

A snapshot of the legal system in South Africa

At the end of the African continent lies an El Dorado in the form of South Africa. Positioned at the southern tip of the continent, it is no wonder South Africa is often dismissed as another African country. In fact, South Africa is out of Africa (if you excuse the pun), viewed as the golden dream country, not only for its reputed natural gold deposits but also for its history and liberation struggles lead first by Gandhi and then later by Nelson Mandela. As a highly modernized and developed state, with a great quality of life, rule of law based on the supremacy of a constitution and a bill of rights, natural beauty, endless coastline and Louis Vuitton or Christian Lacroix ... it is easy to believe why you could be out of Africa!

The new South Africa shows little of the vestiges of the apartheid regime, which can now be found neatly archived in museums, old law reports and government gazettes or in the memoirs of former political prisoners. Perhaps the greatest and foremost change was dismantling the legal edifice that enabled the apartheid regime to work so well. Through a dramatic overhaul in 1994, an apartheid state was instantaneously transformed into a constitutional democracy [1]. What follows below is an overview of the sources of the law, the reformed legal system, the legal profession (which has remained unchanged, although a draft bill on legal practitioners has hovered in parliament for several years) and finally a glimpse on certain controversial constitutional court decisions illustrating the commitment of the judiciary to the new legal order.

Sources of South African law

With early origins in Roman-Dutch law, South Africa follows the common law tradition (that is, based on previous detailed decisions of the superior courts /case law) with adversarial trial (but no jury system) and incorporates English procedural law.

Unlike the French system where laws are set out in Codes, South African law is not codified and similar to English law, must be sought in court decisions, individual statutes (acts of the national and provincial legislatures and governmental regulations) or the common law. In 1994, the (interim) Constitution of the Republic of South Africa entered into force, replaced later by the final Constitution in 1996 and is the supreme law in the country [2]. With an entrenched Bill of Rights in chapter 2 of the Constitution, all laws have to pass the Constitutional test. In the last 18 years South Africa has witnessed and produced some of the most radical and prolific constitutional jurisprudence in the world, some of which is mentioned later. [3]

The court structure

The Constitutional Court, as the highest court in the country with 11 judges, has jurisdiction to hear all matters relating only to constitutional challenges. It is situated in Johannesburg.

All appeals, criminal or civil, are heard before the Supreme Court of Appeal seated in Bloemfontein. Composed of 3 to 5 judges, as the highest court in South Africa, it receives all cases from the High Courts. Only the Supreme Court of Appeal can change one of its own decisions.

The next layer is the High Courts situated in every province and which sits as a civil and criminal court. Jurisdiction of the High Courts is based on *ratione materie* and *ratione personae* for civil matters and is

presided by a single judge. In criminal matters it has jurisdiction over serious offences and minimum sentence trials, presided by a single judge with 2 assessors. Certain High Courts serve as Provincial Division High Courts in which case they sit as review and appeal courts in civil and criminal matters from the courts of first instance or from the High Court within its jurisdiction. Three judges normally preside over appeal applications. Currently there are 14 provincial divisions of the High Court. Other superior courts exist such as the Land Claims Court and the Labour Appeal Court, both created under separate legislation. The important decisions or judgments of the High Courts are reported in law reports (published by Juta and Lexis Nexis Butterworths). These are the South African Law Reports (SALR) which covers leading judgments from all superior courts and selected judgments from Zimbabwe and Namibia, Butterworths Constitutional Law Reports, Butterworths Labour Law Reports and the All South African Law Reports, amongst others.

Courts of first instance are Magistrate courts which are divided into District (similar to the *juge de proximité*) and Regional (similar to the *tribunal d'instance*). Jurisdiction is determined by the Magistrates Court Act 1944, recently amended, to cover civil disputes (usually in claims for less than ZAR 300 000), certain criminal matters and certain family disputes. Magistrate courts are located in the 9 provinces.

Resolving commercial disputes by domestic arbitration is the preferred choice by commercial parties and avoids the long waiting time for a trial date in a High Court. Arbitrations are referred to the independent arbitration institution, the Commission for Conciliation Mediation and Arbitration.

It is worth noting that there are several other specialist courts with specific jurisdiction such as the: Equality courts, Maintenance courts, Small claims court, the Water Tribunal, Land claims court, Divorce courts, Special income tax courts, amongst other small courts.

Attorney or advocate - the legal profession

As a former English colony, the legal profession follows the legal profession in the United Kingdom in that there is a distinction between advocates (barristers) and attorneys (solicitors). It is also known as a referral profession which means that a client first has to consult an attorney in any matter, who in turn will, instruct an advocate.

Attorneys work out of law firms (cabinets) and in the recent years, several international law firms have settled in Johannesburg or merged with South African firms. Advocates on the other hand, practice from Chambers (same as with barristers), are members of a Bar and are independent practitioners. There is a Bar at the seat of every provincial and local division of the High Court of South Africa. You may be wondering what is difference between attorneys and advocate? Very simply, it is a matter of a number of zero's! (Advocates signing off more zeros on their invoices than an attorney - although this trend is rapidly changing in big law firms.)

Whilst the legal education at university is the same for a career as an attorney or advocate (BA, LLB or LLB, LLM), paths diverge at the training level. Attorneys follow a 2 year training period known as Articles in a law firm/s followed by examinations thereafter. Advocates follow a 1 year training known as Pupillage, are attached to a 'master' in Chambers and training includes advocacy, drafting and litigation (but not conveyancing) amongst others.

Attorneys have limited rights of appearance in courts and may only appear in Magistrates court in general, although there are rules enabling extended rights of appearance in the superior courts.

Attorneys are generally business managers of cases and are the lawyers clients first consult with their problems. Attorneys provide general advice on the law.

Advocates (also known as counsel), on the other hand, have full rights of appearance in all courts and are litigation specialists. Senior advocates (usually those who have been in practice for 10 years) may apply for 'silk' and are known as 'senior counsel' (SC). Usually advocates are specialists in specific domains and may appear on behalf of a client only when having received an instruction from an attorney. They cannot solicit clients directly [4]. (In many ways the profession mirrors that in the UK.)

Details of the practicing lawyers are found in Hortors Legal Diary, an annual publication with listings and contact details for law firms, practising attorneys and advocates, judges, court personnel and other legal officials. It covers all South African provinces and has abridged information for neighbouring states such as Botswana, Lesotho, Namibia, Swaziland and Zimbabwe.

Landmark decisions from the Constitutional Court

The Constitutional court as the purveyor and guardian of the Constitution is constantly engaged with how to recognise and give effect to sensitive socio-economic and political legal issues against a backdrop of limited state resources to honour the rights of every citizen. Some examples of this are illustrated in the cases that follow.

Among the first cases considered by the newly appointed court was the death penalty. This penalty was removed from the Criminal Procedure Act 1977 by the decision of the court in *The State v Makwanyane*, in 1995, which stated that 'everyone, including the most abominable of human beings, has the right to life, and capital punishment is therefore unconstitutional' [5]. The court went further in *Mohamed v President of the RSA*, in 2001, by confirming that it would be contrary to the Constitution to extradite an accused person to a country that imposes the death penalty.

The socio-economic rights set out in the Bill of Rights forced the court to make difficult decisions and to consider how to balance basic rights against limited state resources. In *Government of the RSA v Grootboom*, in 2000, the court confronted the right to housing provided for in the Bill of Rights. Ignored by the apartheid government, the acute housing shortage was a problem the new government had to eliminate. The court ordered the new government to devise and implement within its available resources a comprehensive programme to progressively realise the right of access to adequate housing.

In 2002, the court considered the right to health care and access to HIV/Aids treatment in *Minister of Health v Treatment Action Campaign*, and specifically ordered that this right extended to making Nevirapine available to HIV infected mothers and their newborn babies in public health facilities in certain stated circumstances and under certain stated conditions.

In conclusion, one observes that it is a dynamic system tackling issues that are unique to emerging markets, ensuring equality and seeking to bridge the gap between rich and poor ... no doubt, lawyers in South Africa are busy juggling constitutional challenges and commercial matters almost in semi oblivion to the crisis sweeping across the EU