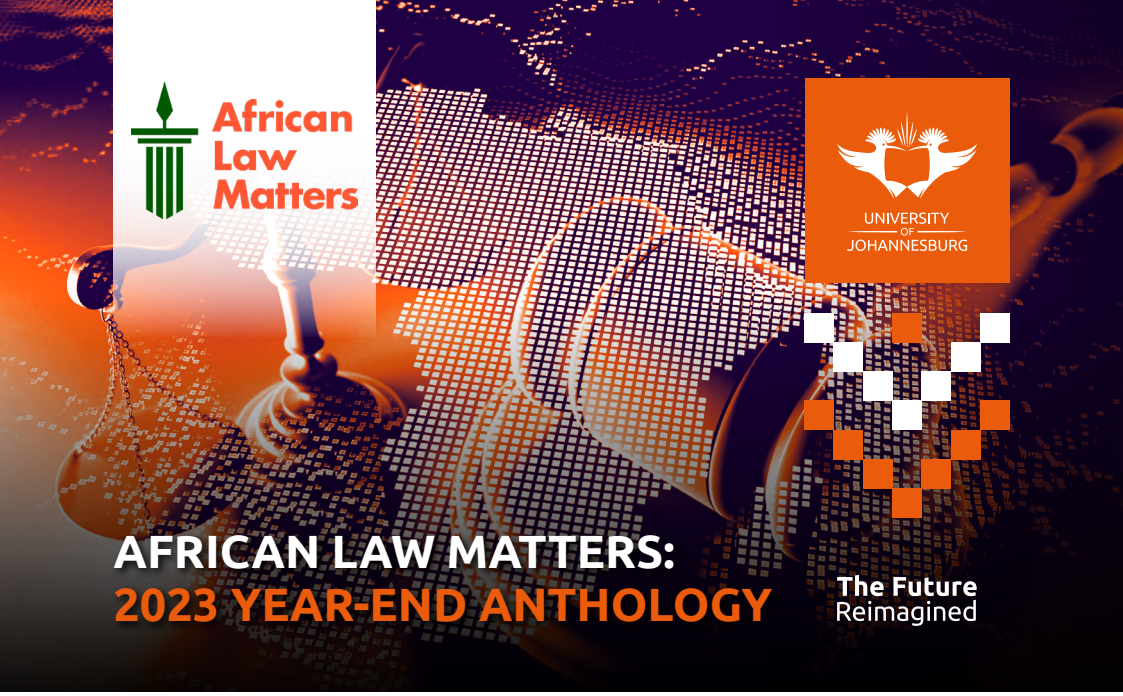


African Law Matters is an initiative of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), a research centre of the Faculty of Law at the University of Johannesburg in partnership with the Konrad Adenauer Stiftung's Rule of Law Programme for Sub-Saharan Africa.

Our vision

African Law Matters seeks to foster inclusive and accessible conversations that give global voice to current legal developments in the fields of constitutional law, public law, fundamental rights, and international law — particularly relating to issues of importance to the African continent. By connecting academics, legal practitioners, civil society actors, and policymakers through our blog, we aim to contribute to the advancement of fundamental rights, constitutionalism, the rule of law, and democracy in Africa and beyond.

Our Work

African Law Matters provides an online platform for high-quality analysis and commentary on current developments in the areas of constitutional, human rights, public and international law. In striving to make a distinctive contribution as a blog focused on Africa with global reach, our work prioritises legal matters of significance to the African continent in the fields of constitutional, public, fundamental rights, and international law.

KONRAD ADENAUER STIFTUNG

SAIFAC

2023 in Review

2023 was an exciting year for African Law Matters. As a very young blog founded in November 2021, African Law Matters has proudly published articles by a range of legal scholars and practitioners from across the continent and globe, including those who are already well-known as well as emerging legal minds. During 2023, ALM published contributions on a range of important and relevant matters, including: LGBTQ+ rights in Uganda and Namibia; a review of the implementation of the Maputo Protocol after 20 years; disability rights; elections in Nigeria; the controversial policy adopted by the United Kingdom relating to an agreement to send asylum-seekers to Rwanda; various matters relating to South Africa's immigration policies; the war in Sudan; the military coup in Niger; and various other significant developments on the continent. The blog has seen a significant growth in the number of visits to our site as well as unsolicited submissions. We look forward to further growth in 2024.

Editors' Highlights – Articles

Uganda's Anti-Homosexuality Bill and the Demise of the Rule of Law

Sylvie Namwase (Lecturer at the School of Law, Makerere University under the Department of Law and Jurisprudence)

On the 21st of March 2023, the Parliament of Uganda passed the Anti-Homosexuality Bill (AHB).

The Bill's stated objectives include among others: "the establishment of a comprehensive and enhanced legislation to protect the traditional family by strengthening the

nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family and protecting the cherished culture of the people of Uganda, legal, religious, and traditional family values of Ugandans against the acts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda."

The Bill now awaits the assent of the Ugandan President under Article 91 of Uganda's Constitution, which must be completed within thirty days from the date upon which it was presented to him.

Failure or refusal to assent to the Bill within the thirty days, among other conditions listed in the said Article, is taken to be assent to the Bill by Parliament upon the expiry of the stipulated period.

It should be noted that a court case was filed to quash all parliamentary proceedings and decisions relating to the Bill on account of the bias exhibited by the Speaker of Parliament in favour of its passing, but the case seems to have had no legal effect on the continuation and conclusion of the parliamentary process.

Homophobia and violent discourse in the law-making processes

The unconstitutionality of the AHB has been comprehensively discussed and public discourse around the Bill in Uganda has notably been heavily animated by extremely violent, and intolerant views based on religious dictates, public morality, and cultural narratives.

In particular, Old Testament biblical references mandating the killing of persons engaged in same-sex relations have featured from some religious camps, echoing provisions of the Bill which impose the death penalty for so-called 'serial offenders'.

One Member of Parliament even called for the castration of homosexuals while showing her support for the Bill on the floor of parliament, conjuring one of the mass atrocity crimes that were committed by Nazis against gay men during the Holocaust.

The prominence of religious fundamentalisms and the accompanying authoritarian paternalism informing the AHB and emerging laws in the country should be carefully noted given the broader regressive implications this could have for the rule of law, the equal rights of women, and other minority groups.

For instance, the Ugandan Parliament is reportedly soon set to debate a private member's bill called the Assisted Reproductive Technology Bill (ARTB). A leaked version of the Bill allegedly contains a provision that would criminalise people who seek to access assisted reproductive health services while unmarried. The ARTB emerged in the same month of March as the AHB was being debated and is sponsored by Sara Opendi, Woman Member of Parliament (MP) for Tororo District, the same MP who called for castration in showing her support for the AHB during public debate.

The Bill has been criticised for being discriminatory against women but as demonstrated by the passing of the AHB, popular morality appears set to usurp human rights in Uganda.

Human rights hollowed out

The AHB and ARTB might appear to be isolated developments but when considered within the broader national context of a breakdown in the rule of law, denialism, and narrative re-framing, they point to a more insidious trend toward the significant hollowing out of human rights norms and the consolidation of authoritarianism in the country.

For instance, in April 2021, while the country's Minister of Foreign Affairs assured the United Nations Security Council that there were no abductions of political opponents in the country, Uganda was in fact witnessing (and continues to) witness abductions and enforced disappearances of opposition politicians after its 2021 presidential elections.

In more recent narratives, the abductions have been reframed by state officials as simple "arrests" even as the victims' whereabouts remain unknown. In another example, following this year's closure of the United Nations Human Rights Office in Uganda, President Yoweri Museveni justified the closure by claiming that there is no longer a need for the Office as the country has strong national human rights institutions and a vibrant civil society.

However, the state-funded Uganda Human Rights Commission, has been consistently underfunded and some members of the political opposition accuse it of working for the interests of the ruling National Resistance Movement (NRM). Meanwhile, there has been a major clampdown and closure of civil society organisations including the closure of fifty four Non-Governmental Organisations and the suspension of the Democratic Governance Facility in 2021.

This cycle of violation, denial, and deception appears to be a deliberate pattern to shock, exhaust, and subdue both victims and defenders of human rights at both national and international levels while hiding behind state sovereignty. The egregious provisions in the AHB are consistent with this pattern and the broader context of authoritarian control.

Militarisation, religious proselytization of the state, and the rule of law

More worrisome perhaps is that the AHB and ARTB come at a time when the very meaning of law —the fundamentals regarding its core principles and sources —are being rewritten through processes of militarisation and proselytization in Uganda.

Uganda has been gradually witnessing a military usurpation of civilian institutions and opportunities as well as a subversion of civilian oversight roles, through Presidential directives or guidelines with no legal anchoring or in contradiction of existing law.

Most recently, the guidance to the Inspector General of Government chose to apply "logic" rather than law and exempt members of Uganda's military from Asset Declaration Obligations under the Leadership Code Act, on account of security reasons.

This upending of law in Uganda is also occurring through proselytization or specifically the "Christianisation of the state" in both covert and overt ways. Whereas the AHB has itself been linked to funding by the United States Christian Evangelical organisations, parliamentary proceedings on the passing of the Bill saw Ugandan lawmakers relying

to a considerable extent, on biblical references as source material, with minimal if any reference to the Constitution or the Constitutional Bill of Rights.

In a robust and very well-attended debate hosted by the Makerere University Law School's Human Rights and Peace Centre, titled: "*The Anti Homosexuality Bill 2023: Protecting the public or oppressing minorities?*", the place of religion in national legislative processes featured prominently.

While a strong case was made that religious texts cannot be applied as sources of law in Uganda, as the country is clearly a secular state as is provided under its Constitution (Article 7), a few audience participants, including some in the legal profession and the academy, made persistent and concerning attempts to ascribe a theocratic status to the country on account of its motto: *For God and my country*.

This debate drew critical attention to how the very foundations of law and its ability to protect minorities in Uganda can be threatened when faced with a wilful inversion of law by a majority, including by dishonest legal scholarship, based on religious or other moral fundamentalisms.

Conclusion: A call to advocacy

The AHB is part of a wider trend in what seems to be a capsizing of human rights and the rule of law as well as a final descent into authoritarianism in Uganda. It remains a heavy but critical obligation for local human rights actors and scholars, with the support of the international community and progressive African governments to continue engaging with the relevant authorities, academics, media, and the judiciary in pushing for the protection of the rights of sexual minorities in the country.

Considering the broader governance context unfolding there, the state of affairs in Uganda if ignored, would not only condemn an already stigmatised group to an environment of legal arbitrariness, violence, and hate but would also provide a portal for the expansion of state authoritarianism into other spheres of Ugandans' lives in a continuum of violence that will surely expand outside Uganda.

Indeed, this seems to already be happening while formalising (Clause 12 AHB) once fringe and reprehensible ideas about gay conversion therapy into the mainstream.

The Future of the Maputo Protocol: Prospects and Challenges

This post was an interview conducted by Dr. Satang Nabaneh who spoke with Hon. Commissioner Ramatoulie Janet Sallah-Njie, the Special Rapporteur on the Rights of Women in Africa. They discussed the future of the Maputo Protocol, its potential for advancing women's rights in Africa, and the challenges that need to be addressed for its full realisation.

Hon. Sallah-Njie is a Gambian lawyer with over 30 years of experience in women's rights advocacy. She was elected to the African Commission on Human and Peoples' Rights in October 2021 and sworn into office on November 15, 2021. She is the Special Rapporteur on the Rights of Women in Africa, Chairperson of the Committee on the Protection of the Rights of People Living with HIV and Those at Risk, Vulnerable to and Affected by HIV, and Vice-Chairperson of the Resolutions Committee.

Why was the Maputo Protocol adopted?

As we commemorate the 20th anniversary of the Maputo Protocol, it is important to reflect on why this Protocol was deemed necessary, despite the existence of global instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and regional human rights instruments, including the African Charter on Human and Peoples' Rights (African Charter). The answer, as provided in the preamble of the Maputo Protocol itself, lies in the persistent discrimination and

harmful practices that African women continue to face despite the existence of these instruments.

As you may all be aware, Article 18(3) of the African Charter does not specifically address the protection of women's rights but rather addresses women's rights in the context of the family. Additionally, it fails to define discrimination against women comprehensively and does not adequately address violations resulting from such discrimination, including issues such as early marriage and female genital mutilation, amongst others.

The second reason for the adoption of the Maputo Protocol was the recognition that global human rights instruments, including CEDAW, were not sufficiently equipped to tackle the unique challenges faced by African women in their daily lives. Consequently, the AU took the bold step of introducing this landmark regional instrument, which encompasses progressive and innovative provisions, aimed at addressing the specific needs and challenges faced by African women.

How has the Maputo Protocol changed the landscape of women's rights in Africa over the past two decades?

The marking of two decades is an opportune time to reflect on where we have come from, what we have accomplished, and where we want to go. If the Protocol was a child, all things being equal, it would be well on its way to finishing a university career, so in essence, our Maputo Protocol has come of age. Since its adoption on 11 July 2003, 44 member States of the African Union have accepted the Maputo Protocol. While this is indeed an encouraging number, the more perfect number would be to have all 55 states of the African Union ratify or accede to it. After all, all the women of Africa deserve the protection that it brings.

In this regard, I would like to highlight that through ratification, States can unequivocally demonstrate their unwavering commitment to establishing an inclusive society that fosters full participation and contributions of women unhampered by discrimination. Furthermore, ratifying the Protocol provides a robust framework to confront and dismantle discriminatory structures and practices that impede women's pursuit of justice and their assertion of rights, thereby paving the way for the realisation of gender equality.

What are some of the key achievements and challenges you have seen in implementing the Protocol?

As the African Commission, women's rights have remained at the center of our work, anchored in the Maputo Protocol. In the last 20 years of the Maputo Protocol, several soft laws have been adopted by the Commission to further elaborate the provisions of the instrument. Two General Comments, specifically No.1 and No.2, provide detailed insights into the responsibilities of states concerning Article 14, focusing on women's health. This includes safeguarding against HIV/AIDS and other sexually transmitted infections, ensuring the right to manage one's fertility, and facilitating access to medical abortion under specific circumstances.

There is also General Comment 6 on Article 7(d) on the distribution of marital property upon the dissolution of marriage. To demonstrate the complementarity within the African human rights system for the protection and promotion of the rights of women

and girls, the Commission adopted two joint general comments together with the African Committee of Experts on the Rights and Welfare of the Child. One is on the elimination of child marriage and the other is on female genital mutilation (FGM), which was recently adopted. The Commission has also adopted Guidelines to combat sexual violence and its consequences in Africa.

All of these soft laws based on the Maputo Protocol go to the heart of some of the main challenges that African women face and are meant to elaborate those provisions in the Maputo Protocol in order to give states a clearer picture of how they should implement their obligations. It is my hope that states are using them to guide policy reform and policy making in line with the Maputo Protocol. Recently we had a webinar with key actors in government, development partners, and civil society organisations, discussing these soft laws and how best they can be incorporated into domestic legal systems.

The Maputo Protocol has also guided several resolutions of the African Commission on various women's rights issues as a way of exhorting member states to fulfil their obligations, and further provide guidance on how to do so. These resolutions have been on several issues including the protection of women in armed conflict (ACHPR/Res. 492 (LXIX)2021), the protection of women human rights defenders (ACHPR/Res. 409 (LXIII) 2018), and the protection of women from digital violence (ACHPR/Res.522 (LXXII) 2022) among several others. These resolutions tackle new and emerging issues plaguing women on the continent and assist in keeping the Maputo Protocol relevant and making it a living document.

States have an obligation under Article 26 of the Maputo Protocol to submit periodic reports to the African Commission on the progress that they have made in implementing provisions of the protocol. This process, while still plagued with challenges of non-reporting, is slowly gaining momentum with more and more state reporting, using the Guidelines on State Reporting on the Maputo Protocol that were adopted by the Commission.

The African Union has similarly put in place various measures to breathe life into the Maputo Protocol. For example, in 2004, soon after the adoption of the Protocol, the African Union adopted the Solemn Declaration on Gender Equality (Assembly/AU/Decl.12 (III)), affirming the commitment to gender equality, as provided for in the Maputo Protocol and other international instruments. Additionally, the war on child marriage is being fought from all fronts, with the African Union launching a campaign to End Child Marriage in 2014. To fortify this, the African Union appointed a Goodwill Ambassador for ending child marriage. The African Union is also complementing the state reporting of the Commission through the Gender Scorecard which takes stock of the progress that states are making in realising women's rights.

In the last 20 years, I want to believe that the Maputo Protocol has had tremendous influence on the domestic laws and policies of member states, thus providing for better protection of women. For example, non-discrimination which is an important feature of the Protocol has become a common characteristic in most Constitutions. Although in most jurisdictions, we still have the clawback clause that allows for the application of customary laws and practices in matters of personal law, which are predominantly discriminatory against women. It is also noteworthy, that because of the pervasive culture of patriarchy, de facto discrimination continues to be perpetuated, despite the existing legal framework, in some countries.

It is also commendable that Article 2(6) of the Kenyan Constitution provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". This provision gives the Maputo Protocol the force of law in Kenya without the need to pass any further implementing legislation. Through Article 144 of the Namibian Constitution, the Maputo Protocol is part of its domestic law. This therefore means that the rights and freedoms provided in the Protocol are enforceable in Namibian judiciary and quasi-judicial bodies.

Furthermore, one of the major women's rights violations on the continent has been FGM. The Maputo Protocol in Article 5 prohibits FGM and the para-medicalisation of FGM. A number of member states to the Maputo Protocol have enacted laws that prohibit FGM in line with Article 5. These include but are not limited to Burkina Faso, Cameroon, Cote d'Ivoire, The Gambia, DRC, Ghana, Ethiopia, and Kenya.

It is important to note that the ratification of the Maputo Protocol alone does not automatically ensure women's rights unless it is accompanied by domestication and implementation. Regrettably, despite being ratified by 44 States, African women still face discrimination, gender-based violence, and sexual harassment, among others, due to various challenges in the domestic implementation of the Protocol. These challenges include inter alia, lack of political will, judicial reluctance to apply the Protocol, weak national institutions, plural legal systems, and reservations.

In your view, what are some of the most pressing challenges that women face in Africa today?

Despite these significant progresses, numerous emerging challenges persist, hindering the full realisation of women's rights and the implementation of the Maputo Protocol. Undoubtedly, the continued existence of stereotypical beliefs about gender roles for women and men presents a significant and pressing challenge in safeguarding women's rights throughout the continent.

Despite the existence of comprehensive international and national legal frameworks on women's rights, gender-based violence (GBV) remains a significant issue in many parts of Africa, posing a grave threat to the well-being and human rights of countless women and girls, and indeed undermining national security and stability of the continent.

Women continue to encounter significant challenges in accessing healthcare, particularly, in the realm of reproductive and sexual health, due to enduring difficulties that are further compounded by financial and legal limitations. Across the continent, multiple countries continue to struggle with high rates of maternal and infant mortality, highlighting the urgent need for comprehensive healthcare reforms.

In addition, digital violence against women is an alarming and increasingly prevalent emerging issue that poses significant threats to women's safety, privacy, and well-being. The impact of digital violence extends beyond the virtual realm, leading to psychological distress, reputational damage, and even physical harm for the victims.

The digital gender divide, which refers to the unequal access and use of digital technologies between men and women further hinders women's access to the internet, information, and the ability to exercise their rights online, thus excluding women from the digital era.

What is the way forward for the Maputo Protocol?

Ratification and implementation of the Maputo Protocol hold immense potential to bring about positive changes in the lives of African women. The pressing need for the universal ratification of the Maputo Protocol becomes evident and significant when we consider the persistent gender inequalities that prevail in many African countries in general and in some of the non-ratified Statewide in particular. It is, therefore, imperative for States to carefully consider the substantial benefits that can be derived from ratifying the Maputo Protocol.

The Zimbabwean Exemption Permit and the Boundaries of Citizenship

Christine Hobden (Senior Lecturer in Ethics and Public Governance at Wits School of Governance, University of Witwatersrand)

There is remarkably little attention given to questions of access to citizenship in South Africa. This might seem like an odd statement in a context where migration, and indeed a xenophobic sentiment of otherness, pervades public discourse. But, while deeply interconnected, the questions surrounding migration are not the same as those of citizenship.

The boundaries of citizenship – how we determine who is included and who is excluded – determine who has what kind of political representation. These are questions at the heart of a democracy. The Department of Home Affairs' persistent efforts to restrict access to citizenship highlights a disregard for this fundamental principle of democracy: that access to participation in forming the rules that govern us is central to our freedom.

The case of the Zimbabwean Exemption Permits (ZEP), while often framed as an issue of migration regulations, is I argue here, also a quintessential case of the Department of Home Affairs' overly-restrictive attitude towards access to South African citizenship. An attitude that comes at the cost of building the democratic vision of a citizenry: a collective project among political equals.

The ZEP (albeit in different bureaucratic instantiations) has been a feature of the South African migration landscape since 2009 but has recently become subject to renewed public debate upon the 2021 announcement that the permit would not be renewed. Permit holders were granted a one-year 'grace period' to leave South Africa or regularise their status through another route. The Department has faced significant criticism for this decision and has been forced to extend the grace period twice and, following a recent case brought by the Helen Suzman Foundation, ordered to reconsider the decision following a fair process in line with the Promotion of Administrative Justice Act (3 of 2000).

This recent judgment in *Helen Suzman Foundation v Minister of Home Affairs and Others* (Case 32323/2022) provides insight into the key rights, values, and priorities that civil society and the Department of Home Affairs have identified in the context of the ZEP. Given the length of the current ZEP holders' stay in South Africa, it is striking (although strategically understandable) that the direct question of access to citizenship did not arise in this court challenge or other activism around the withdrawal of the exemption.

Why might access to citizenship be relevant to a discussion on a dispensation for those fleeing a socio-political crisis who, by definition, are a case of movement away from a state rather than toward one they seek to join? Indeed, one might argue that the origins of the permit give credence to the Department of Home Affairs' insistence that the permit was never meant to be permanent. To be sure, in 2009, it would have appeared politically disproportionate and inconsistent with our legislation' and international norms to respond to the Zimbabwean crisis by immediately offering South African citizenship to Zimbabweans who had only recently arrived in the country.

Time, however, matters. The role of time in shaping our duties to each other is familiar in our interpersonal relationships; we can find a similar role for time in our political responsibilities to each other too. Legislation on access to citizenship varies widely around the world, but it is a widely shared norm that time spent living within the state is a central component of citizenship through naturalisation.

ZEP-holders have lived, worked, and studied legally in South Africa for approximately 14 years. As was argued in *Helen Suzman Foundation v Minister of Home Affairs and Others* (Case 32323/2022), during this period, and 'as a consequence of being granted these permits, ZEP-holders have established lives, families, and careers in South Africa'. They have paid taxes, both through income tax and VAT, they have contributed to the economic life of the country and have participated in and contributed to public goods such as state schooling.

Such long-term contribution to the public purse and public life ought to (and would in many other instances) lead to the option of full political membership. This is not because citizenship ought to be tied so closely to a principle of contribution, but rather that this level of involvement in public life highlights the kind of long-term commitment to life in South Africa that warrants the ability to choose to become a full member. Indeed, the

residency requirement under the current regulations for the South African Citizenship Act is 10 years preceding the application. A failure to create this path to full membership, and so access to full political participation, for long-term residents creates a kind of demi-citizenship and feeds into existing challenges of political inequality among the governed in South Africa.

This speaks to a larger concern identified through observing how, over the years following the original South African Citizenship Act of 1995, the Department has used legislative amendments, regulations, and implementation to build increasingly higher barriers for permanent residents to gain citizenship. The case of the ZEP is, of course, different: the first step to citizenship is already precluded by the conditions of the exemption that 'disentitles ZEP holders from applying for permanent residence irrespective of their period of stay in South Africa'. Viewing the ZEP with attention to the question of the boundaries of our citizenship, we notice that such a barrier is not only high but designed to be permanently insurmountable.

Considering the normative lens on citizenship reminds us that while we should pursue the necessary short-term wins to protect permit holders, we shouldn't lose sight of a deeper democratic worry revealed by how the South African state has treated ZEP holders: the way we determine the boundaries of citizenship is illustrative of our commitment to core democratic values, such as political representation and political equality.

The Department – whether they intended to or not – has created a legal route for ZEP-holders to live long-term in South Africa. In doing so, over many years, while not creating a route for ZEP-holders to access political representation, the Department has not only shown disrespect for the lives of ZEP-holders but also a disrespect towards the South African democratic project of building a democracy that provides political equality and political representation for all who live (and are governed) in this land.

A SLAPP in the Face to the Abuse of Court Processes

Courtney Jones (Pupil advocate at the Johannesburg Bar)

Introduction

A "SLAPP" suit is strategic litigation against public participation and has its origin in the United States of America and Canada.

The hallmark of a SLAPP suit is its lack of merit, having been brought to discourage a party from pursuing or vindicating their rights, often with the intention not necessarily to win the case, but simply to waste the resources and time of the other party until they abandon their defence. SLAPP suits are frequently brought as defamation claims, abuse of process, malicious prosecution, or delictual liability cases.

Having only originated in America in the 1980s, this defence is novel in the South African context and was recently considered by the Constitutional Court for the first time in the case of *Mineral Sands Resources (Pty) Ltd v Reddell* (Mineral Sands).

The dispute in *Mineral Sands* originates from three defamation suits instituted by Australian mining companies (mining companies) and some of their executives. The defendants in the suits are environmental lawyers and activists (activists).

The mining companies are engaged in extensive mining operations in the exploration and development of major mineral sand projects in South Africa. There is fierce community opposition to these mining activities relating to the alleged duplicitous and unlawful nature of the mining companies' operations which were said to be ravaging

the environment. In the course of this opposition, the defendants were alleged to have made statements that were defamatory to the mining companies. In response to these allegations, the activists raised a SLAPP suit defence in the form of a special plea.

The Court had to determine whether our law accommodates a SLAPP suit defence under the abuse of process doctrine and, if not, whether it ought to be developed.

The mining companies argued that a SLAPP defence could not succeed where the case has merit. The activists on the other hand submitted that the merits of the matter are irrelevant and that the motive behind the launching of the lawsuit is the only element.

Contemplating these arguments, the Constitutional Court had to consider and balance the right to freedom of expression against the right to access to courts. The question is whether the Court struck an appropriate balance between these competing constitutional rights.

In order to answer that question, it will be helpful to briefly consider the role and importance of each right.

The right to freedom of expression

The activists argued that a SLAPP suit violates the right to freedom of expression in that it was brought for the sole purpose of silencing public criticism.

The importance of the right to freedom of expression cannot be overstated. The right to freedom of expression commands an important place in our constitutional landscape. It is a right that lies at the core of our constitutional democracy, "not only because it is an 'essential and constitutive feature' of our open democratic society, but also for its transformative potential".

This was recently emphasised in *Qwelane v South African Human Rights Commission*, where the Constitutional Court articulated that the right to freedom of expression "is the benchmark for a vibrant and animated constitutional democracy like ours".

The right to access to courts

The mining companies however argued that to dismiss a meritorious suit, for whatever reason it is brought, would be in violation of the right to access to courts.

The right to access to courts in section 34 of the Constitution is essential for a constitutional democracy under the rule of law. A fundamental principle of the rule of law is that anyone may challenge the legality of law or conduct. The rule of law seeks to promote the peaceful institutional resolution of disputes and to prevent the violence and arbitrariness that results from people taking matters into their own hands.

Did the Court strike the appropriate balance?

The Court held that an abuse of the court process can take various forms and does not have any defining central feature. It is a factual consideration, depending on the facts of the case.

In a case where a plaintiff institutes litigation with little to no prospects of establishing a case, this constitutes "abusive litigation". It would not be easy to establish a case of abusive litigation, but if one can do so, abusive litigation would have nothing to do with the right to access courts. Instead, it would simply be about the use of court process and associated legal costs as a means to an impermissible end, likely to cause appreciable damage to fundamental rights.

Abusive litigation falls under the doctrine of abuse of process as its own nuanced and particular subset, distinguishable from ulterior motive or vexatious litigation. It requires a consideration of both the merits and the motivation. The merits are relevant to the question of whether the plaintiff has a right to vindicate. The motive for bringing the case is relevant to the true object of the litigation. The likely effects of the suit bring into the reckoning what harm to free expression may result.

As such, the Court did indeed strike the correct balance between the respective rights. Had the Court found that the merits of the case is the only determining factor, with no consideration to the motivation behind bringing the action, then the right to freedom of expression would have been unduly limited. Similarly, if motive were the only determining factor, then meritorious claims would be at risk of being dismissed, infringing the right to access to courts.

Further, the two considerations of motive and merit influence each other in that a case which lacks merit has plainly been brought for a reason other than to vindicate a right. However, the Court left it open to parliament to consider whether a more comprehensive, specific SLAPP suit defence of the kind developed in other jurisdictions, ought to be legislated in South Africa.

Because this appeal to the Constitutional Court originated from the dismissal of an exception taken against the SLAPP suit special plea in the High Court, it will now be for the High Court to determine whether the activists have successfully established a SLAPP suit defence in terms of the requirements established by the Constitutional Court.

Conclusion

Having found that a SLAPP suit defence can be accommodated under the common law doctrine of abuse of process, the Constitutional Court struck a delicate balance between freedom of expression and access to courts. However, the question that remains is how this defence will work in practice in light of the fact that this special plea requires a consideration of the merits at a preliminary stage of the trial before any evidence has been led.

The nuanced and technical nature of this defence begs the question as to whether it would have been better left to parliament to provide the much-needed guidance and structure on how the defence will work in practice. Perhaps a few more SLAPPs will clarify the matter.

Sudan at war: A litmus test for the African Union's aspiration for "a peaceful and secure Africa"

Linda Mushoriwa (Researcher at the African Centre for Transnational Criminal Justice (ACTCJ) at the University of the Western Cape)

In 2013 as part of the 50th Anniversary commemorations of the establishment of the Organisation of African Unity (OAU), the African Union (AU) adopted the "Agenda 2063: The Africa We Want" Framework (Agenda 2063).

Agenda 2063 acknowledges the gains made by the AU and its successor, the OAU, and outlines the seven aspirations of the African continent to be achieved by the year 2063. Aspiration 4 of the blueprint is "a peaceful and secure Africa," and one of the goals of aspiration 4 is to "silence the guns in Africa by 2020." This target was not met by the end of December 2020. For that reason, it was extended to 2030 with periodic reviews.

It has previously been asserted that the AU's target to silence the guns is a pipe dream, bearing in mind the governance issues which leave the African continent prone to unconstitutional changes of government (UCG) particularly through military coups, which in turn lead to armed conflict.

The recently erupted war in Sudan highlights the difficulties that the AU faces in its quest to eradicate conflict and to silence the guns on the African continent. This is despite a comprehensive AU Framework to respond to UCGs.

The Genesis of the War in Sudan.

Sudan has experienced the highest number of military coups in Africa since it attained independence in 1958, with six successful and ten attempted coups to date. In April 2019, following months of protests, long-time ruler Omar Al-Bashir was ousted in a military coup. Instrumental to the ouster of Al Bashir was the military alongside a paramilitary group known as the Rapid Support Forces (RSF).

The RSF, which has been accused of committing human rights violations against civilians both before and after the 2019 and 2021 military coups, has its roots in the 1980s Janjaweed militia, and by the 2010s it had evolved into an organized group that fought alongside the Sudanese army during the Darfur war. General Mohammed Hamdan Dagolo, also known as Hemdti, commands it. In the aftermath of Al Bashir's ouster, the military promised a smooth transition. In November 2019, a governing Sovereign Council consisting of members of the military and civilians was appointed, and Abdullah Hamdock became Prime Minister.

In October 2021, General Abdel Fattah Al-Burhan staged another military coup, ousting Prime Minister Abdullah Hamdock and dissolving the Sovereign Council. A new Sovereign Council was named in November 2021 with Al-Burhan and Hemedti retaining their positions as leader and deputy, respectively. Subsequently, the civilian members of the Council were dismissed.

In both military coups, the AU intervened based on its framework for responding to UCG, suspending Sudan's membership both in 2019 and in 2021 pending a return to a civilian-led transitional government. In January 2022 the African Union Peace and Security Council (AUPSC) called on the military to ensure a return to civilian rule within 6 to 12 months.

In the aftermath of the 2021 coup, tensions were brewing between Al-Burhan and Hemedti. A political framework agreement that was scheduled to be signed on 1 April 2023 was not signed due to in-fighting between Hamdock and Hemedti. Amongst the issues causing disagreements, Al-Burhan and Hemedti could not find common ground on the timetable and modalities of the incorporation of RSF members in the army. In addition, Hemedti accused Al-Burhan of giving key positions to members of Al Bashir's former government and plotting to eliminate him from the political arena. The United States of America was closely involved in the collapsed negotiations.

Fighting erupted between the army and the RSF in the capital city, Khartoum, on 15 April 2023. A humanitarian crisis is unfolding in Sudan with about 334 000 people reported to have been internally displaced since fighting began. A further 100 000 people including Sudanese citizens, refugees from countries including Eritrea and South Sudan, and migrants from other countries have left the country. As of 29 April 2023, the civilian death toll had surpassed 400. It has been observed that countries including Libya and Russia are fuelling the conflict.

The AU's Role in Ending the Conflict in Sudan

The AU has in recent times consistently called on the continent to resort to "African solutions to African problems." This position is largely informed by the realization by African leaders that over-dependence on external parties including Western superpowers can hinder the effective and timely resolution of problems that affect the continent.

In response to both the 2019 and 2021 military coups, the AU Peace and Security Council condemned this unconstitutional change of government and suspended Sudan from the activities of the Organisation pending the return to civilian rule. This is in line with Article 25 (1) of the African Charter on Democracy, Elections, and Governance.

However, despite the AU's playing a prominent role in negotiations between General Al-Burhan and General Hemedti, its mediatory role was unsuccessful in the wake of the war. The question to be asked in this regard is: Is the AU's quest for a peaceful and secure Africa feasible?

In the aftermath of the break out of the war on 15 April, the AU condemned the violence and called for coordinated international efforts to end the armed conflict. The AU is guided by the principle of subsidiarity. Subsidiarity is a political concept that empowers the AU to defer action to the regional bloc in response to conflict with the AU only stepping in when the regional bloc has failed. In the days following the outbreak of fighting, the Intergovernmental Authority on Development (IGAD), which is the regional bloc for the Horn of Africa countries, identified mediators for Sudan, thus, the Presidents of Kenya, South Sudan, and Djibouti.

On 3 May 2023, the head of the Arab League Dafa'alla Al-Haj Ali met with Burhan's representative in Cairo. He warned against external interference in the conflict, which he said is an "internal matter." Given the humanitarian, peace, and security crisis unfolding in Sudan, this conflict cannot reasonably be labeled as an "internal matter."

The Constitutive Act of the African Union provides in article 4 (h) that the AU can intervene at the recommendation of the Peace and Security Council in a member state, where war crimes, crimes against humanity, and genocide are perpetrated. War crimes and crimes against humanity have been committed in Sudan, given that more than 400 civilians have died and more than 2000 have been injured since the fighting began. Therefore, in line with the AU's policy shift from non-interference to non-indifference, the AU is well-placed to intervene. Accordingly, the AU in collaboration with the United Nations (UN) and IGAD announced that the AU has agreed with international actors to work towards a complete ceasefire in Sudan.

What next for Sudan?

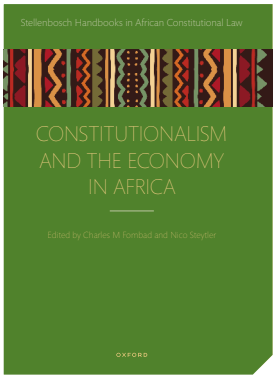
On 16 April 2023, the AUPSC held a meeting on the situation in Sudan. Subsequently, a high-level global meeting convened by the AU on 20 April 2023 followed. The participants included the UN Secretary-General, IGAD Executive Secretary, High Representative of the European Union for Foreign Affairs and Security Policy, permanent members of the UN Security Council (P5), African members of the UN Security Council (A3), Sudan's neighboring countries and Comoros as the AU Chair. On 2 May 2023, the AU Commission Chairperson Mr. Moussa Faki who has traveled to Sudan 5 times in recent years to engage with the civilian and military parties convened another follow-up meeting.

Furthermore, Saudi Arabia-US facilitated talks began in Jeddah on 6 May 2023. The AU Commission Chairperson issued a statement saying that he is closely following the 'talks' and urged the parties to agree to a humanitarian ceasefire to allow relief to reach civilians. He also reiterated that the parties to the conflict must comply with International Humanitarian Law and International Human Rights Law and "permanently silence the guns in the supreme interest of the people of Sudan."

Although the Saudi Arabia-US mediation is welcome as it may help to end the conflict, the AU should remain seized with the matter and continue to play a leading role in finding a lasting solution to the crisis in Sudan. The intervention contemplated in the Constitutive Act includes the deployment of a peacekeeping force.

Since both warring sides in Sudan have failed to respect the terms of the ceasefire agreements, perhaps it is time for IGAD and the AU to consider deploying a peacekeeping force in Sudan. This happened in Cabo Delgado in Mozambique, where SADC deployed the Southern Africa Mission in Mozambique (SAMIM). Deployment of a peacekeeping force would serve to protect civilians from gross human rights violations by both parties to the conflict. Also, it would serve the AU's lofty ideal of a peaceful and secure Africa.

Editors' Highlights – Books



- **Constitutionalism and the Economy in Africa - Charles M Fombad and Nico Steytler (eds.)**

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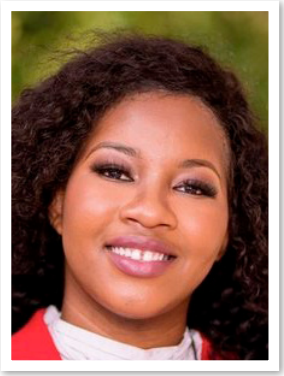

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