

**THE UNIVERSITY OF STELLENBOSCH LAW
FACULTY: MORTI MALHERBE MEMORIAL
LECTURE**

**HELD AT: STELLENBOSCH LAW FACULTY
STELLENBOSCH UNIVERSITY
OLD MAIN BUILDING
ROOM 1023**

**GENDER EQUALITY FROM A LEGAL PERSPECTIVE:
ACHIEVEMENTS AND CHALLENGES**

**SPEECH DELIVERED BY: JHM TRAVERSO
ACTING JUDGE PRESIDENT OF THE WESTERN CAPE HIGH
COURT, CAPE TOWN**

WEDNESDAY, 5 AUGUST 2009 @ 18h00

Langa, CJ said the following about the Constitution:

“The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

... The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.”¹

¹ Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC)

This lecture is combined with the celebration of Women's Day. In line with what was said by Langa, CJ, I have decided to speak to you on gender equality from a legal perspective and take you on a journey through the development of our jurisprudence post 1994 with particular reference to gender equality. I will also allude, briefly to the challenges which lie ahead. And in doing so I will use the metaphor of a bridge as is found in the publication *Precedent and Possibility* by Davis & Le Roux. Because I hope to demonstrate that *"the crossing of the bridge never really ends. At best the journey is a movement by society away from the past and in the direction of a community prefigured in a coherent reading of the constitutional text. That idea of community is never attained completely. The journey itself becomes an essential part of the transformative exercise."*

Women's Day is a day of celebration. It is a day when the social, economic and political achievements of women are

commemorated and the struggle for women's rights are acknowledged and affirmed. On 9 August we honour those women who, 53 years ago, marched to the Union Buildings to demand an end to unjust apartheid laws. Their passion for freedom, equality, and human dignity gave us a gift of which the benefits are still being reaped today, and will continuously be reaped long into the future.

The celebration of Women's Day is thus both a celebration of the constitutionalisation of women's rights and the integration of women's issues into the human rights debate, as well as a commemoration of those women who, especially over the last fifteen years, have been responsible for the enhancement of human dignity, the achievement of equality and the advancement of human rights and freedoms, values true to the spirit of democracy.

Women have always been at the forefront of these struggles, not only assuming the responsibility for the advancement of their rights but also the advancement of rights of people in general. For that reason, I want to dedicate this lecture to those women who, in the fifteen years of our democracy, have had the courage to contest the injustices and the indignities not only suffered by women, but by all South Africans, and who have, through their tireless efforts, succeeded in ensuring that the courts uphold those rights which underpin our democracy. Most of these women are just the ordinary citizens of this country, the “*unsung heroes*” who, despite suffering some demoralising defeats, remained persistent in their challenges. There are many of these women, too many to all be discussed in the short time which is available to me, and I will therefore only make reference to some of their cases. But I hope to demonstrate that these women, by taking legal action, are the women who, in the

words of the official theme of Women's Month are building a better South Africa and a better world.

One such a woman is Ms Irene **Grootboom**. This humble farmworker's willpower was the driving force behind a landmark judgment, one which has been hailed by Mr Justice Goldstone as "*the first building block in creating a jurisprudence of socio-economic rights*". Ms Grootboom and the other respondents in *Government of The Republic of South Africa and Others v Grootboom and Others*² were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. Ms Grootboom, in bringing the application on behalf of 510 children and 390 adults, applied for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent

² 2001 (1) SA 46 (CC)

accommodation. The respondents based their claim on two constitutional provisions, namely section 26 of the Constitution, Act 108 of 1996 (*the Constitution*), which provides that everyone has the right of access to adequate housing; and section 28(1)(c) of the Constitution which provides that children have the right to shelter.

The Constitutional Court, in arriving at its decision, interpreted the elements of the socio-economic rights pertaining to housing and assessed the measures (legislative and otherwise) that were instituted to give effect to access to adequate housing and shelter by the government. The Court primarily focused on the reasonableness of the measures. It held that, for a person to have access to adequate housing, there had to be the provision of land, services and a dwelling. The right also suggested that it was not only the State who was responsible for the provision of houses, but that other agents within

society had to be enabled by legislative and other measures to provide housing. The State therefore had to create the conditions for access to adequate housing for people at all economic levels of society.³ The Court furthermore held that section 26 as a whole placed, at the very least, a negative obligation upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The manner in which the eviction in the present circumstances had been carried out had resulted in a breach of this obligation.⁴ As regards to section 28 of the Constitution, the Court found that the State has to provide the legal and administrative infrastructure necessary to ensure that children were accorded the protection contemplated by this provision.

In the unanimous judgment of the court Yacoob, J stressed the obligation of the State to act positively to ameliorate the

³ At para 35

⁴ At paras 34 and 88

plight of the hundreds of thousands of people living in deplorable conditions throughout the country. This obligation is to provide access to housing, health care, sufficient food and water and social security to those unable to support themselves and their dependants. Realising socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is the key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential. Self-evidently human dignity, freedom and equality is denied to those without food, clothing or shelter. Eventually the court issued a declaratory order which required the State to devise and implement a program that included measures to provide relief for those desperate people who had not been catered for in the State program applicable in the Cape Metropolitan area. Although the impact of the Grootboom case is wide-ranging, and Irene Grootboom became known around the world when enforcing the State's obligation to

respect socio-economic rights, particularly for the homeless, she died homeless in 2008. And although the Grootboom judgment became the foundation in assessing the State's responsibility on socio-economic rights, and has served as the basis for many other legal arguments such as the Treatment Action Campaign's successful court battle against Government for its delays in providing effective measures to cut mother to child transmission of HIV, she never saw the fruits of her endeavours.

Another woman whose spirit, strength and tenacity won her the respect of people all over the world is Ms Alix Jean **Carmichele**. She finally, in November 2003, won an eight year long court battle in which she was seeking compensation from the government. During August 1995, the then 28-year-old woman was brutally assaulted by one Francois Coetzee, who was at the time awaiting trial for rape. In spite of a previous conviction for indecent assault

and a history of violent behaviour towards women, he had been released unconditionally on his own recognisance in the rape matter. Ms Carmichele brought a delictual action in the High Court for damages against the two respondents, being the Minister of Safety and Security and the Minister of Justice, for the injuries she had sustained during the attack. After appealing to the Supreme Court of Appeal, Ms Carmichele launched proceedings in the Constitutional Court. This Court finally agreed⁵ with her contention that the police and prosecutors involved had owed her a duty to safeguard her constitutional right to life, the respect for and protection of her dignity, freedom and security and privacy. While giving effect to its obligation to develop the common law under section 39(2) of the Constitution, the Court found that there is a duty imposed on the State and all its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component

⁵ Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)

which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.⁶

This, however, was not the end of the battle for Ms Carmichele. The Constitutional Court referred the matter back to the trial court to proceed with the trial. The Cape High Court heard evidence in this matter during May 2002 and ultimately ruled that the State was indeed liable. The Ministers once again appealed to the SCA. The Supreme Court of Appeal⁷ confirmed that the police officers and public prosecutors concerned had a public law duty to either oppose bail or to place all relevant and readily available facts before the Court, and that they had failed in this duty. The Court found that Ms Carmichele was not merely a member of the public whom the State had a duty to protect but also a member of a class of people whom the State should have

⁶ At para 44

⁷ Minister of Safety and Security and Another v Carmichele 2004 (3) SA 305 (SCA)

foreseen as being potential victims of another attack by Coetzee. After finding the police and prosecutors to have been negligent and factual causation established, the appeal was dismissed.

Last year, thirteen years after the attack, she was still continuing her battle regarding the quantification of her claim.

Mrs Juleiga **Daniels**, a part-time domestic worker from Cape Town, was the applicant in another landmark decision⁸ in which the Constitutional Court declared that persons married according to Muslim rites are spouses for the purposes of inheriting or claiming maintenance from estates where the deceased died intestate. This ruling was considered in the judgment handed down by the Court in *Robinson and*

⁸ Daniels v Campbell NO and Others 2004 (7) BCLR 735 (CC)

*Another v Volks NO and Others.*⁹ Ms **Robinson**, the applicant, was involved in a monogamous life partnership for fifteen years, but was unable to claim maintenance from her deceased partner's estate. The Court held that the provisions of the Maintenance of Surviving Spouses Act, 27 of 1990, which fail to include domestic partners from the definition of 'survivor' and 'spouse' are unconstitutional in that they contravene the rights to equality and dignity enshrined in our Constitution.

More recently in the case of Fatima Gabie **Hassam**¹⁰ the Constitutional Court declared certain parts of Section 1 of the Intestate Succession Act, No. 81 of 1987 to be inconsistent with the Constitution and invalid to the extent that it does not

⁹ 2004 (6) BCLR 671 (C) Please note that the judgment handed down and which was signed by Van Reenen, J, on behalf of Davis, J, differs from the one which has been reported in the BCLR and All SA Reports.

¹⁰ *Fatima Gabie Hassam v Johan Hermanus Jacobs NO and Others* (with the Muslim Youth Movement of South Africa and the Women's Legal Centre Trust as amici curiae) CCT 83/08 [2009] ZACC 19 Date of Judgment: 15 July 2009. An example of case law concerning monogamous Hindu Marriages is *Govender v Ragavayah NO and Others* 2009 (3) SA 178 (D), where the court held, at paragraph 44 at 186F, that the word 'spouse' as defined in s 1 of the Intestate Succession Act 81 of 1987 includes a partner in a monogamous Hindu marriage.

include more than one spouse in a polygamous Muslim marriage. Ms Hassam was married to her late husband in accordance with Muslim rites. The deceased married a second wife according to Muslim rites. His death certificate shows that he was “*never married*”. The executor of the estate refused to regard the applicant as a “*spouse*” for purposes of the Act. Nkabinde, J found that the exclusion of Mrs. Hassam was not justifiable in a society guided by the principles of equality, fairness and equity, social progress, justice, human dignity and freedom. She also found that the exclusion of the applicant violates the applicant’s right to equality.

What is interesting about Nkabinde, J’s judgment is that she points to the development of our jurisprudence with reference *inter alia* to the following comment of Ngcobo, J in

the *Daniels*¹¹ case where Ngcobo, J observed that Apartheid legislation was “*construed in the context of a legal order that did not respect human dignity, equality and freedom of all people. Discrimination fueled by prejudice was the norm. Black people were denied respect and dignity. They were regarded as inferior to other races.*”

She also referred to the pronouncement by the Appellate Division in *Ismail v. Ismail*¹², where Trengove, JA said the following at 1026:

“I would not regard a polygamous union solemnized under the tenets of the Muslim faith, and the customs related thereto, as being contra bonos mores, in the narrower sense in which the expression is ordinarily used, ie as immoral (see Ngqobela v Sihele (supra at 352) and Docrat v Bhayat (supra at 127)), but such a union can be regarded as being contra bonos mores in the wider sense of the phrase, ie as being contrary to the accepted customs and usages which are regarded as morally binding upon all members of our society or, as Innes CJ said in Seedat’s case at 309,

¹¹ *Supra.*

¹² 1983(1) SA 1006 (AD)

'as being fundamentally opposed to our principles and institutions'."

Our jurisprudence has therefore developed from one which displayed an ignorance and a total disregard of the lived realities that prevailed in certain communities to the present when the *boni mores* of our society must be judged in accordance with the new constitutional order.

So too in *Bhe v. Magistrate, Khayelitsha; Shibi v. Sithole; S.A. Human Rights Commission & Another v. The President of RSA & Another*¹³, the Constitutional Court held that discrimination under the provisions of the Black Administration Act, No. 38 of 1927 dictating that two young black girls could not inherit from their father because firstly they were black and secondly because they were female was invalid, and accordingly it was declared that the two minors were sole heirs of the deceased estate of their father.

¹³ 2005(1) BCLR 1 (CC)

A handful of very brave mothers have led the way in ensuring that maintenance orders are observed and that their children receive the care and protection to which they are entitled. In *Bannatyne v Bannatyne*¹⁴ the Constitutional Court held that the logistical difficulties of the maintenance system were compounded by the gendered nature thereof. After numerous attempts to force her ex-husband to adhere to the maintenance order granted against him, Nadena Bannatyne applied to the Court to have him imprisoned for contempt of court. The Court granted this order while emphasising that effective mechanisms for the enforcement of maintenance obligations are essential for the simultaneous achievement of the rights of the child and the promotion of gender equality. This was also the approach of the Court in *Magewu v Zozo and Others*¹⁵ where it was held that the attachment of pension fund benefits in respect of

¹⁴ *Bannatyne v Bannatyne* (Commission for Gender Equality, as Amicus Curiae) 2003 (2) SA 363 (CC)

¹⁵ 2004 (4) SA 578 (C)

future maintenance claims, is a direct and effective means of ensuring that the rights of the child and dignity of women are upheld. What made the case even more remarkable is the fact that Ms **Magewu** appeared in person and won her battle not only against the father of her child, but also against two big corporations, namely The Telkom Retirement Fund and the Old Mutual Employees Benefits.

During 2003 an 18 year-old single mother by the name of Jade Lee **Petersen**, took it upon herself to challenge¹⁶ the common law and a 1930 Appellate Division judgment. In terms of South African common law the maternal and paternal grandparents of a child born in wedlock are obliged to support him/her if the child's parents are unable to do so. However, where the parents of an extra-marital child are unable to support him/her, the common law, as interpreted in *Motan and Another v Joosub* 1930 AD 61, provides that the

¹⁶ Maintenance Officer, Simon's Town Maintenance Court, and Others, v Petersen 2004 (2) SA 56 (C)

maternal grandparents have a duty of support towards the extra-marital child, but not the paternal grandparents. The Cape High Court found that this common-law rule not only denies extra-marital children an equal right to be maintained by their paternal grandparents, but conveys the notion that they do not have the same inherent worth and dignity as children who are born in wedlock.¹⁷ This, the Court held, constitutes unfair discrimination on the ground of birth and amounts to an infringement of the dignity of such children. As this violation to the rights and best interests of the child cannot be justified under section 36 of the Constitution, this discrimination cannot be tolerated.¹⁸ The Court thus found it necessary to impose a similar duty of support on paternal grandparents as lies with the maternal grandparents.

¹⁷ At para 16

¹⁸ At paras 22-23

The rights of gay and lesbian people have been augmented by the legal victories of two female judges in their respective Constitutional Court challenges. In July 2002 the Constitutional Court¹⁹, at the instance of a judge, Judge Kathleen **Satchwell**, declared certain provisions of the Judges' Remuneration and Conditions of Employment Act, 88 of 1989, unconstitutional because they discriminated against homosexual Judges' same-sex partners. Subsequently, however, a new Act, the Judges' Remuneration and Conditions of Employment Act, 47 of 2001, was promulgated. This Act took no notice of the Constitutional Court order: it still afforded benefits only to the spouses of Judges. The result was that the applicant failed to gain any effective relief from the July 2002 order. Being the indomitable woman that she is, Judge Satchwell again

¹⁹ Satchwell v President of the Republic of South Africa and Another 2002 (6) SA 1 (CC)

challenged²⁰ the discriminatory provisions of this Act. These provisions provided for the payment of certain financial benefits to the '*surviving spouse*' of a deceased Judge. The Court ordered that the words '*or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support*' be read into the provisions after the word '*spouse*'. The Court once again found that the failure to afford the benefits to same-sex life partners of deceased Judges where they had undertaken reciprocal duties of support, was unfairly and unjustifiably discriminatory.²¹

Judge Anna-Marie **de Vos** and her partner in a long-standing lesbian relationship were equally successful in challenging certain provisions of the Child Care Act, 74 of 1983, and the

²⁰ Satchwell v President of the Republic of South Africa and Another 2003 (4) SA 266 (CC)

²¹ At para 9 ****Short version: The Constitutional Court found unconstitutional a law giving benefits to the "spouses" of judges but not their same-sex life partners. It ordered that the legislation be changed accordingly.

Guardianship Act, 192 of 1993.²² Judge De Vos and Ms Suzanne du Toit, her partner, wanted to adopt two children jointly. The Child Care Act, however, confined the right to adopt children jointly to married couples. The Constitutional Court found that excluding partners in same-sex life partnerships from adopting children jointly where they would otherwise be suitable to do so, was in conflict with the principle enshrined in section 28(2) of the Constitution, ie that *'a child's best interests are of paramount importance in every matter concerning the child'*.²³ The impugned provisions of the Child Care Act thus deprived children of the possibility of a loving and stable family life as required by section 28(1)(b) of the Constitution. The said provisions of the Child Care Act accordingly failed to accord paramountcy to the best interests of children and was inconsistent with the Constitution and invalid to the extent of such inconsistency.

²² Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC)

²³ At para 22

The failure by the law to recognise the value and worth of Ms Du Toit as a parent to the siblings, was demeaning and the impugned provisions limited the first applicant's right to dignity.²⁴ The provisions of the Guardianship Act were similarly in conflict with the Constitution as they were premised on the assumption that same-sex life partners could not be joint guardians of children.²⁵ The Constitutional Court as a result ordered that language be added to the statutes to allow same-sex life partners jointly to adopt children on an equal basis with heterosexual married couples.²⁶

I have thus far given a brief overview of the achievements of women in their journey to equality. What are the challenges that remain? There are many. They are complex and the solutions, mostly, do not fall within the domain of the Courts

²⁴ At para 29

²⁵ At para 30

²⁶ Short version: In a unanimous judgment, the Constitutional Court held that statutory provisions which allowed only married couples to adopt a child jointly violated constitutional rights, discriminating on the grounds both of sexual orientation and of marital status.

or the judiciary. How does society ensure that the Grootbooms get their homes before they die? How does one ensure that the Carmichaels do not have to do battle for 13 years before receiving a damages award without impacting on the right of all litigants to have recourse to appeal procedures? I don't have the answers. These problems may seem insurmountable, but the cases above demonstrate is how the law can be used to expand the meaning of the common law to ensure constitutional justice to all. It has shown the path along which we are travelling and the direction in which we are moving.

It has revealed *“that the constitutional journey never proceeds in a single direction. The dominant direction will depend on the outcome of political and legal contest shaped by the prevailing political discourse, the legal traditions of the country, the available legal materials and existing legal*

*precedents, the facts of the particular dispute, the quality of the lawyering and the ideology of the judiciary.*²⁷

And I have little doubt that our constitutional journey will lead us to solutions to these challenges. The outcome may not be perfect, but then What is?

²⁷ Davis & Le Roux: Precedent and Possibility, p. 195