



# LHR case book

Lawyers for Human Rights and public-interest litigation in South Africa





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**Cover (clockwise from top left):** signage at Hargeisa airport; Moutse residents during consultation; Adelaide Tambo emergency camp for evicted persons; a Hillbrow resident during the march against xenophobia.

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**Inside front cover:** Solly Lebelo (LHR attorney) and Kaajal Ramjathan-Keogh (head of refugee and migrant rights programme).

# Introduction



LHR lawyers

**Lawyers for Human Rights (LHR) is a South African non-governmental organisation with a 30-year track record of providing legal advocacy and representation to vulnerable and marginalised communities. LHR sees the law as a positive instrument that can bring about social change and deepen the democratisation of South African society. Our organisation provides a full range of free legal services to marginalised individuals and communities using advocacy, training, policy development and litigation.**

A dedicated litigation programme, the LHR Strategic Litigation Unit (SLU) has a dual mandate:

- 1 to provide administrative and technical support to other projects within LHR during litigation activities and
- 2 to advise on and pursue cases that have precedent-setting value and expand the interpretation and application of human-rights law and the Constitution.

Each of LHR's units provides legal advice and representation to marginalised and vulnerable communities:

- The **Refugee and Migrant Rights Project** assists asylum seekers, refugees and other non-nationals throughout South Africa. This project also houses a detention-monitoring programme that monitors immigration detention; this programme has a particular focus on the border between South Africa and Zimbabwe.
- The **Land and Housing Unit** deals with a wide range of issues involving land reform and restitution, women and land rights, post-settlement disputes and housing.
- The **Environmental Rights Programme** promotes the constitutional rights to a clean environment and deals with access to justice for communities affected by environmental degradation. This programme mostly deals with mining communities and issues of the right to water.

- The **Security of Farm Workers Project** is located in the Western and Northern Cape provinces and protects the rights of farm workers and their families. The project provides assistance in securing tenure and protection against unlawful evictions.

Each of these units also addresses common issues such as child rights, gender equality and non-discrimination.

The SLU provides these projects with:

- technical advice on drafting and aspects of the law and
- administrative assistance such as filing and the collection of cost orders.

LHR is active in all levels of courts in South Africa including the Constitutional Court, the Supreme Court of Appeal, the Land Claims Court, as well as high and magistrates' courts throughout the country. We are fortunate to have forged professional relationships with many of the country's top counsel, who often provide their services in court on contingency or free of charge.

## Litigation

Many cases handled by LHR have set precedents. *Lawyers for Human Rights v Minister of Home Affairs and Others 2004 (4) SA 125 (CC)*, for instance, dealt not only with the rights of non-nationals in detention but also set the test in the Constitutional Court for litigation in the public interest.

Public-interest litigation plays an important role in the development of South Africa's constitutional democracy and continued democratisation of society. Because LHR does not charge its clients any fees, we are wholly dependent on donor funding. In a recent study<sup>1</sup>, the authors identified three main challenges to public-interest litigation in South Africa:

- 1 **Lack of funding:** limited resources and lack of funding for public-interest litigation has resulted in very few organisations engaging in this type of legal work;
- 2 **Lack of experienced, skilled staff:** public-interest organisations must compete with private firms, government and the corporate sector in retaining skilled lawyers; and
- 3 **Government attitude:** the state often adopts the strategy of settling matters at the last minute thereby avoiding precedent-setting cases and the development of human-rights jurisprudence.

1 Marcus, G. and Budlender, S., "A Strategic Evaluation of Public Interest Litigation in South Africa." The Atlantic Philanthropies, June 2008.

LHR sees litigation as an important tool of an overall advocacy strategy that includes capacity building, policy advocacy and development, public awareness and research. LHR discusses litigation strategies at monthly meetings and a litigation committee comprising LHR board members provides advice in this regard. LHR is sometimes required to litigate in its own name and public interest in emergency situations or where we possess special institutional knowledge, particularly in the field of refugee protection. LHR's values ensure that we always act as a reasonable litigant after other advocacy strategies have been exhausted. Our costs are kept as low as possible, and LHR's constitution does not permit collecting on costs orders issued by court in cases where it may be "financially oppressive" for an individual or organisation.

Often felt outside the courtroom, our litigation capacity can be an effective tool to support our advocacy campaigns. LHR was, for instance, active in the development of the Department of Health's policy to provide non-nationals with anti-retroviral treatment. It was the pressure created by the potential for litigation, however, which allowed the parties to negotiate and develop a policy in line with the state's obligations in terms of the Constitution and international law.

## Funding

Donor funding is used in a variety of ways in order to further LHR's aims of creating access to justice and assisting marginalised and vulnerable groups in protecting their human rights. These activities include:

- travel to consult with rural and urban communities who are unable to afford the transportation to major cities;
- payment of fees to counsel who represent our clients in court;
- payment for experts who provide evidence in specialised and complicated matters; and
- payment of attorney fees for consultation, drafting and appearances as well as for disbursements for copying, serving and filing of court documents.

## LHR's role in civil society

LHR is able to take advantage of its position in civil society and works in collaboration with other legal NGOs such as the Centre for Child Law, the Legal Resources Centre and the Wits Law Clinic. LHR also collaborates with social movements

as well as a number of national organisations such as the Consortium for Refugees and Migrants in South Africa, the Law Society of South Africa and Legal Aid South Africa. In this way, our organisation is able to tap into a wide range of knowledge and experience in diverse areas of the law.

Courts have repeatedly commented on the positive contribution that public-interest litigants have played in the development of human-rights jurisprudence in South Africa. LHR strives to play an active role in the development of this area of the law and provide a legal voice for communities and individuals who seek to protect their rights.

*"We have a strong NGO and civil-society sector, and these organisations take on test cases to be challenged. There is the Legal Resources Centre, the Women Legal Resources Centre and Lawyers for Human Rights. They bring cases on behalf of those people and groups who are otherwise marginalised." – Judge Albie Sachs (Constitutional Court judge 1994-2009)*

*"In the words of Chief Justice Ismail Mohamed, Bram Fischer taught us that lawyers must always remember 'that the attainment of justice must be the rationale for all law, that law cannot be distanced from justice and morality without losing its claim to legitimacy [and] that the ethical objectives of the law contain the life blood of a nation'. That is the legacy he left for us: it urges us to stand up against ignorance, oppression and conformity; to always strive to make the law just; and to tell the truth about the Emperor's robes, no matter the consequences." – Judge Pius Langa (Chief justice of the Constitutional Court 2005-2009)*

The purpose of this booklet is to provide an overview of LHR's litigation activities and our role in public-interest litigation in South Africa. The booklet has been designed thematically and looks at past LHR cases with a view of planning for future projects and activities to develop human-rights jurisprudence in South Africa.

# Refugee and migrant rights



Somaliland 2007

# Refugee and migrant rights

**The Refugee and Migrant Rights Project was established in 1996 and provides legal advice and representation to refugees, asylum seekers and other migrants in South Africa. The project has offices in Johannesburg, Pretoria and Durban, and a satellite office in recently opened along the Zimbabwean border in Musina. The offices are staffed with attorneys who are able to litigate on behalf of refugee and migrant communities.**

The project has undertaken litigation in the areas of arrest, detention and deportation; refugee-status determination; and socio-economic rights of refugees.

## Arrest, detention and deportation

One of the project's busiest activities is the detention-monitoring programme. This programme monitors immigration detention of people awaiting deportation at the Lindela Repatriation Centre, police stations, international airports, prisons and the detention facility for non-nationals in Musina. The programme often uses litigation not only to secure the release of those persons unlawfully arrested and detained but also to improve the conditions of detention. During the past year LHR successfully brought more than 20 High Court applications to secure the release of non-nationals. Approximately 5 000 detainees who had been unlawfully detained were released through LHR's intervention during this time.

### ***Lawyers for Human Rights v Minister of Home Affairs, 2004 (4) SA 125 (CC)***

This case challenged the constitutionality of the detention and deportation provisions of the Immigration Act (Act no 13 of 2002) due to the far-reaching and arbitrary powers given to immigration officers. The state maintained that the Bill of Rights does not apply to foreign nationals before they have formally been admitted to South Africa. Although the court only found one section of the provision to be unconstitutional, this case serves as one of the leading cases for institutions that bring litigation in the public interest. It also served as an opportunity for the court to reiterate that unless specifically restricted to South African citizens, the Bill of Rights' provisions do apply to foreign nationals.

### ***Koyabe and others v Minister of Home Affairs and others, (CCT 53/08) [2009] ZACC 23***

A Kenyan national who had previously been removed from South Africa was given permission to return by an immigration

official. His permit was later revoked by another official due to his previous removal. The appellant wanted to appeal the decision but claimed that he was not given enough information as to why the permit had been removed in order to properly use the internal-remedies provision of the Immigration Act. LHR's involvement was limited to the question of whether internal remedies can bar an applicant in detention from applying to court to review that detention. Although the court ruled against the appellants, it specifically excluded the question of detention from its judgment. This is a positive finding in that the state may not use this particular judgment to bar an application for habeas corpus from being heard without resort to internal remedies.

### ***Ulde v Minister of Home Affairs and another (Lawyers for Human Rights as amicus curiae), [2009] 3 All SA 332 (SCA)***

The appellant was arrested while visiting a friend at an immigration detention centre as an "illegal foreigner" despite the fact that a magistrates' court was already seized of his matter and had granted him bail pending the outcome of the matter. LHR was admitted as amicus curiae ("friend of the court") and made submissions regarding the discretion an immigration officer must exercise when detaining in terms of the Immigration Act.

This matter was heard in the Supreme Court of Appeal on 16 February 2009. The case was closely related to the Jeebhai matter involving the unlawful deportation of Khalid Rashid; his counsel had termed the case an "extraordinary rendition" to Pakistan. Both cases were heard on the same day. The court handed down judgment on 31 March 2009 and found that immigration officers must exercise discretion when detaining those persons suspected of being illegal foreigners in the country. This decision marks an important step in immigration enforcement as it separates the decision that someone is in the country unlawfully from the decision to detain that person and requires the immigration officer to account for why he or she decided to detain any person under the Immigration Act.

### ***Lawyers for Human Rights v Minister of Home Affairs and Others, Case no 41276/09 (TPD – main application) and 42685/09 (TPD – urgent interim application)***

A group of foreign nationals had been given shelter in camps during and after the xenophobic violence in May 2008. When some of the group refused to sign registration documents that had not properly been explained to them, they were arrested and threatened with deportation. The group of approximately 750 men, women and children were taken to Lindela. Following



intervention from other organisations they were released and forced to camp on the side of the highway outside the detention centre. The men were arrested for apparently obstructing traffic while the women and children were taken to a nearby shelter. After a week in detention, the charges were dropped against them and the men were again transported back to Lindela for an expedited refugee-status determination procedure and deportation.



R28 group

LHR intervened on behalf of the group and sought an order for their release and a finding that the expedited refugee-status determination procedure was unlawful. While this matter was pending, LHR received word that deportations of our clients were continuing. An interim urgent application was launched to halt all deportations of the applicants. The state eventually agreed to a settlement that would see their release and the normal processing of their asylum applications. By that time, however, hundreds had been displaced, detained and/or deported.

#### ***Consortium for Refugees and Migrants in South Africa v Minister of Home Affairs and Others, Case no 6709/08 (WLD)***

Four Pakistani nationals were detained at the border as they entered South Africa with the intention of applying for asylum and denied access to make refugee applications. Their case was taken to the high court to challenge the practice of detaining asylum seekers pending the outcome of their application. Although the court did not rule the policy unlawful (it concluded that there was no policy/practice), it did find that there were irregularities in the detention procedure (including the possibility of warrants forged by immigration officers) and ordered the immediate

release of the applicants.

#### ***Lawyers for Human Rights v Minister of Safety and Security and Others, Case no 5824/09 (North Gauteng High Court)***

In late 2006 and early 2007, the South African Police Service (SAPS) was operating a detention centre for illegal foreigners in the small town of Musina along the Zimbabwean border. This facility was detaining thousands of Zimbabweans and other nationals and keeping them in deplorable conditions – they had little or no access to ablution facilities, inadequate food, and unaccompanied children were being detained together with adults.

LHR opened an office to monitor the facility and work with government and other stakeholders to deal with the increasing numbers of Zimbabwean nationals fleeing the deteriorating conditions in that country. LHR was forced, however, to bring an urgent application to the North Gauteng High Court in Pretoria to seek an order for its immediate closure if the Department of Home Affairs did not accept responsibility for the facility and improve its conditions. The matter was heard on 24 March 2009, and judgment handed down on 15 May 2009.

This was after LHR was forced to bring another urgent interim application due to stop unlawful periods of detention; these occurred as, due to the fact that immigration officials refused the SAPS permission to deport Zimbabweans, these foreigners were held in custody for unlawful periods of time.

Both of these cases highlighted the lack of cooperation between government departments in dealing with the large numbers of Zimbabwean nationals entering South Africa through Musina. Especially disturbing was the fact that the police, who have no powers to deport, insisted on deporting detainees despite an order by the Minister of Home Affairs that effectively suspended all deportations of Zimbabwean nationals.

The court found that detention at the Musina facility was, in fact, in violation of the basic rights of detainees and was unlawfully being operated by the police. The court was especially concerned about the detention of children in such terrible conditions and the risk to their safety. The court ordered its immediate closure.

#### ***Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others, Case no 27294/08 (North Gauteng High Court)***

In 2008, members of the Zimbabwe Exiles Forum were arrested while protesting outside of the Chinese Embassy in Pretoria over a shipment of arms allegedly being transported by a Chinese-registered ship to Zimbabwe through South Africa. LHR brought an

urgent application for the release of those arrested and the return of their documentation; this application was granted by the court.

**Jean Paul Ababason Bakumundo v Minister of Home Affairs and 2 Others, SGHC, 2009/17271**

Mr Bakumundo, a national of the Democratic Republic of the Congo, spent 63 hours over six days standing in the queue outside of the Crown Mines refugee reception office to renew his permit but could not gain access to the office. The police subsequently arrested him on account of his expired permit. LHR wrote two letters to Home Affairs on Mr Bakumundo's behalf. When Home Affairs did not respond, LHR launched an urgent application seeking Mr Bakumundo's release and a stay of his deportation until his asylum claim was finally determined. Home Affairs filed a notice to oppose and was in active settlement negotiations with LHR leading up to Mr Bakumundo's court hearing. The morning of the court hearing, LHR was informed by the state attorney representing the Department of Home Affairs that Mr Bakumundo had been deported two days earlier.

In July 2009 LHR returned to court seeking an order that Mr Bakumundo's deportation was unlawful and requesting the court to order the state's assistance with his return to South Africa. The court held that Bakumundo's deportation was unlawful and unconstitutional and ordered that he be compensated for the costs of a return flight to South Africa, be admitted entry and re-issued an asylum permit in order to resume his asylum application. The court further requested the filing of additional papers by the state to defend whether it should be held in constructive contempt.

**Refugee-status determination**

**Somali Refugee Forum v Minister of Home Affairs and Others Case no 32849/05 (TPD)**

International law requires that asylum seekers be given immediate legal protection on arrival pending the determination of their status as refugees. This right is denied to asylum seekers in South Africa due to systemic administrative incapacity, thus disallowing newly arrived asylum seekers immediate access to the Department of Home Affairs' asylum-application procedure. LHR has achieved some success in addressing this unsatisfactory situation with two applications launched in the high court during 2005 and 2006.

Pursuant to these applications, in November 2005 the Pretoria High Court ordered the Department of Home Affairs to procure the services of more staff and of an independent process engineer to assess and make recommendations to ensure that newly

arrived asylum seekers have proper and lawful access to South Africa's asylum procedures. The court also ordered the department to re-open a refugee reception office in Johannesburg and ensure that asylum seekers are received at this facility. The department appointed an independent process engineer in December 2006, and in February 2007, he produced a draft report incorporating LHR comments with recommendations to facilitate access of asylum applicants.



Asylum seekers outside Johannesburg refugee office

**Katambayi v Minister of Home Affairs**

In March 2002 LHR won an important court order against the Department of Home Affairs when it approached the court in an attempt to prevent the Australian authorities from continuing with the deportation of a political asylum seeker from Australia via South Africa to a country where he fears persecution and torture; LHR also sought permission for its client to apply for asylum in South Africa. The Department of Home Affairs prevented LHR and its lawyers from consulting with Mr Katambayi and refused to allow him to apply for asylum saying that if he tried to apply he would, in terms of department policy, be returned to Australia.

The judgment is crucial in that it recognises the right of asylum seekers to apply for asylum – even when they are in the transit

area of an international airport. The South African authorities often deport asylum seekers back to countries where their lives are in danger. It further compels the South African government to fulfil its constitutional and international obligation to prevent the cruel and inhumane treatment of refugees and to respect asylum seekers' right to legal representation.

***Ricardo Mayongo v The Refugee Appeal Board and Others (TPD) Case no 16491/06***

LHR represented an asylum-seeker client who was severely tortured in his country of origin, Angola. After he applied for asylum in South Africa, the Department of Home Affairs took more than two years to determine his status and reach the decision to reject his asylum claim. Thereafter, the Refugee Appeal Board also dismissed our client's appeal against the rejection of his asylum application.

After the board dismissed his application for asylum, LHR assisted him in applying for permanent residence, advancing that special circumstances existed to grant such status. The minister of Home Affairs denied the granting of permanent residence, and, in doing so, provided no adequate reason for this decision. Thereafter, LHR launched an application for judicial review of both the Refugee Appeal Board's and the Minister's decisions; this application was heard by the Pretoria High Court on 21 November 2006.

In his judgment handed down in April 2007, Judge Patel overturned the decision of the Refugee Appeal Board and granted our client refugee status. This case showed that Sections 5(1) and 5(2) of the Refugees Act apply at the status-determination stage and that, in some cases, past persecution can constitute grounds for refugee status even if no future persecution is likely.

***Lawyers for Human Rights v Minister of Home Affairs, (TPD) Case no/02***

In 2001 LHR successfully challenged Home Affairs' policy to expel or return any asylum seeker who has transited a safe neighbouring country on their way to South Africa. This policy directly contravened the United Nations Refugee Convention and the South African Refugees Act. The department has subsequently withdrawn the policy.

***Jian-Qiang Fang v The Refugee Appeal Board and Others 2007 (2) SA 447 (T)***

LHR represented a Chinese national who has four children. The client initially came to South Africa after fleeing persecution on the basis of his political opinion. However, in the 12 years that he has been in South Africa, the client fathered four children with his wife. Accordingly, should he return to China, the one-

child policy could imply that he would face acts of persecution such as economic penalties and difficulty in finding employment while his wife may be subjected to forced sterilisation and his children denied identity documents and education.

His asylum application was rejected, first by the Department of Home Affairs and then by the Refugee Appeal Board. The board held that parents of children born in contravention of China's one-child policy did not constitute members of a particular social group and that our client did subsequently not satisfy the definition of a refugee in terms of the Refugees Act. It is the SLU's view that the board made an error of law since many other jurisdictions, such as Canada and the United Kingdom, have recognised that such parents are entitled to international protection under the refugee regime. The SLU thus launched an application in the Pretoria High Court for the judicial review of both the department's and the Refugee Appeal Board's decisions. The court dismissed this application on 15 November 2006. The client has chosen not to appeal the court's decision.

***Consortium for Refugees and Migrants in South Africa and Others v The Minister of Home Affairs and Others, Case no 08/6709 (WLD)***

In collaboration with the Johannesburg Central Methodist Church and Médecins Sans Frontières (MSF), LHR launched an urgent high court application in 2008 for an interdict to prevent the transfer of displaced foreigners from the Jeppestown and Cleveland police stations to a temporary shelter in Vickers Road. This shelter was located right next to a hostel that seemed very aggressive towards the camp and its residents. Some of the hostel dwellers even fired shots at the persons who were tasked with setting up the camp. The court granted the interdict, and the government complied by setting up an alternative site in the south of Johannesburg.

**Socio-economic rights of refugees**

***Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others, 2007 (4) SA 395 (CC)***

Pursuant to legal amendments in 2001, the Private Security Industry Regulatory Authority (PSIRA), the statutory body tasked with the registration of private-sector security guards, started to deregister all refugees working as security guards and refused all new registration applications from refugees. Research reports indicate that this industry provided employment to almost 20% of all economically active asylum seekers and refugees in South Africa.

LHR brought litigation on behalf of 14 individuals and one refugee community organisation, the Union of Refugee Women, challenging this exclusion and ultimately prevailed in the Constitutional Court in a judgment that compels the statutory body to receive and consider applications for registration by refugees. LHR is currently monitoring PSIRA's compliance with the Constitutional Court judgment. In doing so we are assisting refugees in making applications for PSIRA registration and monitoring their reception by PSIRA.

***Scalabrini Centre of Cape Town v Minister of Social Development and Others 32054/05 (TPD)***

Disabled refugees in South Africa are excluded from accessing government-provided social-assistance grants. Following a Constitutional Court judgment in the Khosa matter, which held that the exclusion of permanent residents from the welfare scheme is discriminatory and unfair and infringes the right to equality, LHR pursued the extension of grants to disabled refugees. LHR represented a number of individual refugees who are living with

disabilities, and two refugee organisations that have refugee members who are living with disabilities. We assisted our clients to launch an application challenging the constitutionality of their exclusion from disability grants.

An interim settlement agreement was concluded with the Department of Social Development. This agreement paved the way for LHR's clients to apply for social relief of distress grants and ordered the department to file a comprehensive social-assistance plan for refugees. Filed in October 2006, the plan provides that disabled refugees will receive disability grants to the same value as those received by South African citizens.

In April 2007, LHR provided a draft order to the Department of Social Development where it requested it to gazette regulations, by 3 August 2007, stating that a refugee identification document or a Section 24 Recognition of Status Permit are sufficient for the purposes of obtaining social assistance grants. LHR is awaiting a response from the department.



LHR lawyers consulting with Zimbabwean asylum seekers

# Child rights



Children in Pomfret

## Child rights

The protection and promotion of child rights has been one of LHR's longstanding concerns. The organisation has litigated a number of interesting child-related matters. In doing so, LHR works in close collaboration with the University of Pretoria's Centre for Child Law. The following selection of cases gives an overview of LHR litigation efforts in this field:

### Child's right to apply for asylum

In March 2004 the Pretoria High Court granted an interdict to prevent the deportation of two unaccompanied Rwandan girls. LHR brought the application as the legal representatives of the Centre for Child Law, which acted on behalf of the children who could not act in their own name. Immigration officials in the Free State province refused the girls, who arrived in South Africa on 24 February 2004, the opportunity to apply for asylum telling them that children under the age of 18 years are not allowed to apply for asylum. The Bloemfontein Children's Court granted an application for the children to be removed to Rwanda before the case was referred to the Pretoria High Court.

### *Centre for Child Law v Minister of Home Affairs (TPD) 22866/04*



Children in police detention - Musina

On 3 March 2004 LHR and the Centre for Child Law brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at the Lindela Repatriation Centre. At the time of that application, the detained children were being held together with adults. They were facing imminent and unlawful deportation. The court granted an interdict preventing the Minister of Home Affairs from proceeding with the deportation of the children and also appointed a curator ad litem for the children. The curator's powers and duties included, amongst others, to investigate the circumstances of the children in detention, to make recommendations to the court regarding

their future treatment and to institute legal proceedings in enforcement of their rights. The children were moved from Lindela to Dyambu Youth Centre on 2 April 2004 pending a children's court enquiry.

### *Van Garderen N.O. v Refugee Appeal Board and Others (TPD) Case no 30720/2006*

The case of the Donkakim family highlighted the plight of child refugees from areas of armed conflict and the responsibility of the state to protect and assist foreign children orphaned by war in applying for asylum. In 2003, Mr Donkakim fled with his four daughters from the war-ravaged Democratic Republic of the Congo when it became too dangerous for them to remain there. At the time, the eldest child was 16 and the others were ten, nine and six. He applied for asylum immediately on arrival in Johannesburg. But he became ill and died a year later, leaving the children in the care of the eldest sister. When the financial pressures became too much, she ran away from home and abandoned the children. With the help of a social worker the children were placed in foster care with a woman who knew them. Unfortunately, she could not continue to care for them because she was unable to get a foster-care grant to support them.

In 2005, Home Affairs advised the children that their application had been rejected on the basis that the political situation in their country of origin was stable and safe enough for them to return. Acting for the children, the Wits Law Clinic brought an appeal before the Refugee Appeal Board. The appeal was dismissed on similar grounds, and the clinic helped the children to bring an application to the high court to set aside the decisions of the refugee status determination officer and the Refugee Appeal Board. The Wits Law Clinic requested Jacob van Garderen from LHR to act as curator ad litem for the children in challenging the decision of the Refugee Appeal Board. Judge Chris Botha disagreed with Home Affairs and the Appeal Board that it would be safe to return the children to the Democratic Republic of the Congo. He found that despite recent developments, the political situation in the country remained precarious and dangerous, especially for children.

The high court found that the procedures to determine the asylum applications of unaccompanied children in South Africa were inadequate and fell short of international guidelines, which prescribe the appointment of legal guardians and childcare professionals to help unaccompanied children in their asylum applications. This judgment echoed an earlier one of the same

court that prescribed the appointment of state-funded legal representation to help foreign unaccompanied children. The court acknowledged the difficulty experienced by asylum seekers in proving claims without the necessary documentary evidence of their persecution. In many cases, people fleeing their persecution do not have the luxury of gathering such evidence before leaving the country. The court found that there was a positive duty on administrative tribunals such as the Refugee Appeal Board to inquire into the human-rights situation of asylum seekers' countries of origin. This is an important case that recognises the difficulties that child asylum seekers have in applying for asylum.

#### **Child removed from father's care due to disability**

In March 2008 LHR represented a blind father to be reunited with his nine-month-old daughter after a protracted legal battle. The baby girl was taken away from her father shortly after the mother's death. The father looked after his sickly wife during the months preceding her death and also cared for the baby and his wife's two teenage children. A social worker, however, decided to remove the children ostensibly because the father is blind. It was stated during children's court proceedings that he did not have the financial means to look after the children. LHR, with the financial assistance of the SA National Council

of the Blind, successfully challenged the removal of the children based on unfair discrimination. Judge Pierre Rabie at the time commented that financial difficulty was never a reason for keeping the child from her biological father. He also said there was nothing to suggest that the man was a bad father. He turned down an application by the baby's relatives, who tried to keep the baby from returning to her father. Experts met before the child was handed over to her father to make the process easier for the child. It was decided that the parties would all attend counselling and that the relatives may visit the baby.

#### ***M v Disa Pre-Primary School***

A pre-primary school, being a private entity, refused admission to a four-year-old pupil, arguing that she was an insulin-dependent diabetic and that the school could not accommodate her treatment regime. After LHR issued urgent proceedings during September 2006, and sought the intervention of Diabetes South Africa, the matter was settled amicably between the parties.

LHR has subsequently assisted Diabetes South Africa with a number of similar cases. Fortunately, they have all been settled. These cases illustrate the value of legal and medical education in the settlement of disputes.

# Land reform





# Land reform

As part of its strategic litigation activities, LHR commenced litigating on land and housing issues in 2006 when it formed the Land and Housing Unit. The unit operates under the SLU under the supervision of Advocate Rudolph Jansen and Louise du Plessis. In the urban context the unit focuses on large-scale evictions and housing needs. In the rural areas it focuses on historical land claims in terms of the Restitution of Land Rights Act of 1994.

## Rural land claims

Rural land claims pose a number of peculiar and difficult challenges. Although the right to claim dispossessed land is enshrined in the Constitution in terms of Section 25(7), claimants bear particularly heavy and technical burdens of proof. The claims invariably involve dispossessions that occurred decades ago, sometimes as long as 80 or 90 years. In addition, the dispossessions are almost always of unregistered rights, making proof thereof very difficult.

Rural land claims that have been referred to the Land Claims Court therefore need high-level legal assistance by experienced land lawyers. It is precisely this service that the unit provides to communities who have been unable to reclaim their land through the mediation processes of the Land Claims Commission. It is public knowledge that very few of these claims have been settled, and literally hundreds of these claims are on their way to the court to be adjudicated. The unit currently assists five rural communities in the North West, Limpopo and Gauteng provinces with a combined membership of approximately 60 000 people; their land claims comprise some 100 000 hectares.

### The Richtersveld land claim

LHR played a small but important part in the final settlement of the Richtersveld land claim. The Legal Resources Centre had been working on this case since the 1990s and had brought a number of cases before the court to reach a final settlement. The century-long narrative of the Richtersveld community involves a semi-nomadic people who were dispossessed of their land and boxed into reserve settlements by a succession of South African governments during the pre-apartheid and apartheid eras. Their displacement was a result of a number of things. The discovery of diamonds and the complete lack of respect for the land rights of indigenous people lie at the heart of their dispossession.

LHR assisted with the final implementation and agreement to

the settlement, which involved 180 000 hectares of land and a settlement of approximately R300 million. The community are now also partners in the diamond industry.

### Communal land rights

LHR is currently assisting a number of rural communities facing problems relating to communal land. Many people in communal areas experience tenure insecurity, do not have equal access to communal resources, do not benefit from money that is generated by mining on their land or are not allowed to participate in land-use decisions. These problems have a number of origins – the history of communal tenure legislation, apartheid, the power of the chiefs and tribal authorities, political reasons, gender, etc.

### *Veronica Moos v Minister of Agriculture and Land Affairs*

In May 2009, the North Gauteng High Court ordered the Department of Land Affairs to return the farm previously allocated to and occupied by Veronica Moos. Ms Moos was allocated the farm under Proactive Land Acquisition Strategy, an initiative to redistribute land for agricultural purposes and assist emerging farmers. Under this strategy, the Department of Home Affairs is obliged to provide support to emerging farmers. In the case of Ms Moos, however, this support was not forthcoming, and subsequently, despite Moos' utmost efforts, sustained productivity could not be achieved.

In early April 2009 the then Minister of Land Affairs introduced a controversial "use it or lose it" land-distribution policy. Ms Moos had not even seen this policy when she was ordered to leave her farm. The Department of Land Affairs argued that it was not satisfied that she was using the farm according to the policy. The situation further degenerated when the minister herself arrived at the farm, together with a large group of people, to insist that Moos must vacate the farm.

In the subsequent urgent application, the court found that Moos had been forcibly and unlawfully removed from her occupation of the farm. The judge expressed his concern at the "high-handed" and "sinister" manner in which the minister had handled the situation. The court further ordered Ms Moos' repossession of the farm.

## Housing and evictions

LHR is providing assistance in matters involving large-scale urban evictions, and the concomitant housing rights of the urban

homeless. Despite the very clear and unambiguous injunction of Section 25(1) of the South African Constitution that no-one may be evicted without a court order, evictions without a warrant remain a problem, and many vulnerable persons have no access to legal services to assist them with the enforcement of their rights. One of the first cases taken on by the unit in March 2006 ended up in the Supreme Court of Appeal and has been reported as *Tswelopele and Others v Minister of Safety and Security and Others* (2007). In this matter, the unit succeeded in establishing law that grants victims of unlawful evictions urgent restorative relief. The relief was framed directly on constitutional grounds, instead of common-law relief that posed many technical problems. Through this case, the unit helped develop our constitutional law. Despite the finalisation of the eviction case, the unit remains involved with the Tswelopele community and their continuing quest for decent urban housing.

The unit strongly believes that it should do more than just avert illegal evictions. It believes it should be involved in pursuing its clients' positive housing rights. The unit has succeeded in averting thousands of illegal evictions in its short existence.

***Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd and Others, [2009] 4 All SA 410 (SCA)***

During October 2006, the occupiers of 112, 101, 102 and 104 Shorts Retreat in Mkhondeni, near Pietermaritzburg, were served with a high court eviction application by the owners of the land, Daisy Dear Investments. The informal settlement consists of approximately 500 shacks and about 2 500 individuals. About 1 500 of these people are children under the age of 18. Some of the occupiers have been resident on the land for approximately 15 years.



Mkhondeni

LHR, acting as attorneys in this matter, defended the community on the basis that there was no alternative accommodation available for the occupiers of the land. LHR relied on the recent Constitutional

Court judgments wherein the court stated that the local authority has an obligation to provide alternate accommodation to the informal dwellers affected by the eviction order.

In terms of the Constitution and Section 4(7) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, the court can only evict after considering all relevant circumstances, which include the position of all elderly persons, people with disabilities, children including orphaned and vulnerable children and households headed by women and children.

On 20 June 2008, the Pietermaritzburg High Court ordered the Msunduzi Municipality to submit a report whether land had been made available by the municipality or other organ of state to the occupiers of the applicants' properties. The filed report stated that there was no housing project available to accommodate our clients. The court thereafter found in favour of the private land owner, thereby granting the eviction order. The order was held off until 15 February 2008, thus giving the respondents six months to find alternate accommodation.

LHR brought an application for leave to appeal the decision to the Pietermaritzburg High Court, which denied the application. LHR then approached the Supreme Court of Appeal for leave to appeal, which was granted. On 8 May 2009, the Supreme Court of Appeal upheld the appeal and thereby prevented their eviction.

The court further ordered that the Msunduzi Municipality be joined to future proceedings. The municipality was also directed to file a report on what steps had been taken to provide alternative land or emergency accommodation for our clients. The report had to include what the effects of the eviction would be if alternate land or emergency housing is not made available.

The Supreme Court of Appeal's order to set aside the eviction order of the high court has effectively prevented the threatening eviction of the Mkhondeni community. The municipality now has to actively engage with both parties to the above dispute and commit itself to finding some sort of solution to the impending emergency housing crisis that would be brought about if our clients were to be evicted. The municipality can no longer withdraw from the matter and is obliged to seek some sort of solution between all parties, which may include the process of mediation.

***Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others, 2007 (6) SA 510***

In this matter, the Pretoria High Court upheld a defence of

impossibility to a mandament van spolie claim. In March 2006, at the time of the first cold front of the season, officials of the Tshwane Metro and the SAPS were involved in an illegal eviction of squatters in the Moreletta Park area. Not only did they evict the informal dwellers without any court order, they also razed their shacks and burnt the building materials. Adults and children were literally left without any shelter and exposed to life-threatening cold condition.

A non-profit organisation by the name of Tswelopele went to court seeking urgent relief on behalf of the squatters. The high court found that it could not grant any relief because our law did not provide for urgent restoration in cases where the original material or goods no longer existed. The callous actions of Tshwane and the police followed an alarming emerging trend countrywide in terms of which authorities would completely destroy all shack material during illegal evictions, knowing that they could successfully avoid legal consequences if they could establish that return of the property was impossible. But Tswelopele persisted and, in conjunction with some of the affected squatters, took the matter to the Supreme Court of Appeal.

In a precedent-setting judgment, the Supreme Court of Appeals overturned the high court judgment and ordered the respondents to ensure that the informal dwellers were given basic shelter in lieu of the original materials. This case brings to an end the uncertainty in this area of law that was created by conflicting high court judgments on the issue. It brings our law in line with the values of our Constitution and will ensure that authorities act within the law when dealing with homeless people.

***Schubart Park and Kruger Park Residents' Committee and Two Others v The City of Tshwane and Further Respondents (TPD) Case No 34752/08***

Residents of the inner-city housing complexes at Schubart Park and Kruger Park in central Pretoria approached LHR to assist them in preventing mass evictions as they felt they were being executed in bad faith. The buildings in question were destined to be revamped and the residents had to be evicted in order

to do so. However, there were no alternative accommodation arrangements in place, and an agreement had to be reached with the residents in this matter.

The City of Tshwane tried to circumvent its obligations by embarking on individual evictions starting on 22 July 2008. A fire then erupted in the Kruger Park complex, and despite the confirmed reports of deaths at this complex, the City of Tshwane refused to accede to an order to stop the evictions. It was only after five people had died that they acceded to this order. The legal assistance to the residents' committee at Schubart Park and Kruger Park continues, and we are in the process of embarking on major litigation aimed at improving basic living conditions at these complexes.

***Domingo Sebastio and Others v Molopo Municipality and Others Case No 891/08 (North West High Court)***

LHR is assisting the Pomfret community against their threatened evictions. Pomfret, situated in North West Province near the border with Botswana, is an extremely vulnerable group of South Africans of foreign descent. Although they are recognised as South African citizens, they were originally Angolans who had joined the South African Defence Force during the Angolan civil war and the war for the liberation of Namibia. Due to their political and military history, and given the involvement of some community members in the attempted coup in Equatorial Guinea, the community is viewed with suspicion by authorities and regarded as a security risk.

The community has been settled at Pomfret since the early 1990s, and the government wishes to integrate them into townships in the North West. Pursuant to these plans of integration, the government agencies started with a range of actions to constructively evict the community. Services were cut off, and a number of buildings were damaged and/or demolished. LHR commenced assisting the community in 2008, and we have already obtained a number of court orders in the Pretoria High Court and the Mmabatho High Court interdicting the government from their unlawful activities.

# Farm workers



Farmworker threatened with eviction - Spioenkop

## Farm workers

The Security of Farm Workers Project was established in October 1998 to protect and promote the rights of rural dwellers directly threatened with eviction. In addition to defending farm workers facing possible eviction, the project promotes and advocates the tenure security rights of farm workers through the facilitation of training workshops, the bi-annual publication of *Die Okkupeerder* newsletter and other networking activities.

Some years ago, the project was instrumental in the precedent-setting case of *Conradie v Hanekom and Another* 1999 (4) SA 491 (LCC), which recognises a female spouse's right to family life thereby suspending eviction of her husband. Evictions have a devastating effect on the livelihood of the occupier, especially in light of the backlog with the provision of housing in the Western Cape. The Western Cape has a housing backlog affecting an estimated 310 000 families.



Stellenbosch office (farmworkers)

### ***Corpco 109 CC v Berend Tieties, Piet Goosen and Adriaan Aghulhas LCC77R/09***

In October 2009, LHR's Stellenbosch offices received instructions to assist 35 families on Silver Oaks Farm near Wellington in an urgent eviction matter. An urgent eviction/removal order in terms of Section 15 of the Extension of Security Tenure Act was granted

by the Wellington Magistrates' Court on 30 September 2009. The respondents were absent from the proceedings and not represented. The order made provision for the removal of Berend Tieties, Piet Goosen and Adriaan Aghullis, as well as all persons holding residency with them on the farm. The order was sent to the Land Claims Court for revision in terms of Section 19.

LHR filed an urgent notice of opposition and set down the matter down for an earlier hearing. However, our offices were informed that the sheriff was to execute the order before the hearing. LHR urgently addressed letters to the applicant's attorney and the Land Claims Court. There were also concerns regarding the vagueness of the order's wording, which did not include the actual occupiers by name. No response was forthcoming, and the sheriff executed the order. The respondents and their families as well as other occupiers, some of them long-term occupiers, were removed from the farm. LHR contacted a farmers' organisation as well as the local municipality to organise emergency shelter for the evictees. Both parties filed further submissions and papers with the Land Claims Court regarding the order's revision and possible rescission. LHR called for the urgent restoration of the occupiers' occupancy.

The court subsequently set aside the magistrates' court order as it did not comply with Section 15 of the Act. This order makes clear that an order, in terms of Section 15, must be sent for urgent revision to the Land Claims Court in terms of Section 19 before it can be executed.

In this case the applicant should bring a fresh application, but respondents are granted leave to oppose the matter, which will be set down for hearing in the magistrates' court.

# Constitutional litigation



Merafong demarcation case

# Constitutional litigation



Constitutional Court

SLU's mandate includes taking on cases of precedent-setting value in human-rights and constitutional litigation in South Africa. This is a continuation of LHR's involvement in the first case to be heard before the Constitutional Court, *S v Makwanyane*. The following cases are varied but deal with a number of important constitutional principles.

## ***S v Makwanyane and Another, 1995 (3) SA 391 (CC)***

This was the first case to be heard by the Constitutional Court after the certification of the Constitution. In this matter, the death penalty was challenged as a violation of the right to human life and dignity. LHR had long been involved in cases involving the death penalty and was admitted as *amicus curiae* in this case.

## ***Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others, 2008 (10) BCLR 969 (CC) and Moutse Demarcation Forum and Others v President of the Republic of South Africa and Others, CCT 40/08***

Both the Merafong and Moutse cases deal with the right of the public to be consulted in the legislative process. Both communities were so-called "cross-boundary municipalities" that were divided by a provincial border. In both cases, the provincial and national legislatures passed Acts incorporating the entirety of the municipality in one province or another. Merafong was transferred to the North West from Gauteng, and Moutse was transferred to Limpopo province from Mpumalanga.



Merafong

Only Merafong has been decided. The Constitutional Court found that although the consultation process revealed the vast majority of residents wished to be incorporated into Gauteng, the legislature was not bound by the results of a referendum if those results were in direct conflict with government policy. However, after the case had been decided, legislation was passed that reincorporated the community into Gauteng, their province of choice.



Moutse

The Moutse community is still waiting for a final hearing of their matter.

## ***MEC for Education: KwaZulu-Natal and Others v Pillay, 2008 (2) BCLR 99 (CC)***

A high school threatened disciplinary steps against our client's daughter, a Tamil Hindu, for wearing a nose stud in expression of her cultural practices and religious beliefs. After the Durban Magistrates' Equality Court handed down a judgment in favour of the school, the SLU stepped in to represent the learner and her mother with an appeal to the Natal High Court, which heard the matter on 21 April 2006. On 5 July 2006, judgment was granted in favour of our clients.

The court declared the school's decision prohibiting Hindu/Indian learners from wearing nose studs null and void. The judgment provides a positive legal precedent for cultural diversity in South Africa. The school filed an application for leave to appeal the matter to the Constitutional Court, which was heard on 20 and 21 February 2007 and for which we await judgement. Since the high court stage, three amici curiae have joined the proceedings.

The matter has received a lot of interest from the international media, due to similar issues being dealt with in Canada and Europe. This judgment will affect all religious and cultural groups, especially minority groups, in South Africa, and will add to the growing International jurisprudence on the subject.

***Biowatch Trust v Registrar Genetic Resources and Others, 2009 (10) BCLR 1014 (CC)***

In this extremely important case before the Constitutional Court the question of costs for public-interest litigants raising a constitutional issue was addressed. The applicants had made an application through the Promotion of Access to Information Act for information regarding genetically modified foods. Despite

the fact that the original court application was partially successful, the high court judge issued costs against the NGO, which effectively prevented them from continuing their work. LHR was admitted as amicus curiae and presented evidence before the court regarding the dangers of cost orders for public-interest civil-society organisations that litigate in their own name. This is possible in South Africa due to wide provisions regarding locus standi in the constitution.

The court adopted a number of practices designed to reduce the chilling effect potential adverse cost orders may have on public-interest litigants. In cases of a private litigant and the state, should the litigant be successful, the government would pay all costs, but if the government won, then both parties would bear their own costs. It is important, however, that the constitutional issue must be a "genuine, non-frivolous" challenge.

This remains precedent-setting case for protect public-interest litigants and clients with a genuine constitutional issue who may have been discouraged due to the danger of a cost order.



## Environmental rights



The Environmental Rights Programme received funding and was launched in August 2009. The programme focuses on matters concerning the environmental rights of marginalised people in South Africa. Its main objectives are to provide legal assistance to communities who are adversely affected by environmental degradation, and it will focus primarily on access to clean water, the implications of unlawful mining operations and the use of irresponsible pesticides. LHR is currently in the process of building our litigation capacity and advising communities on their rights to a clean environment.

## Conclusion

Public-interest litigation plays an important role in many areas of the law and touches many communities and individuals across the country. These communities and individuals share a common need to access the justice system through non-profit organisations that provide legal services for reduced or no cost.

Organisations working in this area, however, must always maintain the highest standard of legal representation and professionalism toward their clients, stakeholders, governments and the court. LHR is a part of a network of legal NGOs, social movements and umbrella organisations working in various fields of the law.

LHR is dedicated to continue working in these areas and meeting our mandate to use the law as a positive instrument for social change and the deepening of constitutional democracy in South

Africa. We are extremely appreciative of our donors' continued support of this work and participation in transformation in South Africa.

We are also looking forward to branching out into new areas of the law, including environmental justice and issues involving service delivery, to expand our capacity to advocate on behalf of vulnerable communities. This advocacy strategy must include a strong litigation capacity in order to provide a full range of services to our clients.

If you would like any more information on our programmes or past and present cases, please do not hesitate to contact our offices at their addresses and numbers below.

# Funders

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Broederlijk Delen

Fastenopfer

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