

LAW MATTERS

by Franny Rabkin



Pinky Mashiane, founder of the United Domestic Workers of South Africa, was one of the driving forces behind the famous *Mahlangu* case, in which, when the judgment came from the Constitutional Court, extended the protection of the Compensation for Occupational Injuries and Diseases Act to domestic workers. Before then, they had been excluded from the ambit of the legislation.

Maria Mahlangu drowned in her employer's swimming pool in Faerie Glen, Pretoria in 2012. Mashiane told me that she came across the story in the newspaper when she was at work, at her own employer's house. It reminded her of another newspaper story she had read previously: Christina Moyo was a domestic worker who had been killed while looking after her employers' house during the Christmas holidays.

"It happened on the 29th of December. They broke into the employers' house, and Christina was there with her four-year-old daughter. Then Christina was raped in front of her four-year-old daughter. Her throat was slit in front of her four-year-old daughter. On the first of January, after four days, when the employers came back from their holidays, they found that poor child sitting next to the decomposing body of her mother."

When the police asked the child what happened, the child said: "My mother won't wake up," Mashiane told me.

"And do you know what hurt me most? The employers offered the family three cabbages. Three cabbages. For a domestic worker who died for their house ... Three cabbages for a domestic worker who died looking after their *insured* house. Insured furniture. But her life was not insured. It was a very sad story."

"When I saw Maria Mahlangu, it brought back the story of Christina Moyo ... I said, this time ... I'm going to find justice for domestic workers. I will look for these people, I will look for the family of Maria Mahlangu." When she met with Mahlangu's family, including her daughter Sylvia – the first applicant in the case – they did not even have an office in which to meet. They sat in the park in Church Square – opposite the palace of justice.

The rest of the story is well known because it is set out in the judgment of the Constitutional Court. Mashiane was then at Sadsawu and, with the Socio-Economic Rights Institute as attorneys, they went to court. The Women's Legal Centre and the Gender Commission came in as amici. They worked "tirelessly," said the Constitutional Court.

It was a landmark victory for a marginalised sector. The

Constitutional Court said: "The marginalisation that domestic workers and Black women in general faced during apartheid has regrettably been extended to the present day. The exclusion of domestic workers from the protections under COIDA has resulted in a situation where domestic workers have for decades into our democracy, had to bear work-related injuries or death without compensation. They are a category of workers that have been lamentably left out and been rendered invisible. Their lived experiences have gone unrecognised. It took the tragic death of Ms Mahlangu to bring this egregious form of discrimination into vivid focus."

The court upheld the high court's declaration of invalidity of the section that had excluded domestic workers. It made its order retrospective to 27 April 1994.

Kgomotso Moroka SC was Mahlangu's senior counsel. In 2024, the *Sunday Times* did a package on 30 years of democracy and asked some of the lawyers who helped build South Africa's constitutional jurisprudence to choose a case that was most significant to them personally in shaping South Africa's democracy. Moroka SC chose this case – it was "the most important case of my life", she said.

"My grandparents were domestic workers. They would never have been entitled to claim. And here we were, 27 years into our democracy, and [domestic workers] were still not covered. So for me, that case was seminal. To say to us: if we are going to be a constitutional state, and affirm rights that are guaranteed in the Constitution, if one group is not extended those rights – the most vulnerable group – then our democracy is not working," said Moroka.

My interview with Mashiane was for a project I am working on about the Constitution and the bill of rights, which will, this year, be 30 years old. When I entered law school in 1997, we were brimming with optimism and excitement about the transformative potential of the constitution. But nowadays there is a growing sentiment that the bill of rights and the constitution have failed us. Our 30 Years project has been exploring why this is so. We have interviewed many people: lawyers, historians, activists.

Mashiane said that, while the order was retrospective to 1994, Mahlangu's case was the only successful claim by a domestic worker she knew of. She had asked the department for its statistics on this, she told me. She was still waiting for its answer.

This statement stopped me in my tracks. If it was correct, one could see why people could say the Bill of Rights has failed us. Such a long and hard-won fight – from 2012 to 2020, all that tireless work. But, as yet, no tangible change in people's lives.

I left the interview feeling flustered and ashamed. I thought I was a fairly decent court reporter. But I never followed up on the *Mahlangu* judgment – I had never thought, perhaps a year after the judgment, to check in with the department of labour on the impact of the judgment and report on it. Worse, as a general rule, once litigation is done, and there is a final judgment, I don't follow up. Court reporting means reporting courts, right? Wrong.

I have since followed up and was told by the department of labour that the number of domestic employers registered with the Compensation Fund is 5616. The number of "processed claims as received" is 43. And the number of the claims that have been paid is 23, of which three relate to funeral expenses.

There are, according to recent Stats SA numbers about 854,000 domestic workers in South Africa. Mashiane thinks this is an under-representation and that the pre-Covid numbers of close to 1m is more accurate. But in any event, 5616 registered employers is pretty dire. And 23 claims for a period spanning 30 years does not seem like very much.

Sometimes people ask me why I gave up practice as an attorney to be a journalist. Well, there are many reasons, but one is the same reason that I became a lawyer – access to justice. It's just that I came to realise access to justice is about more than access to courts and to access to lawyers. Courts should be the last stop. The first stop should be understanding the law and knowing our rights. And, as a general proposition, South Africans don't know our laws very well.

This is unsurprising. The law was, for centuries, an

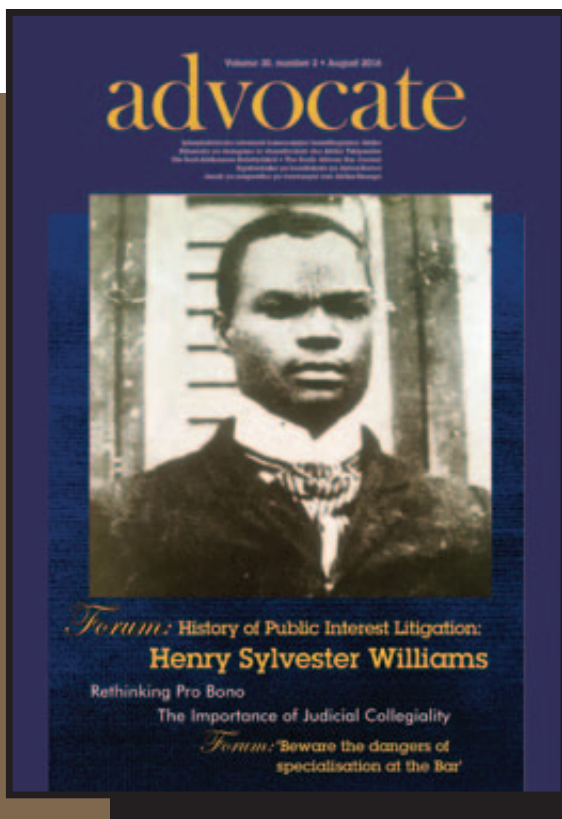
instrument of oppression and alienation for the majority. The democratic transition ushered in, in one fell swoop, a new constitution, a massive raft of new legislation and a new(ish) system of courts. This past 30 years has been a steep learning curve for the whole country.

More, the transition ushered in a new democratic culture – of transparency and accountability and questioning and debate. Access to justice means knowing, and owning, all of this. I thought I could contribute better as a journalist in all this than as a lawyer. I leave the lawyer part to you all.

However, what my interview with Mashiane made me realise is that being a journalist in a constitutional dispensation means doing journalism differently or at least asking if I'm doing it properly. A news report on the numbers I had received could have explored why there were so few employers registered and what needed to be done to rectify this. It could have asked, and answered, if 23 payouts was indeed a small number (maybe there aren't that many accidents in the workplace in this sector). It could have, in short, bridged the information gap on the extent of the impact of the judgment.

I would suggest the constitutional dispensation means doing lawyering differently and asking whether you are doing lawyering the right way. Was there a way to craft the litigation and the order in *Mahlangu* so that there would be more than 23 claims in 30 years? Maybe; maybe not. The same for civil servants. Is there a better way for government to monitor and ensure compliance?

It means doing citizenship differently (how many of you have registered your domestic workers?). Thirty years on, we can, and must, ask if the Constitution is failing us. But we also must ask if we are failing the Constitution. **A**



advocate

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