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Issue 41

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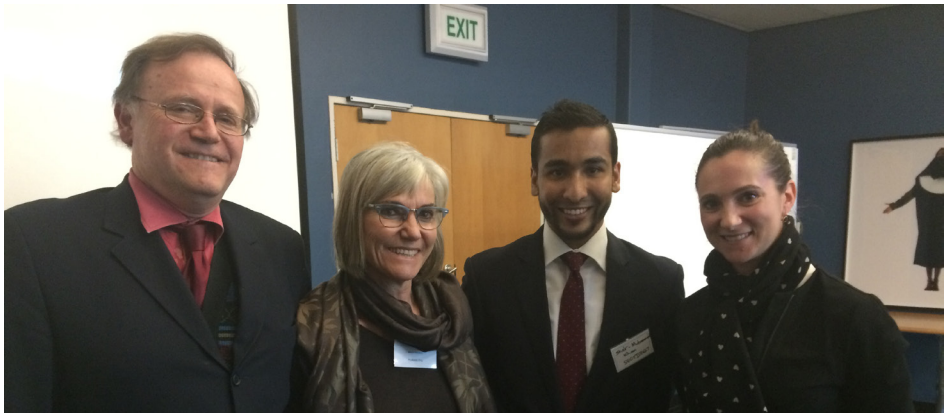
**IN THIS ISSUE: August 2015**

We dedicate this issue to the Public Interest Law Gathering held at Wits University from 22-24 July 2015, and introduce two new additions to the ProBono.Org staff in Joburg and Pretoria.

# Reflections on the Public Interest Law Gathering 2015

*By Alice L. Brown, PILG Convenor*




*The Conflict of Interest Panel, L-R: Moray Hathorn (Webber Wentzel), Erica Emdon, Sher-Muhammad Khan (Section 27), Donna Gewer (Bowman Gilfillan)*

**From July 22 – 24, the halls of the University of the Witwatersrand School of Law (WLS) were abuzz with the voices and presence of Public Interest Law Gathering (PILG) participants.**

This initiative, organised by a number of local public interest law organisations, brings together a vast array of people - from across the country and beyond – who are concerned about the cutting edge of human rights and social justice. Focusing on public interest advocacy and litigation, the Gathering and its associated activities is a

knowledge and skills-sharing exercise as well as an opportunity to promote greater collaboration and networking within the public interest law and human rights communities. Participants include, amongst others, public interest legal practitioners, advice office workers and paralegals, social movement activists, law students, legal academics, lawyers from the private sector and public servants. The aim of the Gathering is to serve as a focal point for practitioners, activists and other interested persons to share and develop learnings and insights, with the ultimate goal of improving and enhancing access to justice and the quality of services provided to marginalised, vulnerable individuals and communities. Indeed, this process provides an important opportunity for attendees to exchange ideas, strengthen partnerships, discuss, debate, reflect, strategise and commune.

By way of background: The nuts and bolts of PILG are organised through a Coordinating Committee consisting of ProBono.Org, the Centre for Applied Legal Studies (CALS), Lawyers for Human Rights (LHR), the Legal Resources Centre (LRC), Section27, the Socio-economic Rights Institute (SERI), the Southern Africa Litigation Centre (SALC), Students for Law and Social Justice (SLSJ) and WLS. This year, in recognition of the growth of the initiative and the value it delivers, the Coordinating Committee took a decision to establish a roving PILG secretariat and ProBono.Org took on the first term.

The Gathering has grown through the years. From a relatively small grouping in 2010, PILG has developed into a much-anticipated forum in the South African social justice calendar. Indeed, in 2015, over 200 participants registered and attended the Gathering. The strategy has always been to keep the infrastructure and bureaucracy economical and efficient while delivering a well-organised, carefully crafted and professionally administered event. This has been possible with in-kind support from the WLS and all other members of the Coordinating Committee in addition to financial contributions from a few key sources that include the Bertha Foundation, the Ford Foundation and the Open Society Foundation for South Africa.

As in the past, the 2015 Gathering ran over a period of three days, with the first day (July 22) reserved for side meetings among the various organisations, individuals and groupings that gather for PILG. This year, pre-gathering workshops were held by Lawyers for Human Rights (focused on refugees and migrants), the Centre for Applied Legal Studies (focused on environmental matters) and the Legal Resources Centre (focused on openness, accountability and information rights in the digital age).

With regard to its primary activities, PILG 2015 was off to an auspicious start on the evening of July 22 with a keynote address delivered by Judge Navi Pillay, former UN High Commissioner for Human Rights. Her presentation was entitled "Adherence to Universal Human Rights Norms and Standards in Public Interest Litigation" and the judge delivered a timely, bold and inspirational message that addressed a number of crucial issues including the universality of international human rights norms and standards and the necessity for civil society generally, and public interest law and advocacy groups in particular, to hold violators to account and to protect and promote rights. The judge also stressed the need to fight corruption and lack of accountability and to promote respect for the rule of law. Given Judge Pillay's years of experience and expertise on fronts domestic, regional and international, we could not have found a better placed individual to kick off officially the fifth anniversary of PILG.

Over the next two days, there was a very full agenda consisting of 19 panel sessions that explored topics such as "Failure to Comply: Strategies to Ensuring Compliance with Court Orders," "Sentencing Reform," "Reckless Lending and Emolument Attachment Orders," "Respecting and Protecting the Right to Freedom of Expression: Lessons in Using the Courts to Protect Human Rights Defenders in the Southern African Region," "The Right to Protest: the Regulation of Gatherings Act," "Strategic Litigation and Transnational Fora" and "The 2015 State of the Nation Address: A Watershed Moment in South Africa's Constitutional Democracy?" PILG ended with the showing of the documentary film The Shore Break, which tells the plight of the Pondo people in the Amadiba area of the Wild Coast and a proposed mining project on their land.

Based on the enthusiastic attendance and positive feedback, Coordinating Committee members have committed to continuing this initiative and plans are already underway for PILG 2016. So stay tuned!

*[The full text of Judge Pillay's address, along with other details on PILG 2015, can be found at www.publicinterestlawgathering.com]*

**ProBono.Org convened three panels at PILG 2015. In this newsletter we report on two of them:**

# 1. Reckless Lending and Emolument Attachment Orders Panel by Erica Emdon

*The Reckless Lending Panel*

**After the victory in the emoluments orders case heard in the Cape High Court earlier this year, it was highly pertinent to hear a group of experts talk about their work both on the case and in respect of their experiences with similar cases.**

The facilitator, Odette Geldenhuys of Webber Wentzel, acted as the attorney in the case, representing 15 clients who had approached the University of Stellenbosch Legal Aid Clinic. All the clients were having large amounts of money deducted from their salaries in terms of emolument attachment orders (EAOs), sometimes in excess of 50% or more of their earnings.

There were a number of issues in the case that Stefanie Boyce, one of the panellists, said she had also experienced with her clients. She runs a busy legal practice in Johannesburg where she mainly represents debtors who are struggling to deal with problems relating to their loans.

She said, as was stated in the case, that an EAO is based on a person consenting to judgment, in terms of Section 58 of the Magistrate's Court Act (MCA). Frequently people sign consents without knowing what they are signing. Debtors are "encouraged" to sign these, so that creditors can have them made orders of court to enable the EAOs to be implemented. However, in many cases debtors sign these consents under duress with no witness being present. In the Stellenbosch case, the court held that any consent to judgment signed where the witnesses were not present at the time that the individual applicants allegedly signed them, can be set aside. If the witnesses' signature is obtained ex post facto, it is in breach of Rule 4(2) of the MCA.

Companies shop around and find courts where they can have the consents easily approved, often at courts far from those where the debtors live. Boyce had a case in Ermelo and Hankie (a place she had never heard of) despite the fact that her client lived in Johannesburg. In the Stellenbosch case, the court set aside the EAOs that were issued in areas not in the jurisdiction of the garnishee (employer). This is a breach of Section 65J(1)(a) of the Magistrate's Court Act (MCA).

As in the case of the Stellenbosch clients, Stefanie Boyce finds that clerks of the courts and not Magistrates hand down judgements. This means that no proper enquiry is undertaken. She did report cases to the National Credit Regulator but had no response.

Judicial oversight is required prior to the sale in execution of property (Jaftha and Gundwana cases – two Constitutional Court judgments). Desai held, in the Stellenbosch case, that the same judicial oversight is required prior to the issue of an EAO. "EAOs are execution orders that are made against a salary or wages of an individual in order to satisfy a judgment debt. Judicial oversight must be mandatory and should take place when the execution order is issued. It is needed to evaluate whether the amount of money to be attached leaves money for the debtor to support herself and her family." At the moment a Magistrate is not required to evaluate EAOs. They are signed off by clerks of the court.

The Stellenbosch case tackled this issue, and stated that section 65J(2)(b)(i) and 65(2)(b)(ii) of the MCA are constitutionally invalid because they allow for EAOs to be issued by a clerk of the court without judicial oversight.

Mathilda Roslee, the second panellist and the coordinator of the financial literacy project at the Stellenbosch Legal Aid Clinic, spoke about the need for education regarding loans, EAOs, and financial management. She has an extensive programme aimed at educating people working on farms and in other employment around Stellenbosch and the Greater Boland area that she described in some detail.

She too identified the problems clients at the clinic were experiencing and that were taken up in the case.

Darryl Bernstein of Baker & McKenzie, the final panellist, told the gathering about a case he is involved in that will probably be heard later this year. The case centres around the costs and charges added to debts, mainly by debt administrators. The vagueness as to what can and cannot be charged is highly problematic and situations arise where the debt amount escalates exponentially, resulting in unrealistically high deductions.

All in all the panel was highly informative and alerted the audience to the findings of the judgment in the Stellenbosch case, which will have positive implications for thousands of EAO debtors.

# 2. Watching briefs by Annelie du Plessis

**The Watching Brief panel discussed the role an advocate or attorney can play as a watching brief lawyer in matters involving children, prisoners and other victims of assault, violence and/or abuse. The panel was facilitated by Sushila Dhever (partner at Fasken Martineau), while Egon Oswald (Egon A. Oswald Attorneys), Carina du Toit (senior attorney at the Centre for Child Law) and Matthew du Plessis (attorney at Rademeyer Attorneys) led the discussion.**

Carina du Toit presented an interesting case involving a 14-year-old girl. The girl was 7 years old when she testified in court that her father had raped her. Now, being 14 years old, she wanted to recant this testimony and made a statement saying he did not rape her. The court was left to decide whether the matter needed to be returned to court for further evidence and the Centre was appointed to represent the girl (essentially as a watching brief attorney). Du Toit explained that referring the matter back to the court of origin would involve an application for leave to appeal by the father, in a criminal matter. The young girl would be required to testify again and further evidence would need to be led. The Centre, as the watching brief attorney would have to ensure that the girl was able to give her testimony without prejudice.

Du Toit pointed out that it was extremely important to have an intermediary appointed in this matter. She also made the point that the role of a watching brief attorney is not always clear and may depend to some extent on the client, the nature of the matter and the appointment. The appointment is not always formally made and can cause uncertainty.

The challenges faced by an attorney acting as a watching brief attorney for prisoners who wish to press charges against the Department of Correctional Services in torture cases are enormous, according to Egon Oswald. He has had a number of matters over the years where prisoners who have been subjected to torture have failed to succeed in criminal prosecutions against the Department.

In these matters, it is often difficult to get access to the prisoners in need of assistance, resulting in watching brief attorneys having to bring applications against the Department to allow visits and access before anything else can be done in the matter. Torture claims will not succeed without evidence as this goes to the very heart of the dispute and without access to your client there is very little you can do. In Oswald's experience,

*ProBono.Org staff at the PILG gathering. L-R: Gift Xaba, Thembelihle Khubeka, Nhlanhla Mtombeni*

correctional staff often frustrate attempts to compile or obtain evidence, see clients or resolve disputes. They collude and cover up any incidents very quickly, even threatening inmates who speak out. Some of these investigations spark further attacks on prisoners by staff. In some prisons, psychotropic drugs or medicine is administered to prisoners to 'subdue' or 'manage' them, often scarring them for life.

Even serious injuries sustained by prisoners heal over time, and any delay in capturing or recording these injuries seriously hampers court cases from an evidentiary point of view. The lack of evidence places these claims at risk and makes them almost impossible to prosecute.

Oswald says there is a total lack of will to prosecute these cases by the National Prosecuting Authority, leaving little recourse for these torture victims. He suggests bringing compensation claims to court instead, which forces departments to 'pay' for their mistakes. This is something that he himself has done, and he's about to succesfully conclude a damages claim against the State in the St Albans case, being heard in the Port Elizabeth High Court, ten years after the torture incident took place, involving over 200 inmates of the St Albans prison.

Matthew du Plessis touched on the role of a watching brief attorney in cases involving sexual abuse, where minor victims and their caregivers need assistance in navigating the criminal justice system. Some international jurisdictions like Kenya and Malaysia recognise the important role a watching brief attorney can play and in some cases will not proceed without one. In South Africa this role is not regulated and perhaps the time has come for the law to reform on this point.

In criminal matters it is du Plessis' experience that the rights of the accused are paramount and, in some

cases, contrary to the principles of the Constitution and Children's Act. He sees the role of the watching brief attorney as ancillary to that of the prosecutor, where a subtle approach to assist the state in prosecuting alleged abusers should be followed. However, du Plessis concedes that watching brief attorneys can also play a more aggressive role in matters (such as those highlighted by du Toit and Oswald).

An interesting point raised by the audience involved the role a watching brief attorney can play in environmental cases. Many rural communities are affected by mining violations and these seldom result in prosecutions. The question is whether watching brief attorneys can assist communities in taking some of these cases on review, resulting in better sentences or whether such cases can be privately prosecuted by attorneys and communities working together.

From the discussions it sadly seems that our criminal justice system is failing to protect those most in need, leaving this responsibility with civil society.

# Meet our new staff members

**Nomaswazi Malinga** was born and raised in Soweto. Both her parents worked for a firm of attorneys, which played a huge role in her choice of career.

After completing her law degree at the University of Johannesburg, Nomaswazi completed her articles at Webber Wentzel. Soon after, she joined First National Bank insurance brokers as a legal advisor. While there she obtained a Higher Diploma in Labour Law in 2011 from the University of Johannesburg.

Nomaswazi joined ProBono.Org in July 2015 as the staff attorney in the family law department. She finds this role very challenging and looks forward to helping her clients with the assistance of her fellow colleagues in the legal fraternity.

**Neo Chokoe**, Manager Probono.Org Pretoria Office

Neo obtained her LLB from the University of the Witwatersrand. She is a qualified attorney and worked for Lawyers for Human Rights for two years as a litigation attorney in the Refugee and Migrant Rights Programme. She joined Probono.Org on 1 July 2015 as the manager of the Pretoria office. Her duties include recruiting attorneys around Pretoria and surrounding areas to do pro bono work, organising community workshops, workshops for attorneys and referring cases to attorneys. She has a special interest in public interest law and social justice.