dark history of gross human rights violations, racial stratification and the systematic subjugation of the majority under the erstwhile Apartheid order. Many of its critics became the victims of persecution, detention without trials, political trials and political elimination. Policymakers of the time were impelled to formulate policies that will strengthen the regime and create a human rights culture that favoured the minority over the majority.

One of the gross human rights violations which occurred was the forceful removal of black people from their land. Land removals were well-coordinated and supported by a series of legislative instruments. The Legislature that crafted the enabling Acts were devoid of ethical leadership. This and many other misdeeds point to the centrality of ethical leadership in our country as we make positive strides from a shameful past. South Africans from all sectors of society and cultural backgrounds joined forces in building a united democratic South Africa. Through our internationally revered constitution, we have demonstrated to the world our determination to rebuild a nation from the rubbles and deleterious effects of colonialism and apartheid. We have vowed to entrench a functional state premised on the will of the people and wherein the human rights culture permeates.

Through the Constitution, we have successfully characterised the aspirations we have as a nation. These are aspirations which would, if we all embark on their relentless pursuit, help alleviate the standard of living of all our people and make our democracy a functional reality. Those who occupy positions of power must never forget that we cannot solve unemployment by pretending it doesn't exist, neither can we eradicate slums by ignoring their existence. The eradication of these realities will get us closer to the ultimate goal of restoring the dignity of our people, a fundamental human right. We need ethical leadership, strong state institutions and an independent prosecuting authority underpinned by a transformed and independent Judiciary. The scourge of corruption and other forms of greed, undermine

Image sourced from enca.com

> "The relentless struggle was not just for democracy, but a functional democracy with supporting institutions and other organs that remain resolute in the execution of their tasks."

efforts to progressively realise socio-economic rights. We need a corruption watchdog led by ethical leaders who are not malleable and open to manipulation. This is essential for a total entrenchment of a human rights culture our constitution envisages.

The struggle for political and economic emancipation, culminated in a new democratic order premised on the human rights culture and equal participation for all. The relentless struggle was not just for democracy, but a functional democracy with supporting institutions and other organs that remain resolute in the execution of their tasks. Each of these institutions or organs must perform tasks diligently, such diligence will help reduce malfeasance and corruption in public institutions.

Politicians, as our elected policy formulators, hold the superior opportunity to determine the path of our nation. They can plunge us into the path of despair, destruction and deeper chaos. They can also lead the path to a prosperous and inclusive future, envisaged by the Constitution. Corruption and weak institutions are to blame for our socio-economic stagnation and the widening gap between the rich and poor. As a nation, we are all aware of a corrosive corruption culture that has infiltrated the spine and penetrated the soul of our democracy. Serious allegations of corruption have surfaced, pertaining to state capture and a coordinated scheme to weaken democratic institutions to protect the proceeds of corrupt ends. Political meddling and a deliberate subversion of our constitutional values also appears rampant. Corruption is a scourge which severely limits the state's capabilities to ensure the full realisation of human rights. When resources are squandered for private advantage, the gap between the rich and the poor proportionally widens, inequality soars high as many people are pushed to the slums by the conditions.

The right to equality is recognised as one of the fundamental rights universally, it is amongst the category of inalienable rights. However, the absence of ethical leadership in critical institutions such as the NPA and the Hawks renders the question "are we truly equal?" more pertinent. The culture of selective prosecution we have witnessed over the years must be ended. This can be achieved by appointing ethical individuals to our key institutions. All the commissions investigating allegations of malfeasance and corruption must be supported by each one of us. As our national motto reminds us to foster unity in our rich diversity (!ke e: ǀxarra ǁke) "Diverse people, Unite", we must unite against graft in all forms of its manifestation. We must unite in the cause to strengthen our key institutions. Each one must play a role in the entrenchment of a human rights culture that our progressive constitution envisages.

The choices we make today, determine our tomorrow. WE OWE IT TO POSTERITY!!

BLA-Legal Education Centre - Training Programmes

By Andisiwe Sigonyela: Director-BLA-LEC

The following trainings have been conducted from April 2021 to February 2022.

Continuing Legal Education (CLE) - 2021

PROGRAMME	DATE	AREA	NUMBER OF DELEGATES
Bills of Costs	24 April 2021	Webinar	21 legal practitioners attended
Quantification of Medical Claim	10 July 2021	Webinar	28 legal practitioners attended
Court Procedure – Revision for Board Exams	31 July 2021	Webinar	16 legal practitioners attended
Prospecting and Mining Law	04 September 2021	Webinar	20 legal practitioners attended
Bills of Costs	25 and 26 January 2022	Webinar	40 legal practitioners attended.
Procurement law	19 February 2022	Webinar	14 legal practitioners attended
Prospecting and Mining Law	26 February 2022	Webinar	13 legal practitioners attended

Commercial Law Programme (CLP)

PROGRAMME	DATE	AREA	NUMBER OF TRAINEES
Contract Drafting and Negotiation Skills	24 July 2021	Webinar	20 legal practitioners attended
Risk and Compliance Management – Due Diligence	28 August 2021	Webinar	24 legal practitioners attended
Mergers and Acquisitions	09 October 2021	Webinar	11 legal practitioners attended
Taxation & Utilization of Trusts in Estate Planning	30 November 2021	Webinar	12 legal practitioners attended
Joint Ventures	11 December 2021	Webinar	15 legal practitioners attended
Drafting and Contracts	27 January 2022	Webinar	15 legal practitioners attended

At the BLA-Legal Education Centre (left-right): Judge President F. Legodi, Adv. Mc Caps Motimele SC (Chairperson) & Justice Serithi (retired JA)

Advanced Trial Advocacy Training: (left-right): Judge Vukeya, Acting Judge Langa and Acting Judge Roelofse

Trial Advocacy Training (Schools for Legal Practice)

PLT SCHOOL	DATE	NUMBER OF TRAINEES
East London School for Legal Practice (day class)	12 – 16 April 2021	33 candidate legal practitioners attended
East London School for Legal Practice (night class)	19 – 23 April 2021	26 candidate legal practitioners attended
Johannesburg School for Legal Practice (night class)	19 – 23 April 2021	51 candidate legal practitioners attended
Pretoria School for Legal Practice (day class)	03 – 07 May 2021	28 candidate legal practitioners attended
Polokwane School for Legal Practice (day class)	03 – 07 May 2021	43 candidate legal practitioners attended
Polokwane School for Legal Practice (night class)	03 – 07 May 2021	35 candidate legal practitioners attended
Johannesburg School for Legal Practice (night class)	03 – 07 May 2021	60 candidate legal practitioners attended
Pretoria School for Legal Practice (night class)	10 – 14 May 2021	32 candidate legal practitioners attended
Port Elizabeth School for Legal Practice (night class)	10 – 14 May 2021	21 candidate legal practitioners attended
Potchefstroom School for Legal Practice (night class)	17 – 21 May 2021	44 candidate legal practitioners attended
Durban School for Legal Practice (day class)	17 – 21 May 2021	31 candidate legal practitioners attended
Cape Town School for Legal Practice (day class)	17 – 21 May 2021	44 candidate legal practitioners attended
Cape Town School for Legal Practice (night class)	17 – 21 May 2021	41 candidate legal practitioners attended

Advanced Trial Advocacy Training: Judge Modiba, Adv. Mc Caps Motimele SC (Chairperson), Deputy Judge President Mphahlele and Judge Mankge with the legal practitioners that appeared before them for trials of the Advanced Trial Advocacy Training held in Mbombela from 31 May – 06 June 2021

Trial Advocacy Training (Schools for Legal Practice)

PLT SCHOOL	DATE	NUMBER OF TRAINEES
Durban School for Legal Practice (night class)	25 – 28 May 2021	35 candidate legal practitioners attended
Unisa Johannesburg School for Legal Practice (night class)	07 – 11 June 2021	43 candidate legal practitioners attended
Unisa Pretoria School for Legal Practice (night class)	07 – 11 June 2021	37 candidate legal practitioners attended
Unisa Mthatha School for Legal Practice (night class)	07 – 11 June 2021	16 candidate legal practitioners attended
Unisa Cape Town School for Legal Practice (night class)	21 – 25 June 2021	18 candidate legal practitioners attended
Johannesburg School for Legal Practice (night class)	02 – 04 August 2021	59 candidate legal practitioners attended
Pretoria School for Legal Practice (day class)	04 – 06 August 2021	47 candidate legal practitioners attended
Johannesburg School for Legal Practice (day class)	17 – 19 August 2021	55 candidate legal practitioners attended
Polokwane School for Legal Practice (day class)	23 – 25 August 2021	55 candidate legal practitioners attended
Polokwane School for Legal Practice (night class)	23 – 25 August 2021	46 candidate legal practitioners attended
Port Elizabeth School for Legal Practice (night class)	06 – 08 September 2021	34 candidate legal practitioners attended
Pretoria School for Legal Practice (night class)	06 – 08 September 2021	52 candidate legal practitioners attended
Cape Town School for Legal Practice (day class)	13 – 15 September 2021	40 candidate legal practitioners attended
Cape Town School for Legal Practice (night class)	13 -15 September 2021	42 candidate legal practitioners attended
Durban school for Legal Practice (day class)	13 – 15 September 2021	38 candidate legal practitioners attended
East London School for Legal Practice (day class)	04 – 06 October 2021	49 candidate legal practitioners attended
UNISA Mthatha school for Legal Practice (night class)	11 – 13 October 2021	20 candidate legal practitioners attended
UNISA Pietermaritzburg School for Legal Practice	11 -13 October 2021	16 candidate legal practitioners attended

Trial Advocacy Training (Schools for Legal Practice)

PLT SCHOOL	DATE	NUMBER OF TRAINEES
East London School for Legal Practice (night class)	18 – 20 October 2021	54 candidate legal practitioners attended
UNISA Durban School for Legal Practice (night class)	03 – 05 November 2021	41 candidate legal practitioners attended
Johannesburg School for Legal Practice (day class)	03 – 05 November 2021	60 candidate legal practitioners attended
UNISA Cape Town School for Legal Practice (day class)	08 – 10 November 2021	50 candidate legal practitioners attended
Cape Town School for Legal Practice (day class)	15 – 17 November 2021	39 candidate legal practitioners attended
UNISA Pretoria School for Legal Practice (night class)	15 – 17 November 2021	67 candidate legal practitioners attended
Cape Town School for Legal Practice (day class)	15 – 17 November 2021	40 candidate legal practitioners attended
UNISA Johannesburg School for Legal Practice (night class)	22 – 24 November 2021	47 candidate legal practitioners attended
Bloemfontein School for Legal Practice (night class)	22 – 24 November 2021	43 candidate legal practitioners attended
Polokwane School for Legal Practice (day class)	06 – 08 December 2021	76 candidate legal practitioners attended

Advanced Trial Advocacy Training: Acting Judge Roelofse, Acting Judge Langa, Adv. Mc Caps Motimele SC (Chairperson) and Judge Vukeya with the legal practitioners that appeared before them for trials of the Advanced Trial Advocacy Training held in Mbombela from 31 May – 06 June 2021

Trial Advocacy Training - Legal Practitioners

TRAINING	DATE	AREA	NUMBER OF TRAINEES
Advanced Trial Advocacy Training	31 May - 05 June 2021	Mbombela	27 legal practitioners attended
Advanced Trial Advocacy Training	20 September – 25 September 2021	Johannesburg	55 legal practitioners attended
Advanced Trial Advocacy Training	29 November 2021 – 30 December 2021	Polokwane	23 legal practitioners attended
Advanced Trial Advocacy Training	13 – 18 December 2021	Cape Town	24 legal practitioners attended
Advanced Trial Advocacy Training	21 – 26 February 2022	Durban	24 legal practitioners attended

Black Lawyers Association and its future role: We must not be blinded by our past achievements

By Mashudu Kutama, BLA President

As the Black Lawyers Association (BLA) march to its 43rd Anniversary Annual General Meeting (AGM) on 20 November 2021 in East London, we must never be blinded by our past achievements. We must emerge out of the AGM with new energy, vigour and program of action to take us to new heights. It must never be business as usual.

Our challenges are immense in particular post the enactment of Legal Practice Act 28 of 2014 (LPA). The Gala Dinner gives us an opportunity to pay homage to the legacy and values of Ntate Pitje and other leaders. We draw lessons from the path they travelled and their experiences. While this might be the last Pitje Gala Dinner organised by the BLA, as the family wishes to broaden the Lecture to the public, we must then find ways to honour our past leaders at both branch and national level.

The BLA should consider establishing a bursary scheme in honour of past departed Presidents Pitje, Baba Ngubane, Judge Jake Moloi, Cde Lutendo Sigogo (may their activist souls rest in eternal peace). The Pitje Ngubane Moloi Sigogo Excellence Award may be for LLM students in the field of Constitutional Law to encourage our members to research on this important field in our constitutional democracy.

Transformation of judiciary

The BLA has achieved tremendous results in the transformation of the legal profession and the judiciary. We participate in all structures of governance in the profession and our members are regularly appointed to various Divisions of the High Court, Lower Courts and tribunals. These we achieved through a detailed and meticulous programme of action intended to transform these structures. It is not by coincidence that we boast to be the only organisation that has its past members respectively as Chief Justice (Mogoeng Mogoeng) and Deputy Chief Justice (Dikgang Moseneke) at the same time.

We have in the recent past years produced and recommended a new generation of judicial officers to the bench namely Judges Brian Mashile, Babalwa Mantame, Lebogang Modiba, Leicester Adams, Nomsa Khumalo, Thoba Poyo-Dlwati, Daphney Mahosi, Nelisa Mali, Mpostoli Twala, Martha Mbhele (now elevated to the position of Deputy Judge President, Free State Division) Lester Nuku, Mandla Mbongwe, to name but a few. This is a tremendous achievement and we must be proud of these former BLA members for their elevation to the bench.

The BLA must intensify the transformation of the judiciary and recommend more black women to the bench. Through the BLA Legal Education Centre (the BLA-LEC), we must introduce judicial skills training for our members and be biased towards black female legal practitioners within our ranks.

Since the adoption of the Constitution, more than two decades ago, the legal profession and the Judicial Services Commission (the JSC) have not seriously considered the impact of chapter 8 of the Constitution in the transformation of the judiciary and jurisprudence. In terms of section 175(2) of the Constitution, the Minister is not expressly enjoined to consider gender nor racial composition of a Division of a High Court when he or she appoints acting judges. However, the JSC consider this constitutional imperative when appointing permanent judges in term of section 174(2) of the Constitution.

We must also begin to debate the relevance of having the existence of the Supreme Court of Appeal (the SCA) and the Constitutional Court. In other jurisdictions like India there is only one apex court with both first instance and appellate powers. In South Africa the SCA is not a final court of appeal as parties may appeal against a decision of the SCA to the Constitutional Court.

> **“As a vanguard of black legal practitioners, the BLA adopted a radical program of action to fight against skewed briefing patterns and racist distribution of legal work by the state and state-owned enterprises.”**

Regulatory framework

As a constituent member of the Law Society of South Africa (the LSSA), the BLA continues to play a meaningful role in the discussions on the future of the LSSA, post the promulgation of the LPA. We will be guided by transformative agenda of the legal profession and not by narrow interests of those against transformation.

We particularly pay special attention to the future of the profession by participating in the Legal Practice Council and its various committees. We are shaping the future governance structure of the profession, education and training of legal practitioners, rules, as well as the unification of the profession. We will continue to be robust and transformative in our engagements with various organisations and stakeholders.

The BLA wants the LPA to produce innovative, honest, skilful and competent legal practitioner ready to practice law at the highest level and who can easily be elevated to the bench. We dare not fail on this mission.

Distribution of legal work

As a vanguard of black legal practitioners, the BLA adopted a radical program of action to fight against skewed briefing patterns and racist distribution of legal work by the state and state-owned enterprises. We must continue to strive and take radical steps until the spirit of section 217 of our Constitution, relevant procurement legislations and rules and regulations, are realised.

While our focus is on state and state-owned enterprises, the BLA must equally ready itself to confront the unfair distribution of legal work in the private sector. The financial and mining industries are the visible perpetrators as they continue to instruct mainly white male-owned law firms and brief mainly white male advocates.

We must continue to be vigilant against the financial sector and any other key sectors of our economy. Legal practitioners are huge business consumers of the banks and insurances as we buy their products for our law firms and for our personal needs. We cannot continue to be milking-cows while we do not benefit from procurement of their legal work. The continued violations of the Competition Act 89 of 1998 are normalised despite prosecutorial powers of the Competition Commission as stated in section 49B of the Competition Act.

It is perhaps befitting this gala dinner that I remind all of us what former Deputy Chief Justice Moseneke said on the occasion of the Inaugural Pitje Memorial Lecture at the Constitutional Hill:

> “The power relations within an economy dictate choices of who should provide legal support services. The dominant business class calls the shots on distribution of legal services to the profession and the acquisition of the required skills. Therefore, the dominant class dishes out patronage as it wishes and chooses. Briefing patterns of commercial or corporate work will always be reflective of the class, gender and race of the dominant decisionmakers. So, briefing patterns are not function of compassion and good-heartedness or a wish list. No amount of pleading will help. They are inferred by both the financial interest and prejudices of the moneyed class. Often, all this boils down to them using the legal services of those with whom they share race, class and gender. It is a jolly waste of time to call for transformation of the profession and, in particular, of equitable distribution of work without changing the economic relations in private sector.”

This trenchant observation must be our torch-bearer in our discussions. This we see in the distinct legal work in both the Road Accident Fund and competition law, despite both legislations passed by same legislature, two years apart. The difference is the class, gender and race dominant.

Bridging the gap in education

As a non-sectorial and non-partisan organisation, the BLA is very much alive of the issues confronting society at large. In Eastern Cape scores of children cross rivers to go to school. This is the highest form of deprivation of the right to education. Our silence is deafening and an extension of the demeaning treatment of these children in their quest for education. The BLA cannot keep quite while society is ravaged by corruption in both public and private sectors. Corruption wherever it occurs, represents a decline in our value systems as a nation. If left unchecked, it poses a grave threat to our democratic values and our dream of an ethical and developmental state.

It is indeed time that the BLA-LEC considers establishing a public law interest unit to assist the public at large on matters affecting our communities, e.g. housing, land etc. This unit could also provide necessary training to legal practitioners in the field of public and constitutional law, as well as training of candidate legal practitioners.

Despite all the progress in the regulatory, governance, judiciary and transformative agenda, we must never be blinded by our past achievements to achieve more.

Aluta continua! ●

GM Pitje Memorial Lecture

By Justice Tshiqi

President of the Black Lawyers Association, National Executive and fellow members of the Black Lawyers Association, colleagues, distinguished guests, ladies and gentlemen; good evening. I wish to express my heartfelt gratitude for the privilege of being invited to deliver this lecture, thereby being afforded a valuable opportunity to honour a man who has done so much for me personally, as he has done for the legal fraternity of our country. I am not only honoured to be here, but also to speak of so great a giant that enabled me to overcome the shackles of the economic and racial difficulties which characterised the beginning of my career, as they did and continue to do so for many.

I am sorry that I am not able to be there physically, but I am happy that technology has made this possible. Godfrey Mokgonane Pitje has indeed left a remarkable legacy. As the Black Lawyers Association, a laudable relic of his life's work, convenes its 43rd Annual National General Meeting, it is indeed proper that we celebrate the life of this remarkable icon and remind one another other just how much Ntate Pitje and the likes of him sacrificed in order for Black lawyers to be recognised in this country. As we are gathered here, we do so in the knowledge that the late and formidable GM Pitje championed the establishment of the Black Lawyers Association.

At this juncture I briefly pause to note that this memorial lecture presents us with a moment to reflect, not only on the achievements and legacy of a legal icon, but also on the achievements and potential of the Black Lawyers Association, for the two are inextricably related. And, as we celebrate our founding member, we must also recognise how far we have come in 43 years. After all, GM Pitje was convicted for contempt of court for sitting at a table reserved exclusively for white practitioners. The oppression that black people faced in those times was adeptly described by former President Mandela during his trial in the Old Synagogue Court when he asked the Magistrate: "Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin, by his own flesh and blood?"

At this stage I wish to reflect a bit on GM Pitje's legacy. The mark of a great man is the memory he leaves in the minds of those who remain long after his lifetime. For me, this memory has its genesis in the very beginning of my career as a legal practitioner and ultimately a Justice of the Constitutional Court. The BLA Legal Education Centre (BLA-LEC) sponsored my articles at Neluheni Attorneys from 1989-1991. The completion of my articles through the support of the BLA-LEC enabled me to pursue my career, during which I have been privileged to have been involved in the work of the BLA-LEC, both as a Litigation Officer and Trial Advocacy Trainer and as an enduring member with a fervent belief in and admiration of the mission of the BLA.

During my tenure at the BLA-LEC, I had the privilege of being mentored by legal giants who were all passionate about its role and who always prioritised the future of a black legal professional through its training programmes. These legal giants, some of whom later joined the Judiciary, and some of

whom are eminent counsel, still align themselves passionately with the work of the BLA-LEC.

The purpose of a memorial lecture is to reflect on the legacy of those who walked the journey before us, their ideologies, and how they have shaped the law and the transformative agenda and its relevance presently. I am conscious that I am faced with no easy task tonight, for this memorial lecture has been delivered by the best and brightest trailblazers of our profession. I am honoured to follow them, and shall endeavour to uphold the high standard that they have set through their tributes to GM Pitje.

Godfrey Mokgonane Pitje

The late Godfrey Mokgonane Pitje was born on 20 July 1917 in the village of Phokoane in the Limpopo Province and met his death on the 23rd April 1997. He was a multidisciplinarian with degrees in anthropology, education and an LLD (honoris causa) conferred on 17 July 1987 by the University of the North. Much of his youth was dedicated to activism and the fight against apartheid, as fondly recalled by my brother and the former Deputy Chief Justice Dikgang Moseneke in a lecture he gave at this auspicious event. GM Pitje distinguished himself as a leader in these earlier years as he was elected as the President of the African National Congress' Youth League in 1949. He then retired from student activism in the year 1951 and was succeeded by the late former President Nelson Rholihlahla Mandela. Following his youth activist years, GM Pitje retired from teaching with the introduction of Bantu Education, as the profession understandably lost its allure owing to his consciousness and the fight against apartheid, to which he was a staunch contributor. GM Pitje endured difficulties during the volatile Apartheid era and was subjected to political bans from the year 1963 through to 1975. Despite these difficulties, which were designed to oppress and stagnate him, GM Pitje was admitted as an attorney on 24 March 1959 under the tutelage of the late President of our country, Mr Nelson Rholihlahla Mandela and the late ANC stalwart and leader, Mr Oliver Reginald Tambo.

> **"The BLA was formed in the 1970s during the Apartheid era by GM Pitje and other black practitioners with shared concerns for the space that they occupied, and were being prevented from occupying in the legal profession."**

After completing his legal training, GM Pitje proceeded to start his own practice, where he was later joined as a partner by Ms Desiree Finca, the very first black woman to become an admitted attorney. It should come as no surprise that this particular detail is noteworthy to me, as a woman who is accustomed to being outnumbered by my male counterparts. (Although I am pleased to note that this trend seems to be slowly changing.) GM Pitje's practice was primarily focused on family law, but his political activism and concern for the obstacles faced by black practitioners were ever-present, and culminated in his instrumental involvement in the formation of the BLA. My predecessors have done an excellent and thorough job in the past by recounting finer details of GM Pitje's career and accolades, and indeed they are many. I, however, shall focus my tribute to his memory on the BLA itself, because it is, as I have already noted, an embodiment of the work to which GM Pitje and many of his colleagues dedicated their lives and careers. My perspective is that the BLA is a vehicle through which GM Pitje's legacy and goals can endure, and that we, as black lawyers who share the beliefs and objectives of GM Pitje, have the opportunity to harness the potential of the BLA to achieve genuine upliftment of black practitioners in the legal profession.

Is the BLA still relevant? In order to answer this question, it is helpful to reflect briefly on what prompted the formation of the BLA? The BLA was formed in the 1970s during the Apartheid era by GM Pitje and other black practitioners with shared concerns for the space that they occupied, and were being prevented from occupying in the legal profession. This was indeed a dark era for black lawyers as they were deliberately marginalised in various ways. They were faced with many challenges that were discriminatory, unfair and inhumane. I can do no better than to refer to the remarks made by former DCJ Moseneke, as he dealt with some of these discriminatory challenges during the inaugural GM Pitje Memorial Lecture in 2015. [1] He said: Black lawyers were

1 The Godfrey Mokgonane Pitje Inaugural Memorial Lecture "The Life of Godfrey Mokgonane Pitje as a Professional, Activist, Educator: Reflections to Aspiring Lawyers" by Deputy Chief Justice Dikgang Moseneke Constitution Hill Friday 9 October 2015.

treated as inferior to their white counterparts purely because of the colour of their skin. Their capabilities and qualifications were constantly questioned, and they had to constantly prove to the general public and clients that they were qualified lawyers and that they were as capable as white lawyers.

Judicial officers were also not kind to black lawyers, and the structure of court buildings and other legal institutions perpetuated this unfair discrimination. Black lawyers used their own designated entrance to court buildings, served at different counters and could not address the court from the same desk as white lawyers. What was worse, for me, is that judicial officers often took unfavourable views of meritorious cases simply because they were pleaded by black lawyers. In addition, the Influx Control Legislation and the Group Areas Act restricted the movement of black people and, as a consequence, black lawyers could set up their offices only in the periphery of South Africa's township's towns and cities. It was all of these challenges that culminated in the formation of the BLA, by a group of practitioners who were determined not to accept the injustice of the status quo.

I now turn to the objectives of the BLA. The BLA was initially formed as the Black Lawyers Discussion Group, which later evolved into what is now known as the Black Lawyers Association. The BLA was specifically formed to address the impediments placed on the work of Black lawyers by the Apartheid system, as I have briefly discussed. It advocated for change, transformation of the legal profession and of the Judiciary. The objective was, and still is, to remove all the barriers that hinder talented black lawyers from realising opportunities to develop, and gain skills and experience within the legal field.

I think that we can all agree that the BLA's work has led to the successful realisation of these objectives in many ways. For instance, the BLA membership has many prominent jurists in its midst, who are playing a significant role within the South African legal system. The list is endless Ladies and Gentleman. The president has already mentioned some of the colleagues. It is also noteworthy to mention that some of the hard working and dedicated members of the BLA have accomplished a lot, both in and outside of the legal profession.

Behind the empirical evidence and the trailblazing members of the BLA, there are fundamentally important educational initiatives spearheaded by the BLA. These include programmes of the BLA-Legal Education Centre, such as trial advocacy training and commercial litigation training, which have equipped many lawyers with the necessary litigation skills which undoubtedly assisted them in becoming the best litigators they are today. Thus, the BLA-LEC and its programmes remain important for the achievement of one of the primary objectives of the BLA – to empower and produce competent, or rather excellent black lawyers. It is incontrovertible that this objective remains relevant today, because although the formal and legal barriers that faced GM Pitje and his colleagues have been stripped away, certain challenges remain, and the BLA's work is far from complete.

It has been precisely twenty-five years since the enactment of the Constitution, which promises equality, freedom and dignity for all. Although strides have been made, much has yet to change. Black lawyers continue to be denied the opportunity to service the government and corporate sector in South Africa. It is even worse for black female lawyers. In 2014, the Centre for Applied Legal Studies conducted a study on transformation in the legal profession. In their report, they summarised the barriers that currently face black female lawyers as including:

a) "Briefing patterns which tend to prefer a small selection of black women and a larger selection of white men;

b) Cultural alienation as black female lawyers face invisible rules determined by social interaction outside of work;

c) Bias based on historic roles of black women who are subliminally associated with their white colleagues' domestic workers;

d) Racism as they are continuously referred to as window dressing, a direct form of racism which speaks to the person's race / gender rather than their capability; and

e) Sexual harassment, violence and rape."

It is unfortunate and concerning that today, over two decades into democracy, black lawyers and women, in particular, are still confronted by these types of challenges. I do not think that the legal fraternity is as transformed as GM Pitje and other founding members of the BLA would have hoped for. All these challenges are indicative of the relevance of the BLA and the role it can continue to play in furthering the objectives of our founding members. There is a lot that still needs to be done.

Skewed briefing patterns are probably the biggest challenge that currently face black lawyers in South Africa. Work allocation is based on race and gender prejudices.[2] White male lawyers are getting better briefs than black male lawyers, whilst male lawyers are receiving better briefs than female lawyers.

Commercial and corporate work remain the preserve of White male lawyers, and black lawyers tend to be briefed on constitutional and labour law matters which are not as financially rewarding as commercial work.[3] This undoubtedly deprives black practitioners an opportunity to receive exposure and experience in complex commercial matters such as intellectual property and maritime law, mining and competition law. This issue persists despite numerous talks, seminars and colloquiums on the need to ensure an even distribution of legal work amongst advocates and attorneys.

Not long ago, Action Group[4] provided an update on the progress made since its formation in 2016. Action Group was

2 Transformation of the Legal profession by the Centre for Applied Legal Studies, August 2014.

3 *De Rebus*, August 2017 "A historic moment – Action Group on Briefing Patterns delivers on procurement protocols "by Kgomotso Ramotsho.

4 Action Group was established in 2016 to investigate briefing patterns in the legal profession. It consists of representatives of the attorneys' and advocates' professions, the big law firms and the Department of Justice and Constitutional Development.

quoted by the media[5] as having reported the findings of its research on how national government departments and state-owned entities distribute their legal work to legal practitioners.

> The findings include, amongst others, that:
>
> a) "lucrative work goes mainly to a select pool of black male advocates and thus, excludes many other advocates;
>
> b) other lucrative work goes to an identifiable pool of a few white male advocates thus, also excluding other advocates;
>
> c) to a limited extent, other lucrative work goes to a classifiable group of black female advocates; and
>
> d) the majority of advocates, regardless of gender and race, receive little and/or no work. This is disappointing and concerning to say the least."[6]

The State, as the largest consumer of legal services, has the power to significantly turn things around, and should demonstrate its constitutional commitment to transformation and the realisation of a truly equal South Africa. One would expect the state to be at the forefront and leading by example in ensuring even distribution of legal work. This, unfortunately, is yet to happen.

In the light of these challenges, there is no doubt that the BLA is still relevant and must start to creatively think of ways to overcome them. After all, the organisation's inception was during a time where we faced challenges that were far more sinister, overt and determined. If the BLA could play the role that it did in black empowerment during Apartheid, I have no doubt that it can continue to realise the aspirations of GM Pitje today.

What do I perceive to be the BLA's role in the future? I have said much about the challenges that we face as black lawyers, and indeed as a society as a whole. After all, substantive equality is a social good from which all of South Africa will benefit. I have also said that the BLA remains relevant and important in overcoming these challenges, and that it should do so by continuing to strive towards the achievement of the BLA and GM Pitje's original mission. The question is how?

For my part, I am a fervent believer in the potential of the BLA's Legal Education Centre. After all, targets and statistics are just numbers. True transformation can only occur through genuine upliftment that overcomes the vast racial disparities that have been created in our society through prolonged patterns of systemic disadvantage. We need to focus our efforts on educating, developing and supporting young people, so that they are ready to enter the legal profession and flourish, notwithstanding any past disadvantage they may have encountered.

5 *De Rebus*, May 2017 "Action Group on Briefing Patterns in the Legal Profession reports on progress one year on " by Nomfundo Manyathi-Jele.

6 *Ibid.*

"It is thanks to their ingenuity, bravery, and collective efforts that we are here tonight, celebrating over four decades of an organisation committed to the true equalisation of opportunities for black practitioners."

To this end, programmes like the BLA's Trial Advocacy Programme are of utmost necessity. This programme offers training to practitioners wishing to improve their advocacy skills by providing a simulated court room experience in which participants can gain practice in the art of persuasion. The trainers on this programme include senior counsel and many Judges. There is also the BLA's Continuing Legal Education programme, and its Commercial Law Programme, both of which offer additional training to practitioners to enable them to enhance their knowledge and understanding in a range of legal fields. Initiatives like these are indispensable to the goal of erasing racial and gender lines in the profession, as they foster competence and confidence, thereby enabling black practitioners to excel. My view is that all young practitioners are bound to benefit from these programmes, and that we need to promote and develop these initiatives to encourage confidence and belief in black lawyers, both in society at large and in black lawyers themselves.

In conclusion I wish to state that as black practitioners in South Africa, we have experienced a complicated and unique relationship with the law. For our forebears, including the extraordinary man whose memory we celebrate tonight, the law was an enemy – a weapon used against black people by the Apartheid apparatus. Yet, they found their own way to fight back, and even successfully wielded the weapon themselves, finding innovative and creative ways to navigate a seemingly insurmountably unjust system in a way that worked to their benefit. It is thanks to their ingenuity, bravery, and collective efforts that we are here tonight, celebrating over four decades of an organisation committed to the true equalisation of opportunities for black practitioners. Let us honour GM Pitje and his life's work by remembering that, but most importantly, let us honour him by taking his work further, and working tirelessly towards the realisation and furtherance of the BLA's ideals and objectives. Let us harness our powers to educate and uplift, and to nurture a generation of excellent black practitioners. Let us impress upon young black lawyers that they can be as successful, in their own right, as GM Pitje and his colleagues. For as former President Mandela said "sometimes it falls upon a generation to be great. You can be that great generation. Let your greatness blossom."
I thank you once again for this opportunity. ●

The National Health Insurance and access to traditional medicine in South Africa

Author: Pritzman Busani Mabunda
PhD Candidate University of Pretoria
Co – Authored by Supervisor Dr Llewellyn Gray Curlewis

Abstract
The withdrawal of the National Health Insurance Bill (NHI) at the end of 2019 posed a question as to whether the Bill would be promulgated into an Act in the foreseeable future. The reintroduction of the Bill in parliament at the beginning of 2020 brought hope on the future of NHI in the republic of South Africa. The NHI Bill has become one of the most debated pieces of legislation in the country. The NHI is intended to bring about transformation that will improve service provision and health care delivery. It aims to promote equity and efficiency to ensure that all South Africans have access to affordable, quality health care services and access to medicines or drugs regardless of their employment status and ability to make a direct monetary contribution to the NHI Fund. The mandate of ensuring that medicine or drugs are more affordable should include the use and acceptance of Traditional Medicine to enhance and provide for transparency in the pricing of medicines in South Africa. Traditional medicine should act as an alternative for western medicine, in enabling the society at large to attain adequate access to medicine thereto. In the quest for universal health cover under the ambit of the NHI, the government needs to address the inability to develop a unifying framework for the use of both traditional medicine and western or biomedicine in human health-care practice. If government does not develop such a framework, it will further impact government's ability to accomplish comprehensive health and medical coverage in South Africa.

Photo: Freepik/ Wikipedia

> **"The NHI Bill is by no means the most straightforward Bill as it is riddled with ambiguity around funding, medical skills shortages, medical aids, infrastructural problems, wastage and corruption in the public sector.[6]"**

Introduction

"The introduction of the National Health Insurance (NHI) Bill took many by surprise and was for various reasons not warmly received in the industry. The pricing of drugs and medicine by pharmaceutical companies has led to access being unaffordable for the larger population of impoverished South Africans."[1]

There is a narrative that suggests that access to healthcare through the NHI will create a competitive edge just as what is currently happening in the private sector at the moment as government strives with plans towards the progressive realisation of affordable healthcare for the masses in line with the National Development (NDP) Plan Vision 2030 and the World Health Organisation (WHO).[2] The WHO estimates that 80% of the populations of Asia, Africa and Latin America use traditional medicine to meet their primary health care needs. For many people in these countries, particularly those living in rural areas, this is the only available, accessible and affordable source of health care.[3] The 50th Session of the WHO Regional Committee for Africa held in 2000 recognised the importance and potential of traditional medicine for the achievement of health for all.[4] Participants urged accelerating the development of local production of traditional medicines in order to improve access to health care for the African Region.[5]

The NHI Bill is by no means the most straightforward Bill as it is riddled with ambiguity around funding, medical skills shortages, medical aids, infrastructural problems, wastage and corruption in the public sector.[6] However, what is apparent is that the NHI is going to sooner rather than later make it imperative for the government and pharmaceutical companies to get involved explicitly in access to health care. The NHI, in all its submissions, does not mention the use of traditional medicines (TM) as a viable alternative to lower the costs of medication and bring about transparency in the health fraternity. Access to affordable medication is imperative in any health reform legislation such as that of the NHI. There is a great need to consider all options available and include the cultural and historical diversity in South Africa.

In this article, the history and use of traditional medicine and traditional medicinal practitioners within the South African context will be discussed. In order to shed light on the importance of traditional medicine, the article will also make reference to and discuss the traditional medicine systems of other countries including, China, India, Japan and Thailand. The comparative analysis will also include discussions on the intellectual property regimes of these countries as it relates to traditional medicine. The legal position of traditional medicine in South Africa will also be explored, including the Traditional Health Practitioners Act. The article will ultimately recommend that the South African government needs to clarify a range of issues with regards to the use and access of traditional medicine in South Africa as an alternative medicine in its quest to achieve the intended goal of NHI including its status and regulatory framework at large. The government should thrive to ensure that traditional clinics and medicine are well integrated to afford every individual the autonomy to choose their intended choice of treatment.

History of traditional medicine

The history of traditional medicine predates the Alma Ata Declaration.[7] Throughout the decades, countries of the world have been utilising traditional medicines for curative and preventative purposes and South Africa is no exception.[8] Countries such as India, China, Japan and Thailand, amongst others, have been at the forefront of using these traditional medicines to this day.[9] The International Conference on Primary Health Care, held in Alma-Ata on 12 September in 1975, articulated the need for urgent action by all governments, all health and development workers, and the world community to protect and promote the health of all the people of the world.[10]

The emphasis of this meeting was in line with the existing gross inequality in the health status of people in developed and developing countries.[11] The conference was centered to confirm that States or Governments have a responsibility for the health of their people, which can only be met by the provision of adequate health and social services.[12] It emphasises the point that primary health care is crucial. The social target of governments, international organisations and the whole world community in the coming decades should be the attainment for all peoples of the world of a level of health

1 Stevens "Innovative Approaches to Increase Access to Medicines in Developing Countries" *US National Library of Medicine National Institutes of Health* (2017) p 2.
2 National Health Insurance Bill 2019 and available at: www.health.gov.za/index.php/nhi (accessed 28/03/2022).
3 The African Health Monitor 2010 https://reliefweb.int/sites/reliefweb.int/files/resources/FCC3BB0257168C448525779000718FB3-who-ahm-special-issue-aug2010.pdf (accessed 28/03/2022)
4 *Ibid.*
5 *Ibid.*
6 Government Gazette Reg No 41725.
7 David "WHO and Tradition Medicine" Adv Complement Alt Med 2017 p 2.
8 IARC "Some Traditional Herbal Medicines, Some Mycotoxins, Naphthalene and Styrene" *International Agency for Research on Cancer*, 2002 p 3.
9 *Idem.*
10 Alma-Ata, USSR, 6-12 September 1978.
11 *Idem.*
12 *Idem.*

that will permit them to lead a socially and economically productive life by the year 2000.[13]

During April of 2008, the WHO Regional Office for Africa (AFRO), hosted an international conference in Burkina Faso on primary health care and health systems in Africa. The conference was meant to assess the relevance of primary health care for the 21st century and to recommit to health care for all.[14] It was also at this conference that it was stressed that globally there was much work to be done to improve equity, strengthen intersectoral collaboration and involve communities in decisions concerning their health. The government of South Africa also realised that they were lagging behind, and reformation of the health sector was taken forward.[15]

In 2008, the WHO celebrated its 60th anniversary and also the 30th anniversary of the Alma-Ata Declaration, adopted by the WHO and The United Nations International Children's Emergency Fund (UNICEF) in 1978.[16] It is also apparent that the Congress on Traditional Medicine was the first of its kind where member state delegates came together to deliberate traditional medicine with the intention of preparing a feasible structure for countries to adopt.[17] During this congress, the Beijing declaration recognised the role of traditional medicine in the improvement of public health and reinforced its integration into national health, which is crucial given the occurrence of epidemics globally.[18] Governments were also encouraged to advance state policies on traditional medicine through better-quality education, investigations, research and clinical inquiry into traditional medicine as well as improved communication between health care providers.[19]

Traditional medicine, mostly in African countries suggests economic considerations (it is more affordable), traditional practitioners know better the sociocultural background of the patients and they are closer to the patient's ideology, more concerned about the adverse effects of chemical (synthetic) medicines, desire for more personalised health care and assists with the shortage of health professionals, particularly in rural areas.

Traditional medicine has greater public access to health information and more accessible than western medicine and for centuries it has played a significant role in ensuring that the needs of primary health care are met. For example, data indicates that 70 to 80 percent of the population in India and Ethiopia depend on traditional medicine for primary health care and as such they use it as standard medicine for medical treatment rather than as an alternative.[20] Established

"Traditional medicine has greater public access to health information and more accessible than western medicine and for centuries it has played a significant role in ensuring that the needs of primary health care are met."

nations have been using traditional medicine which can be substantiated with the fact that 70 percent of the population in Canada and 80 percent in Germany have been reported to use it as complimentary and/or alternative medical treatment.[21]

The most important question that remains unanswered in Africa is the following: Is traditional medicine to remain principally marginalised from and stigmatised by national health services? This is very much so in reference to countries persistently continuing to complain about the lack of drugs or access to medication whilst having traditional medicine at their disposal. In South Africa the government seems to have put measures wherein the two systems can be able to find common ground, however, traditional medicine is lagging with its integration, implementation and finding its full standing in the health care system.

There has been great acknowledgement that traditional medicine has the propensity to encompass a large group of health care systems, practices and products that are evidence-based and effective.[22] For example, as early as 1998, the US National Institute of Health stated that acupuncture was effective in the treatment of certain conditions such as post-chemotherapy induced nausea and vomiting.[23] Traditional medicine therapies, such as Tai Chi, act as preventative medicine and benefit quality of life. Many traditional treatments have also proven effective in the treatment of chronic, disabling and neglected diseases for which adequate western treatments do not yet exist.[24]

Traditional Medicines in the South African Context

South Africa

It has been estimated that there are between 250 000 and 400 000 traditional healers in South Africa, and 28 000 medical doctors.[25] Furthermore, eight out of every 10 black South Africans are believed to, in one way or the other, rely on traditional medicine alone, or in combination with Western

13 *Ibid 2.*
14 WHO Global Report, 2018 – The Africa health transformation programme: A Vision for Universal Health Coverage. See www.who.int/docs/default-source/primary-health-care-conference/phc-regional-report-africa.pdf?sfvrsn=73f1301f_2 (accessed 28/03/2022).
15 National Department of Health Strategic Plan 2010/11-2012/13 www.mm3admin.co.za/documents/docmanager/2D5ED792-878C-4371-9575-8281A96BBB26/00023294.pdf (accessed 23/02/2022).
16 World Health Organization www.who.int/medicines/areas/traditional/congress/congress_background_info/en/ (accessed 1/10/2019).
17 Abbot 'The Beijing Declaration: A Landmark for Traditional Medicine' 2009 p 1 www.ictsd.org/bridges-news/bridges/news/the-beijing-declaration-a-landmark-for-traditional-medicine (accessed 1/11/2019).
18 *Idem.*
19 *Idem.*
20 *Ibid 2.*
21 *Idem.*
22 *Ibid 3.*
23 *Idem.*
24 *Idem.*
25 Zuma "The role of traditional health practitioners in Rural KwaZulu-Natal, South Africa: generic or mode specific?" 2016 p 2 www.ncbi.nlm.nih.gov/pmc/articles/PMC4994274/ (accessed 28/03/2020).

> **"Traditional medicine features in the lives of millions of people in South Africa every day. In fact, it is estimated that 80% of the Africa population uses traditional medicines across the continent.[38]"**

medicine.[26] In fact, 66% of African psychiatric patients in Cape Town indicated that they used a combination of medical and indigenous services for mental health problems.[27] This coexisting use of western and traditional medicine is referred to as medical pluralism or medical syncretism. It is crucial to note that in Africa as a whole, traditional healers occupy respected positions within many indigenous African cultures as they are consulted for a wide range of physical, social and emotional problems and are often expected to assume the multiple roles of medicine healer, physician, priest, psychiatrist, advisor, teacher, diviner and herbalist.[28] These roles are important to the society at large and there is a need for the government, through the NHI, to ensure that the health facilities bring about awareness for those that want traditional medicine without the stigmatisation that currently surrounds this debate.

During the Apartheid era, the Health Act 56 of 1974 and its 1982 amendments constrained traditional healers' performance of any act related to medical practices. Nevertheless, despite these laws, traditional healing remained resilient, continued to operate in both urban and rural areas, and were used at all educational and socio-economic levels.[29] When the African National Congress (ANC) came into power in 1994, the government enacted the White Paper for the Alteration of the Health System in South Africa,[30] which documented that traditional healer form part of the broader primary health care team. In the year 2007, the government promulgated the Traditional Health Practitioners' Act 22 of 2007, to create the Interim Traditional Health Practitioners' Council of South Africa to adjust the registration, training and practice of practitioners, and protect persons who use their services.[31] Traditional medicine is widely practiced in Africa and other parts of the world.[32] It uses herbs and roots in the treatment and management of diseases, predominantly but not exclusively in rural areas where there is no access to health care.[33] The practice of traditional healing is a continuous experience that has been part of national healthcare systems of many African societies for many years. The traditional medicine paved the way for the development and research of these herbs to what is now known as western medicine which people mostly purchase in pharmacies.[34] There is also evidence of how the Khoi San – people indigenous to Southern Africa – used traditional medicine to cure the colonisers during some of the epidemics that occurred during the era of 1600s.[35] Traditional Medicine is the first-choice healthcare treatment for at least 80% of Africans who suffer from high fever and other common ailments.[36]

Traditional medicine has been shown to have numerous benefits including psychological relief from ailments and reducing anxiety through a shared, unquestioned and unwavering belief in the powers of the healer. Modern medicine may be looked upon with doubt and uncertainty as some communities' regard it as being foreign. One may argue that colonial powers and structures have played an overwhelming role in altering the cultural scenery and practices of traditional healers and their patients. This can be viewed as having interrupted the discrepancy between diviners and herbalists.[37] The government needs to raise consciousness about traditional medicine, through NHI safeguard that the traditional medicine finds its suitable place in our health system.

Traditional medicine features in the lives of millions of people in South Africa every day. In fact, it is estimated that 80% of the Africa population uses traditional medicines across the continent.[38] Traditional African medicine often carries with it a perception and stigma of being irrational and ungrounded in scientific method in the academia. One reason for this common prejudicial view of traditional African medicine is the failure by governments, especially African governments, through its policies to effectively interpret African traditional medicinal concepts as these are often metaphorical descriptions of the biological and psychological effects of plants or combinations of them used in the traditional medicine preparations.[39] South African traditional plant medicines are fascinating with so many colours, forms and effects. It is an artform and one must be well-versed in order to use them correctly to bring about health and harmony, the aim of all true traditional healers.[40]

26 Ross "Inaugural lecture: African spirituality, ethics and traditional healing - implications for indigenous South African social work education and practice" *South African Journal of Bioethics and Law* 2010 3.
27 *Idem.*
28 *Ibid p 2.*
29 Felhabe Care Handbook (1997) 38.
30 *Ibid 46.*
31 *Idem.*
32 Mahomoodally "Traditional Medicines in Africa: An Appraisal of Ten Potent African Medicinal Plants" Evidence-Based *Complementary and Alternative Medicine* 2013 p 1.
33 Parliament www.parliament.gov.za/news/science-and-technology-committee-explores-indigenous-knowledge-systems-traditional-medicine (accessed 28/03/2022).
34 Fokunang "Traditional medicine: past, present and future research and development prospects and integration in the National Health System of Cameroon Afr J Tradit Complement Altern Med 2011 p 95 https://pubmed.ncbi.nlm.nih.gov/22468007/ (accessed 28/03/2022).
35 *Idem 31.*
36 Ogunyemi "Traditional Medicine Development For Medical And Dental Primary Health Care Delivery System In Africa Afr J. *Traditional, Complementary and Alternative Medicines* 2005 p 46 https://tspace.library.utoronto.ca/bitstream/1807/9189/1/tc05007.pdf (accessed 28/03/2022).
37 *Ibid 47.*
38 South African Traditional Medicine 2018 p 1 www.ethnobotany.co.za/index.php/healing/african-traditional-medicine (accessed on 11/07/2018).
39 Sobiecki "The intersection of culture and science in South African traditional medicine *"Indo-Pacific Journal of Phenomenology"*. 2014 7.
40 *Ibid 3.*

In Southern Africa, there are two main types of traditional health practitioners: the herbalist (Zulu inyanga; Xhosa ixhwele; Tsonga n'anga; Sotho ngaka) and the diviner (Zulu isangoma; Xhosa igqirha; Tsonga mungoma; Sotho selaodi).[41] The diviners are considered to be the spiritual specialists and use divination to communicate with their ancestral spirits to diagnose their patients' misfortunes or medical conditions (both types of practitioner use plant medicines for spiritual healing).

Everyone has the right to equality and non-discrimination in terms of section 9 of the South African Constitution. Traditional healing should not experience discrimination in relation to the practice of Western' medicine, where it fulfils the same standards of efficacy, safety, accurate patient information, professionalism and ethics.[42] Everyone has the right to freedom of conscience, religion, expression, thought, belief and opinion and the right to culture in accordance with section 12 of the Constitution. Traditional healers and their patients may not be prevented from expressing or practicing their beliefs and traditions, except in cases where it causes undue suffering or infringes on the human rights of others.[43]

> **"Traditional healing should not experience discrimination in relation to the practice of Western' medicine, where it fulfils the same standards of efficacy, safety, accurate patient information, professionalism and ethics.[42]"**

Everyone has the right to the freedom of trade, occupation and profession in terms of section 22 of the Constitution. Traditional healers must be free to practice their profession just as medical doctors have the autonomy to practice anywhere in the country.[44] Everyone has the right to have their environment protected in terms of section 24 of the Constitution. It is important that in preparing their medicines, traditional healers do not contribute to environmental degradation, while they should promote conservation and secure ecological sustainable development.[45] Lastly on the checklist, everyone has the right to access to health care services in terms of section 27 of the Constitution, which is the prime focus of all interdependent rights, which establishes a framework for NHI. Everyone should be able to make use of adequate, safe and beneficial health care assistance, and be able to elect being treated by traditional healers.

41 *Ibid 4.*
42 *Ibid 29.*
43 *Idem.*
44 *Ibid 29.*
45 *Ibid 29.*

World Health Organisation definition of traditional medicine

The World Health Organisation (WHO, 2008) defines traditional medicine as:[46]

> "The health practices, approaches, knowledge and beliefs incorporating plant, animal and mineral-based medicines, spiritual therapies, manual techniques and exercises, applied singularly or in combination to diagnose, treat and prevent illnesses or maintain well-being."

The other alternative definition, which can be construed from the WHO is the sum total of all knowledge and practices, whether explicable or not, used in diagnosis, prevention and elimination of physical, mental, or societal imbalance, and relying exclusively on practical experience and observation handed down from generation to generation, whether verbally or in writing.[47] Ritcher in 2003 states that western medicine or biomedicine, on the other hand, is often juxtaposed with the method taken by traditional medicine practitioners as mentioned above. Western medicine is usually associated with diseases of the physical body only, and is based on the principles of science, technology, knowledge and clinical analysis developed in Northern America and Western Europe.

In South Africa, reference needs to be made to the word "muti" which has come to be allied with body parts used for witchcraft in South Africa. This can be attributed to the notion caused by religion, magic and witchcraft which are conceptual, socially constructed categories, the boundaries of which have been contested under diverse religious, cultural and intellectual conditions in the west. One often hears about sensational stories of human killings to obtain human muti. This may happen on occasion, but these are unbalanced individuals who have twisted beliefs and that is akin to serial killers. These atrocities are not truly indicative of what traditional healing is and the government, traditional bodies and associations ought to raise more awareness through campaigns, educational materials, indabas and to have the traditional practitioners fully incorporated into the NHI system as they are already recognised by law. This must be done with the backdrop that traditional and western health systems have operated concurrently, however, western healing has enjoyed far greater official acceptance. Furthermore, looking back in history, successive governments have had more confidence in the western health system because it is deemed to be solely based on "scientific and rational knowledge", whilst traditional healing is perceived to be based on "mystical religious belief.[48] As a result, to date, the greater part of state and private funding has been invested in developing western healing as opposed to its traditional counterpart.[49]

As indicated, traditional healing uses plants, minerals, and animal products to bring about physiological or psychological effects in a person. Many animal fats contain hormones

46 *Idem.*
47 Richter Aids Law Project 2003 7.
48 Peltzer "An Investigation into the Practices of Traditional and Faith Healers in an Urban Setting in South Africa" 2001(2) Health SA 4. There are also reports of a "white" traditional healer – see Clark "The Doctor of Port St Johns" 1998-03-30 Dispatch Online www.dispatch.co.za/1998/03/30/editoria/HERBMAN.HTRADITIONAL MEDICINE (accessed 23/02/2022); and Van Zyl "Ons eie Sangoma" June 1992 Publico 4-6
49 *Idem 52.*

that have effects on the body and are therefore medicinal.[50] Minerals have effects on mood and can be used to relax a person. All of nature can be used as medicines, even poisons in very small doses. The issue that can be raised with animal muti is that in certain instances it is not sustainable, and the animal dies in the process of obtaining the medicine. Plant muti is a sustainable source of medicines without the type of animal suffering associated with animal muti.[51] Therefore, traditional practitioners also need awareness as they practice their craft to ensure that animal cruelty is avoided by all means necessary.

> **"The National Development Plan (NDP) states that it encourages collaboration with traditional healers with regards to reducing the prices of medicine.[55]"**

The Traditional Health Practitioners Act

The Traditional Health Practitioners Act 22 of 2007 affords registration options to commence registration of traditional health. However, nothing significant has been done to realise this objective after almost a decade since establishing the interim council. The Traditional Health Practitioners Act, was enacted to regulate the traditional health sector in South Africa. With effect from 1 May 2014, a cluster of the Act's sections became effective by promulgation in the Government Gazette. African traditional medicine is one of the major service industries in South Africa, yet there is limited information about the medicine in the health sector. It is estimated that raw medicine plants, prescriptions and herbal medicine add up to an industry worth R 2.9 billion.[52]

The Constitution is accommodative to the diversity of the country's population. Section 9(2) of the Constitution, as stated above, protects everyone's right to equality. Section 1 prescribes clear legal guidelines for the registration of traditional healers and the required training.

The amendment to the Traditional Health Practitioners Act (the Traditional Health Practitioners Regulations of 2015), identifies certain conditions in which traditional healers can be registered directly. Regulations No 2015 - Regulation 10 reads:[53]

> "The circumstances under which any applicant for the registration of any category or specialty may be exempted from any of the prescribed requirements of Traditional Health Practitioners Act is that the applicant who, on promulgation of these Regulations, is a diviner, herbalist, birth attendant or traditional surgeon may be registered as such by the Registrar on the basis of the documentary proof he/she may produce to the Registrar, or on basis that the community regarded him/her to be a diviner, herbalist, traditional birth attendant or traditional surgeon."

The above stipulation suggests and makes it possible that all 200,000 traditional healers be registered on the Council's register through the open-door policy (which recognises that there seems to be no formal qualifications and learning institutions for traditional healers but there are well-functioning informal traditional healing educational and training systems in place that can be sufficient).[54] This will have a very significant impact on the health sector if they work side by side through the NHI to increase access to healthcare and medications to the people of South Africa. Reason being, once traditional healers are absorbed into the mainstream of the healthcare system through the already existing Act, then all South Africans can have access to medical care. This can only be achieved if the integration of traditional medicine into the national health care system is supported by the involvement of pharmaceutical industry. Currently the traditional medicine market is not adequately regulated, and related products are introduced into the market without any mandatory safety or toxicological evaluation and the products are therefore not registered and controlled by regulatory bodies. There is no effective regulation for manufacturing practices and quality standards. The establishment of regulation and registration procedures is still a problem in both developed and developing countries and South Africa is not excluded.

The National Development Plan (NDP) states that it encourages collaboration with traditional healers with regards to reducing the prices of medicine.[55] It submits that since 2011, more than 28 million consumers partook in traditional medicine in South Africa and the country had about 185 500 traditional medicine practitioners nationwide.[56] This collaboration, which is encouraged by the NDP, is essential and there is no better time to merge with the NHI.

The above-mentioned collaboration is critical because the Act, in its current form, seems to suggest little protection for traditional health practitioners because it appears to place more emphasis on protecting the public from the traditional health practitioners.[57] This surely is against the spirit and objective that supported the overview of the legislation and the guard and recognition of the traditional health sector.[58] The stated outline of the legislation referring to traditional medicine is more concerned about regulations than it is about the protection of the traditional health practitioners and their medicines.[59] It states:

50 *Ibid 34.*
51 *Idem.*
52 Yeld IOL 1-24-2019.
53 Regulation No 39358 of 2015.
54 Louw "The Traditional Health Practitioners Act 22 of 2007 of South Africa: Its history, resolutions and implementations in perspective (Part 1: History) *Australasian Medical Journal* 2016 p 396.
55 National Development Plan 2030 p 349 www.gov.za/issues/national-development-plan-2030 (accessed 29/03/2022).
56 *Ibid p 321.*
57 Tshehla "The traditional health practitioners act 22 of 2007: A perspective on some of the statute's strengths and weaknesses "African Journal of Indigenous Knowledge Systems (2015) 47.
58 *Idem.*
59 *Idem.*

> "To establish the Interim Traditional Health Practitioners Council of South Africa; to provide for a regulatory framework to ensure the efficacy, safety and quality of traditional health care services; to provide for the management and control over the registration, training and conduct of practitioners, students and specified categories in the traditional health practitioner's profession, and to provide for matters connected therewith".[60]

The government's response of being more concerned about regulation and less about protection should not be interpreted as suggesting that regulation and stringent enforcement mechanisms are not essential and not required in the profession, because they undoubtedly are. It is submitted that the legislation be amended to expressly provide for the recognition of traditional healers and defining the role which they play medically within society, subject to the regulatory framework as envisaged in the legislation. This will relate with what India has implemented legislatively pertaining to its traditional medicine.[61]

"The efficacy of testing is important as some traditional products on the market may be of low quality and suspecting efficacy, but sold without prescription and the potential hazards of such an inferior product may not be recognised.[63]"

Traditional Medicine and Intellectual Property Rights

The Traditional Practitioners Act missed certain things that are important to ensure the progressive realisation of access to health. Certain aspects were therefore not properly addressed, including the intellectual property rights protection of traditional medicines, promotion of clinical testing, licensing, testing and registration of traditional medicines.[62] The efficacy of testing is important as some traditional products on the market may be of low quality and suspecting efficacy, but sold without prescription and the potential hazards of such an inferior product may not be recognised.[63] Although herbs may also have undesirable side effects, no set "doses" and herb-drug or herb-herb interactions are possible. [64] There is a belief that herbs, as natural products, are inherently safe without side effects and their efficacy can be obtained over a wide range of doses. The general perception is that herbal remedies or drugs are very safe and devoid of adverse effects.[65] But, herbs have been shown to produce undesirable or adverse reactions causing serious injuries, life-threatening conditions and even death. Furthermore, this notion is supported by WHO as in 2008 with its Member States, celebrated 30 years of the Alma-Ata Declaration and Member States adopted the Ouagadougou and Algiers Declarations which, among other things, underscored the role of traditional medicine in health systems and the need to produce scientific research findings in support of traditional medicine.[66]

It is important to note that in response to all these resolutions and declarations, some countries have already commenced promoting research through the establishment of national institutes. [67] These institutes and centres have intensified their efforts to produce scientific evidence on safety, efficacy, and quality of traditional medicines, which may have public health importance particularly in the treatment of malaria, opportunistic infections of people living with HIV/AIDS, diabetes, hypertension and sickle-cell disease. [68] Several countries have developed national herbal pharmacopoeias to document medicinal plants that have been found to be effective and to further ensure their safety, efficacy and quality.[69]

In respect of the acknowledgement and testing of traditional medicines, the Department of Health has introduced the Medicines and Related Substances Amendment Bill (B 6-2014), which creates among its key necessities, the South African Health Products Regulatory Authority, which substitutes the current Medicines Control Council.[70] A major factor hampering the development of medicinal plant based industries in the African region has been the lack of information on their socio-economic benefits. [71] Except for the medicinal uses of these plants, very little information exists on their commercial value and trading possibilities.[72] Consequently, governments or entrepreneurs have failed to exploit the real potential of these plants.[73]

It has been noted that a very large number of traditional medicinal products, variously described as nutritional supplements, phytonutrients or nutraceuticals, are available on the African market.[74] As the names imply, these products are usually sold as functional foods and not as therapeutic agents. [75] They are produced with commercial intent to be used in health promotion, or as agents which can be taken by even healthy individuals as a means of protection against ill health or as tonics to invigorate the body to provide a sense of well-being and so is the case in the South African pharmaceutical sector.[76] Since these products are not presented as medicines,

60 *Idem.*
61 *Idem.*
62 *Ibid 47.*
63 Mordeniz "Integration of Traditional and Complementary Medicine into Evidence-Based Clinical Practice" *Traditional and Complementary Medicine* 2019 p 4 www.intechopen.com/chapters/67739 (accessed 28/03/2022).
64 *Ibid 73*
65 *Ibid 74.*
66 *Idem 3 p 5.*
67 *Ibid p 5.*
68 *Ibid.*
69 *Ibid.*
70 *Idem 72.*
71 Busia 'Towards sustainable local production of traditional medicines in the African Region' 2010 *Afr health monit* p 80 -88.
72 Ibid 84 p 81
73 *Ibid.*
74 *Ibid.*
75 *Ibid.*
76 *Ibid.*

> **"In South Africa, it has been recognised that most people consult a traditional health practitioner before a primary health practitioner and may not disclose this fact during consultation with a healthcare provider.[97]"**

they are often exempted from some of the rigorous regulatory requirements that "proper" medicines would normally have to meet before being granted marketing authorisation. [77]
This situation therefore poses potential health risks to humans especially for those products that possess potent medicinal properties and for which quality and safety may have been compromised in their production. The clinical application of such products would be untenable because there would be no evidence of their clinical efficacy and no information of any potential adverse effects during use.

Furthermore, there are two legislative measures that have been presented in this regard, namely, the Intellectual Property Laws Amendment Act 28 of 2013[78] (IPLAA) and the Medicines and Related Substances Amendment Bill (B 6-2014) (MRSAB). The IPLAA Bill was first presented by the Department of Trade and Industry in 2010 with the aim of amending the current laws relating to intellectual property rights.[79] The Bill was ultimately passed by Parliament and directed to the President for his signature so that it could become law. This legislation challenges the exclusion of indigenous or traditional knowledge from the conventional intellectual property rights regime of the country, often resulting in the exploitation of such knowledge and this is of vital importance if traditional medicine is to be developed further under the NHI.

There are several countries in the world that are still using traditional medicine. China uses the so-called traditional Chinese medicine (TCM), which originated in ancient China and has evolved over thousands of years. TCM practitioners use herbal medicines and various mind and body practices, such as acupuncture and tai chi, to treat or prevent health problems.[80] In the United States, people use TCM primarily as a complementary health approach.

Another country, which is still using traditional medicine as part of their national health system, is Japan. Japanese traditional herbal medicine (Kampo medicine) obtained the unique features observed today during its phase of long historical development in Japan. In Japan, the administration of crude herbal drug formulations dates back more than 1500 years. Recent decades have seen a revival of Kampo medicine in medical practice, accompanied by a scientific reevaluation and critical examination of its relevance in modern health care.[81] Kampo traditional prescriptions have been included in the Japanese National Health Insurance drug list since 1971. A total of 148 Kampo herbal prescriptions are able to be funded to date. The application of Kampo has steadily increased and according to a survey by the Journal Nikkei Medical, more than 70% of physicians prescribe Kampo drugs today.[82]

In Western countries, herbal therapies originating in other cultural areas, mainly Chinese herbal medicine as part of TCM, are receiving increasing interest. South Africa should also be raising interest in the use of traditional medicines like the Japanese are doing with Kambo and its specific regulation in their national health system.[83] Kampo drugs are only available over the counter, meeting Japanese GMP criteria. Through the NHI, traditional medicines ought to be regulated and clinically follow the necessary procedures to enable the users to purchase these medicines legally in a well-regulated environment.[84]

In India, ayurveda, siddha, and unani systems of medicine have coexisted with yoga, naturopathy, and homeopathy for centuries.[85] Siddha is one of the oldest systems of medicine in India. In Tamil, siddha means "perfection" and a siddha was a saintly figure that practiced medicine. Siddha has close similarities to ayurveda, the difference between these two systems being more linguistic – Tamil versus Sanskrit – than doctrinal. In siddha, as in ayurveda, all objects in the universe, including the human body, are composed of the five basic elements: earth, water, fire, air, and sky.[86] Yurveda, unani, siddha, naturopathy, homeopathy, and yoga are all recognised by the Government of India. The first step in granting this recognition was the creation of the Central Council of Indian Medicine Act of 1970.

India is also unusual in that it has seven national medical systems. Almost four-fifths of India's billion people use traditional medicine and there are 430,000 ayurvedic medical practitioners registered by the government in the country. The department overseeing the traditional medical industry, known as Ayush, has a budget of 10bn rupees ($260m).[87] India moved to protect traditional medicines from foreign patents to turn them into western medicine that make them unaffordable soon

77 *Ibid.*
78 Act 28 of 2013.
79 *Ibid 47.*
80 National Institutes of Health traditional medicine www.nccih.nih.gov/health/whatiscam/chinesemed.htm%20traditional%20medicine (accessed 11/7/2018).
81 Watanabe "Traditional Japanese Kampo Medicine: Clinical Research between Modernity and Traditional Medicine—The State of Research and Methodological Suggestions for the Future" www.ncbi.nlm.nih.gov/pmc/articles/PMC3114407/ (accessed 38/03/2020) *Evid Based Complement Alternative Med*v.2011 p 1.
82 *Idem.*
83 *Idem.*
84 *Idem.*
85 WHO http://apps.who.int/medicinedocs/en/d/Jh2943e/8.4.html (11/7/2018).
86 *Idem.*
87 Ramesh "India moves to protect traditional medicines from foreign patents" 2009 www.theguardian.com/world/2009/feb/22/india-protect-traditional-medicines (accessed 29/03/2022).

after being patented.[88] The government stopped multinational companies patenting traditional remedies from local plants and the Indian government effectively licensed 200,000 local treatments as "public property" free for anyone to use but no one to sell as a "brand.[89]

India's battle to protect its traditional treatments is rooted in the belief that the developing world's rich biodiversity is a potential treasure trove of starting material for new drugs and crops. Dr Vinod Kumar Gupta, who heads the Traditional Knowledge Digital Library, which lists in encyclopedic detail the 200,000 treatments stated that it costs the West $15bn and 15 years to produce a "blockbuster drug".[90] A patent lasts for 20 years, so a pharmaceutical company has just five years to recover its costs, which makes conventional treatments expensive.[91] South Africa should follow the Indian local patenting model to address the issues of affordability.

Thailand is also another country that values the contribution of the Indigenous Traditional Medicine and has committed to ensuring the welfare of its aging population by utilising it as a health care resource.[92] The Kingdom of Thailand has its own system of traditional medicine called "Thai traditional medicine". Historical evidence shows that Thai people began to use herbal medicine for the treatment of various symptoms and diseases and health promotion since the Sukhothai period (1238-1377). Traditional medicine knowledge was gradually developed, systematised, revised, recorded, and passed on from generation to generation throughout the country's history, from Sukothai to Ayutthaya (1350-1767), Thonburi (1767-1782), and the early Rattanakosin period (1782-1916), as a means of health care for the Thai people.[93]

In order to successfully integrate traditional medicine into the national health care system and to gain acceptance from health personnel and the public, it is necessary to conduct pre-clinical and clinical researches to obtain scientific evidence to support efficacy, safety, and quality of traditional medicines, herbal medicines, and traditional procedure-based therapy.[94] Cancer patients commonly use traditional medicines in Thailand as these are popular for both self-medication and as prescribed by traditional medicine practitioners, and are rarely monitored. A study was conducted at Wat Khampramong, a Thai Buddhist temple herbal medicine hospice, to document some of these practices as well as the hospice regime.[95] Patients reported a significant reduction in symptoms after staying at Khampramong, indicating an improvement in quality of life, the aim of hospices everywhere. Based on this evidence, it is not possible to justify the use of traditional medicine for cancer in general, but this study suggests that further research is warranted.[96]

> **"The United Nations has projected that developing nations lose billions of dollars annually in unpaid royalties to foreign pharmaceutical corporations that appropriate traditional medicine."**

In South Africa, it has been recognised that most people consult a traditional health practitioner before a primary health practitioner and may not disclose this fact during consultation with a healthcare provider.[97] The Traditional Practitioners Act provides for the relevance of traditional doctors in order to participate in the health sector.

From the above-mentioned discussion, it is imperative, therefore, to note that intellectual property rights have become very extrinsic when it mirrors traditional medicine. Some countries such as India have shown that they are concerned about misuse of natural resources, preservation of biodiversity and protection of medicinal plant resources for the sustainable development of traditional medicine.[98] In 2005, the World Health Assembly decided that member states should "take measures to protect, preserve and to improve, if necessary, traditional medical knowledge and medicinal plant resources for sustainable development of traditional medicine, depending on the circumstances in each country. Such measures could include, where appropriate, the intellectual property rights of traditional practitioners over traditional medicine formulas and texts, as provided for under national legislation consistent with international obligations, and the engagement of WIPO in the development of national sui generis protection systems.[99] South Africa is also not an exception member state and, therefore, the government should facilitate such measures in accordance to the WHA.

States with a robust history of traditional medicine have awareness in protecting against misappropriation and securing intellectual property rights that would allow their communities to derive economic benefits from their traditional medicine related resources such as in India. The United Nations has projected that developing nations lose billions of dollars annually in unpaid royalties to foreign pharmaceutical corporations that appropriate traditional medicine.

India, for example, has created a Traditional Knowledge Digital Library to avoid misappropriation through documenting formulations used in traditional medicine.[100] The database was created following public outrage over the patenting of turmeric in the United States, a herb used

88 *Idem.*
89 *Idem.*
90 Food and Agriculture Organization 2009 www.fao.org/forestry/55335/en/ (accessed 29/03/2022).
91 *Idem.*
92 James "Thailand Uses Traditional Thai Medicine Bringing Health Care To Elderly" 2017 https://thaimassage.com/2017/04/02/traditional-thai-medicine-bringing-health-care-elderly/ (accessed 29/03/2022).
93 Same as above.
94 *Idem.*
95 Williamson 'Traditional medicine use by cancer patients in Thailand'. 2015 p 1 www.ncbi.nlm.nih.gov/pubmed/25847624 (accessed 29/03/2022).
96 *Idem.*
97 Venter "Cutting the cost of South African antiretroviral therapy using newer, safer drugs" *South African Medical Journal* 2017 p 28.
98 *Ibid 6.*
99 *Idem.*
100 *Ibid 5.*

in traditional Indian medicine (Ayurveda).[101] Even though making this information publicly available may protect against misappropriation, it also makes it more difficult for communities to benefit financially from traditional medicine. A balance is therefore needed so that it can also be a means of alleviating poverty.[102]

China has recently also enacted new laws that require disclosure of the source of genetic resources in domestic patent applications.[103] This is a mechanism that seeks to shield its large domestic market for pharmaceutical and traditional medicine products based on native biological materials against uncompensated exploitation by foreign companies. It also has an interest in promoting exports of biological resource-based inventions to foreign markets.[104]

Conclusions and Recommendations

Through the implementation of the NHI (just as India and Japan patented their traditional medicine) so should South Africa follow in order to maximise access of medicines without the fear of being marginalised through the stigmatisation of traditional medicine as this is part of the cultural values, norms and livelihood of Africans. The government ought to inherit traditional medicines and ensure that they meet the contemplated NHI threshold. Using a hybrid of clinically tested and proven traditional and western medicine will be very beneficial in improving access to health, medicine, and drugs and will limit exploitation and manipulation of the pharmaceutical companies as traditional medicine is usually cheaper than western medicine. Other advantages of traditional medicine include its diversity and flexibility; its availability and affordability in many parts of the world; its widespread acceptance in low- and middle- income countries such as South Africa; its comparatively low cost and the relatively low level of technological input required.

The South African government needs to invest in clinically testing traditional medicines and also leverage to shelf such medicines in pharmacies in order to make them more accessible to those who are already using these medicines for curing various diseases. They should also monitor those shelves are not limited to western medicine to affect this. Government has a duty to realise that its people are already utilising traditional medicine and it has a duty to realise the well-regulated use of traditional medicine so that people can have access to affordable medicine and drugs instead of relying on western medicine only.

Aligning traditional healing and human rights is important, especially considering that the quality of health that people have impacts the economy and the following checklist is essential to guide the government on how they can integrate traditional medicine in the health sector. Firstly, everyone has a right to human dignity in terms of section 10 of the Constitution. Traditional healers and their patients have to be treated with respect and dignity. Patients must not be subjected to degrading rituals or procedures.[105] Everyone has a right to privacy in accordance with section 14 of the Constitution. Traditional healers must respect their patients' confidentiality and not disclose any medical information to third parties without their clients' express consent.[106]

The government, through the NHI, needs to provide the political economic, legal and regulatory environment for the production of traditional medicines and therefore should have in place the institutional and legal framework for such production. Also, existing laws are sufficient, in that the legal framework will be the same as that required for the establishment of a pharmaceutical production facility. Partnership arrangements should be further promoted between the traditional health practitioners and researchers as well as with the pharmaceutical industry. This trend must be accelerated through the commitment of resources by all the stakeholders, creation of a conducive environment for investment and fostering of appropriate partnerships.

However, despite the progress made in locally producing traditional medicines of acceptable standards, the quantities are often inadequate to meet public health demand and the medicines are still generally unacceptable to national regulatory authorities due to lack of convincing data on quality, safety and efficacy. It is hoped that efforts will be enhanced through effective implementation of the NHI for local production of traditional medicines to address these drawbacks to ensure that traditional medicines of acceptable quality are made available to the people of South Africa.

Lastly, the government should be bold and determined to make concerted efforts in light of the recognition in the NDP to inject capital into research into traditional medicine (just like Thailand) with the view of getting more traditional medicine. Also, there is need for patent involvement and better negotiations within the pharmaceutical industry, which will lead to better price regulation. We need both western and traditional medicine to coexist in the healthcare system. The sooner both traditional medicine and western medicine is integrated into a universal approach to healing and treatment, the healthier and wiser it will be for all within the NHI.

101 *Idem.*
102 *Idem.*.
103 *Idem.*
104 *Ibid 5*.
105 *Ibid 29.*
106 *Ibid 29.*

Uniform Rule 43(6): A proposed test for determining "material change taking place in the circumstances of either party"

Prof Fareed Moosa (B Proc LLB LLM LLD)
Associate Professor, Department of Mercantile & Labour Law, UWC

Photo: Chanikarn Thongsupa/Rawpixel

In a modern society, as in South Africa, divorce is a reality of the institution of marriage. In as much as consenting adults are free to marry, they are free to divorce: Provided all necessary legal procedures and requirements are met for marriage and divorce, as the case may be. At the best of times, the wheels of justice turn slowly. During the current COVID-19 pandemic with its associated restrictions, it turns even slower. Consequently, matrimonial litigation plagued by acrimony between litigants, fuelled at times by their legal representatives, may be protracted even longer than is usual. This causes vulnerable groups in our society who are at the wrong end of the economic rung, invariably women and children, to be at a disadvantage. They may be left destitute.[1] In this context, Uniform Rule (UR) 43 and Magistrate Court Rule (MCR) 58 play pivotal roles. Although the ensuing discussion focusses on the former, the legal position outlined applies equally in relation to the latter.

UR 43 provides a truncated mechanism for litigants to obtain interim relief for, *inter alia*, maintenance pending the finalisation of a matrimonial action. This rule aims to facilitate an inexpensive and expeditious remedy.[2] It achieves this, in part, by providing a streamlined process permitting the filing of only a single sworn statement by both parties in which they make a full and frank disclosure of their respective financial affairs.[3] Neither litigant may, as of right, adduce additional supporting affidavits, save with leave from the court.[4] A robust

1 *S v S and Another* 2019 (6) SA 1 (CC) paras 3, 31, 54.
2 *TS v TS* 2018 (3) SA 572 (GJ) at 584D-585C.
3 *E v E; R v R; M v M* 2019 (5) SA 566 (GSJ) para 30.
4 *Leppan v Leppan* 1988 (4) SA 455 (W) at 458D.

> **"No hard and fast rules can be laid down in advance as to what constitutes a "material change". A change which may properly be characterised as material in one case may not necessarily be so described in another."**

judicial process is followed at hearings.[5] A litigant who cherry picks the disclosure of information favourable to his or her case is guilty of fraudulent non-disclosure and may be denied relief.[6]

Once issued, an interim order must be complied with, both "in form and spirit".[7] Wilful failure to comply imperils the rule of law and may, in appropriate cases, be visited upon by a contempt order designed to, on the one hand, protect the court's authority and, on the other, protect the dignity of the order's beneficiaries.[8]

UR 43 is a procedural rule that does not affect the substantive law.[9] It merely provides a procedure "by which substantive rights are enforced".[10] These include the fundamental rights in the Constitution, 1996 of every person to dignity (s 10) and to "sufficient food and water" (s 27(1)(*b*)), and to the entrenched right of a child to "basic nutrition, shelter, basic health care services" (s 28(1)(*c*)). The interim maintenance envisaged by UR 43 is distinguishable from the emergency monetary relief catered for in s 7(4) of the Domestic Violence Act 116 of 1998. The latter is available to a claimant in a "domestic relationship" with a respondent within the meaning of this term as defined in s 1 thereof.[11]

UR 43 operates for the benefit of a spouse and child entitled to maintenance from a respondent in a marital relationship with the applicant.[12] It does not only benefit persons married under South African law. UR 43 applies even to persons whose status as a spouse is disputed in pending litigation.[13] It also benefits persons married by religious doctrine.[14] This legal position is reinforced by the recent decision in *President of the Republic of South Africa v Women's Legal Centre Trust and Others; Minister of Justice and Constitutional Development v Faro and Others; and Minister of Justice and Constitutional Development v Esau and Others* 2021 (2) SA 381 (SCA). In casu, the SCA, at para 51, confirmed that, until legislation is enacted that recognises Muslim marriages as valid for all purposes in law, marriages validly concluded according to the tenets of Sharia law and subsisting at the date of its order may be dissolved through the ordinary judicial structures provided for in s 2 of the Divorce Act 70 of 1979.

The substantive basis of a spousal claim under UR 43 is the common law reciprocal duty of support between spouses.[15] The rules pertaining to this duty is gender neutral. Thus, an indigent husband may claim support from an affluent wife.[16] As regards same-sex partners in a registered civil union, the reciprocal duty does not arise from the common law in its original form since it discriminates against same sex partners by denying them the right to marry each other.[17] For a discussion of the reciprocal duty of support between same-sex partners, see *Laubscher NO v Duplan and Another* 2017 (2) SA 264 (CC). The duty of support existing between civil union partners arises, it is submitted, from the amendment to the common law effected by s 13(*d*) of the Civil Union Act 17 of 2006. It stipulates that "husband, wife, or spouse" in the common law includes a "civil union partner" as defined in s 1 of this Act.

By virtue of section 16(3)(*a*) of the Superior Courts Act 10 of 2013, no appeal lies against a maintenance order granted pursuant to UR 43(1). By virtue of s 83 of the Magistrate's Court Act 32 of 1944, the same applies in relation to orders issued under MCR 58(1).[18] It is in this regard that UR 43(6) is significant. It permits a litigant to seek a variation of an interim maintenance order by utilising the same procedure stipulated for the procuring of interim relief.

To succeed, an applicant for a variation order must prove that, after the granting of the interim order, a "material change" took place in the circumstances of a party affected by the order which merits an increase or decrease in the interim maintenance, as the case may be.[19] At the time this article was penned, a case law survey reveals that our courts have not pronounced a test for determining what constitutes a "material change" in the context of this expression and for its purpose in UR43(6) and MCR 58(6). The remainder of this article aims to postulate a possible test to be used in this regard.

Court rules are subject to the trite principle of interpretation that, to determine the meaning of words in a court rule, due consideration must be given to the ordinary, dictionary meaning of words read in context, and having regard to the purpose of the rule.[20] UR 43(6) must be interpreted strictly.[21] A strict interpretation ensures that the mechanism it creates is not impermissibly used to undertake a rehearing of a maintenance application, nor to launch a form of review. Nevertheless,

5 *CT v MT and Others* 2020 (3) SA 409 (WCC) para 25(g).
6 *Du Preez v Du Preez* 2009 (6) SA 28 (T) paras 15-16.
7 *SS v VVS* 2018 (6) BCLR 671 (CC) para 23.
8 *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) paras 27-28.
9 *Jeanes v Jeanes & Another* 1977 (2) SA 703 (W) at 706F-G.
10 Per Rogers J in *CT v MT supra* para 19.
11 For a discussion thereof, see Moosa F 'Understanding "emergency monetary relief" under the Domestic Violence Act' 2020 *De Rebus* March ed 15.
12 *JG v CG* 2012 (3) SA 103 (GSJ) at 110E–G.
13 *Zaphiriou v Zaphiriou* 1967 (1) SA 342 (W) at 345F-H.
14 *AM v RM* 2010 (2) SA 223 (ECP) para 10; *TM v ZJ* 2016 (1) SA 71 (KZD) para 17.
15 *Cary v Cary* 1999 (3) SA 615 (C) at 619I.
16 *AF v MF* 2019 (6) SA 422 (WCC) para 30.
17 *Gory v Kolver NO* 2007 (4) SA 97 (CC) para 19.
18 Van Loggerenberg DE *Jones & Buckle Civil Practice of the Magistrates' Court of South Africa* vol. II p 59-1.
19 *Micklem v Micklem* 1988 (3) SA 259 (C) at 262G.
20 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) paras 18-19.
21 *Grauman v Grauman* 1984 (3) SA 477 (W) at 479I – 480C.

since court rules are designed to ensure fair hearings, a value-based interpretive methodology requires that UR 43(6) be interpreted in a way that advances, not reduces, the scope of the constitutional right to a fair hearing.[22] However, this right applies only when a litigant has a right to a hearing in the circumscribed conditions imposed by UR 43(6).

The object of this sub-rule is manifest, namely, to allow variations of interim maintenance orders provided it is based on a "material change taking place in the circumstances of either party or a child". Accordingly, for a variation to be justified, a court must be satisfied on a balance of probability that there has indeed been a change in circumstances of a "material" nature. In the context of UR 43(6), "material" is used as an adjective to describe the kind of "change in circumstances" contemplated. Etymologically, "material" denotes substance as opposed to form.[23] Linguistically, the word "material" refers to a matter "of serious or substantial import; of much consequence; important".[24]

Therefore, it is submitted that in UR 43(6), the meaning and effect of "material", when considered in conjunction with the "circumstances" it refers to, means a change in the relevant personal circumstances which of such significance or importance as to justify a finding that fairness dictates a judicial intervention by way of a variation order. Viewed in this light, a change of an inconsequential or trivial nature would not fall within the realm of UR 43(6). Nor would justification exist for a variation by reason that a respondent is in a "somewhat better position" than s/he was when the interim maintenance order was granted and the applicant is in a "slightly worse financial position" than s/he was at that time.[25]

No hard and fast rules can be laid down in advance as to what constitutes a "material change". A change which may properly be characterised as material in one case may not necessarily be so described in another. Each case would have to be decided on its own facts and merits. The test whether the trigger for an order under UR 43(6) has been met is objective (not subjective). In each instance, a court is called upon to compare the personal circumstances forming the basis of the variation application with that which existed at the time when the interim maintenance order was granted in the first place. A variation order *may* be granted if circumstances exist which, as a consequence, effect a change in relevant personal circumstances which is of a serious or substantial nature in the context of the case at hand. Even if this test is met, a court retains an overriding discretion as to whether to grant a variation order. UR 43(6) expressly provides that a court "may" vary its earlier decision if the stipulated requirements are satisfied. This discretion must be exercised judiciously. Accordingly, a justifiable reason must exist for a court not granting a variation if the legal requirements for same is met. ●

22 *De Beer NO v North Central Local Council and South Central Local Council and Others* 2002 (1) SA 429 (CC) at 439.
23 Quilingile v South African Mutual Life Assurance Society 1993 (1) SA 69 (A) at 74I.
24 *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A) at 785D.
25 *Jacobs v Jacobs* 1955 (4) SA 211 (T) at 212D.

The role of property in postcolonial contexts

*By Sfiso Benard Nxumalo**

Excising property from the claws of colonial Eurocentric thought is necessary. It plays a crucial role in imbuing those who have been historically (violently) dispossessed of land and marginalised, with dignity and the freedom to construct their own lives as well as self-determine. Plainly put, property, in a postcolonial and decolonial world, plays a crucial and unique role by (re)centring those who, through the harshness of colonisation, were relegated to the margins of society. To borrow the words of Bob Marley, property, in postcolonial and decolonial contexts, is an essential verse in the "songs of freedom".

To explicate the unique role of property in postcolonial and decolonial contexts, this paper will: First, set out the role that property played during colonisation, and touch on its effects; and secondly, dissect the role of property in postcolonial, decolonial contexts through the prism of decentering and dignity; self-determination; and reconstructing "use". The paper will look at South Africa, Ireland, and Australia.

Photo: Jo Round/Unsplash

Property and colonisation: What is the connection?

While the spreading of ideas of Christianity and democratisation is oft-quoted as the moral underpinning of colonisation of "uncivilised" soils, it is undeniable that the accumulation of wealth was at the heart of colonisation.[1] Property was a pivotal mode and mechanism for the colonial accumulation of capital, and thus property law was the primary means of achieving this.[2] Property and property laws also served to exclude, erase and efface the lives (not just modes of living) of colonised populations by introducing possession/ownership by improvement.[3] Central too was property to forming what was regarded as the proper legal subject. This was because being an owner of property and having the capacity to appropriate were considered prerequisites for being conferred the status of a proper legal subject or a so-called fully individuated citizen-subject.[4] It is thus evident, as Fanon rightly posits, that property law was a form of colonial domination.[5]

A significant justification employed under colonisation was the doctrine of *terra nullius*. For instance, 1788 Australia was *terra nullius* (nobody's land), which resulted in the land rights of Aborigines not being recognised.[6] *Terra nullius* territories could be lawfully acquired by a state through occupation.[7] It is commonplace that uninhabited territory was *terra nullius*, as it logically belonged to nobody. However, the doctrine was expanded to include particular types of inhabited territory.[8] Thus, whether inhabited land fell within the extended version was contingent on the degree of political development and other characteristics of the inhabitants, such as the use and cultivation of the land.[9] For instance, Blackstone explained that the only type of inhabited territory that could be seized was "deserted" and "uncultivated" land.[10] Or if the inhabitants were "barbarians" or "savages".[11] However, this essentially gave the Crown and other European colonial powers the liberty to appropriate territory inhabited by indigenous persons because such persons did not conform to European cultural norms.

The special role of property in postcolonial and decolonial contexts

I interpose here to mention that while post-colonisation and decolonisation considerably overlap, they are slightly different due to socio-historical and geographical reasons. Briefly, postcolonial theory is concerned with hybridity, diaspora, representation, narrative, and knowledge/power. In contrast, decolonisation is concerned with economic inequality, violence, and political identity and dismantling the system that perpetuates these incidents.[12]

> "On the other side of that coin, the lack of ownership justifies the continued existence of socio-economic inequalities, political vulnerability, dependence, and legal insecurity.[14]"

Decentring and Dignity

As a starting point, Van der Walt asserts that property plays a central role in law and legal theory, and the ownership of property catapults a concatenation of legal entitlements, rights and privileges.[13] On the other side of that coin, the lack of ownership justifies the continued existence of socio-economic inequalities, political vulnerability, dependence, and legal insecurity.[14] He suggests that property should move from the centre towards the margins of the law; where it focuses not on the property owner but those without property, like those who have been historically dispossessed of property.[15] Thus construed, property will serve to protect those who do not hold a central position in law due to their lack of status and possession. This illustrates a compelling role of property in postcolonial, decolonial contexts – it protects those who have been marginalised and do not enjoy any legal privileges and inculcates their dignity.

South Africa provides an example of this role of property in a postcolonial context. Section 25 (the property clause) and section 26 (the housing clause) of the South African Constitution implicitly recognise the indignity and dispossession pioneered through colonisation and then perpetuated by Apartheid.[16] These clauses then make provision for land reform (centring those at the margins) and reversing colonial and Apartheid legacies of forced, state-endorsed removals and protects the interests of unlawful occupiers through the enactment of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 (PIE Act). Specifically, section 26 of the Constitution and the PIE Act are fundamental in decentring the traditional concepts of property by subjecting (limiting) the right of a landowner to have unlawful occupiers evicted from his or her property based

1 *LLB (University of Witwatersrand), BCL (University of Oxford), DPhil in Law Candidate (University of Oxford).
See generally Lee and Paine "Did British Colonialism Promote Democracy? Divergent Inheritances and Diminishing Legacies" (2016) accessed at: *www.rochester.edu/college/faculty/alexander_lee/wp-content/uploads/2016/09/Lee-and-Paine-Britain-and-democracy.pdf* (accessed 29/03/2022) and Locke *Two Treaties of Government* at 25-40.

2 Bhandar *Colonial Lives of Property: Law, Land and Racial Regimes of Ownership* (2018) at 3.

3 Bhandar note 2.

4 Bhandar note 2 at 4-5.

5 See generally Fanon *Wretched of the Earth* (1961) at 109-111.

6 See the discussion in *Mabo v Queensland*. Also, Ritter "The Rejection of *Terra Nullius* in *Mabo*: A Critical Analysis" (1996) 18 *Sydney Law Review* at 7-8.

7 For a general overview: Jennings *The Acquisition of Territory in International Law* (1963).

8 Ibid. Also see *Mabo* at [33].

9 *Mabo* at [33]-[36] and Ritter note 6 above at 8.

10 Blackstone *Commentaries on the Laws of England* (18 ed) (1823) at 106.

11 Bhandar "Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony" at 275 and Mercer "Aboriginal self-determination and indigenous land title in post-*Mabo* Australia" (1997) *Political Geography* 189.

12 See generally Bhambra "Postcolonial and decolonial dialogues" (2014) *Postcolonial Studies* 115.

13 Van der Walt "Property and marginality" at 81-83.

14 Ibid at 83.

15 Ibid at 89

16 See specifically section 26(2) of the Constitution.

on considerations that are outside of his or her control.[17] Bhandar argues that Ireland was the colonial training ground for the British.[18] The Irish Constitution, through Article 43.2.1, demands that property rights in civil society ought to be regulated by social justice principles. Thus, for instance, property rights may be limited by considerations of greater equity by making it possible for particular tenants to enter into a sale agreement with their landlords for a fee simple interest at a fixed price.[19]

Untangling property from the web of colonisation and through postcolonial theory, moving it to the margins to those who have been historically dispossessed, allows us to develop an approach of property that is not exclusionary but inclusive of those who are not propertied and treats them as persons worthy of the benefit and protection of the law and human dignity, regardless of the absence of property ownership.

Self-government and preservation of cultural life

In postcolonial, decolonial contexts, property provides a mechanism for marginalised persons, like the Aboriginal people in Australasia and the Americas, to self-determine their lives on their own cultural terms. As Iverson rightly points out, claims for self-determination or self-government are not calls for national sovereignty in the form of independent statehood.[20] While I have reservations concerning Iverson's conception of decolonisation, he makes several key points. First, reconstructing property and acknowledging the diversity of ownership is crucial for treating people equally in heterogenous political communities.[21] Through acknowledging this diversity, marginalised people may organise and govern themselves as they see fit, provided that it does not offend a constitution. Secondly, Aboriginal people require land to live on it, conduct burial rituals, use it for food and build their homes. Their very culture is engraved on the land. Thus, self-determination rights (or interests) through property ensures that their cultural practices and way of life are preserved.[22] Postcolonial and decolonial property and laws of property are about securing some form of external protection from the decisions and policies of non-Aboriginal communities, which might adversely impact the viability of Aboriginal communities.[23]

The case of *Mabo* is instructive in this regard, wherein the majority of the Australian High Court held that the indigenous inhabitants of the Murray Islands were entitled to possession, occupation, use and enjoyment of the lands of those islands as against the whole world. Generally, it is accepted that the Aboriginal people were considered physically present but legally irrelevant.[24] This judgment recognises that the native title was not extinguished by the Crown and thus remains part of Australian law. In my view, the undeniable impact of this judgment is that it implies that Aboriginal people and Islanders have an inherent right to self-determination arising from the endurance of their original sovereignty. Thus, Aboriginal people do not merely have to look outwards to international law but may also look inward to their own cultural beliefs and practices.[25]

Why is it repugnant for Aboriginal people to rely on the current colonial conceptions of property to self-determine? Lorde reminds us that the master's tools will never dismantle the master's proverbial house.[26] Land is more than soil; it relates to all facets of existence for indigenous people. Genuine self-determination cannot take place if property is still restricted to the Crown's notion of property – such conceptions might not be able to account for Aboriginal people's relationship with property and land.

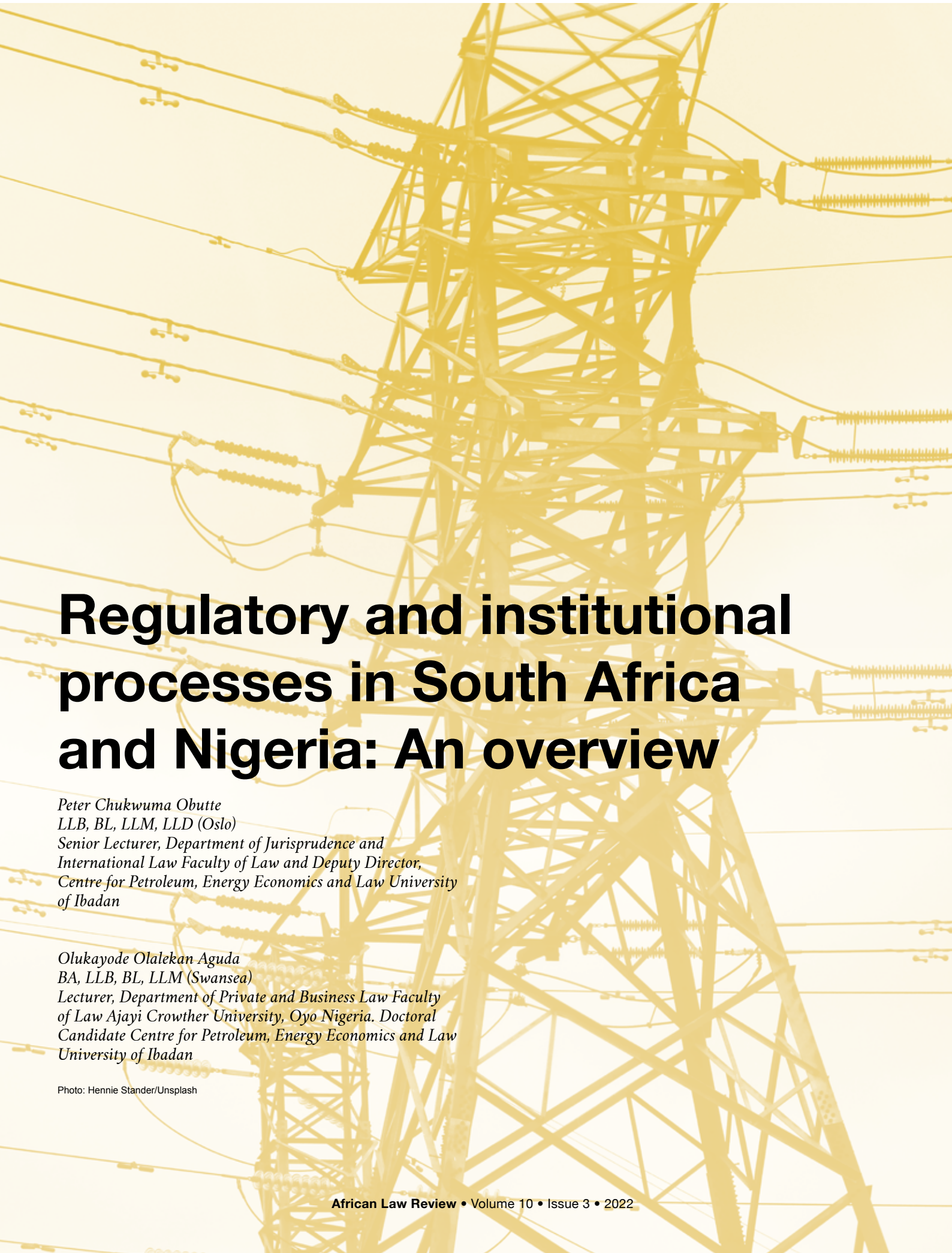
(De)Colonial Use

Bhandar argues that, in the colonies, legal frameworks of ownership obtruded by settlers were sculpted by racialised notions of use and improvement. For instance, Petty's labour theory of value was utilised to justify the colonisation of Ireland. Similarly, Locke believed that land communally owned by indigenous people was "uncultivated waste", which could be improved through the superior productivity of industrious men through their God-given natural right.[27] A postcolonial approach to property provides a way for us to (re)think the racialised notion of use and improvement and reconfigure and transform the grammar of property itself. Reconstructing use and improvement enables us to defang property's racialised, exploitative and exclusionary nature. In other words, property is conceived outside of predatory colonial-capitalistic relations. In a postcolonial context, property is recognised as being more than a commodity to be exploited – it has a significant social component.

Conclusion

Terra nullius was a convenient, colonialist fiction utilised to justify the commonly violent and heinous conquest of territory. The ideological hangover of this was that the inhabitants of the colonised land were being dispossessed of the land and stripped of their dignity, political identity, and ability to self-determine. To undo this, we must decenter property and alter its role – it should no longer be used as a mechanism to exclude but should be used to protect and include people. In postcolonial, decolonial contexts, property plays a fundamental, and unique role in restoring the dignity of those who have been dispossessed; it provides an outlet that ensures that the marginalised can preserve their cultural life, self-determination and ontological use of property. ●

17 Van der Walt at 95-96 and *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7.
18 Bhandar note 2.
19 Van der Walt at 94.
20 Iverson "Decolonizing the Rule of Law: Mabo's case and Postcolonial Constitutionalism" (1997) at 253.
21 Ibid at 254.
22 Ibid at 254.
23 Ibid at 255.
24 Simpson "*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19 *MULR* 195 at 200.
25 Reynolds "Property, sovereignty and self-determination in Australia" in *The Governance of Common Property in the Pacific Region* (2013) at 125.
26 Lorde *The Master's Tools* at 19.
27 Bhandar note 2.



Regulatory and institutional processes in South Africa and Nigeria: An overview

Peter Chukwuma Obutte
LLB, BL, LLM, LLD (Oslo)
Senior Lecturer, Department of Jurisprudence and International Law Faculty of Law and Deputy Director, Centre for Petroleum, Energy Economics and Law University of Ibadan

Olukayode Olalekan Aguda
BA, LLB, BL, LLM (Swansea)
Lecturer, Department of Private and Business Law Faculty of Law Ajayi Crowther University, Oyo Nigeria. Doctoral Candidate Centre for Petroleum, Energy Economics and Law University of Ibadan

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Abstract
It is not in doubt that the Nigerian electricity industry is faced with several challenges. From mergers to privatisation and even reforms, steps taken to revamp this industry is yet to yield a welcoming result. The introduction of the EPSRA 2005 was one of the attempts taken to solve the numerous problems hindering the optimal performance of several institutions and companies involved with the supply of electricity. In this article, through the use of the doctrinal methodology, attempts have been made to analyse the electricity industry of South Africa showing how it has helped in ensuring stable supply of electricity. It is believed that there are valuable lessons that can prove to be useful when applied to the Nigerian Electricity regime. A brief comparison was carried out with that of Nigeria to draw lessons that may be useful for policy makers. The outcome of this comparison has been able to reveal the loopholes in the Nigerian electricity industry especially as regards its electricity institutions and companies in order to combat the poor state of electricity in Nigeria.
Keywords: Nigeria Electricity; South Africa Electricity; Stable Supply of Electricity; Electricity Supply Industry; Energy Consumption; Energy Mix; Regulations

Introduction

South Africa and Nigeria may not have much in common with one country in Southern Africa[1] and the other in the West.[2] Notably, their electricity industries have proved to be just as far if not farther. On the one hand, South Africa is being regarded as the African continent's most advanced country[3] with her growth rate which is above 4%;[4] while on the other hand, Nigeria still struggles to provide energy for 40% of the population.[5] Even though worlds apart, there still remains the similarity of hydropower electricity. However, while one is able to cater for the country, the other still struggles.

Historical background of electricity in South Africa and Nigeria

Over the years, distinct stages have distinguished the power industry. This stage denoted the emergence by the end of the 19th and 1900s of bigger electricity systems producing electricity for itself and tiny electricity companies producing electricity for the towns. The first stage was the creation of a Monopoly plant (Victoria Falls and the Transvaal Power Company, VFTPC), which provided electrical supplies to the gold mining industry, in the early 1900s until the start of the 1920s.[6] The third phase which took place around the early 1920s still exists to date.[7] The need for a regulated electricity system became imperative as industries and stakeholders began to increase. This is essential to make sure that issues that will hinder full productivity will be easily identified and resolved.

> "South Africa is being regarded as the African continent's most advanced country[3] with her growth rate which is above 4%;[4] while on the other hand, Nigeria still struggles to provide energy for 40% of the population."

Historical background of electricity in South Africa

Eskom owns and controls the elevated voltage distribution system that provides 60% direct energy to clients while the short fall in terms of distribution is done by local authorities.[8] Specifically, South Africa's electricity history is closely related to that of the United States.[9]

Notably, the engineer that constructed the Hydropower Station of the Niagara Falls first visited the Victoria Falls in Southern Africa.[10] The electricity generation potential of Victoria Falls impressed him, as although Niagara Falls and Victoria Falls were essentially equal in width, Victoria Falls was spectacularly twice as tall. He was able to factor out difficult logistical and structural differences between the two power schemes and making the Victoria Falls project feasible while making use of high voltage alternating current technology. Subsequently, he applied for a license in 1901 to establish a hydroelectric scheme to exploit the power of the Victoria Falls along the Zambezi River and was granted same.[11] The reality that minerals and valuable metals were found in Southern Africa in early 1800s together with the required mining activities was at the heart of the country's wide supply for electricity.[12] The above no doubt represents the

1 Border Control Operational Coordinating Committee, Republic of South Africa www.borders.sars.gov.za/neighbouring-country%5Cindex.html (accessed 12/04/42018)
2 Ojosu J. (1990), the iso-radiation map for Nigeria. Solar & Wind Technology 7 (5):563–75
3 RoulaInglesi, 2010. *Aggregate Electricity Demand in South Africa: Conditional forecasts to 2030*, Applied Energy 87 pp 197–204.
4 RoulaInglesi, 2010. *Aggregate Electricity Demand in South Africa: Conditional forecasts to 2030*, Applied Energy 87 p 197.
5 Retrieved from "National Renewable Energy and Energy Efficiency Policy (NREEEP) Approved by FEC for the Electricity Sector" dated 4/20/2015.
6 Hoops, EC. 2010.*The impact of increasing Electricity tariffs on the automotive industry in South Africa.* Master's Thesis. Nelson Mandela Metropolitan University. Business and Economic Sciences. Port Elizabeth. South Africa.
7 Hoops, EC. 2010.*The impact of increasing Electricity tariffs on the automotive industry in South Africa.* Master's Thesis. Nelson Mandela Metropolitan University. Business and Economic Sciences. Port Elizabeth. South Africa.
8 Anton Eberhard, 2001. *Competition and Regulation in the Electricity Supply Industry in South Africa*, Annual Forum, University of Cape Town. p 1.
9 Moeti, K. 2013. *The role of Government in ensuring an affordable supply of electricity in South Africa: Challenges and Future prospects*, Journal of Public Administration vol 48 p 335.
10 This is in reference to Professor George Forbes in 1895.
11 Vosloo, H. Naidoo, P. Van Heerden, L. Nel, W, Smit, I. 2008. *Sustainable Energy: Some of the issues that need to be considered*. Discourse; 36(1).
12 Moeti, K. 2013. *The role of Government in ensuring an affordable supply of electricity in South Africa: Challenges and Future prospects*, Journal of Public Administration vol. 48 p 335.

entrance of heavy power plants in the mining industry.[13]

Eskom has been providing power to other industries of the economy and of culture since its founding in 1921.[14] In fulfilling its responsibilities, the Victoria Falls Power Company took a significant step forward on its 1948 acquisition.[15] Eskom has since become the biggest power provider and manufacturer of energy in Africa, responsible for 95% of the country's energy and nearly half of the continent's energy produced.[16] Today, 26 energy plants with a complete operating capability of over 42,000 megawatts and a complete energy supply network of 359,854 kilometres serving roughly 32,000 workers are owned and operated by the business. Eskom is therefore not only claiming to be one of the world's five largest electricity companies but also one of the world's lowest energy cost producers.[17]

Historical background of electricity in Nigeria

As early as 1896 even prior to the 1914 amalgamation of the Northern and Southern Protectorates, there was government involvement in the power sector of what would later be known as Nigeria. History has it that the first-ever diesel firing plant in Nigeria, with capacity to produce 20 MW of electricity, was installed in Ijora,[18] Lagos, the development of which was later followed by other small-scale diesel-powered plants in several other locations. By 1951, the Electricity Corporation of Nigeria was established to serve as a national agency charged with the responsibility of supervising and coordinating electricity distribution in the country using captive or embedded generators. Shortly after, in 1961, the Niger Dams Authority was established to assist in meeting the increasing demand for electricity in the country.

A far-reaching decision was taken in 1972 to bundle the Electricity Corporation of Nigeria and Niger Dams Authority into an agency known as NEPA, resulting in a vertically integrated power sector monopoly. This brought all power sector value chain activities involving generation, transmission, distribution, and marketing under the purview of this single entity. The strategic importance of the sector, economies of scale, and effective coordination and standardisation were some of the rationales for the bundling policy.

After NEPA came PHCN (Power Holding Company of Nigeria) which was later unbundled into 18 different companies – 11 distribution companies, 6 generation companies and 1 transmission company.[19] The FGN took the next step in setting up the Nigerian Electricity Regulatory Commission (NERC) and the Nigerian Bulk Electricity Trading P (NBET).[20] The Operators of the Nigerian Electricity Market (ONEM)[21] was established with the responsibility of the wholesale market and settlement operator. After the establishment of the agencies, the Federal Government of Nigeria then placed the new power plants for sale. Although most of the Generating Companies were bound to suffer a loss, the Federal Government allocated N50 billion to them so as to reduce the impact of the loss.[22] The NBET buys electric energy generated from the Generating Companies and sells it to the Distribution Companies for sale to the final electricity consumers.[23]

Sources of energy

The South African economy is structured on several sources of energy ranging from coal, nuclear energy, hydro, gas and others. The above are the main energy suppliers in the country. Notably, in South Africa, coal constitutes the major contributor among the sources of electricity supply and is considered as one of the major country exporting coal.[24] In 2014, coal's percentage in main energy use was 70%, whereas 92% of the energy output in the country is focused on native carbon manufacturing.[25] In this regard, it is therefore safe to posit that coal is important in the South Africa energy sector. A narrative on South Africa coal will now be briefly considered.

South Africa's sources of energy

Coal

Notably, the country's coal consumption is huge. In 2014, complete main power usage was reported to be 181 Mtce. Notably, the coal supply is projected to be 66.7 trillion tonnes in South Africa.[26] It must be stressed that coal cannot be undermined in the electricity sector. This is premised on the fact that efforts had earlier been put in place so as to put in place mechanisms that will sustain consistent availability of coal in ensuring that the power stations continue to function in that regard. These power stations, as it were, operate on long term basis with regards to agreements with the supply

13 In fact, it is widely accepted that many of the first power plants in the country were built primarily to provide support to the mining industry (Lennon 2007; Grover and Pretorius 2008).

14 Moeti, K. 2013. *The role of Government in ensuring an affordable supply of electricity in South Africa: Challenges and Future prospects*, Journal of Public Administration vol. 48 p 336.

15 Moeti, K. 2013. *The role of Government in ensuring an affordable supply of electricity in South Africa: Challenges and Future prospects*, Journal of Public Administration vol. 48 p 336.

16 Lennon, S. 2007. *Electricity supply in South Africa*. Discourse; 35(2).

17 Grover, HK. and Pretorius, MW. 2008. *The technology assessment of demand side bidding in the South African context*. South African Journal of Industrial Engineering 19(2).

18 Eric Kehinde Ogunleye, Political economy of Nigerian power sector reform, WIDER Working Paper 2016/9.

19 ONEC Department Report, 2013. "Nigerian Power Sector Privatisation Program Appraisal Report". Partial Risk Guarantee in Support of the Power Sector Privatization Program, African Development Fund.

20 The NBET was set-up, although not fully effective, but was intended to come into full operation when the Nigerian electricity market becomes completely privatised and then the power purchase agreements will be signed and passed on to the DISCOs (The Presidency 2013).

21 This responsibility extends to the management of the metering system of the TCN, DISCOs and the GENCOs.

22 KPMG (2013) A guide to the Nigerian power sector. www.kpmg.com/Africa/ en/ IssuesAndInsights/Articles-Publications/Documents/Guide%20to%20the%20 Nigerian%20Power%20Sector.pdf (accessed 30/12/2014).

23 www.nbet.com.ng

24 Nikki Fisher and Gina Downes, IEA report on South Africa. www.iea.org/ciab/ South_Africa_Role_Coal_Energy_Security.pdf (accessed 7/08/2018).

25 Nikki Fisher and Gina Downes, IEA report on South Africa www.iea.org/ciab/ South_Africa_Role_Coal_Energy_Security.pdf (accessed 7/08/2018).

26 Nikki Fisher and Gina Downes, IEA report on South Africa www.iea.org/ciab/ South_Africa_Role_Coal_Energy_Security.pdf (accessed 7/08/2018).

of coal ranging from 10 to 40 years. Notably, the current fleet of power stations has life duration of close to 40 years. This explains the importance of having an agreement for the supply of coal that will meet up with that period. It is therefore necessary that all efforts must be put in place to prevent coal short falls as this will cause a break in the security of supply with regards to electricity.[27]

Considerably, the electricity sector enjoys high consumption of coal with an estimate of about 65.1%. Even though coal serves other purposes locally, its impact in power generation is huge and as such it is not surprising that efforts are constantly being made to invest in coal supply infrastructures. Notably, the traditional method that has been adopted by South Africa is to ensure that power stations are located at regions close to the source of the coal. This will no doubt enable easy access to coal and reduce the cost of transportation and infrastructure.[28]

Nuclear energy

Nuclear also constitute a proportion of South Africa energy mix. The nation has two nuclear reactors that generate around 5% of its electricity while in 1984, its first commercial nuclear reactor started working.[29] Efficiency becomes strategic in prioritising the location of the nuclear plants. In the mid 1970's, it was therefore decided in Koeberg near Cape Town to build 1,800 MWe of nuclear power. This decision led to the commissioning by Framastome (now Areva) of Eskom of the structure which was built in 1984-85.[30]

The energy mix in South Africa is not restricted to both coal and nuclear. It also comprises others such as hydro, gas turbines known as open cycle gas turbine (OCGT) and wind.

Nigeria's sources of energy

Nigeria is also endowed with myriads of renewable energy resources which have been advocated by many to be used in the power sector. In a study carried out in twelve (12) states and four (4) river basins, over 278 unexploited small hydropower (SHP) sites with total potentials of 734.3 MW were identified.[31] However, the reality remains that not quite up to half of these resources are in use.

The current energy mix in the country is typified by the energy distribution of energy in the country from as far back in 1995. The share of natural gas was 5.22%, hydroelectricity took 3.05%, fuel wood had a lion share of 50.45% and petroleum product had 41.23% share. This is an indication that the renewable energy used in the country is split essentially between hydroelectricity and traditional fuel wood.[32]

27 Nikki Fisher and Gina Downes, IEA report on South Africa www.iea.org/ciab/South_Africa_Role_Coal_Energy_Security.pdf (accessed 7/08/2018).
28 Nikki Fisher and Gina Downes, IEA report on South Africa www.iea.org/ciab/South_Africa_Role_Coal_Energy_Security.pdf (accessed 7/08/2018).
29 World Nuclear Association 2018 www.world-nuclear.org/information-library/country-profiles/countries-o-s/south-africa.aspx (accessed16/08/2018).
30 World Nuclear Association 2018 www.world-nuclear.org/information-library/country-profiles/countries-o-s/south-africa.aspx (accessed16/08/2018).
31 UO Aliyu and SB Elegba, "Prospects for small hydropower development for rural application in Nigeria," Nig.J of Ren. Energy, vol. 1, pp. 74-86, 1990.
32 Akinbani, (2001), "Energy supply mix in Nigeria".

"Nigeria has the largest natural gas reserve in Africa, but the sector is still underdeveloped as most of the gas (about 80%) is presently flared[39] accounting for 19% of the total gas flared globally for each year."

It is clear that no single energy resource can sustainably meet the energy demands of any country. Integrating all exploitable energy sources is a viable way of achieving stability in energy supply for Nigeria.[33] It is at this point important to mention some energy sources in Nigeria.

Coal

According to the Federal Government of Nigeria,[34] coal mining in Nigeria started in 1906 and recorded an output of 24500 tons in 1916. Production peaked at 905,000 tons in 1958-1959 making over 70% of commercial energy conception in the country. The Nigerian Railway Corporation was the major consumer of coal but by 2001, coal made up just 0.02% of commercial energy consumption in Nigeria.[35]

Crude oil

Then came crude oil, following its discovery at Oloibiri, Delta state in 1956.[36] Presently, oil accounts for over 95% of export earnings and over 65% of government revenue according to the International Monetary Fund (IMF).[37]

Gas

Gas discoveries in Nigeria were incidental to oil extraction activities. Proven reserves are estimated to be about 163 trillion standard cubic feet which is enormously larger than oil resources in energy terms.[38] Nigeria has the largest natural gas reserve in Africa, but the sector is still underdeveloped as most of the gas (about 80%) is presently flared[39] accounting for 19% of the total gas flared globally for each year. Natural gas is a cleaner and environmentally safer source of energy than oil when used properly. There have also been prospects for other sources such as tar sand, biomass energy, hydro power, etc.

33 Uzoma, C, Nnaji, C, Nnaji, M, (2012), "The Role of Energy Mix in Sustainable Development of Nigeria", www.researchgate.net/publication/233952340_THE_ROLE_OF_ENERGY_MIX_IN_SUSTAINABLE_DEVELOPMENT_OF_NIGERIA (accessed 29/03/2022).
34 FGN (2003), National energy policy. Abuja: Energy Commission of Nigeria.
35 Sambo, AS, (2010), matching electricity supply with demand in Nigeria.
36 Bendi M, (2011), Extraction of crude petroleum in Nigeria-Overview.
37 World Bank, (2007), World Development Indicators. World Bank Publishers. http://data.worldbank.org/data-catalog/world-development-indicators (accessed 29/03/2022).
38 FGN, (2003), National energy policy. Abuja: Energy Commission of Nigeria.
39 Chukwudi, M, (2008), Nigeria's energy mix and climate change. In: Alexander's Gas & Oil Connections: Company News Africa. Doi: www.thetidenews.com (accessed 29/03/2022).

Institutions involved in the electricity sector

South Africa institutions

South Africa electricity industry has three electricity generators. These include Eskom (public electricity utility), Municipality generators and private generators (Independent power producers).[40] Nigeria has institutions such as Nigerian Electricity Regulatory Commission (NERC), Nigerian Bulk Electricity Trading Plc. (NBET).[41]

Eskom

Eskom is a South Africa electricity public utility, established in 1923 as the Electricity Supply Commission (ESCOM) also known by its Afrikaans name Elektrisiteitsvoorsieningskommissie (EVKOM) by the South African government in terms of the Electricity Act 42 of 1922.[42]

With effect from 1 July 2002, Eskom was converted from a statutory body into a public company as Eskom Holdings Limited, in terms of the Eskom Conversion Act 13 of 2001. The two-tier governance structure of the Electricity Council and the Management Board was replaced by a Board of Directors.[43]

Recently, the corporation has been plagued with a number of mismanagement and corruption scandals over the years, which has contributed to serious financial issues[44] leading to the use of reserves[45] power outage, R450bn debt,46 loss of generating capacity, scheduled blackouts, etc

Nigerian institutions

The major Nigerian institution particularly after the unbundling of the defunct PHCN is the

Nigerian Electricity Regulatory Commission (NERC)

The role of NERC in the electricity industry as a sector regulator is confined under the Electric Power Sector Reform Act. The Act charges Nigeria Electricity Regulatory Commission (NERC) with the following:[47]

Regulate tariffs and quality service oversee the activities of the industry for efficiency institutional and enforcement of the regulatory regime licensing of generation, distribution, transmission and trading companies that result from the unbundling of NEPA.

Legislative authority to include special conditions in licenses provision relating to public policy interest in relation to fuel supply, environmental laws, energy conservation, management of scarce resources, promotion of efficient energy, promotion of renewable energy and publication of reports and statistics. Providing a legal basis with necessary enabling provisions for establishing, changing, enforcing and regulating technical rules, market rules and standards.[48]

In November 2005 NERC was inaugurated and took full responsibility. Thus, the law ensures that responsibilities are duly spelt out under its objects and functions. Thus, these include:

a. The establishment, promotion and maintenance of effective industrial and market structures, and ensuring ideal use for the supply of energy resources.

b. The improvement by encouraging customer links to distribution systems in both rural and urban regions of access to energy services.

c. Ensure that the consumer has adequate electricity supply.

d. Ensure price rates charged by licensees are fair to consumers and are adequate to enable licensees to finance their businesses and provide for reasonable revenues in order to operate efficiently.

e. Ensure security, safety, confidence or the quality of the electricity service produced and supplied.

(2) The Commission shall conduct the following tasks for the purposes of furthering subjects as referred to in subparagraph (1) of this section:

a. Promoting competition and the involvement of the private industry where and whenever possible.

b. Establishing or where applicable approving suitable operational codes and safety, security, reliability and standard quality.

c. License and regulate individuals involved in power generation, transmission, system operation, distribution and trading.

d. Approve market rules amendments.

e. Supervise electrical business operations and

f. Carry out those other operations needed to implement.

g. Create suitable customer rights and responsibilities in relation to the provision and usage of electric services.[49]

The above shows that NERC as a regulator is bound by its responsibilities as a motor space for efficient leadership of the laws, directives, guidelines and aims of the sector. They are therefore to be seen as the official watchdog of the electricity industry in the process of managing their affairs and activities.

40 Mvuleni, J.B. 2008.*The Influence of three Electricity Distributions restructuring on the Nelson Mandela Bay Municipality*. Unpublished Masters Dissertation. Port Elizabeth: Nelson Mandela Metropolitan University.

41 The NBET was set-up, although not fully effective, but was intended to come into full operation when the Nigerian electricity market becomes completely privatised and then the power purchase agreements will be signed and passed on to the DISCOs (The Presidency 2013).

42 www.eskom.co.za (accessed 29/03/2022).

43 www.eskom.co.za/OurCompany/CompanyInformation/Pages/Legislation.aspx (accessed 29/03/2022).

44 BBC news, (2020), "Eskom crisis: Arrests over $50m South Africa Power Station Fraud", www.bbc.com/news/amp/world-africa-50854186 (accessed 29/03/2022).

45 Aljazeera, (2020), "South Africa's troubled utility Eskom to extend power cuts", www.aljazeera.com/amp/ajimpact/south-africa-troubled-utility-eskom-power-cuts-20010971170613951.html (accessed 21/09/2020).

46 www.prnewswire.com/news-releases/south-africa-electricity-generation-market-report-2020--featuring-eskom-dedisa--avon-peaking-power-plants-hopefield-wind-farm-coria-and-more-301005171.html (accessed 21/09/2020).

47 Inugonam, T.A. 2005. Challenges facing the Developments of Independent Power Producers in a deregulated Power Sector (NEPA as a Case Study), 6th International Conference on Power Systems Operation & Planning (ICPSOP) 2005 pp33-37.

48 Victor Okolobah, Zuhaimy Ismail, 2013, On the Issues, Challenges and Prospects of Electrical Power Sector in Nigeria, TI Journals International Journal of Economy, Management and Social Sciences, Vol 2, Iss. 6, pp 410-418 www.tijournals.com (accessed 29/03/2022).

49 EPSR Act section 32 (1) (a)-(g), (2) (a)-(g).

In particular, this also demonstrates that NERC performs supervisory tasks of quality control to comply with established norms. It also guarantees that energy rates are suitable for service quality without exerting undue stress on electricity users.[50]

Regulatory framework

Electricity generation is not enough in itself without the help of regulators and regulations. The Minister of Mineral and Energy has been entrusted with responsibility in this regard by the 1999 Nuclear Energy Act for nuclear power generation, radioactive waste management and the country's international commitments.[51]

In addition, a Nuclear Energy Corporation of South Africa (NECSA) is responsible for a number of nuclear power issues including waste and safeguards, established by the Atomic Energy Corporation (AEC) under the Act.[52]

The National Nuclear Regulator (NNR) has been established in 1999 by National Nuclear Regulatory Act (NNRA) in the framework of regulatory actions that cover the entire fuel cycle from mining to waste disposal and in particular installation, design, construction, operational and decommissioning.[53]

In general, the Department of Minerals and Energy (DME) is responsible for overall nuclear energy management and administration, while Eskom is located under the Public Enterprise Ministry.[54] Notably, the Ministry of the Environment with a co-operative Nuclear Regulator Agreement is responsible for the project assessment with regard to environmental impacts.[55]

The National Energy Regulator of South Africa (NERSA)

NERSA is an enforcement authority established as a legal body under section 3 of the NERSA Act 40 2004.The mandate of NERSA[56] is The National Energy Regulatory Authority (NERSA) is established as a legal entity under section 3 of the NERSA Act, Gas Act 48 2001 and Petroleum Pipelines Act, 60 of 2003. As regards its composition, the Energy Regulator is made up of nine representatives including the Chief Executive Officer (CEO), five representatives part-time and four full-time representatives. The Energy Regulator is backed by staff headed by the CEO.[57]

NERSA's task is to implement public legislation and policies, global norms and industry standards in order to promote viable, organised energy development. NERSA must conform to consistent values and methods when governing the sectors under its jurisdiction to fulfil its mission and attain its goals. One of NERSA's key values is its professional prowess. The previous globally agreed legislative principles have been used to support its regulatory policy as guided by its legal

"NERSA's task is to implement public legislation and policies, global norms and industry standards in order to promote viable, organised energy development."

directive. This is to ensure that equity and fairness is enshrined in its daily operations. These principles are: [58]

a. Openness: It is required that the regulator has to clarify to controlled organisations and other stakeholders its choices and procedures suggesting that the data or information on which that choice is founded is easily accessible and that the rationale behind it is easily clarified. This includes government discussion and availability. The importance of this is to ensure that stakeholders and particularly consumers are not kept in the dark about decisions that have been carried out by the regulator which will no doubt boost the confidence level amongst stakeholders.

b. Neutrality: The importance of this principle cannot be overemphasised. All stakeholders should be autonomous without one or other community favouring the energy regulator. This will reduce conflict of interest at all levels.

c. Consistency and Predictability: In comparable situations it is essential for decision-making to be coherent across panel and sensible depending on prior choices to be predictable.

d. Autonomy: The energy regulator's independence from controlled undertakings is an essential condition for any sound regulation scheme. It is also necessary to guarantee the long-term stabilisation of legislative procedures independence from political impact. Avoiding legislative catch by certain organisations of customers is also needed to successfully regulate.

e. Oversight: The Regulator of Energy should take responsibility for its actions and decisions. Independence must not therefore be mistaken for lack of accountability.

f. Credibility: In the leadership of and relationship with the stakeholders of the Energy Regulator, the Energy Regulator shall be honest, fair and honest.

g. Productivity: The regulator should leverage the funds necessary to advance legislative goals through objectivity and dedication to evidentiary improving policies.

h. Public Interest: The Regulator should endeavour to take decisions in the interest of the public as far as possible.

Eskom

Eskom which was established in 1923[59] is a South African electricity state owned utility whose responsibility of which in South Africa includes energy production, transmission

50 Oke, Y. 2016. *The Pathway to Energy Liberation in Nigeria: Lessons for Namibia* published in Essays on Nigerian Electricity Law, Princeton and Associates. p 15.
51 World Nuclear Association 2018 www.world-nuclear.org/information-library/country-profiles/countries-o-s/south-africa.aspx (accessed 29/03/2022).
52 This is exclusive of power generation.
53 World Nuclear Association 2018 www.world-nuclear.org/information-library/country-profiles/countries-o-s/south-africa.aspx (accessed 29/03/2022).
54 *Ibid.*
55 *Ibid.*
56 NERSA 2018 www.nersa.org.za/# (accessed 29/03/2022).
57 NERSA 2018 www.nersa.org.za/# (accessed 21/08//2018).
58 NERSA 2018 www.nersa.org.za/# (accessed 21/08//2018).
59 Escom Act of 1922.

and transport. It is certainly not the only participant in South Africa's energy sector, however, as it dominates the sector for its commitment to securing that electricity is produced and circulated not only extensively.

The distribution of energy was much divided in the mid 1900s in South Africa, but the 1987 Electricity Act completely substituted the 1958 Act and the Electricity Supply Commission (Escom) was created Eskom.[60] Currently Eskom which was formed under the Act of 1987 has been replaced by the Eskom Conversion Bill of 2001 and now named Eskom Holdings Ltd.[61] Thus Eskom became a public company as of 1 July 2002, under the Eskom Conversion Act, 13 of 2001, as Eskom Holdings Limited.

It produces about 95 per cent of South Africa's power and around 45 per cent of Africa's electricity.[62] It produces, transmits and distributes the energy to the clients and redistributors of industry, mining, trade, agriculture and residence.[63] In particular, extra power stations and large energy lines were constructed to satisfy the growing requirement for electricity in South Africa to guarantee supply problems did not arise.[64] Eskom will therefore proceed to concentrate on enhancing and enhancing its key energy generating, transmission, trade and delivery company.[65]

Department of energy

The Energy Department is the public organisation to develop, use and manage South African power supplies.[66] In particular, it administers and controls programs aimed at energy access and offers policy assistance and leadership facilities in the nation.[67] In this regard, it becomes central to ensuring that South Africa's electricity management is positioned to serve its customers with constant supply of electricity. In order to carry out its goals, the department of energy sets as one of its priority a strategic plan to ensure energy security which is expected to promote the constant availability of electricity in the country.[68]

In South Africa the role of the above institutions cannot be over-emphasised. These institutions are key to the continuous development of the energy sector and its proper management is therefore crucial to ensuring stable electricity for the numerous consumers in South Africa. It should be noted that while policy formulations and implementations can be said to include part of the strategies to ensure that the electricity industry continues to maintain a focus on the promotion of the constant availability of electricity in the country, the role of law in ensuring that the above are maintained cannot be neglected. Laws are therefore important to ensure that laid down obligations are correctly adhered to in the industry and that violators of obligations are punished. In this context, the significance of law in the electricity business must therefore be regarded by analysing the accessible legal framework to determine how safe the availability of electricity has been considered.

Legal framework

Attention will be placed on the two principal legislations, which include the Act regulating the Nation's Energy of 2008 and the Act Regulating Electricity of 2006. It is believed that an understanding of these two legislations will provide an in-depth background on the legal framework of electricity in South Africa. Notably, while all the provisions in the laws are useful, attention will only be placed on those sections that are important to the development of this research for the purpose of analysis.

The National Energy Act 34 of 2008

South Africa has a robust energy regime that seeks to ensure stability and consistency in the sector. The Act has six chapters with 21 sections. The preamble to the Act is illuminating and defines clearly the objective of the law which is: "To guarantee varied power assets accessible to the South African community for the sake of financial development and poverty reduction, in order to be able to provide viable amounts and at inexpensive rates, bringing into consideration environmental leadership and the interaction between financial industries."[69]

Some authors have observed that the Act would no doubt bring important changes, which would create a more coalesced legal framework with regards to South African energy and the Act would become the foundation of this legal context.[70] This line of reasoning was, however, not followed by some other writers who pointed out some notable concerns with regards to the effectiveness of the Act.[71] This issue was based on the fact that the 2005 Energy Efficiency Strategy in the run-up to the Energy Act noted the scarcity and failure of the state to take power security programs, as well as the accessibility of power management. This reflects some of the varied opinions articulated before the Energy Act 2008 was implemented. The concern over supply of electricity is paramount thus, there is an emphasis placed on the law in ensuring that this issue is effectively resolved on regular basis. In this regard, the Minister is charged with the responsibility to constantly address matters that are connected with it by ensuring that concerted efforts are structured in its planning.

It is observed that efforts have been put into ensuring that security of supply with regards to energy has a place in the legal framework. Amongst others, it is important that the plans must not only be made but also be subjected to public views. This will no doubt strengthen the plans before it is finalised. Emphasis is placed amongst other things on maintaining

60 Ramokgopa, BM 2007. *Tariff History 2002 – 2007* [Online]. Available from: www.eskom.co.za (accessed 21/08/2022) p 14.
61 Eberhard, A and Mtepa, M 2003. Rationale for restructuring and regulation of a low priced public utility: A case study of Eskom in South Africa. 3(2): 77-102.
62 www.eskom.co.za/OurCompany/CompanyInformation/Pages/Company_Information.aspx (accessed 28/03/2022).
63 *Ibid*.
64 *Ibid*.
65 *Ibid*.
66 Department of Energy www.energy.gov.za/files/au_frame.html (accessed 28/03/2022).
67 *Ibid*.
68 Department of Energy, South African Energy Synopsis 2010. Directorate: *Energy Information Management, Process Design and Publications.* ISBN: 978-1-920435-4. 2010
69 The Preamble, National Energy Act.
70 Glazewski J. 2005. The Legal Framework for Renewable Energy in South Africa p 9.
71 Strydom HA and Surridge AD 2009"*Energy*" in Strydom HA and King ND (eds) Fuggle and Rabie's Environmental Management in South Africa 2nded (Juta Cape Town) p 799.

> **"The Act sets the electricity industry's supervision role under section 3 in the National Energy Regulator. It means that the regulator is not only the guardian but also the implementing authority of the legislative structure as laid down in the Act."**

the safety of demand, as the Minister is mandated to guide all state-owned enterprises to obtain the domestic global energy supplies and distributors, to keep them under control and to handle them. Thus, while issues such as funding and cost benefit analysis would be factored into the processes, obligations to deliver the required power feedstock to the nominated state-owned organisation by power feedstock manufacturers are to be provided. The above no doubt will ensure that saboteurs are easily prevented from disrupting the security of supply that has been envisaged by the Act.

Discussions on the security of supply will not be complete without considering mechanisms by which it can be attained. One of such is the presence of functioning energy infrastructure.

A very key aspect is the importance of funding energy infrastructure. This is considered as a crucial aspect in ensuring security of supply. Thus, in situations where there are existing infrastructures, it is envisaged that such should be adequately maintained through proper funding. No doubt, this will prevent decadence and ensure the longevity of such infrastructure. There have been deliberate attempts by South Africa to put in place mechanism that will guarantee availability of energy which is considered vital to the good health of the energy sector.

It can also be seen that the State's role in securing energy supply cannot be underestimated. This has constantly been reflected in the mandate that has been placed on the Minister in the provisions of the law.

Electricity Regulation Act 4 of 2006

The Electricity Act 41 of 1987 was abolished by this Act. It relies on stabilisation of the country's energy production while fostering rivalry from suppliers and different competitive market choices, supporting the opening-up of the resources base.[72] The objective of the Act is the establishment of the National Energy Regulator as a custodian and enforcer of domestic legislative structure for electricity supply. It also aims to provide licenses and registrations in accordance with the way of the regulations governing production, transmission, delivery, trading, and transport and export of electricity.[73]

The Act sets the electricity industry's supervision role under section 3 in the National Energy Regulator. It means that the regulator is not only the guardian but also the implementing authority of the legislative structure as laid down in the Act. In accordance with this, the agency is required to review the license requests and submit them for the reasons of production, transmission, delivery, energy and trading, import and transport.[74] These powers though wide are considered to be important towards ensuring that the industry is properly monitored for efficiency purposes. The idea of placing such roles in a single entity is commendable as it will aid ease of processing and prevent unnecessary bottlenecks by interested stakeholders.

The regulator is also charged with the responsibility of regulating prices and tariffs.[75] This is no doubt a huge task that has been placed on the regulator. The independence of the regulator in this aspect has been contemplated positively as against placing such role in the hands of the government through the Minister who may be swayed by political motives to fix prices that will go against economic reasons for the purpose of getting sympathy from the citizens. This may usually be carried out for the purpose of electioneering.

While this constitutes the regulator's obligatory requirements, it does also contain additional requirements. These include mediating conflicts between generators, transmitters, retailers, clients or end users; investigating and investigating licensees' activity and conducting all other acts that are incidental with their function.[76] The implication of the above is that the law has opened a window for the regulator to invite a third party to perform the stated role to the extent stipulated under section 42 of the Act.[77] The whole essence of the above with respect to electricity is to ensure that the institutions and its legal framework are put into use. Thus, it is expected that once the above are functional, the result will be evident through availability and security of electricity supply in the country. In this respect, the magnitude of energy safety in South Africa should be examined.

Short comings

The call to guarantee electricity supply safety is particularly noteworthy and has been described as "a bit more complicated".[78] Planned monopolies often result in over-investments. The situation is particularly peculiar because in the case of electricity it is not capable of being stored.[79] All of these merely point to the fact that there must be a check

72 Strydom HA and Surridge AD 2009"*Energy*" in Strydom HA and King ND (eds) Fuggle and Rabie's Environmental Management in South Africa 2nd ed (Juta Cape Town) p 799 – 800.

73 Preamble to the Act; World Bank Group Public-Private-Partnership Legal Resource Centre https://ppp.worldbank.org/public-private-partnership/library/south-africa-electricity-regulation-act-2006 (accessed 29/03/2022).

74 Section 4 (a) (i) Electricity Regulatory Act 2006.

75 Section 4 (a) (ii) Electricity Regulatory Act 2006.

76 Electricity Regulatory Act 2006 section 4 (b).

77 The introduction of a third party is, however, not contemplated where disputes involve licensees and they have indicated that the regulator must act as such.

78 Anton Eberhard, 2001. *Competition and Regulation in the Electricity Supply Industry in South Africa*, Annual Forum, University of Cape Town. p 6.

79 Anton Eberhard, 2001. *Competition and Regulation in the Electricity Supply Industry in South Africa*, Annual Forum, University of Cape Town. p 6.

> **"The factors that affect the efficacy and stability of power supply in any developing country/region could be classified as follows:[80] government policy; economy factor; natural factor; society/ community factor; effective energy management; skilled personnel; efficient technology and security factor."**

in place to deter over and under investment in the sector which would send a signal for a quick intervention of the government. This no doubt will provide a platform that will ensure constant supply of electricity in South Africa given its huge resources, legal and institutional framework.

South Africa and Nigeria Energy sector: Comparative analysis

The factors that affect the efficacy and stability of power supply in any developing country/region could be classified as follows:[80] government policy; economy factor; natural factor; society/community factor; effective energy management; skilled personnel; efficient technology and security factor. Government policy could be grouped into three categories as follows: energy policy; fiscal policy and monetary policy. South Africa like most countries has had their fair share of problems relating to poor supply of electricity. Notably, it was pointed out that in 2008, blackouts were prevalent which was as a result of imbalance in demand as it relates to electricity generation capacity.[81] Constant availability of electricity cannot be discussed in isolation. Several factors have to be put into consideration before arriving at the point of stock safety. Notably, issues that pertain to security of supply which include, the sources of energy, presence of strong institutions and legal support through the available legal framework are to be considered.

No doubt, efforts to improve supply efficiency in electricity supply industry means that the energy supply sources must be improved. Eskom, the main provider of electricity in South Africa, has constantly carried out this assignment. South Africa's energy supply industry is not only ranked seventh in the globe in numbers of volume and power sale but is the only dominated by a state-owned and vertically integrated power plant.[82] It was further revealed that Eskom provides nearly 96 percent of South Africa's energy needs, which equals over third of the African continent's electricity.[83]

Nigeria on the other hand, has also privatised its energy sector. However, the stark differences between these two cases have led to comparison on basis of sources of energy, strong institutions, legal support, framework, etcetera.

This section focuses on analysing the appropriate legislation governing the electricity industry in Nigeria and South Africa. The Electric Power Sector Reform Act 2005 (EPSRA 2005) and the Electricity Regulation Act 2006 (ERA 2006) of Nigeria and South Africa respectively will therefore be considered in this regard.

Starting from the peripheral aspects, it is important to note that while the Electric Power Sector Reform Act 2005 (EPSRA 2005) of Nigeria has 101 sections which are divided into 13 parts, the Electricity Regulation Act 2006 (ERA 2006) of South Africa has 37 sections divided into 7 chapters. Notably, it can be seen that the Nigerian law has more content than that of the South African law. This clearly does not translate to efficiency.

A comprehensive overview of the Act's intent[84] which does not only ensure the regulation of the industry but also provides statutory directions as to the ways and manners in which the erstwhile company[85] will be taken over. The South African law on the other hand is solely concerned with the regulatory objective of the electricity supply industry. Thus, it seeks to: "Establish a domestic legislative structure for the production sector of electricity; ensure a domestic energy regulator for South Africa; provide for licensing and enrolment as to how electricity production, transmission, production, cross-linking, trading and importation and exportation are controlled."[86] The above reflects that the ERA 2006 does not concern itself with other incidental issues. The effect of the above is that the legislators could have separated the objects of taking over of the former companies from the objects of regulating the industry. This would not have defeated the purpose that was intended. In fact, a better result would have been achieved by ensuring that events that have been carried out are not reflected in the EPSRA 2005. Notably these issues could have been dealt with contractually or in a separate legislation.

There are peculiar similarities that can be seen in both the EPSRA 2005 and the ERA 2006. The issue of licenses and tariffs are areas where both laws do not only provide for but also ensures that the regulatory bodies manage and implements policies that affect stakeholders. In essence, all affairs relating to licences and tariffs are subjects of regulation under sections 62 to 76 of the EPSRA 2005 and sections 7-21 of the ERA 2006.

80 JY Oricha, G A Olarinoye, (2012), Analysis of Interrelated Factors Affecting Efficiency and Stability of Power Supply in Nigeria, International Journal of Energy Engineering 2012, 2(1): 1-8 DOI: 10.5923/j.ijee.20120201.01.

81 Hoops, E.C. 2010.*The impact of increasing Electricity tariffs on the automotive industry in South Africa.* Master's Thesis. Nelson Mandela Metropolitan University. Business and Economic Sciences. Port Elizabeth. South Africa.

82 Anton Eberhard, 2001. *Competition and Regulation in the Electricity Supply Industry in South Africa*, Annual Forum, University of Cape Town. p 1.

83 Anton Eberhard, 2001. *Competition and Regulation in the Electricity Supply Industry in South Africa*, Annual Forum, University of Cape Town. p 1.

84 EPSRA 2005 Long title.

85 National Electric Power Authority (NEPA).

86 ERA 2006 Long title.

Furthermore, issues relating to land acquisition and access rights are both considered by these Acts. The slight distinction in structural arrangement between that of Nigeria and South Africa could possibly be to connote that in actual fact, issues of licensing cannot be separated from access to land and such other incidental rights hence the classification with licensing under the same chapter in the ERA 2006.

Notably, both laws provide for the presence of a constituted body to serve as an independent regulator. This can be seen as one of the primary objectives of the Acts as reflected under the long titles. The importance of the regulator in the scheme of activities of the electricity industry cannot be overemphasised. The establishment by means of Article 31, and the particular orders supplied for under sections 32 and 33 EPSRA 2005 is carried out by the Nigerian Electricity Regulatory Commission. Section 3 of the ERA 2006 also shows this. The committee responsible for electricity in South Africa has evident distinctions.

A careful look at the ERA 2005 shows that the responsibility to oversee the electricity industry has been placed on the Nation's Energy Regulatory body which was created through another Act.[87] It stipulates that "the National Energy Regulator formed pursuant to section 3 of the Act is a guardian and enforcer of the legislative structure set out in that Act."[88] The implication of this is that the regulators do not concern itself alone with electricity issues but the overall energy affairs in South Africa. This responsibility allows it to manage all the affairs of the energy industry in order to create the necessary balance that will achieve optimal performance of the electricity industry. No doubt, the above framework, unlike that of its Nigerian counterpart will ensure that issues of regulatory conflict will be reduced when it comes to harmonising resources in making electricity availability certain.

In order to address the problems of poor rural electrification in Nigeria, the 2005 EPSRA provides for a rural electrification fund under sections 88 to 92. This is, however, not present in the ERA 2006 as South Africa had dealt with such similar issues as noted earlier through debt financing by the issuance of bonds.

The issue of dispute resolution mechanisms is an area that is fundamental to the electricity industry as it aids continuous relationship among stakeholders. This is provided under sections 30 and 31 of the ERA 2006 while such measures are provided indirectly under the EPSRA 2005 by virtue of section 96 (2).[89] The implication of this is that while issues of dispute resolution mechanisms are statutorily provided under the ERA 2006, such measures are situated under the self-interests of the regulator under the EPSRA 2005.

There are discretionary powers with regards particularly to the issue of hearings and proceedings, arbitration and mediation proceedings. This is clearly a distinction from its South African counterpart. There is no doubt that with such powers, a new commission may decide to change its style of administration with regards to the above issues. This will therefore mean that consistency of approach will not be guaranteed under the ESPRA 2005 as against what is obtainable under the ERA 2006.

Significantly, issues of financing have not been a hindrance to the prospect of sustaining its security of electricity supply. This is because the domestic power station is publicly operated and does not rely on the domestic budget for its financing. Thus, it relies on the commercial principle of debt financing where it issues bonds which have the support of local and international capital markets.[90]

Recommendations

The power sector has been privatised, which leaves the regulatory functions with the government. The implication of this is that the government should no longer play an active capital-intensive role anymore but rather regulate the actions of these private companies to ensure that Nigerians get the best services.

This article hereby recommends a fact-finding committee to first and most importantly understand the plights of the average Nigerian so as to be in the best position to draft a comprehensive, up-to-date regulatory legislation in order to penalise over billing and other corrupt practices.

It is also important that steps should be taken to develop a structure that will capture the peculiarities of each region and states in the generation and distribution of electricity in Nigeria.

Furthermore, it is important that research and development that is dedicated to expanding and utilising the different sources of energy should be prioritised. It might be time for the Nigerian Electricity Reforms Act 2005 to be amended and for reforms to take place in the institutional framework.

Conclusion

This article has been able to prove that the seemingly minute differences in the regulatory and institutional processes of Nigerian and South African energy sectors have far reaching effects. There is no doubt that there are noticeable shortcomings in the legislations, however, it becomes important that these will be considered in future for possible inclusion in amendments.

Eventually, it is important to note that there is no perfect system and thus each system must be able to undo and redo certain acts as well as constantly look inwards and outwards in order to optimise performance and on the long run affect the economy positively. ●

87 National Energy Regulatory Act section 3.
88 ERA 2006 section 3.
89 Customer Complaints Handling (Standards and Procedures) 2006 and NERC Business Rules 2006.
90 Anton Eberhard, 2001. *Competition and Regulation in the Electricity Supply Industry in South Africa*, Annual Forum, University of Cape Town. p 5.

Interrogating judicial recusal and the demands of due process in South Africa

By Sbusiso Dimba

Judicial recusal is to disqualify or remove oneself as a judge over a particular proceeding because of one's conflict of interest. A judge must review the general facts of the case assigned to determine whether she or he has any conflict of interest. If a conflict of interest exists, the judge may recuse herself on her own volition and accord.

Photo: Ezequiel Octaviano/Pixabay

In any event any party to the proceedings may bring an application asking a judge to recuse himself from presiding over the matter. In *Dube & Others v The State* (523 /07) (2009) ZSC 28;2009 (2) SACR 99 (SCA) It was held that generally speaking, a judicial officer must not sit in a case where he or she is aware of the existence of a factor which might reasonably give rise to bias. The rational for the rule is that one cannot be a judge in his own cause. Any doubt must be resolved in favor of recusal. It is imperative that judicial officers must be sensitive at all times. They must, of their own accord, consider if there is anything which may influence them in executing their duties or that may be perceived as bias on their part. The tragic comedy is that the same judge in our jurisdiction determines whether or not the alleged conflict requires her recusal and her decision in this regard is expected to be received with a measure of deference

Impartiality

Recusal or the judge's act of disqualifying himself or herself from presiding over a proceeding is based on the maxim that judges are charged with a duty of impartiality in administering justice. The requirement of impartiality is a fundamental prerequisite for a fair trial.

Section 34 of the South African Constitution provides that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal.

Section 165 of the Constitution vests judicial authority with the courts, which are independent and subject only to the constitution and the law which they must apply impartially and without fear, favor or prejudice. In essence, the demands of due process are enshrined in the Constitution of the Republic of South Africa against, which every act or conduct must be consistent with to be valid.

The right to a competent, independent, and impartial tribunal is articulated in Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights and Article 7 of the African Charter on Human and Peoples Rights including other regional treaties. Recognising the essential role played by a competent, independent and impartial judiciary in the protection of human rights and fundamental freedoms, the United Nations Congress adopted and the General Assembly endorsed the basic principles on the independence of the judiciary which are to be taken into account and respected by governments within the framework of their national legislation and be brought to the attention of judges, lawyers, members of the executives and the legislature and public in general.[1]

The integrity and independence of the judiciary is integrally intertwined with the integrity of the judicial process and the extent to which the public perceives the justice system as fair and just. The extent to which the judges uphold the Constitution and international standards and norms in [2]

> **"It is imperative that judicial officers must be sensitive at all times. They must, of their own accord, consider if there is anything which may influence them in executing their duties or that may be perceived as bias on their part."**

conducting trials and proceedings reflects both upon the integrity of the judge, the court and the justice system.

There is a number of case law regarding the duty of a judicial officer in certain circumstances to recuse himself or herself under common law. In *S v Radebe* 1973(1) SA 962 (A) and *South African Motor Acceptance Corporation (Edms) Bpk v Oberholser* 1974 (4) SA 808 (T) it was held that broadly speaking the duty of recusal arises where it appears that the judicial officer has a vested interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer, that is he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.

In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (the SARFU case) the court said, "it follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of counsel.

The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judge to administer justice without fear or favor, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for

1 *Dube & Others v The State* (523 /07) (2009) ZSC 28;2009 (2) SACR 99 (SCA) Section 34 of the Constitution

2 Article 10 of the Universal Declaration of Human Rights and Article Article 7 of the African Charter on Human and Peoples Rights

whatever reasons, was not or will not be impartial.

The objective test is *South African Commercial Catering and Allied Workers Union and Others v 2 Irvin & Johnson Ltd* (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (the SACCAWU case) as the double reasonableness. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal, but the apprehension must also be reasonable.

In *S v Schackell* 2001 (2) SACR 185 (SCA), the court said "Moreover, apprehension that a judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the judge will not be impartial, provided a suspicion of partiality is one which might reasonably be entertained by a lay litigant, a reviewing court cannot be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."

At para (15) of, the *South African Commercial Catering and Allied Workers Union and Others v 2 Irvin & Johnson Ltd* (Seafoods Division Fish Processing) 2000 (3) SA 705(CC), 2000 (8) BCLR the (SACCAWU case) Cameron AJ pointed out that the two-fold emphasis on the aspect of reasonableness serves to underscore the weight of the burden resting upon the applicant for recusal who bears the onus of rebutting the weighty presumption of judicial impartiality. On the other hand, Cameron AJ further points out that it is vital to the integrity of our courts and the independence of judges and magistrates that ill-founded and misdirected challenges to the composition of a bench be discouraged.

On the one hand the court's very vulnerability serves to underscore the preeminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance.

To this effect as stated above one cannot help but filter in the former President Jacob Zuma application for recusal of Former Deputy Chief Justice Raymond Zondo from being the Chairperson of the State Capture Commission citing prior friendship and bias on the part of the Former Deputy Chief Justice. Same being dismissed on the bases of alleged failure to meet the reasonable apprehension for bias test, The tragic comedy again is that the same judge in our jurisdiction determines whether or not the alleged conflict requires his recusal and his decision in this regard is expected to be received with a measure of deference. The question could be was there no likelihood of bias on the part of the judicial officer that is he will not adjudicate impartially in the Zuma application? The Court in *S v Radebe* 1973(1) SA 962 (A) and *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 (4) SA 808 (T) said the matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important. It would appear from case law that that perception in judicial recusal applications comes to bear heavily.

Reasons that warrant a judge's recusal

The first is where the judge is in reality biased or has a clear conflict of interest. In this instance a clear conflict of interest would constitute where a judge is related to one of the parties appearing before him or her.

Financial interest in the matter may also serves as one reason for recusal, however, in this regard judicial pronouncement shows that the question of whether a judge should recuse himself depends on the remoteness of the financial interest in question. The dominant view around financial interest indicates that a remote or insignificant financial interest should not demand recusal

The second is where a reasonable person in possession of facts would harbor a reasonable apprehension that the judge is biased. What follows then is a question as to what constitutes a reasonable apprehension of bias. Must a discomfort for reasons of anxiety on the part of a litigant be considered enough that a judge should recuse himself or herself? In this regard therefore the requirement as per the Constitutional Court, in *President of the Republic of South Africa v South African Rugby Football Union*, is that there must be a reasonable suspicion that the judicial officer[3] might be, not would be biased. Second, the suspicion must be that of a reasonable person in the position of the accused or litigant. Third, the suspicion must be based on reasonable grounds.

> "Judicial Recusal is a Constitutional matter because the impartial adjudication of disputes in both criminal and civil cases is a cornerstone of any fair and just legal system."

What happens in the event a Judicial Officer refuses to recuse

Failure to recuse by a Judicial Officer where grounds for recusal exist nullifies the proceedings. Be that as it may, the proceedings are not automatically nullified. Application for either appeal or review must be lodged. The result is that on review the proceedings will be set aside and must start afresh. In South African Rugby Football Union the Constitutional Court noted that where one member of a bench should not have heard the matter the effect is the hearing is rendered void. In *South African Commercial Catering and Allied Workers Union and Others v 2 Irvin & Johnson Ltd (Seafoods Division*

3 Moch v Ned travel (Pty) Ltd American Express 1996 (3) SA 1 (A) at 13H
S v Stoffel's and 11 Similar Offences 2004 (1) SA SACR 176 C
South Afrcan Commercial Catering and Allied Workers Union and Others v 2 Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR.

Fish Processing) 2000 (3) SA 705 (CC), 2000 (8) BCLR 886, the Constitutional Court held that the question of judicial recusal is a constitutional matter and that an appeal on judicial bias is competently directed to this court.

Judicial Recusal is a Constitutional matter because the impartial adjudication of disputes in both criminal and civil cases is a cornerstone of any fair and just legal system. A Judge who sits on a case who ought not to do so by reason of actual or perceived bias acts in a manner that is inconsistent with section 34 of the Constitution and in breach of the requirements of section 165 (2) 17 of the Constitution.

What happens where in the event a Judicial Officer recuses himself or herself?

In *S v Stoffels and 11 Similar Offences* 2004 (1) SA SACR 176 C the full bench adopted the approach that the situation where the magistrate has recused himself from the case after evidence has been adduced, is equivalent to a situation where the magistrate has died, becomes incapacitated to continue with the case, is dismissed or has resigned. In such a case the part heard proceedings before him are aborted and are therefore a nullity. The same applies to a situation where the magistrate has recused himself from the proceedings, the trial may then proceed afresh before another magistrate.

The Appellate Division in *Moch v Ned travel (Pty) Ltd American Express* 1996 (3) SA 1 (A) at 13H, held that a judicial officer should not be unduly sensitive and ought not to regard an application for recusal as a personal affront.
In *South African Revenue Service v Commission for Conciliation Mediation and Arbitration and Others* CCT19/16) [2016] ZACC 38 Chief Justice Mogoeng had this to say:

> "Judicial officers must be careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtly sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however, much the parties might seek to appeal to their emotions. To be caught up in that web as a judicial officer, amounts to dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing in line with the affirmation of oath of office."

Approach to an application for recusal

The *South African Rugby Football Union* full court judgment said the following in this regard: "It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it is rest upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case that is a mind open to persuasion by the evidence and the submissions of counsel.

The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judge to administer justice without fear or favor and or prejudice and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse himself if there are reasonable grounds on the part of a litigant for apprehending that a judicial officer, for whatever reasons, was not or will not be impartial."

In any case where the impartiality of a judge is in question the appearance of a matter in the eyes of the applicant or any distant observer is just as important as the reality. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done
It is worth noting that the apprehension must be in itself a reasonable apprehension with substance or else it may be seen as just fanciful and devoid of merit [4]. ●

4 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC), 1999 (7) BCLR 725.

North-West University signs memorandum of agreement with Black Lawyers Association – Legal Education Centre

Photo: North-West University

The North-West University's (NWU's) Faculty of Law and the Black Lawyers Association – Legal Education Centre (BLA-LEC) has committed to producing market-ready lawyers through a memorandum of agreement signed on 11 November 2021.

The agreement, signed at the NWU's Mahikeng Campus is for a period of three years and the NWU is the second university in the country, after the University of Venda, to sign such a momentous agreement.

The primary aim is to assist final-year law students at the NWU to acquire the necessary skills needed in the profession through Trial Advocacy Training. In short, Trial Advocacy Training is the art of persuasion, using language to tell a convincing and believable story, often in a simulated courtroom environment.

Adv McCaps Motimele SC, Chairperson of the Board of Trustees of BLA-LEC, says they recognise the need for

> **"The primary aim is to assist final-year law students at the NWU to acquire the necessary skills needed in the profession through Trial Advocacy Training."**

Signing the agreement: Prof Sonia Swanepoel, NWU acting deputy vice-chancellor for community engagement and Mahikeng Campus operations, and Adv. Mc Caps Motimele SC (Chairperson) from BLA-LEC, sign the memorandum of agreement. Prof Jeffrey Mphahlele, deputy vice-chancellor for research and innovation, Dr Neo Morei, executive dean of the Faculty of Law, and Justice Serithi witness the agreement.

Photos: North-West University

institutions of higher learning, such as the NWU, to produce law graduates that are adequately trained and ready to enter and thrive in the legal profession. "The BLA-LEC will provide the appropriate and necessary trial advocacy training to enhance teaching and learning at the NWU. Not only will this produce high-caliber graduates who become leaders in the profession, but it will also strengthen the reputation of the NWU's Faculty of Law as one of the leading faculties in the country," he adds.

Representing the NWU, Prof Sonia Swanepoel, Acting Deputy Vice-chancellor for community engagement and Mahikeng Campus operations, confirmed this. He said: "This programme will vastly benefit our students and contribute to the NWU's goal to deliver well- rounded graduates. The NWU offers more than just an education: We offer people a place in the world. Academically, students benefit from great choice and flexibility, enabling them to fulfil their potential and start preparing for their careers."
On the NWU's website under the heading "Welcome to NWU" the university has stated that they collaborate with other institutions as part of a global and higher education community. That is why the NWU responded decisively to the formalisation of the long-standing relationship with the BLA-LEC.

The NWU has been associated with the Black Lawyers Association and its Legal Education Centre for a very long time, providing training to final year LLB students in trial advocacy without any formal arrangements.
The NWU's Faculty of Law has always valued and benefitted from the training which has contributed to the Faculty's goal of equipping law students with the knowledge and skills that they will need in their professional lives and also expand the science of law through practical legal training and supplements the clinical legal training offered by both law clinics in the University.

The NWU's responsibilities in terms of the MOA is to:

a) mobilise students for the training;

b) provide a list of students to the BLAC-LEC prior to any scheduled training; and

c) provide the necessary training facilities.

The NWU in signing the MOA has committed itself to the responsibilities and ensuring that both partners contribute to producing graduates who are ready for the legal profession and ready to serve their communities.

Partnership between BLA-LEC and UFH: (left – right), Mr. Pango (Director: UFH Law Clinic), Mr. Katurura (Executive Operation Manager), Justice Serithi (retired JA), Adv. Mc Caps Motimele SC (Chairperson), Prof Buhlungu (Vice-Chancellor), Dr. Lubisi (former Dean) and Ms Sigonyela (Director of the BLA-LEC)

The BLA-LEC and UFH faculty of law sign an MOU to partner in the delivery of the LLB

Actor Katurura
Executive Operations Manager: Registrar's Office (UFH)
Former Deputy Dean: Faculty of Law
Member of the BLA-LEC Research & Publications Committee

On 17 November 2021, the long-standing relationship between the Nelson R Mandela School of Law (Faculty of Law) at the University of Fort Hare (UFH) and the Black Lawyers Association-Legal Education Centre (BLA-LEC) was formalised through signing of an MOU between the two institutions. The momentous and landmark occasion was held at the historic UFH Campus in Alice.

The MOU represents a commitment between BLA-LEC and UFH to work together in an arrangement where the BLA-LEC will offer Trial Advocacy Training to final year law students registered at the UFH. This move is designed to assist final year law students to acquire the necessary trial advocacy skills needed to thrive in the profession. In this relationship the BLA-LEC commits to identifying and coordinating qualified trainers to conduct the trial advocacy training "based on the learn-by doing approach in that all exercises are conducted in a simulated court–room session." The training will be offered as part of a final year module; Legal Clinic Internship which is offered through the Law Clinic. Crucially, upon successful completion of the training, each student will be awarded a certificate. This could give them an edge over other LLB graduates who would not have undergone the same training.

Speaking at the occasion, the chairperson of the BLA-LEC, Adv Mc Caps Motimele SC, and Prof Sakhela Buhlungu, the Vice Chancellor and Principal of UFH recounted the histories and visions of the two institutions. It was quite apparent that in human terms the partnership between the two institutions was one between two "kindred spirits". Clearly the commitment to egalitarianism, change and transformation and the provision of quality education comparable with the very best, among others, are shared commitments.

The BLA-LEC chairperson, in outlining the history of the BLA recounted, among others, the case of *R v Pitje* 1960 (4) SA 709 (A). The case involved one of the earliest members of the BLA and subsequently the BLA-LEC who had a run in with the racial segregation that characterised the apartheid system. In 1958, Mr Pitje, who was then a candidate attorney at Mandela and Tambo Attorneys, appeared in a magistrate's court to defend a client. In violation of the segregationist laws he took his seat at a table that was provided for white practitioners. The magistrate requested him to vacate the seat but Mr Pitje refused and upon which the magistrate charged him with contempt and imposed a fine as well as some time in jail. The case was an appeal against this decision (related in greater detail on the BLA website).

Part of the significance of the story from the chronicles of the BLA is, of course, the demonstration of how its genesis was in a push back against, among other things, racial injustice in the legal profession and in society in general. Beyond this, the names Mandela and Tambo have an indelible mark on the history and identity of UFH in general and the Faculty of Law in particular. Both are UFH alumni and the Faculty of Law bears the name Nelson R Mandela School of Law. The Faculty is also home to OR Tambo Centre for Human Rights. Incidentally Tambo was the principal to Mr Pitje, the candidate attorney in the case recounted by Adv Motemele. In fact, Tambo had appeared earlier before the same magistrate and had withdrawn from the case when he was informed that he would not be heard unless he moved to a non-white table.

The importance of the partnership between the BLA-LEC and UFH goes beyond aspects of shared history, associations and values as the Tambo-Pitje story demonstrates. The signing of the MOU comes at a time when the quality of LLB programmes and the graduates produced have been under serious scrutiny. An LLB Summit, initiated by the South African Law Deans' Association, the Law Society of South Africa and the General Council of the Bar, took place on 29 May 2013 to discuss the future of the LLB degree. A common sentiment at the time was that legal education in South Africa is in crisis.

This summit resulted in, among other developments, the CHE National Review of LLB programmes offered at Public Universities. The review process resulted in the redesign of LLB programme at UFH in 2018. For the university, Prof Buhlungu pointed out that the partnership also comes at a time just as the institution has embarked on a Decade of Renewal and the implementation of the University Strategic Plan 2022-2026. Significantly, the first goal in the Strategic Plan is to "pursue high quality and innovative teaching and learning". In this regard, it cannot be overemphasised that the collaboration between the Faculty of Law and the BLA-LEC will go a long way in achieving this goal in respect of law teaching and the inculcation of desirable graduate attributes.

> **"The signing of the MOU comes at a time when the quality of LLB programmes and the graduates produced have been under serious scrutiny."**

Signing the MOU: Senior Counsel and Chairperson of the LEC Board of Trustees, Advocate Mc Caps Motimele SC, the Vice-Chancellor Prof Sakhela Buhlungu, Dr Nombulelo Lubisi (former Dean) and retired Judge Willie Seriti.

The process leading to the signing of the MOU took quite a while and considerable delays were also experienced due to the COVID_19 pandemic. Nevertheless, the Director of the Law Clinic at UFH, Mr Pango worked tirelessly together with the Acting Director of the BLA-LEC to ensure that the MOU and the occasion for its signing became a reality. The signing also came as a significant "last act" for the then Dean of Law, Dr Nombulelo Lubisi, the Faculty's first female Dean whose term at the helm ended in December.

The occasion was also attended by, among others, Justice Willie Seriti (retired); the Acting Director of the BLA-LEC and colleagues from her office; the Director of the Law Clinic at UFH as well as some of the staff from the Clinic and the Faculty. Lastly and perhaps most importantly members of Law Students Council were also in attendance and, on behalf of all law students, expressed their heartfelt appreciation for this partnership. ●

Black Excellence

Justice Mandisa Maya

Justice Mandisa Maya was born in Tsolo, Eastern Cape and grew up in King William's Town and Mthatha. She obtained her matric from St John's College in Mthatha. Added to that, she obtained a BProc from the University of the Transkei, now Walter Sisulu University, an LLB from the University of Natal. Justice Maya was awarded a Fulbright Scholarship to study LLM (Labour Law – Alternative Dispute Resolution and Constitutional Law) at the Duke University School of Law in the United States of America.

She began her legal career as an Attorney's Clerk at Dazana Mafungo Inc in Mthatha in 1987 until 1988. She went on to become a Court Interpreter and Prosecutor at the Magistrates' Court in Mthatha from 1988 to 1989. Justice Maya became the Assistant State Law Adviser in Mthatha in 1991 and was admitted to the Transkei Bar in 1994. In 1994, she worked as an investigator for the Independent Electoral Commission, looking into allegations of white farmers in the Eastern Cape who were destroying the election material. Since 1999 Justice Maya has served as a member of the judiciary in various capacities and was appointed as a member of the Bench in the Supreme Court of Appeal in 2006. She was then appointed as Deputy President of the Supreme Court of Appeal in 2015 and as Acting President of the Supreme Court of Appeal in 2016. In May 2017 she became the first woman President of the Supreme Court of Appeal. Awards she has received over the years, include:

- Duke Law Alumni Association International Award
- LLD (Honoris Causa) Nelson Mandela University
- LLD (Honoris Causa) Walter Sisulu University
- LLD (Honoris Causa) University of Fort Hare (conferment deferred for COVID-19)
- South African Chapter of the International Association of Women Judges Recognition Award for contribution to gender transformation in the judiciary
- Recipient of the South African Women Lawyers Association History & Icon Programme:
- Commonwealth Foundation Fellowship
- Georgetown University Law & Gender Fellowship Program

Justice Maya has been a member of the Black Lawyers Association, the National Association for Democratic Lawyers and the Commonwealth Association of Law Reform Agencies. In 2004, she founded the South African Chapter of the International Association of Women Judges. She also holds various leadership and advisory roles in organisations such as Lawyers Against Violence, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, and the South African Judicial Education Institute. She has served as a member and Chairperson of the

South African Law Reform Commission since 2013 and as a board member of the South African Journal on Human Rights. In 2012 she was the recipient of the South African Women Lawyers Icon award. She was honoured for the role she plays in empowering and mentoring women in both the judiciary and the broader legal profession. Justice Maya makes a valuable and substantial contribution to the promotion of women's rights by being involved in many community-based organisations, including the Transkei Women Zenzele Association and the Women's Economic advancement Group (Pty) Ltd. Her other professional activities include:

Madam Justice Mandisa Maya, president of the Supreme Court of Appeal.

- Member of the Judicial Service Commission
- Member of the Duke University (USA) Bolch Judicial Institute Leadership Council
- Board Member of the University of Free State Law Faculty
- Advisory Board Member of the Yearbook of South African Law
- Advisory Board Member of the South African Law Journal
- Board Member of the National Bar Examinations Board
- Member; of the Commonwealth Association of Law Reform Commissions
- Elected Regional Director: West and Southern Africa the South African Chapter of the International Association of Women Judges (SAC-IAWJ)

Regarding her judgments, the Constitutional Court has upheld many of her judgments including her dissenting minority judgment in Minister of Safety and Security v F 2011 (3) SA 487 (SCA). The matter involved a claim for damages arising from the rape of a woman by an off-duty policeman. The majority of the Court held that the Minister was not vicariously liable as the policeman was not on duty at the time of the rape. In her minority judgment, Justice Maya focused on the constitutional role entrusted to the police and the responsibility of police officers to conduct themselves properly to foster the community's trust in this institution. The Constitutional Court upheld Justice Maya's judgment in *F v Minister of Safety and Security* 2012 (1) SA 536 (CC). In *AfriForum v Chairperson of the Council of the University of South Africa*, Maya made history by writing the first recorded judgment of a superior court in South Africa in isiXhosa. Her other key judgments include:

- *Helen Suzman Foundation v Judicial Service Commission* [2017] 1 All SA 58 (SCA) (2 November 2016)
- *Sandvliet Boerdery (Pty) Ltd v Mampies* 2019 (6) SA 409 (SCA) (8 July 2019
- *Mbungela v Mkabi* 2020 (1) SA 41 (SCA) (30 September 2019)
- *Minister of Safety and Security v F* [2011] 3 All SA 149 (SCA) (22 February 2011
- *Lebowa Platinum Mines Limited v Viljoen* 2009 (3) SA 511 (SCA) (1 December 2008)

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