

Tamara Jewett
2016 IHRP Fellowship Final Report
The Helen Suzman Foundation

I spent my 2016 IHRP Internship at the Helen Suzman Foundation (HSF) in Johannesburg, South Africa. Helen Suzman, who died in 2009, was the only member of the Apartheid parliament from the Progressive Party and a vocal opponent of the Apartheid system from within parliament. She insisted on visiting black communities for herself and bearing witness to the evils of the Apartheid system. Her foundation is dedicated to protecting constitutionalism, democracy, the rule of law, and human rights and is involved in research and litigation to uphold those ideals.

The two main projects in which I was involved were 1) freedom of expression litigation against new editorial policies by South Africa's public broadcaster, the South African Broadcasting Corporation (SABC); and 2) research into human rights issues in traditional communities displaced by mining combined with some legal work for those communities.

My first week at the HSF focused on reviewing court papers related to the HSF's application for judicial review of the appointment of Berning Ntlembeza as the head of the Directorate for Priority Crime Investigation (commonly known as the Hawks). The Hawks investigate major organized crime, commercial crime, and corruption. In litigation relating to his dismissal of Hawks officials, Ntlembeza was found to have lied to the court and to lack integrity. Consequently, HSF wants his appointment reviewed as irrational. Although I read a high court judgment (denying an interim interdict - ie. injunction - to prevent Ntlembeza from making decisions for the Hawks pending the review) and various affidavits and responding affidavits relating to the case, the HSF was waiting on court dates while I was there. Consequently, there was not much progress on the matter.

Shortly before I arrived in South Africa, the SABC announced a policy of not covering violent protests or protests involving damage to property. Unfortunately, many political protests in South Africa do involve damage to property, especially burning cars and buses. This ban was particularly problematic in the lead up to the municipal elections held on August 3. Municipal elections in South Africa are held all across the country on the same day. They are a (somewhat complicated) hybrid of first-past-the-post and proportionality-based elections and involve the same parties operating nationally. After over 20 years of dominance, the ANC looked like it would lose significant ground in these elections because of voter frustration with poor service delivery and rampant corruption (indeed, the ANC, although it maintained a majority in most municipalities, did lose significant ground to the opposition DA and EFF).

Civil society feared that the SABC policy would be used as an excuse not to publicize evidence of discontent that reflected badly on the ANC. Another, very troubling, development was that the SABC dismissed eight journalists who criticized the editorial policy. They also locked journalists still working at the broadcaster in their offices at lunch one day to prevent them from joining a public protest against the editorial policy.

The HSF's application is for a judicial review of the policy, arguing that it violates s.16 (freedom of expression) and s.32 (right of access to information) of the South African Bill of Rights. A court has not yet heard the application, but, because of the upcoming elections, the HSF also filed an application for an urgent interdict halting the policy pending judicial review (or the resolution of an investigation by the Independent Communications Authority of South Africa (ICASA)). The brunt of the legal work for this case was done by lawyers from the firm Webber Wentzl, but I was able to read the various affidavits and court papers filed and to attend the High Court in Pretoria with HSF. Despite much blustering in their court papers, the SABC conceded the entire case on the day, including a punitive cost award. This made for a somewhat anti-climactic day in court. Most of the action turned out to be behind-the-scenes negotiations about the exact wording of the interdict. Many similar scenarios in which state organizations waste money on frivolous litigation and drawing out court proceedings are increasing calls within South Africa for private liability by officials for costs in certain cases.

Aside from being an interesting opportunity to watch a court process unfold, HSF's SABC litigation provided interesting insight how civil society organizations navigate working together towards common or similar goals. Alongside HSF's constitutional challenge of the editorial policy, other organizations - including Save Our SABC (SOS), Right2Know, and the labour union, Solidarity - initiated proceedings at the regulator, ICASA, and in the Labour Court (the cases in the Labour Court challenging journalists' dismissals were successful and most of the journalists have been reinstated). I attended several meetings as a representative of HSF in which these organizations coordinated organized protests and public awareness campaigns and explained to each other what their various pieces of litigation were about.

Given that, for now, the HSF outsources its litigation to lawyers at Webber Wentzl (there is some talk of setting up an in-house litigation unit), the job of the lawyers in the HSF office is legal research and commentary on cases and legislation. This research is published on the HSF website and in the HSF weekly newsletter or in its magazine, Focus. I was able to do self-directed research on any relevant topic of my choice. I was interested in land governance issues, particularly after doing some research on traditional communities in South Africa, which are still governed by traditional chiefs and customary law. I wanted, however, for this research to be based on hands-on experience.

I was lucky enough to meet a well-known (or notorious, depending on who you ask) human rights lawyer named Richard Spoor while mountain biking during a long weekend in Mpumalanga province. He represented ANC members in political trials during Apartheid but now runs a private, non-profit, public interest firm that does work related to mining and land issues. It turns out that Richard Spoor Inc.'s Johannesburg office is literally across the road from the HSF offices. HSF permitted me to do some hands-on legal work with Richard Spoor Inc. and to use that experience to write a series of research briefs on human rights issues related to mining in traditional communities in rural South Africa. For these briefs, I analyzed South Africa's mineral law, various land laws, laws about traditional leadership, and customary law. I have attached my briefs with this report.

Spoor's firm is best known for their ground-breaking work on a silicosis class-action suit targeting the gold mining industry. I got involved in work that they are doing representing communities displaced by platinum mining in Limpopo province and unhappy with deals that their traditional chiefs made and are making without adequate consultation.

With a group of lawyers and interns from Richard Spoor Inc. and researchers from the Land and Accountability Research Centre (LARC) based at the University of Cape Town, I traveled to the Mapela community in rural Limpopo for four days to meet with councils of headmen and committees of community members negatively impacted by mining and unhappy with their traditional chief. Before departing, I helped to draft legal memos assessing the structure of a community trust to be set up in Mapela to control settlement payments paid by Anglo American in relation to their Mogalakwena Platinum Mine. The concern with the trust is that it gives too much control to the traditional chief, which we argued is inconsistent with democratic decision-making practices within customary law. On the trip, I helped to keep minutes at client meetings. I also helped to conduct interviews with community members in Mothlothlo and to draft parts of affidavits.

The community at Mothlothlo has a particularly sad story. They eventually managed, with Richard Spoor's help, to negotiate a decent deal with mining company Anglo American to relocate to farmland of their choosing. Their community organization (a structured called a Community Property Association (CPA) in South African land law) now holds the title deed to that land, but their move is being blocked by two neighbouring white farmers funded by an organization called AfriForum. The municipality must hold a hearing to sort out the issue before the community can start building on their land. The municipality has delayed the hearing for over five months and still has not set a date. In the meantime, the open-pit Platinum mine has continued to expand. Because it has covered the community's agricultural land, they are unable to farm and are living off of food vouchers provided by the mine. They are also living literally meters away from a giant tailings dump. The interviews are meant contribute evidence in another case, unfolding on the Wild Coast in the Eastern Cape, of the harms of not halting mining until negotiations and, potentially, relocation are complete.

I was quite shocked by the evidence of corruption; poor traditional, municipal, and provincial governance; lack of meaningful consultation by mining companies; and brutality by mine security, as well as by some evidence of a local magistrate and the police force working together to prevent legal public protests. Under South African law, notice for a public protest must be submitted to a municipality seven days before it occurs. If there are any concerns about the protest, a magistrate makes a case-by-case ruling about whether it may proceed. One of the most surreal experiences on the trip was traveling to a local police station to hand in a notice of protest on behalf of the Mothlothlo community. They wanted to hand a petition to the mayor insisting that they need a hearing date to sort out the issue about their new farm land. A local police chief insisted to me and the attorney that I accompanied that the local magistrate has assured him that no protests would be allowed under any circumstances whatsoever.

I had an opportunity shortly after returning from the Limpopo trip to attend the Environmental and Mining Justice Conference in Pretoria co-hosted by Lawyers for Human Rights, the Centre for Applied Legal Studies at the University of the Witwatersrand, and the Centre for Environmental Rights. It was disturbing to hear the same story repeated across South Africa of communities negatively impacted by mining as a result of poor traditional, municipal, and provincial governance; poor regulation or poor enforcement of regulation; attitudes of legalistic compliance rather than meaningful risk assessment and monitoring by mines; inadequate measures for compensation; and precarious land rights.

It was also quite interesting after returning to examine reports by the South African Human Rights Commission (SAHRC) and by the University of Stellenbosch Business School on the issues in Mapela as well as publications from the mines. Overall, the reports rang true to my observations. In contrast, a new mine in the area, run by a Canadian company called Ivanhoe, is extremely aggressive in its press releases and lambasts the work of human rights lawyers in Mapela as well as publications and protests by Mining Watch, a Canadian NGO. I am not anti-mining, but I was disturbed by what I saw in Mapela at the same time that I was impressed by the brave determination, fairly good organization, and calm, respectful meetings of the community committees that were our clients. In one of its aggressive media statements, Ivanhoe accuses Mining Watch of having “Canadian blinkers” and not understanding the South African context. But having researched and seen the context in which Ivanhoe is operating, Mining Watch’s criticism rings much more true than Ivanhoe’s very aggressive, defensive statements.

I am very grateful to the International Human Rights Program at the University of Toronto, the Helen Suzman Foundation, and Richard Spoor Inc. for providing me with this opportunity. I learned a lot and found the work both rewarding and eye-opening.



Me with interns from Richard Spoor Inc. interviewing members of the community at Mothlothlo, near Mokopane, Limpopo



Me with colleagues from the Helen Suzman Foundation at the High Court in Pretoria