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Luke Choate

The editors wish to thank all of the contributors and sponsors.

Thank you also to Saronda and Patience for their outstanding efforts in the creation of this year's magazine.

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From the Editors

JC Atouguia & Luke Choate



Many people believe that the best way to teach someone to swim is to throw them right into the deep-end. They'll either learn very fast or, if they are lucky, will have someone save them. Rhodes Law prepares us for the head-first dive into the real world. As students, we are at first intimidated by each test or assignment, but with each difficult obstacle we overcome, we successfully come out swimming.

Putting together this publication felt like being plunged into a pool. Having almost mastered legal jargon in our final year of law, we were thrown into the arenas of journalism and publication. We had to make sense of words such as advertisement specifications, trims, bleeds, photographic angles and so much more. But in the end, after a few hundred emails and phone calls, we were successful in producing the 2009 edition of In Camera.

The success of this publication would not be so without the contribution by students and staff in the faculty. Each article is in itself an accomplishment – delving into a new legal topic, deciphering the law, or just commenting on a current situation. The publication would not be what it is without each

contribution and we thank them for their work. Funding is another obstacle faced, and we would like to thank our various sponsors for their contributions and advertisements. Without their funding, this publication would not be possible.

After five years of law in Grahamstown, one comes to view the particular stretch of road that gets you from the door of your unkempt, shoddy accommodation to the daunting doors of the Law faculty with a mixture of fear, familiarity and a bit more than a dash of respect! Never quite knowing what to expect, the gruelling triathlon that is the LLB is almost done.

For us final years, the nervous, shifty-eyed first years that stumble across our paths remind us just how quickly it has all gone by. From the GLT to Eden Blue to our own back-yard, it's been a trip, thanks for the memories.

To the first-years and everyone in-between, it goes by quicker than you think. Exams will come and go, tests will go wrong, essays will keep you up all night, lecturers will refer to you as pillars of salt (whilst comparing you to their new batch of first years who, apparently, know more than you do) and the sun will rise, these are the best times of your life. **Enjoy the ride.**

The President's Report

By Amanda Mapanda
President of the Law Society

This year, the Honourable Justice Lex Mpati, President of the Supreme Court of Appeal, officially opened the Rhodes Law Faculty with his address to students and staff. His speech proved to be an appropriate way to mark the beginning of the year for all, be it wide-eyed first years, anxious-to-finish final years, and all in-between. His message was an important one, reminding us all that social responsibility is part and parcel of our legal training. He emphasised that as Rhodes students we are privileged to receive such a high calibre education and that we should therefore use this opportunity to help others.

One of the major events on the Law Society calendar is the Law Careers' Day. This year a relatively large number and wide range of institutions took part in this event. We had law firms, national institutions and some NGOs. Among these were the Competition Commission, the National Prosecuting Authority and the Legal Aid Board. This gave the students a wide spectrum of options in deciding what route to take with their LLB. Some of the firms took the opportunity to conduct interviews with potential article clerks for 2010. The end of the day was marked with a cocktail evening giving students a chance to network and socialise with the representatives of the firms and institutions in attendance.

This occasion was the successful product of a partnership between the Law Society, The Law Faculty and the Rhodes Career's Centre. In previous years the Career's Centre had not been involved in our Career's Day but the new addition was invaluable. In the week leading up to Career's Day, the head of the Career's Centre, Mr Jurgens Kietzmann held talks and workshops on CV writing techniques and interview skills. He also called for students to submit their CVs to him so he could assist them with the drafting.

Although the whole Committee made a contribution to this event it is important to individually thank certain pivotal role players. Thank you to Mrs. Helen Kruuse for her guidance, energy and leadership in pulling this whole thing together. Thank you to Mr Jurgens Kietzmann for his enthusiasm and willingness to work with us to make this event a success. The administrative staff, Saronda of the Law Faculty and Phumla from the Career's Centre, must also be thanked for their

"I wish you all the best in every future endeavour."

"...as Rhodes students we are privileged to receive such a high calibre education and that we should therefore use this opportunity to help others."

efficiency. Without their involvement in the planning and preparation the event's success would not have been possible. Last but not least, a big thank you to Lindsay, the Public Relations Officer. Career's Day was her "baby" from the start. Well done to her for a fantastic job. This year the Law Society had the usual task of organising social functions to provide a platform for interaction amongst the different years of the LLB degree as well as other students

of the University. Our first event was "A night in Paris", a smart occasion which was held at Kiara's restaurant. The evening proved to be an absolute success with people partying until the early hours of the morning. Special thanks must go to Mr. Gordon Barker for going where no staff member has gone before and joining us in our festivities.

Our social event for the second semester was a much more relaxed affair that took place at the 'student hot-spot', Pirates Pizza. Despite the gloomy weather that evening, students came in their numbers to make merry with blue punch and great pizza. To make the event more meaningful, we took the opportunity to collect tins of food donated by members that we then handed over to one of the local soup kitchens.

The biggest event on our social calendar was the annual law ball. This year the committee decided on an exotic theme- 'An Arabian Night'. The decor was beautifully done, the food was superb and the entertainment kept us all dancing until our feet ached. To this top off, the evening was graced by the presence of the Honourable Mr Justice Johann Kriegler. Having such a topical legal figure share the evening with us was a great way to end off the year.

Being in an educational environment it is important to acknowledge the successes of our peers. This benefits us all because it raises the national and international profile of the Law Faculty and the University as a whole. Every year the Rhodes Law Faculty participates in the prestigious All Africa Moot Competition. This year Rhodes was represented by the winners of the Internal Final Year Moot, Christopher McConnachie and Roxanne Francis-Pope. After receiving generous sponsorship from Schindlers Attorneys, our team was able to fly to Lagos, Nigeria where the competition was held this year. Rhodes performed excellently and were placed 5th overall and

Christopher McConnachie won the award for Best Oralist. Congratulations to Roxanne and Christopher for doing us proud!

Another great accolade to the Rhodes Law department this year was the appointment of two our own colleagues, Chris McConnachie and John Shija, as clerks in the Constitutional Court in Johannesburg. McConnachie has been appointed to the office of Chief Justice Pius Langa and Shija to Justice Yvonne Mokgoro. We wish them all the best in this exciting venture.

My report would not be complete if I did not take the opportunity to thank my Committee for all their hard work and to congratulate them on such a successful year for the Law Society. To Lumka Dlukulu (Secretary), Jessica Staples (Treasurer), Lindsay Luppnow (Public relations), Nikita Young (Legal Aid Liaison), JC Atouguia and Luke Choate (InCamera Editor). Thank you all for being amazing individuals and an incredible team to work with. I have enjoyed working with you and getting to know you all.

To the final years class of 2009, I know we are all glad that it is over, but do take time to reflect and soak in all the memories. Times flies and before you know it, you will be missing the 'coffee mug scramble', the sun-bathing on the lawns, and the student life we have loved and loathed these past few years. I wish you all the best in every future endeavour. Let this not be good-bye... After all, there's Facebook!



Amanda Mapanda, the President of the Law Society for 2009.

Faculty Report 2009

By Professor Jonathan Campbell
Dean of Law

Introduction

2009 has been a year of transition and consolidation. The three day Law Faculty staff *imbizo* in January provided the perfect opportunity for me to speedily settle into my new role as Dean, and for the staff together to plan the year ahead. It is important for any manager to be decisive and to lead from the front; but it is equally important for decisions as far as possible to be taken in consultation with staff, in a transparent manner. Our students are central to our purpose, and we re-affirmed our commitment “to produce high-quality graduates”, enabling them “to become responsible, productive and ethical members of society”, and to be a destination of first choice for law students. Besides these grand aspirations, we came away from the *imbizo* with an 80 point action plan which set the tone for the hard work ahead!

The academic year got off to an excellent start in February with the Faculty Opening, at which we were greatly honoured to have the Honourable Justice Lex Mpati, President of the Supreme Court of Appeal and Law Faculty alumnus, as guest speaker. This event presented a wonderful opportunity to recognise our high achievers from the previous years with a number of awards and prizes.

Academic matters

The Faculty places a high premium on quality teaching and learning, with undergraduate teaching being our most important core business, and greatest strength. Our lecturers demonstrate exceptional commitment to their work, and our good teaching was borne out by extremely positive first semester evaluations by the final year and penultimate year classes. Further, we have a sound clinical legal education programme that complements traditional academic teaching.

A new elective course was introduced by Prof Glover, the Law of Unjustified Enrichment, which has been a success. *Capita Selecta Corporate Law*, an elective not offered for some years, was taught by Adv Renaud and proved to be very popular. With the many changes in company law, corporate law subjects will look somewhat different in the LLB curriculum from next year. The names as well as the content of most of these courses will change. Finally, given the increasing rigour of Administrative Law, from next year Admin Law A and B will be offered in final year, a direct swop with Delict A and B, which will be offered in penultimate year. This means that both classes will do Delict together in a bigger venue next year.

Flowing in part from first semester evaluations, the Legal Skills course has been re-visited. From next year the course will be taken over both semesters, with moots in the 3rd term, which will serve to distribute the workload of penultimate students more evenly over the year. Further, numeracy will no longer be a separate requirement for the award of the LLB degree, but will still form part of the Legal Skills course. Separate teaching groups were established for the first time this year for (i) Legal Theory, (ii) public law, (iii) private law, (iv) commercial law and (v) practice, procedure and skills courses. These groups comprise all lecturers in these areas,

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and will meet at least once per semester during swot week (June and November).

The law library has had an excellent year, and received unprecedented positive feedback in student evaluations. The University has been reviewing its library services in anticipation of the opening of the new university library next year, and most branch libraries in other departments will be closed and centralised in the new library. Despite this trend, the law library will be retained in the Faculty, which is excellent news for students and staff, and testimony to its vital importance and centrality in the law academic project.

Two of our eminent Visiting Professors were with us in the second semester. Adv Wim Trengrove SC presented six lectures during his visit in August, and Judge Clive Plasket delivered several lectures between August and October. Dr Tim Burrell was unfortunately not able to make his annual visit this year due to his wife’s illness.

Research publications

Professor Glover updated the chapter on “Divorce” in the LexisNexis *Family Law Service*, and he and Professor Alastair Kerr updated the chapter on “Sale” in LAWSA. Dr Rosaan Kruger updated the chapter on “Family Law Procedures” in the *Family Law Service*. Ms Liezel Niesing contributed two chapters to *The Law of Delict in South Africa*. Ms Helen Kruuse has had a chapter on “A South African Response to Ethics in Legal Education” accepted for publication in *The Ethics Project in Legal Education*.

A number of staff have had articles published or accepted for publication in accredited peer review journals: Prof Kerr “The Nature and Future of Customary Law” (in the South African Law Journal); Prof Glover “Reflections on the Sine Cause Requirement and the Conditiones in South African Law” (in the South African Law Journal); Prof Laurence Juma “Peacekeeping in Africa: Problems and Prospects” (in University of Botswana Law Journal); Dr Rosaan Kruger “Of Fences and Peace Between Neighbours” (in *Obiter*); Ms Helen Kruuse “Fetal ‘Rights’? The need for a Unified Approach to the Fetus in the Context of Feticide” (in *THRHR*), and “Here’s to You Mrs Robinson: Peculiarities and Paragraph 29 Determining the Treatment of Domestic Partnerships” (in the South African Journal of Human Rights); and Prof Jonathan Campbell “The In *Duplum* Rule: Relief for Consumers of Excessively-priced Small Credit Legitimised by the National Credit Act” (in the South African Mercantile Law Journal). Further, Ms Emma

Holland achieved the rare feat of having an article accepted for publication in an accredited journal while still an LLB student: “How to fix a life: lessons on *ubuntu* and restorative justice from Alexander McCall Smith’s *The No. 1 ladies’ detective agency*” (in *Speculum Juris*).

Papers presented at conferences

Papers were presented by Faculty staff at various conferences in South Africa and abroad: Prof Glover “The law of unintended consequences? The Consumer Protection Act of 2008” (Private Law and Social Justice Conference, NMMU, Port Elizabeth, August 2009); Prof Juma “Returnees and post-conflict reconstruction in Africa: the challenges of inclusivity in divided societies” (the International Association for the Study of Forced Migration Conference, Cyprus, June/ July 2009), and “In reality who am I? In search of African jurisprudence” (the Law Curriculum in South African Schools: Taking Africanness Seriously Conference Unisa, Pretoria, September 2009); Dr Kruger “The South African Constitutional Court and the rule of law: the Masethla judgement, a cause for concern?” (Conference of the African network of constitutional lawyers, UCT, August 2009); Ms Sarah Driver “The legal regulation of genetic resources and traditional knowledge in South African: intended and unintended consequences” (WIPO/WTO Colloquium for Teachers of Intellectual Property, Geneva, Switzerland, June/ July 2009).

In addition, several papers were presented at the South African Law Teachers Conference (Pietermaritzburg, July 2009): Prof Mqeke “Proprietary consequences of a customary marriage since the Constitutional Court judgement in *Gumede v President of the Republic of South Africa and others* 2009 (3) SA 152 (CC)”; Prof Juma “Assessing the viability of a human rights approach to conflict prevention in Africa”; Ms Sharlene Ramlall “Improved lives, improved profits: reconciling the difference”; Prof Campbell “The in *duplum* rule: relief for consumers of excessively-priced small credit legitimised by the National Credit Act”.

Other research activities

The year started with the wonderful news of Prof Glover’s appointment as a co-editor of the prestigious *South African Law Journal*, which is a great achievement for Prof Glover and the Law Faculty. He thus resigned his position as the technical editor of *Speculum Juris* (a joint publication of University of Fort Hare and Rhodes University), and Ms Helen Kruuse was appointed the new technical editor. During her tenure and due largely to her hard work, the 2008(2) edition of the journal was published earlier this year.

Prof Nazeem Goolam made a presentation as an expert panellist at a group meeting on “Human Rights and Islam: Economic, Social and Cultural Rights” (Beirut, Lebanon, August 2009); Ms Helena van Coller attended the Centenary Symposium of “Die Suid-Afrikaanse Adademie vir Wetenskap and Kuns” (Bloemfontein, June 2009); Adv Roberts attended the Law Teachers Conference (Pietermaritzburg, July 2009);

and Adv Renaud attended a seminar on “Advanced Corporate Law and Securities Law” (Unisa, July 2009) as part of his endeavour to get on top of the imminent new Companies Act. Ms Kruuse conducted a research visit to the National *Pro Bono* Centre and School of Law, University of New South Wales, Australia (January 2009), and was a participant in a course on “Teaching Law, Human Rights and Ethics” run by the Public Interest Litigation Institute of New York in Budapest, Hungary (July 2009). Ms Ramlall spent three months as a visiting researcher at the School of Human Rights Research, Utrecht University, The Netherlands (February to April 2009), where she spent invaluable time drafting her PhD research proposal, attending various legal seminars and conferences, presenting lectures and seminars and participating in various working groups and projects.

The Law Faculty undertook a number of research initiatives during the year to promote research activity and output, under the guidance of our research portfolio holders, Prof Mqeke and Dr Kruger: a writing workshop was held during swot week in June, when staff had the opportunity to present their current research to each other and obtain feedback (a similar workshop is planned for swot week in November); Prof Mqeke and Adv Roberts presented their research during lunch time seminars in the first semester, and more of these are planned; we hosted a research colloquium for post-graduate students from NMMU, Fort Hare and Rhodes Universities in September, and some of our post-graduate students and staff attended a similar colloquium at Fort Hare in August, accompanied by Prof Juma and Ms Ramlall.

Community engagement

Prof Bodenstein, the new Director, has brought new ideas and fresh perspective into the Legal Aid Clinic. Besides the regular core activities of the clinic (clinical legal education, legal service provision and advice office work), a new focus was the introduction of a street law initiative. Several staff members were trained as street law facilitators, and they will present workshops in various fora.

In July clinic staff undertook a “roadshow” in various centres, providing training on the Children’s Act to paralegal advice offices. Flowing from this, there was a focus on the issue of the taking of child brides by force in the Lusikisiki area, attended by 54 members of community organisations, traditional leaders, the SAPS and the Department of Social Development. In October the clinic hosted the Department of Justice and Constitutional Development training on the Equality Act, PAJA and PAIA in Grahamstown and Queenstown, aimed at community organisations.

The University Constitution Week took place in September, co-hosted by the Dean of Students Office, the Law Faculty (including the student Legal Activism Society and the Legal Aid Clinic) and the SRC. There was a public forum, a schools debate, several workshops and a film screening, with the high point being the keynote address by Judge Johan Froneman, who has since been appointed to the Constitutional Court.

Student news

In April 56 students graduated with LLB (six of these with distinction, representing over 10% of the class). In addition we had four students graduating with LLM degrees, and two with PhDs (including our own Dr Rosaan Kruger) – a great achievement considering we are a small Faculty with our primary focus being a professional qualification.

A high point of the first semester was the initiative around student careers, spearheaded by Ms Kruuse and the Law Students’ Society. Two workshops were given by Mr Jurgen Kietzmann, the Head of the Careers Centre, on drafting of CVs and interviewing skills. At the law market day in May, 11 private firms, community law organisations and state law agencies provided information through their stalls on St Peters lawns, and students were able to engage with them informally during a cocktail party. Interviews with certain students were arranged around the day.

The Moot finals took place in early April. The penultimate year moot final, in which Judge Dambuza presided, was won by Ingrid Cloete, with Kathryn Abrahams runner up. The final year final was won by Roxanne Francis-Pope, with Chris McConnachie runner up (and Judge Erasmus presiding). In August the two final year finalists represented Rhodes at the Africa Human Rights Moot Court Competition in Lagos, Nigeria, accompanied by Ms Mutsa Mangezi. The Rhodes team did extremely well, being placed 5th overall against some 70 teams from 26 African countries, and Chris McConnachie was named best individual oralist for 2009 – an exceptional achievement indeed.

In September / October Kathryn Abrahams and George Kahn (again accompanied by Ms Mangezi) represented Rhodes in the Lexis Nexis Intervarsity Mock Trial Competition at the University of Pretoria. They did very well, gaining the highest number of points in the preliminary rounds and making the semi-finals of the competition.

Four first year students (accompanied by Ms Davies and Ms Kruuse) represented Rhodes at the University of the Free State Faculty of Law First Year Moot Competition which took place in the High Court and the Supreme Court of Appeal Bloemfontein.

The result was unknown at the time of writing.

Chris McConnachie was a joint winner of the Ismail Mohamed National Essay Competition on Law Reform – another truly outstanding achievement – with an essay entitled: “With such changes as may be required by the context: section 13 of the Civil Union Act, absurdity and gender discrimination

“The excellent work of the Faculty this year has proved to be the result of a tremendous team effort...”

in the legal consequences of marriage.” So good was the essay that he was asked by the South African Law Reform Commission to put together a summary document on his proposals, which I am advised was forwarded to the legal advisers of the Department of Justice and Constitutional Development for consideration.

The Ntuthuko Legal Activism Society continued their good work this year, and was named as a finalist in the “Society of the Year” category of the Rhodes Community Engagement Awards.

Many law students were elected to the Students Representative Council for 2009/2010, including Mr Eric Kweku Ofei (President), Mr Garth Elzerman and Mr George Kahn (Vice Presidents), Mr Egmont Bouwer and Mr Cameron Stewart.

At the time of writing preparations are under way by Amanda Mapanda and her Law Students Society committee for the Law Ball, which promises to be an entertaining occasion, with retired Judge Johan Kriegler as guest speaker.

As part of our student exchange programme with Leicester University in 2009, Ruth Mhlanga (from Rhodes) went to Leicester on exchange in order to complete a combined Law/Management Honours programme; and James Moss (from Leicester) came to the Rhodes Law Faculty to further his studies during the first semester.

Staff news

A big gap was left with the departure of Professors Midgley and de Vos last year, and so we were delighted to be able to appoint Professors Juma and Goolam, who started work in July. Prof Bodenstein commenced work as Director of the Legal Aid Clinic on my departure. We are now back to our full academic staff complement, with no-one on sabbatical leave this year which helped to stabilise the Faculty in a time of transition.

Furthermore, the year started with a complete overhaul of the admin staff complement with the appointment of Ms Andrea Comley, Ms Saronda Fillis and Ms Patience Ngele (Patience was with us for a one year internship last year). They have done excellent work, and have really gelled together as a team. Andrea is an exceptional administrator and an astute financial manager, and is running an extremely tight ship. Saronda, amongst other responsibilities, has done excellent work with Ms Niesing on updating and maintaining the Faculty website. All our admin staff have attended various Rhodes courses which provide useful staff development opportunities, including: health and safety course (Andrea); supervisors’ course (Saronda); first aid and MS word courses (Patience). In May 2009 Ms Yvette Williams was appointed as library assistant, and has settled in extremely well.

Various new staff were appointed at the Legal Aid Clinic this year: Ms Debbie Ainslie, as Projects Manager (to replace

Ms Candice Egan); new candidate attorneys Johan Botha (Grahamstown office) and Siyanga Radasi, Khayaletu Tshiki and Zingisa Diyelela (Queenstown office); Nonzame Mpofu (projects assistant); Sessa Moodley, Simon Barker and Loris Saglam (interns).

Various part-time staff were employed to teach this year, mainly where specialist expertise was needed: Mrs Anita Wagenaar (Legal Accounting), Mr Richard Poole (Tax), Mr Bruce Brown (Numeracy), Mr Gys Niesing (Civil Procedure) and Ms Pam Maseko (isiXhosa for law). A “New staff guide” was drafted to assist with orientation of new academic staff, which doubles as a useful guide for part-time lecturers.

Notable staff achievements include: the award of doctoral degrees to Dr Rosaan Kruger (Rhodes) and Prof Nazeem Goolam (International Islamic University, Kuala Lumpur, Malaysia). Mr Johnnie Jacobs was admitted as an attorney in March, and it is expected that Mr Nkosinathi Faxi will be admitted soon. Prof Bodenstein was appointed as Vice President of the national Association of University Legal Aid Institutions (Aulai), and Ms Mangezi was appointed to the Aulai Executive Committee. Ms Ainslie was elected to the Eastern Cape Advice Office Forum committee.

The excellent work of the Faculty this year has proved to be the result of a tremendous team effort, with every staff member assuming certain administrative responsibilities, in which they provide leadership. The Faculty Executive Committee, in particular, has worked efficiently and provided me with invaluable guidance in regard to policy issues.

We are therefore well placed to be able to look forward to an even better year in 2010!



Professor Jonathan Campbell

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rewarding original thinking in law reform

The highs and lows of a Law student

By Kate Selwood

The hustle of people in the law department is usually not filled with happy or excited students. If one looks more closely, the students are usually sleep deprived, annoyed, frustrated and all other synonyms of these. If nothing else, our law degree teaches us all one thing – the art of complaining.

This is the life of the law student: we complain about the volume of work, the lecturer, the amount we are expected to read for an essay, the length of a particular case, the assignments due, the word count of an essay, the amount we are expected to learn for a test, the test date, the exam timetable – the list endlessly goes on. Perhaps the slight pleasure derived from this constant complaining is what gets us through the day in the end.

Whilst these things are undoubtedly the lows of the law student's life, we persevere and do not forget the satisfaction that being a law student can bring.

We secretly enjoy the fact that when asked a question such as, "What is your view on the death penalty?", we can respond with (and actually understand) an answer such as, "Well, based on the *ratio per Chaskalson* in *Makwanyane*, the rights of both the aggrieved and the culprit must be considered as well as the effect that the sentence is likely to have, keeping in mind the triad of factors established in *w*".

Further pleasure is found when some legal concept is mentioned in the news and, instead of having to vaguely nod and pretend that we understand, we actually do know what's going on. Again, this gratification is found when explaining to someone we consider much wiser than ourselves that we study "crim proc", "civ proc" and "delict"; and after some thought when this person says, "I can understand that 'crim' and 'civ' are short for criminal and civil procedure, but what does delict stand for?" we can say in the most patient (and potentially smug) of tones that, "delict is actually not abbreviated but rather a word and subject all on its own."

Amidst all the moaning and complaining there is a satisfaction that what we are studying is important and relevant and affects the daily lives of not only every South African but people all over the world. So, after a semester of delict, while we may be convinced that the reasonable man is actually a balding 40 year old guy who still lives with his mother and his seventeen cats, instead of complaining about it, we should embrace the fact that we are studying something which makes us valuable in the job market. Perhaps most importantly, it is something which gives us insight into a world that many cannot understand and which we will, whether we like it or not, be a part of forever

We need individuals
who think like us...

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Kate Selwood

'Paedophilia': What does it basically mean?

By Claire Marais

This year was marred by the death of Michael Jackson – the 'King of Pop' that ruled the entertainment world for over three decades. However, his musical talent was dampened by rumours and allegations of inappropriate conduct with children and even sexual abuse. Such conduct included befriending and touching children, sharing beds and the infamous (alcoholic) 'Jesus juice' with them. All allegations of sexual activity were denied and Jackson was eventually acquitted on all counts.¹

These whisperings surrounding Jackson might seem bizarre and unusual, but have actually occurred in South Africa. One case even presented itself in the Eastern Cape. Bruce Ehrlich was a karate instructor that used his position to gain and abuse the trust of boys that attended his class, and charmed and manipulated those he met by chance while travelling around the Eastern Cape.² Ehrlich was charged with and convicted of 14 counts of indecent assault of these boys.³

After psychological evaluation, it was found that Ehrlich could be classified as a paedophile. This classification is not linked to a bad joke, nor is it in terms of the colloquial 'child molesting'. Rather, it is related to the medical and psychological diagnosis of the mental disorder of having paedophilic tendencies. In other words, the diagnosed party has a 'fetish' or obsession involving the sexual interest of a prepubescent child.⁴

Most psychiatrists and psychologists use the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR)⁵ to classify and diagnose this sexual obsession. The DSM-IV-TR sets out that to classify as a 'paedophile', one must fulfil these criteria:

A. Experiencing, over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or

behaviours involving sexual activity with a prepubescent child or children (generally age 13 years or younger); and

B. Either have acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty; and

C. The person is at least age 16 years and at least 5 years older than the child or children in Criteria A.⁶

Interestingly enough, the above diagnosis criteria includes 'sexual urges or fantasies' which embraces thoughts without any physical action. Nonetheless, it is trite that a person can only be convicted of a sexual offence towards a child in the form of physical unlawful acts or conduct. However, it is notable that South African courts have started to take cognisance of these 'sexual urges or fantasies' as they can show a paedophile's potential intention of eventual sexual conduct with a child.

“sexual abuse of children is calculated and stage-managed, indicating clear mala fide and intent”

child's need and want for love and affection, including the child's curiosity and playfulness, and the naive trust they hold of adults;

iii. Creating a 'special' relationship with the child, under the guise of 'love' and friendship, which enables them to become a 'significant' person in the child's life;

iv. Gaining the trust of the child's parents and guardians, in order to receive approval of the 'special' relationship and lengthy time spent with the child;

v. Earning the trust of the child, to allow for initial non-

These intentions are shown through a process known as 'grooming'. Research has shown that most paedophiles use this process to choose and draw in their child victims.⁷ Grooming involves:

i. Choosing a child that is emotionally vulnerable and thus easier to influence;

ii. Manipulating the

⁶ American Psychiatric Association *Diagnostic and Statistical manual of Mental Disorders* 4ed (2000) 571 and 572.

⁷ A Van der Merwe "Expert evidence on the sentencing of paedophiles" (2005) *THRHR* 416 at 421.

sexual touching, which would then increase in its sexual nature without the child resisting;

vi. Convincing the child that sexual activities are 'games' which are not wrong;

vii. Isolating, shaming and bribing the child, in order to maintain the silence of the child; and

viii. Creating an image of themselves so that any disclosure of the inappropriate sexual activities by the child is met with disbelief.⁸

Ehrlich used this set of behaviours in the manipulation and sexual abuse of his child victims.⁹ As seen in Ehrlich, and many cases like it, this process of grooming is now used as evidence in the trial of sexual offence(s) against a child.

In the case of *S v M*¹⁰, a case of sexual abuse of the accused's step-daughters, the court noted, "a lack of violence is not always a mitigating factor when sentencing"

led that the offender used violence or a threat of violence. Subsequently, in such cases, a lack of violence is not always a mitigating factor when sentencing.¹²

Thus, this evidence of grooming distinguishes a need for violence in the commission of the sexual crime. On the other hand, and moreover, the evidence of grooming can show a paedophile's true intention. In other words, it brings to light that the "sexual abuse of children is calculated and stage-managed, indicating clear mala fide and intent",¹³ where the end goal is usually sexual activity with the victim child.

This evidence of this true intent could have an interesting effect. If evidence can be led that a classified paedophile has not yet acted on his 'sexual urges' but has begun the grooming process, it could be argued that a sexual offence with the child would eventually occur. The legislature has considered this and has grouped certain aspects of grooming behaviours under the offence of sexual grooming in the Criminal Law (Sexual Offences and Related Matters) Amendment Act.¹⁴ This offence includes: encouraging a third-party to perform a

⁸ H Conradie "Entrapped by grooming: about the modus operandi of paedophiles" (2006) *The Social Work Practitioner-Researcher* 174 cited in (2008/2009) *Sexual Offences and Community Affairs Bulletin* (NPA) 54 at 56 – 66.

⁹ Ehrlich par 125.

¹⁰ 2007 (2) SACR 60 (W).

¹¹ 2007 (2) SACR 60 (W) para 37D.

¹² 2007 (2) SACR 60 (W) para 85.

¹³ Conradie (2008/9) *Sexual Offences Bulletin* (NPA) 56.

¹⁴ Act 32 of 2007.

sexual act with a child; showing a child a film or pornography to explain or encourage the child to perform a sexual act; and conduct that encourages or forces a child to perform a sexual act with another person, self-masturbation, or expose parts of their body.¹⁵

In conclusion, 'paedophilia' is only a medical or psychological diagnosis, with no influence on the actual legal conviction of an offender of sexual offences against children. However, this mental disorder can still play a role in the trial of a paedophile. This role is particularly vital when leading evidence of grooming behaviours that either proves an offence of sexual grooming, and/or influences sentencing. Therefore, it is important that when convicting a paedophile, his or her *modus operandi* is investigated and brought to the court's attention.

15 S18.

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Marais is a student currently completing her LLB research project on the general stance of Paedophilia in the South African legal sphere.

¹ *The People of the State of California v Michael Joseph Jackson* (2005) 128 Cal.App.4th 1009.

² *Ehrlich v S* (unreported) case no. CA & R 341/04 delivered 4 September 2008 (E).

³ Ehrlich par 1.

⁴ Where the child is usually 13 years or younger; where on the other hand, 'infantophilia' is the sexual interest in children younger than 5 years old; A Van der Hoven and M Ovens "A forensic case study of a paedophile illustrating the presentation and value of the pre-sentence evaluation report" (2003) *Acta Criminologica* 19 at 20.

⁵ The revised fourth edition is the latest edition (DSM-IV-TR), published in 2004.

BY KATE SCOTT-SHAW
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WITNESSING YOUR DEGREE IN MOTION

From tutorials to trial -

I have a vivid memory of studying for a civil procedure exam. A table contrasted 'Action' and 'Application' procedures. I repeated for the fourth time: "oral evidence is action, affidavits are application". A snapshot of this table popped into my mind as I was sitting in motion court for the first time during articles. I had been in the meetings when counsel had drafted the various affidavits. I had taken our client to depose their affidavits in front of a commissioner of oath. I had served and filed the very papers which the Judge slowly flipped through. Theory had become practice.

Later that year I began assisting with trial preparation. Although there is vast preparation and much pruning of affidavits in the application procedure, it is known for being speedier than the action procedure. I now understand why; while assisting with trial I felt like an events co-ordinator. Preceding and during trial, your life becomes a blur of ensuring all the witness document bundles are correct and delivered to the right people, setting up the evidence in court each morning, quelling crises when witnesses have arrangements that clash with their court appearances, bartering and exchanging cash with interpreters at the end of the court corridor, running back and forth to the court library for judgments and reassuring distressed witnesses.

I remember presenting my moot at Rhodes; after raised stress levels and some late night rehearsing, I recall how difficult it was to learn as much case law on the subject as possible so that when on your feet, you could cover any challenge thrown at you. Having had to prepare on a set issue, it is fascinating to be in court with your client's instructed advocates, knowing that you have assisted on the research and preparation of the papers from which their eloquent argument flows. Their depth of knowledge and ability to recall authoritative case law is mind-boggling. I remember chuckling as one of South Africa's top advocates pleaded with the Judge that our opponent was by no means in the position of an 'Idutywa pensioner'! Subtleties and innuendos are definitely the name of the game in this battle.

After a gruelling morning in court, the Judge signals a break for lunch, our team progresses down the court stairs; either excited at receiving an acknowledging nod from the Judge during argument or disheartened as a witness conceded unnecessarily during cross-examination. The banter continues and then hushes when the opposing team draws near. Strategies and angles of arguments are exchanged over a quick bite to eat and, with a flap of a black gown,

we are back to court. After experiences such as these I can now mentally tick off each 'compare and contrast' row of my civil procedure study table and can add some of my own intricacies and anecdotes.

Learning from Lectures - I remember sitting in the Graham room gazing ahead, waiting for the lecture to begin. It began with the words: "if there is one thing to take from my lectures, know the case of *Barkhuizen v Napier*." Having studied and read academic articles about the case, it is so rewarding to see its principles argued in court and applied in recent judgments. Such were the cases of *Bredenkamp and Others v Standard Bank of South Africa Ltd and Another (2009/7907) [2009] ZAGPJHC 4* (the interim interdict) and *Bredenkamp and Others v Standard Bank of South Africa Ltd and Another (09/7907) [2009] ZAGPJHC 30* (the final order).

The bank had made an executive decision to close a customer's various business accounts and terminate the underlying contractual relationship. The customer and the various businesses had been placed on the United States sanction list and had gained a notorious reputation in the media for the conduct of these various businesses.

The bank, fearing damage to their reputation and a significant business risk in banking a client of this nature, decided that they would not transact with any person who was listed on either the American or European sanctions lists. In terminating the offending contracts, the bank relied on the general terms and conditions in their various banker/customer contracts which stipulate that the bank can terminate the contract on reasonable notice for any reason. Written notice was given by the bank, as well as two consensual time extensions in which period the customer was to find an alternative bank to open facilities with.

During this period, the client sought an interim interdict restraining the bank from cancelling the contract pending the final determination of whether the bank had a right in law to cancel a banking contract on reasonable notice. In both hearings, counsel for the customer relied on the principles emanating from *Barkhuizen v Napier 2007 (5) SA 323 (CC)*. *Barkhuizen v Napier* is authority for the proposition that a party to the contract cannot, first, impose a term on another party if it would operate unfairly and, secondly, cannot enforce a term in a manner that is unfair.

In the judgment for the interim interdict, the court watered down the test for the granting of interim relief and held that the central question was whether it was fair, in the circumstances, to allow the bank to terminate its contracts with the customer.

In granting the interim interdict and coming to the finding that the bank's decision to close the accounts was unreasonable, the court held that the banks operate within the framework of an oligopoly in which the four large banks dominate the market for banking services. Consequently, the banks offer similar products and services with the result that a prospective customer has little choice on the contracts he or she must conclude in order to become a bank customer. The court held that in effect, the closure of an account operates to put the customer on an informal "blacklist".

In contrast, the court hearing the matter for final determination held that the customer must be treated as if it was a person of equal bargaining capacity at the time the contract was concluded. The contract must accordingly be treated as if it was concluded by contracting equals, each able to include terms which they each required. Each party was free to negotiate and conclude the terms ultimately agreed. The terms contained within the contract represented the product of persons who were skilled enough to know what they were doing and who were able to implement their knowledge freely; each exercised its rights of freedom and dignity to conclude a relationship governed by terms that each found appropriate to govern their relationship.

"...Thus, after performing a rights-balancing exercise, the court found that the bank's conduct in exercising its right of cancellation of the contract to be constitutionally fair..."

The court determining the final order considered constitutional fairness by comparing the impact of the bank's conduct upon the customer with the impact of the continued relationship on the bank, if the bank were not entitled to cancel. If the bank were allowed to cancel, then the applicant could seek banking facilities elsewhere. If the bank was not allowed to cancel, the bank would be compelled to continue a relationship with a person with whom it does not wish to remain in contact, and the continued relationship would place it at risk financially, both locally and internationally. This would significantly invade the bank's right of freedom to contract. It would cause it an indignity in that it would be forced to accept a position it finds repugnant.

Thus, after performing a rights-balancing exercise, the court found that the bank's conduct in exercising its right of cancellation of the contract to be constitutionally fair.

At Rhodes we learnt about the weighing up of the nature and importance of a right against the extent, importance and purpose of the limitation. I have observed how judges are faced with two sets of papers, they hear two sets of arguments and they ultimately weigh each up to give a judgment depicting why, in the circumstances, the chosen argument trumps. Back at the office a similar exercise is performed in preparation of the papers and for the hearing of a matter. Possible arguments for and against your client are debated at length and an argument is finally formulated with the intention to tip the scales in your client's favour.

With the fast paced lifestyle of articles, one often does not take the time to consider the transgression from studying to working life. Starting your articles is a metamorphous like no other; to be plucked from your comfortable 80-seater fishbowl and plopped into the hot waters of a busy litigation department (after a three month beach vacation) is no easy feat. Being thrown in the deep end and applying your training to stay afloat, despite mouthfuls of water, is the most common means of survival. But there is nothing better than having that moment of realisation when you flashback to your Rhodes days and think to yourself, 'so this is what my lecturer was talking about!' All your hours of studying for tests and exams become worthwhile when you read a judgment in your client's favour, on which you have assisted every stroke of the way. DR

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A landmark decision in South African Trust Law?

By Rowan Stafford

Today's law of trusts is no longer confined to the traditional common law principles that existed previously. With the implementation of the Constitution of the Republic of South Africa, 1996, together with the functioning of the Trust Property Control Act¹, South African courts are obliged to give the fullest protection to the beneficiaries of an *inter vivos* trust and in doing so, keep a watchful eye on miscreant trustees. However, unlike most other common law jurisdictions, South African trust law is based on the law of contract, and not the law of equity. The consequence of the above is a seeming mismatch of beneficiary rights, trustee obligations and a mountain of legal disparities.

In 2005, one of the most significant developments in trust law occurred since the promulgation of the Act when the Supreme Court of Appeal handed down judgment in *Land and Agricultural Bank of South Africa v Parker and Others*.² Cameron JA, writing a unanimous judgment, noted that the trust, although a useful instrument in the management of assets, is often exploited for the protection it offers.³ The learned judge reasoned that in light of the widespread abuse of the trust form, it was necessary to extend the well-established principles of company law into trust law. In particular, the court necessitated the importation of the 'doctrine of the corporate veil' as well as the future possibility of also extending the *Turquand* Rule⁴ in the same manner.

The outcome of *Parker* is that the courts are now able to 'pierce the veneer' of a trust, should the conduct of the trustees invite the inference that the trust form was a mere façade for the conduct of a business 'as before', and that assets allegedly vesting in trustees in fact belong to one or more trustees.⁵ Under such circumstances, the veil will be lifted, and the trust property which was once protected by the trust, becomes susceptible to the claims of third-party creditors.

A year later, in the matter of *Badenhorst v Badenhorst*⁶ the SCA once again waved its wand over trust law and the ripple-effect of the *Parker* judgment became apparent. The respondent in this case sued his wife in the court *a quo* for a decree of divorce

and ancillary relief. The appellant wife counter-claimed and sought a redistribution order in terms of s 7(3) of the Divorce Act,⁷ whereby fifty-percent of the value of the respondent's estate be awarded to her. Included in the appellant's prayer was a claim that the assets within the family trust be regarded as assets in the respondent's estate. Armed with the veil piercing doctrine, the court considered the application and unsurprisingly, the result was a further development in the law. With reference to the unscrupulous power granted by the trust deed to the respondent, the fact that the respondent had no regard for the difference between trust assets and his own, as well as being dissatisfied by the respondent's apparent misuse of the trust, Combrinck AJA held that the present case was a classic example of the one party having full control of the assets of the trust, and merely using it as a vehicle for his business activities.⁸ In its closing, the Court accepted that the trust was in effect the respondent's alter-ego and on that ground, the appeal succeeded and the trust property was taken into account in the redistribution order.

What is evident from *Badenhorst* is that the courts are willing to pierce the trust should the court find the trust to be the 'alter-ego' of the settlor. Furthermore, Combrinck AJA accepted the trial court's conclusion that unless the court finds the trust to be a 'sham', no redistribution order can be made with regard to the trust property.⁹ This supports the widely accepted academic opinion that in *Badenhorst* the court did in fact find the trust to be a sham.

In my opinion, neither of the above judgments expressed the correct view. Both decisions respectively reflect little knowledge of the doctrines of the 'sham' and the 'alter-ego', which has in turn led to two wholly unjustified decisions.

To begin with, the doctrine of the 'sham' has its origins in English law. Accepted unanimously in Australia, New Zealand, Canada and the United Kingdom is the *Snook* test,¹⁰ which sets out the shamming status of any transaction. This test has been adopted and readily applied in the majority of sham trust cases abroad and in summary, requires there to be a common intention amongst the settlor and at least one trustee to mislead or deceive third parties into the belief that the trust is genuine,

when in fact it is not. Worryingly, in *Badenhorst* the SCA failed to take cognisance of this test. Instead Combrinck AJA held the trust to be a sham based on the court's conclusion that the trust was the 'alter-ego' of Mr. Badenhorst.

Unbeknown to Combrinck AJA, the alter-ego trust argument is not an argument of sham. For sake of clarity, the argument of sham arises when it is found that the arrangements apparently in place are not real. As it relates to a family trust, the concept of sham requires there to be a finding at law that a part or the whole of the trust is in fact a façade.¹¹ An alter-ego trust on the other hand is more limited, and it represents two distinct situations. The first is where assets are settled on a trust, but the trustees of the trust act as mere puppets, doing whatever they are instructed to do. The second is where the trust property is treated as if it were personally owned, instead of belonging to the trust.

The above distinction was confirmed in the case of *Official Assignee in Bankruptcy in the Property of Gary Martin Reynolds v Wilson & Others*¹² where the New Zealand Supreme Court cautioned against the amalgamation of the two doctrines. In particular, Robertson J reasoned that if alter-ego trusts were to be automatically recognised as shams, the common intention requirement held in *Snook* would be negated. The learned judge pointed out that the result would be the creation of a halfway house between a conventional sham trust and a valid trust and that such a development would be effectively to rewrite the traditional understanding of a sham.¹³

Returning to *Parker*, there are two aspects of Cameron JA's judgment that are questionable, to say the least. Firstly, the trust in dispute was neither held to be a sham, nor was it declared the alter-ego of the settlor. For all intents and purposes this was correct according to the multitude of foreign judgments dealing with similar facts. However, overseas, it is settled practice that the veil of a trust cannot be lifted unless the trust falls under one of those categories. Hence the importation of the 'piercing of the corporate veil' doctrine discussed earlier. Suddenly, it seems as if the SCA had its mind set on the outcome of the case prior to its hearing and simply re-drafted the law of trusts in order to achieve the desired result.

Secondly, the SCA failed to realise the incompatibility of the imported corporate law doctrine with trust law. In essence, a trust misses the key ingredient which motivates the application of the veil piercing doctrine – separate legal personality. A company in this regard is distinct from its members. This allows a company to perform juristic acts in its own name, as well as to sue and be sued. This, according to *Salomon v Salomon & Co Ltd*¹⁴ is what affords the members and directors of companies the well established protection against personal liability and is the core of the corporate veneer. Needless to say, the 'piercing of the corporate veil' doctrine acts to discard the separate corporate personality of a company or close

corporation. A trust on the other hand does not have separate legal personality, nor does it have *persona standi in iudicio*. It thus follows that on a technical front, the doctrine is unsuited to the trust entity. Catastrophically, this was not taken into consideration by Cameron JA in *Parker*.

Ironically, in Honoré,¹⁵ Cameron himself discusses 'the danger of imprudently translocating legal doctrines from one area of the law to another without due caution and consideration',¹⁶ noting that the decision in *Man Truck & Bus SA v Victor*¹⁷ was incorrect because the court sought to impose on the trust, which has no legal personality, company law doctrines such as the *Turquand* Rule.¹⁸

In conclusion, South African trust law has undoubtedly been the subject of many unwarranted developments over the past five years. The failure to fully appreciate and distinguish relevant trust law doctrines is not only offensive to the rights of beneficiaries, but also to the very essence of the trust entity and the duty of South African courts to uphold those rights. Furthermore, surely a mismanaged trust is better dealt with according to the law of trusts and not company law? It is submitted that the courts should change the existing approach in order to restore certainty, predictability and a more sound trust law, harmonious with its very origins. The legal personality of a company is a matter of substance and not merely a technicality which may be shifted to other areas of the law. Moreover, substance should not be cast aside for apparent convenience and piercing the veneer of a trust imposes a scheme of rights and obligations on the parties which are very different from that upon which they arranged their affairs. Accordingly, when the courts lift the veil, the effect thereof is substantial and is potentially damaging to those parties. The above reasoning explains why foreign courts observe the strictest approach when considering the casting aside of a trust's veneer.

¹⁵ E Cameron *et al* Honoré's South African Law of Trusts 5 ed (2002).

¹⁶ Honores Cameron pg 34.

¹⁷ 2001 (2) SA 562 (NC).

¹⁸ Cameron *et al* Honoré's South African Law of Trusts 95.



Rowen Stafford

¹ Act 57 of 1988. Hereafter referred to as 'the Act'.

² 2005 (2) SA 77 (SCA).

³ Para 23 – 24.

⁴ Based on the rule developed in *Royal British Bank v Turquand* 1856 119 ER.

⁵ Para 37.3.

⁶ 2006 (2) SA 255 (SCA).

⁷ Act 70 of 1979.

⁸ Para 10.

⁹ Para 7

¹⁰ Based on the case of *Snook v London & West Riding Investments Ltd* 1967 (2) QB 786.

¹¹ *Faucilles* 90 ATC 4003.

¹² 2008 NZCA 122.

¹³ Para 58.

¹⁴ 1897 AC 22 (HL).

“A Rose by any other name” ?

The Supreme Court of the United Kingdom

By Professor Graham Glover
Associate Professor of Law

Two-thousand-and-nine has been a significant year for the judicial system in the United Kingdom. Following an extensive and contentious phase of constitutional reforms, the judicial functions of the House of Lords have come to an end, and the United Kingdom now has a new Supreme Court. Since decisions of the House of Lords are a feature of law students’ reading lists across the South African curriculum, and decisions of the courts in the United Kingdom continue to be cited by South African courts, a review of what has happened to the United Kingdom’s judicial system should be of some interest.

Background

Traditionally, the House of Lords, in addition to being the second (higher) chamber of the legislature, also had a judicial function as the court of appeal of last resort. Although originally the entire House could hear and vote on appeals, this practice soon died out because of the load it placed on the full House and its legislative duties, and because most peers had no legal training. Hence, by convention, it became the practice that only those members of the House who were legally qualified (Lords of Appeal in Ordinary, colloquially known as “Law Lords”) were entitled to hear appeals. By the 1990s there were twelve Law Lords, appointed by the Sovereign on the recommendation of the Prime Minister, and who became life members of the House of Lords – although they had statutory limitations on their role as members of the judicial appellate committee itself. Normally, an appeal would be heard by five of the Law Lords.

Since the Parliament of the United Kingdom is known for its pomp and pageantry, one might be forgiven for thinking that an appearance before the House of Lords Judicial Committee would have been marked by high formality. Interestingly enough, this was not really the case. During World War Two, it became the convention to hold judicial sessions in a Committee Room, and this continued to be the case until this year. The room was neither large, nor daunting, nor ornate. No robes or wigs were worn by the Law Lords. The atmosphere has been described as “relatively informal”. The more formal side of matters came at the time of judgment, which was given in the full chamber of the House of Lords. Only the Law Lords spoke, delivering their respective opinions, which were properly called speeches. By convention, the House would vote to follow the majority opinion of the Law Lords who adjudicated the matter. All members of the House of Lords were free to attend and to vote in such sessions, although not very many would do so.

Concerns

During the latter part of the twentieth century, concerns began to be raised about this structure, and whether it violated the principles of good democratic governance and the European Convention on Human Rights. In particular, the fact that a person could hold legislative and judicial powers at the same time was self-evidently contrary to the doctrine of separation of powers and the fundamental principle of judicial

“while some traditionalists might have cried “O tempora, O mores”, to all intents and purposes the judicial process will continue in much the same manner as before”

Blair’s government was the passage through Parliament of the Constitutional Reform Act, 2005. Although this Act changed a number of things about the British constitutional system, for our purposes, its primary effect was the abolition of the judicial appellate function of the House of Lords, and the creation of a “Supreme Court of the United Kingdom”. The structural approach adopted in doing so was quite different to that adopted in South Africa in the 1990s, when the Constitutional Court was created. We chose to create a brand-new Constitutional Court that was additional to, and separate from, the original highest court (the Appellate Division), and which saw justices appointed across a broad range of candidates, including from the ranks of those who had not held judicial office before. In the United Kingdom, on the other hand, the least dislocating approach was adopted. The same twelve Law Lords who held office as members of the House of Lords Judicial Committee were by statute appointed as the first twelve justices of the Supreme Court. The Senior Law Lord (Lord Phillips of Worth Matravers) has become the first President of the Supreme Court, and the former Second Senior Law Lord (Lord Hope of Craighead) is the Deputy President. The Court will continue to sit and hear appeals in benches of five members, and will thus not sit as one, or *en banc*, as most Supreme Courts (including South Africa’s Constitutional Court) do. (The wisdom of this has been questioned by some: see, for example, the comment by the Rt Hon Sir Richard Buxton “Sitting en banc in the new Supreme Court” (2009) 125 LQR 288.)

The one significant change is that the court will no longer simply be a committee housed in the Houses of Parliament, but will have a separate physical existence to enhance the impression of judicial independence. The Court will be housed at the Middlesex Guildhall in Parliament Square, which has been renovated to meet the needs of the Court and its administra-

independence. What made the system even more contentious was that the Lord Chancellor (one of the great officers of State in the British constitutional system) effectively held positions in all three forms of government: legislatively, as a peer in the House of Lords; judicially, as a Law Lord; and executively, as what would probably be described as the Minister of Justice in Cabinet. (For a discussion, see Fiona Cowney and Anthony Bradney *The English Legal System* 2 ed (2000) 44–47).

Reforms

One of the most controversial episodes of Tony

Blair’s government was the passage through Parliament of the Constitutional Reform Act, 2005. Although this Act changed a number of things about the British constitutional system, for our purposes, its primary effect was the abolition of the judicial appellate function of the House of Lords, and the creation of a “Supreme Court of the United Kingdom”. The structural approach adopted in doing so was quite different to that adopted in South Africa in the 1990s, when the Constitutional Court was created. We chose to create a brand-new Constitutional Court that was additional to, and separate from, the original highest court (the Appellate Division), and which saw justices appointed across a broad range of candidates, including from the ranks of those who had not held judicial office before. In the United Kingdom, on the other hand, the least dislocating approach was adopted. The same twelve Law Lords who held office as members of the House of Lords Judicial Committee were by statute appointed as the first twelve justices of the Supreme Court. The Senior Law Lord (Lord Phillips of Worth Matravers) has become the first President of the Supreme Court, and the former Second Senior Law Lord (Lord Hope of Craighead) is the Deputy President. The Court will continue to sit and hear appeals in benches of five members, and will thus not sit as one, or *en banc*, as most Supreme Courts (including South Africa’s Constitutional Court) do. (The wisdom of this has been questioned by some: see, for example, the comment by the Rt Hon Sir Richard Buxton “Sitting en banc in the new Supreme Court” (2009) 125 LQR 288.)

Conclusion

According to the provisions of the Constitutional Reform Act, the judicial functions of the House of Lords came to an end on 31 July 2009. In fact, the House of Lords Judicial Committee handed down its final six decisions on the afternoon before – Thursday the 30th of July – in accordance with the custom that all judicial business of the House was attended to on Thursday afternoons. And thus, the function of one of the most significant courts in the world came to an end. But the moment was not accompanied by great nostalgia or fanfare, doom or gloom. For, while some traditionalists might have cried “O tempora, O mores”, to all intents and purposes the judicial process will continue in much the same manner as before; just in a new home down the road. It was on the 1st of October that the new Supreme Court began its work. We can no doubt expect the same traditions of judicial excellence that epitomised the work of the House of Lords Judicial Committee to characterise the work of the new Supreme Court, and South African courts will surely continue to look to the decisions of this Court for guidance where appropriate.

One last footnote: for the sake of completeness, the Constitutional Reform Act does not affect that other judicial appellate committee – the Judicial Committee of the Privy Council – which will continue to exist and to operate as the final court of appeal for those nations and states of the British Commonwealth that still utilise its services. However, that Committee will now be housed in, and will decide appeals in, the new Supreme Court building, rather than in the old Houses of Parliament. This will draw a clear and final distinction between the legislative and judicial arms of the British State and the Commonwealth.



Graham Glover

From Human Wrongs to Human Rights

By Roxanne Francis-Pope

After months of demanding research and diligent preparation, we finally found ourselves stepping out into the suffocating and buzzing air of Lagos, Nigeria, to represent Rhodes University in what is now recognised as the largest academic human rights gathering in Africa: the All Africa Moot. It was with some anticipation that we arrived in the city: we knew that security would always be a legitimate concern and that four gruelling moots lay ahead of us.

The hypothetical case to be argued canvassed a variety of current issues in Africa's human rights jurisprudence which require development, including whether the African Court has the authority to depart from a decision of the International Court of Justice; whether a person who is considered a threat to national security may be detained without trial; whether a group advocating the rights of sexual minorities has the right to be registered in a country outlawing sodomy; as well as issues pertaining to, among others, genocide. We had to argue for both the applicant and the respondent, and put forward arguments as to admissibility and the merits on each topic.

The more we learned about our host country during our stay, the more we realised that these issues found specific reference to its current legal situation, especially regarding events occurring in the Niger Delta.



The moots, which took place on the University of Lagos Campus, required us to show our knowledge of international law sources, an articulate analysis of the issues and an ability to respond to questions from the (sometimes surprisingly hostile) judges. The experience was both exhausting and exhilarating. The opportunity to mix with some 160 law students from a variety of different legal traditions to discuss these topical issues was invaluable.

We returned home proudly South African and equally-proud Rhodes students, being placed 5th overall with

Chris McConnachie winning best oralist. We are incredibly grateful to Schindlers Attorneys for their fiercely loyal and much appreciated sponsorship of our moot team. Your contribution made our attendance at the event a possibility. It is now with a new appreciation of human rights in Africa and the importance of the African Charter that we view the legal system, and hope that we have, in at least a small way, contributed to the recognition and development of human rights on our continent.



Roxanne Francis-Pope and Chris McConnachie, winners of the final year Rhodes Moot Competition, represented Rhodes University in the 18th All African Human rights Moot Court Competition 2009 in Lagos, Nigeria.

About the Competition

The African Human Rights Moot Court Competition has become the largest annual gathering on the continent of students and lecturers of law. Established in 1992, 845 teams from 125 universities, representing 45 African countries, have over the last 17 years participated in this premier event on the university and human rights calendar of the continent.

The Competition aims to prepare a new generation of lawyers to argue cases of alleged human rights violations before the newly established African Court on Human and Peoples' Rights, which is likely to become operational in 2008. The programme is organised each year by the Centre for Human Rights, in collaboration with a faculty of law in a host country on the continent.

In 2009, the Moot Court Competition was hosted at the University of Lagos in Nigeria. Some 80 African universities were expected to send teams to participate. Prominent African and international jurists served as judges in the final round. Students and lecturers also attended a one-day training workshop on human rights in Africa.

The African Human Rights Moot Court Competition is unique in giving the youngest and the brightest future African lawyers the opportunity to critically examine the human rights situation on the continent, with a view to improving it through the use of the persuasive tactics of logical legal argument based on the African Charter on Human and Peoples' Rights.

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Human Dignity is an Oxymoron

By Chris McConnachie

A brief synopsis of a more complete argument developed in his final year research paper.

There is no doubt that human dignity is the ethical foundation of our Constitution. It is described as the 'touchstone' of our society, the source of all other personal rights in the Constitution and the guiding principle for all law.¹ Despite this high praise, it is a concept that remains frustratingly indeterminate. I contend that if we subject it to closer scrutiny we will find that it is internally contradictory: an oxymoron. The ethical obligations required by a commitment to dignity are simply too far-reaching to be confined to human beings alone.

¹ *S v Makwanyane* 1995 (3) SA 391 (CC) paras 144 and 329.

As a starting point, we need to gain a clearer sense of what human dignity means. In its ordinary usage, the word 'dignity' can be thought of as a synonym for moral value, worth or esteem. The concept of 'human dignity' goes a step further by making a radical claim: that all human beings possess equal and inherent dignity and are entitled to have this dignity respected. It is a radical idea as it entails all human beings have equal value that is independent of their talents, abilities, intelligence, race, class, sex, religion etc. The starving refugee and the successful business mogul are of equal value and significance and ought to be treated with respect consistent with this status. The only thing that matters to their moral value is their shared humanity.

This takes us some way to understanding the content of human dignity, but what does it mean to recognise others as being of equal value with an equal entitlement to respect? I suggest that two ethical values form the basic core of these obligations. The first is the principle of equal moral significance. This requires that everyone's interests must be taken into account and cannot be ignored. The second principle is the principle of equal consideration. This requires that we must afford equal weight to the similar interests of others. Their interests are just as important as the similar interests of others and ought to be weighed on the same moral scale. Slavery violated the first principle as it regarded the interests of slaves as being of no significance whatsoever. Apartheid violated both principles by treating the interests of black South Africans as being, at best, less worthy of consideration than the similar interests of whites and, at worst, as being entirely irrelevant.

This account of the ethical obligations of human dignity is somehow deeply satisfying. However, there is a niggling worry lurking at the edges of this concept. If we are to say that all human beings possess equal and inherent dignity, then where does this entitlement come from? Given that we have rejected talent, intelligence, success or any other factual quality of human beings as being irrelevant to their moral worth, where are we to find the source of our equal and inherent value? The challenge of finding this source is neatly articulated by the philosopher Tom Regan: it must be shown that there is 'something invariant and equal in all human beings and *only* in their case'.¹

The natural response to this challenge is simply to assert that the thing that is equal and exclusive to all of us is the brute fact that we are members of the human species. That seems plausible at first glance. However, on closer inspection there is a clear flaw in this assertion. It responds to the question, 'why are human beings inherently valuable?', with the simple response, 'because we are human beings'. This is not a justification but rather a mere tautology. It is much the same claim that the bigot would make in justifying his preference for his own race, class, sex or soccer team. This sort of logic is the foundation of any form of prejudice and cannot be used to

¹ T Regan 'Animals Have a Right to Life' in T Regan and P Singer (eds) *Animal Rights and Human Obligations* (1976) 197 at 198.

justify a principle as enlightened as human dignity. To present any real justification for the moral significance of our species, we would have to point to some quality that is uniquely human. The most obvious quality is that of our intellectual abilities. Our intellects are indeed impressive. We have developed calculus and quantum mechanics, built technological marvels and have put man-made objects on other planets. Surely this gives us an entitlement to exclusive moral worth? The problem is that this is not a quality found in all human beings. Young children, the elderly, those suffering from brain damage or other comparably serious mental defects all lack the type of mental capacities that we think are uniquely human. While children may develop these capacities in time, a significant portion of human beings will never gain these abilities, let alone the ability to care for themselves. If we were to assign moral value on the basis of intellectual abilities we would have to exclude the weakest and most vulnerable in our society. This is a monstrous conclusion, one which is antithetical to the very notion of human dignity. Therefore, this cannot be the source of our equal and inherent human value.

We may cast out for any number of additional qualities that we believe to be intrinsically human, from forming religious beliefs to having intimate relationships. I would argue with a fair degree of confidence that the same two problems will always arise: either the quality is not found in all human beings (many human beings, myself included, cannot muster much religious conviction) or it is not exclusively human (the capacity for relationships is certainly shared by all social species). Ultimately there is simply no answer to Regan's challenge.

The result is that we should not abandon human dignity and the important ethical obligations that it requires. Instead, the philosophical dead-end that we have reached calls for a reassessment of the content of this value. The reason for our difficulties in locating the source of human dignity is simply that it does not rely on a factual source. The idea encapsulated in human dignity - that all human beings possess equal and inherent moral value - is not a description of the *factual* equality of humans but is instead an ethical principle: that we *ought* to treat others as being bearers of equal worth. As a result, human dignity as an ethical principle does not require humans to be factually equal in any sense.

What human dignity does require is that we must treat the interests of others as being morally significant and deserving of equal consideration. The only thing that matters to this entitlement is the fact that they possess interests. Any factual feature of their identity that has no bearing on whether they possess interests cannot be an appropriate dividing line for their value. For someone to possess interests they must, at minimum, be sentient. This is the capacity to experience pain and pleasure; the essential requirement for anything to be said to have 'a welfare' with an interest in promoting this welfare. Without doubt all mammals and the majority of other non-human animals possess sentience and do feel

pleasure and pain, a point that was emphatically recognised in the recent minority judgment of Cameron JA (as he was then) in *NSPCA v Openshaw*.² I am content to leave this claim as an unsupported assertion as our daily experience of our companion animals as complex, embodied creatures with the capacities for tremendous pleasure and unspeakable suffering presents the most powerful case for their sentience.³

If I am correct that human dignity requires the equal consideration of interests and that non-human animals are sentient creatures that possess interests then we have to conclude that the ethical obligations required of human dignity cannot be confined to humans alone. If this is the case, then talk of human dignity is an oxymoron. The ethical obligations required by human dignity are simply too broad and expansive to be qualified by the arbitrary species-marker 'human'. Instead, we can only give full expression to these obligations if we recognise a species-neutral concept of dignity, one that applies to all animals, human and non-human.

This conclusion has radical implications for our treatment of non-human animals. If we take as our premise that human dignity is the source of all personal rights under the Constitution then to expand dignity to include non-human animals would entail a dramatic change in their legal status. It would require their elevation from the status of objects of rights, mere property whose only protection is found in weak anti-cruelty laws,⁴ to full bearers of moral worth deserving to be treated as bearers of rights. This is an unavoidable consequence if we take the ethical implications of a commitment to dignity under our Constitution to their logical extension. The slow-moving nature of our legal system combined with the general ambivalence of the majority of South Africans to the interests of animals would present significant stumbling blocks.⁵ Nevertheless, if one accepts that dignity cannot be confined to human beings, then there is a clear moral imperative to gradually develop the law in this direction.

² (462/07) [2008] ZASCA 78 (RSA) para 38.

³ This point is emphatically made in JM Coetzee *The Lives of Animals* (1999).

⁴ Performing Animals Protection Act 24 Of 1935; Animal Protection Act 71 of 1962; Societies for the Prevention of Cruelty to Animals Act 169 of 1993.

⁵ For a full analysis of the political, economic, religious and legal hurdles to such a process see S Wise 'Animal Rights, One Step at a Time' in CR Sunstein and MC Nussbaum (eds.) *Animal Rights: Current Debates and New Directions* (2004) 19 – 50.



Chris McConnachie

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Victory in the Hlophe Saga

By Dario Milo

In August this year, Judge Frans Malan in the South Gauteng High Court handed down a ruling which reaffirmed the fundamental constitutional principle that government must function in accordance with the values of openness, transparency and accountability.

The drama began on 22 July 2009, when the Judicial Service Commission (JSC) decided to appoint a 3-member sub-committee comprising Judge Bernard Ngoepe, the Judge president of the North Gauteng High Court, Ismail Semanya SC, and Marumo Moerane SC, to investigate the complaint by the judges of the Constitutional Court against Judge President of the Western Cape High Court, John Hlophe, and his counter-complaint against the Constitutional Court judges. The JSC decided that the complaints would be investigated by conducting interviews "behind closed doors" with Chief Justice Pius Langa, Deputy Chief Justice Dikgang Mosekeke, Justice Bess Nkabinde, Judge of appeal Chris Jafta, and Judge Hlophe.

The decision to investigate the complaints in private came as a shock to members of the media. Ever since it was announced in July last year that the JSC would be holding a formal hearing into the complaints, the media had agitated for an open hearing. To its credit, the JSC had then called for representations from interested parties on the question of whether the formal hearing – ultimately scheduled for April this year – should be open to the public.

But after the JSC considered these representations, it decided, just a few days before the April hearings were due to begin, that the hearings would be closed. In an important show of unity, a number of print media groups, eTV and the Freedom of Expression Institute, with the Centre for Applied Legal Studies intervening as a friend of the court, brought an urgent application to set aside the JSC's decision. Judge Nigel Willis in the South Gauteng High Court ruled that the JSC was required in terms of its own rules to hold the formal hearing in the open, unless good cause is shown otherwise. The reason that the JSC had given for keeping the hearing closed – that this was required in order to protect the dignity of the office of the chief justice, the deputy chief justice and the judge president – was not sufficient to exclude the media. Judge Willis endorsed the sentiment of the philosopher Jeremy Bentham, who famously said, "publicity is the very soul of justice. It is the ... surety of all guards against improbity".

And indeed, the formal hearing proceeded on the first of April this year in the glare of media publicity. Judge Hlophe requested a number of postponements due to illness, but the JSC ultimately resolved to continue the hearing in his absence. Evidence was then heard from the Constitutional Court judges and widely reported on by the media.

Before the JSC could conclude the hearing, Judge Hlophe successfully applied to the South Gauteng High Court for the proceedings of the JSC to be declared unlawful. The majority of the Court, led by Judge Moroa Tsoka, ruled that the

“The Constitutional Court judges alleged that Judge Hlophe had improperly attempted to influence one of the Court’s decisions”

proceedings ought not to have taken place in Hlophe’s absence, and set aside the two days of the hearing during which the Constitutional Court judges had given evidence. The court ordered that these proceedings had to commence *de novo*.

It appears from court papers that it was this decision of the High Court, together with the fact that, in the meanwhile, the JSC had experienced a material change in its composition that prompted the JSC to change

its procedure in relation to the complaints to that of a private preliminary investigation conducted by a subcommittee. But the media and others were not going to take that decision lying down. They again came together to bring an urgent application before Judge Malan, arguing that the JSC had not exercised its discretion to decide on a closed hearing with due regard to the constitutional rights of freedom of expression, and to the principle of openness.

Judge Malan agreed, ruling that although the JSC was empowered to change its procedure for adjudicating on the complaints, “this power does not absolve them from acting in accordance with the Constitution”. As an organ of state, the JSC was obliged to exercise its discretionary power “with appreciation of the impact of [its] decisions on the constitutional rights of those affected”. The JSC had argued that it was important for the investigation to take place “outside the intrusive glare of publicity”, and that the closed nature of the investigation would allow the judges to speak freely. Judge Malan rejected these arguments. Most of the judges had already testified in an open hearing and there had been no suggestion that they had not been able to speak freely; moreover, none of the judges opposed the relief sought by the media. The application by media groups and others to open the hearing was granted with costs.

There can be no underestimating the significance of the complaints that were being investigated. The Constitutional Court judges alleged that Judge Hlophe had improperly attempted to influence one of the Court’s decisions. Judge Hlophe alleged that the Constitutional Court judges invaded his right to dignity by prematurely informing the public of their complaint, and acted with ulterior purposes. The public had a right to see the JSC at work in resolving these complaints. It has now done so, ruling by a majority that the complaints should not proceed to a formal hearing. Whether or not one agrees with this outcome, the important point is that the public has seen the JSC do its work in the open.

Dario Milo is a partner at Webber Wentzel. He represented various media groups in the successful High Court application to have the JSC preliminary investigation held in the open.

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The meaning of 'spouse' in South African law

The dire need for uniformity and clarity.

By Professor Nazeem Goolam
(BA LLB MCL)
Associate Professor, Law Faculty

Having joined Rhodes University in July 2009 I was asked to teach the course on *The Law of Insolvency and the Winding-up of Companies*. I informed the students that this was a course which I had never before taught and a subject and course in which I possessed neither an interest nor any expertise. However, perhaps one of the things I have learnt thus far in teaching the course is the quite remarkable definition of 'spouse', referring here to the solvent spouse, to be found in the *Insolvency Act 24 of 1936*.

Section 21(13) provides:

"In this section the word 'spouse' means not only a wife or a husband in the legal sense, but also a wife or a husband by virtue of a marriage according to any law or custom, and also a woman living with a man as his wife or a man living with a woman as her husband, although not married to one another."

I say that this definition is 'quite remarkable' in light of the fact that Islamic law, in particular Islamic family law, is one of my areas of expertise. For many years South African courts have grappled with the question of whether a woman married in terms of Islamic law – and religious law in general – may be recognised as being legally married in terms of South African law and thus be regarded as a lawful 'spouse.'

I shall very briefly now examine some of these decisions. In the case of *Davids v The Master* 1983 (1) SA 458 (C) the court held that that section 49(1) of the Administration of Estates Act 66 of 1965 did not include a woman marries according to Muslim rites. In the 1983 Appellate Division judgment of *Ismail v Ismail* 1983 (1) SA 1006 (A) the court held the concept of marriage as monogamous is firmly entrenched in our law. It was Judge Farlam who for the first time – in *Ryland v Edros* 1997 (1) BCLR 77 (C) stated that Muslim marriages are not contra bonos mores. One would have thought that the courts would have built on this pronouncement.

However, it was the judgment of Van Heerden in the case of *Daniels v Campbell* NO 2003 (9) BCLR 969 (C) which was particularly disturbing and disappointing. She

"...the Constitution demands a change in the legal and values of our society. In my view the word 'spouse' in the statutes under consideration must be [interpreted] to reflect this change"



was simply required to decide whether the word 'spouse' in the Intestate Succession Act 81 of 1987 and the word 'survivor' in the Maintenance of Surviving Spouses Act 27 of 1990 could be interpreted so as to include a husband or wife married in terms of Islamic rites. Acknowledging that the *Edros* decision was enlightened and progressive and enhanced the values of diversity and pluralism, she nevertheless felt that this decision could not be interpreted as authority for the fact that Muslim marriages are valid in terms of South African law. This led a colleague and I to ask whether a Muslim wife is still a whore in terms of South African law (see Goolam and Rautenbach "The legal status of a Muslim wife under the law of succession: is she still a whore in terms of South African law?" 2004 *Stellenbosch Law Review* 369; see also Goolam "The potentially polygamous saga: when will it end?" 2000 *THRHR* 522.

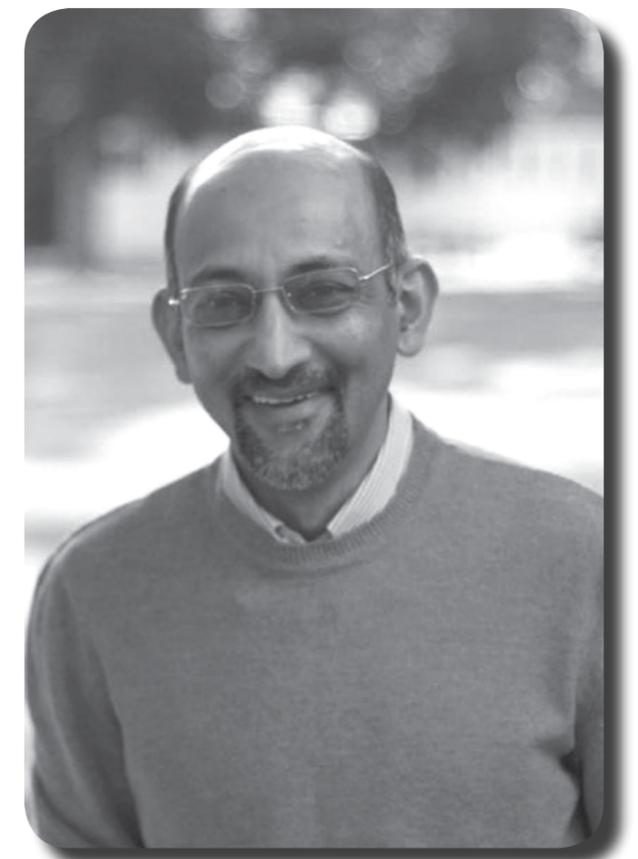
The ludicrousness of Van Heerden's reasoning becomes all the more glaring when one bears in mind that, in 1936, in terms of the Insolvency Act, a concubine or mistress could be regarded as a 'spouse' in terms of the law. The case in point is that of *Chaplin NO v Gregory (or Wyld)* 1950 (3) SA 555(C). Indeed the only reason that Ms Wyld was not regarded as a 'spouse' was that the man she was living with was still lawfully married to his wife in England.

However, the more logical and sound reasoning of Judge Sachs in the Constitutional Court, in *Daniels v Campbell and Others NO and Others* 2004 (7) BCLR 735 (CC), is to be welcomed with a fair amount of relief. Sachs argued that the word 'spouse' and 'survivor' in their ordinary meaning includes parties to a Muslim marriage and that the context of these terms in the respective Acts supports such interpretation. If this interpretation were not followed the purpose of these Acts would be frustrated. Perhaps Van Heerden, in the earlier *Daniels* judgment, ought to have refreshed her memory on the basic principles of statutory interpretation!

Judge Ngcobo, concurring with Judge Sachs, made some important remarks regarding the proper approach to legislative interpretation. He stated that the context in which the old order legislation was interpreted during the pre-constitutional era was very different from the present era. Old order legislation was interpreted in the context of a legal order that did not respect human dignity, equality and freedom for all people. The new constitutional order now affirms the equal worth and equality of all South Africans.

Judge Ngcobo added:

"...the Constitution demands a change in the legal and values of our society. In my view the word 'spouse' in the statutes under consideration must be [interpreted] to reflect this change"



Nazeem Goolam.



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Purposive interpretation in labour tenancy disputes – too little, too late.

By Professor RB Mqoke

This note has been prompted by two recent decisions of the Constitutional Court¹ and the Supreme Court of Appeal², which have signified a new approach in the adjudication of labour tenancy disputes. In the past the bone of contention has been whether a conjunctive or disjunctive approach to the definition of a labour tenant is the correct one. The issue was settled by the Supreme Court of Appeal in *Ngcobo and Others v Salimba CC; Ngcobo v Van Rensburg*³.

Cases on labour tenancy are usually concerned, with the preliminary issue of whether the applicant before court satisfies the definition of labour tenant as defined in section 1 of the Land Reform (Labour Tenants) Act 1996⁴. A finding that the applicant was or was not a labour tenant as defined in the Act was crucial to his or her lodgement of a claim for the acquisition of the portion of the land he or she has occupied in terms of section 16 of the Act⁵. The latter originates from s 25 (5) of the new Constitution which seeks to bring about corrective⁶ and distributive⁷ justice in redressing the injustice caused by land dispossession of the apartheid⁸ past.

¹ See the *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) 199 (CC)

² *Brown v Mbhense and Another* 2008 (5) SA 489 (SCA). Contrast these two cases with the approach of the Land Claims Court in *Labuschagne and Another v Ntswane* 2007 (6) SA 129 (LCC)

³ 1999 (2) SA 1057 (SCA)

⁴ Act 3 of 1996

⁵ Section 16 (3) reads thus:

"Subject to the provisions of the Act, a labour tenant or his or her successor may apply for an award of –

(a) The and which he or she is entitled to occupy or use in terms of s3,

(b) The land which he or she or his or her formally occupied or used during a period of 5 years immediately prior to the commencement of this Act, and which he or she or his or her family was deprived contrary to the terms of an agreement between the parties;

(c) Rights in land elsewhere on the farm or in the vicinity which may have been proposed by the owner of the farm, and

(d) Such servitudes of right of access to water, rights of way or other servitudes as are reasonably necessary or are reasonably consistent with rights which he or she enjoys or has previously enjoyed... Provided that the right to apply to be awarded such land, rights in land and servitudes shall lapse if no application is lodged with the Director General in terms of s 17 on or before 31 March 2001.

⁶ On the notion corrective or commutative justice see John Finniss *Natural Law and Natural Rights*, Clarendon Press (1980) 178 where the author comments on the notion of correction and remedying of inequality. In the 1993 Constitution the provisions of ss, 121, 122 and 123 which gave birth to the Restitution of Land Rights Act 22 of 1994 dealt with the notion of correction manifested in restoration of land rights to the rightful owners or in making of compensation in kind.

⁷ On the distributive justice see the same author at 175 where he points out that in distributive justice one seeks to assess the practical reasonableness requirement of a particular people. The new Constitution has addressed this in section 25(5).

⁸ Under the 1913 Land Act and the regulations which were used to control the influx of Africans into urban areas, labour tenancy became the only legal way in which cropping and grazing rights could be acquired by Africans

In the majority of cases the original land owners were forcibly removed from their ancestral land and then allowed to come back or to retain certain portions of their former land as labour tenants⁹. The case in point is that of the members of the Maake family who were the original owners of the land known as Boomplaats in the 1800s and their forebears according to the court record, had enjoyed undisturbed indigenous rights to the land and also exercised occupation, cropping and grazing rights. They also buried their dead on the land.

When the land was taken over by the colonialists they became labour tenants and were granted cropping and grazing rights when the apartheid state had embarked on wholesale forced removals of squatters and labour tenants during the 1960s and 1970s.

When the drafters of the Constitution inserted the provisions of s 25 (7) they had in mind the injustice which was caused by the forced removals. In *Brown v Mbhense and Another*, supra, the court noted that the position of labour tenants had become precarious and led to widespread loss of rights. One of the objects of the *Land Reform (Labour Tenants) Act* which was enacted to regulate labour tenancy was to give redress to labour tenants by ensuring that they obtain security of tenure and that they are not further prejudiced¹⁰. As indicated above positive legislative intent to redress the peculiar problems of labour tenants has been frustrated by the conjunctive reading of paragraph (a), (b) and (c) of section I. This section defines a labour tenant as a person;

“(a) who is residing or has a right to reside on a farm; (b) who has or has had the right to use cropping or grazing land on the farm, referred to in para (a), or author farm of the owner and in consideration of such right provides or has provided labour to the owner or lessee, and (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such a farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of s 3 (4) and (5) but excluding a farm worker.”

The latter is defined as a person who is employed on a farm in terms of a contract of employment which provides that “in relation for the labour he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration and not predominantly in the right to occupy and use land”.

In calculating the monetary value of the workers’ earnings it has been held that the various components of the earnings should be valued from the perspective of the employee. In *Landman and Another v Ndlozi; Landman and Another*

⁹This refers to the case cited in Note 1 above.

¹⁰ 2005 (4) SA 89 (LCC)

*v Gama*¹¹ *Gildenhuys J* was of the view that it would be unwise to adopt a dogmatic approach and that courts should consider each case on its own merits. The learned judge indicated that the determination of the valuation should cover the entire period the employee complied with the requirements of (a) and (b) of the definition. The court’s reasoning for the conjunctive reading of the definition of section 1 of the Land Reform (Labour Tenants) Act appears from the judgment of Olivier JA. The court first referred to the anomalies that would arise in the adoption of either a conjunctive or disjunctive reading of the definition. Unfortunately the court hid behind what it called a bad and slovenly draftsmanship of the Act. At page 10691 – J and A – B at 1070 the court stated:

“Meticulous and unambiguous craftsmanship when it comes to spelling out the rights and duties of those to whom the legislation is applicable is the first principle of legislative drafting. A draftsman should give careful consideration to the policy it is intended to enshrine in legislation and then formulate appropriate enactments, not in vague or polyphonus terms, but in exact terms, having in mind the consequences of what is intended to be said. I am not convinced that the draftsman has properly thought through all the situations that can and will arise as a consequence of the wording of the definition of labour tenant in the Act.

The sheer number of cases that have come before the courts since the Act was put on the Statute book as recently as 1996 speaks for itself and must be a cause for grave concern”

One feels, after reading Olivier JA judgment, that the rationale for the judgment appears at 1064 C-D where it is stated:

“In interpreting the definition of “labour tenant” it is important to bear in mind that, although a purposive approach might be appropriate, a finding that a person qualifies as a labour tenant detracts from the registered owner’s real rights in and to his property which (i) he enjoys at Common law (ii) are guaranteed in terms of s 25 of the Constitution of the Republic of South African Act 108 of 1996.

“ In eviction proceedings the applicant owner would often allege that the respondent was a farm worker whilst the respondent would allege that he or she was a labour tenant as defined .”

¹¹ This appears in the Preamble to the Act

“..the new approach will be seen as a relief that can be characterized as being too little, too late as there might be few claims can would meet the cut-off date .”

In the final analysis, a bald statement that a conjunctive reading of the requirements would in substantial measure stultify the object of the Act and lead to injustice is of no assistance as it must be kept in mind that the Act seeks to strike a balance between labour tenants and owners ...”

The last part of this quotation was extracted from the arguments advanced on behalf of the appellants in the courts a quo which appears at 10617 – I. For the sake of completeness the arguments read thus:

“... that paras (a), (b) and (c) of the definition fall to be read disjunctively for the following reasons; the intention of the legislature could not have been that the three paragraphs be read conjunctively, because such a reading would in substantial measure stultify the object of the Act and to lead to injunctive. The object of the Act is to protect those who traditionally rendered labour in exchange for the right to occupy and use land from eviction at the whim of the owner of the land subject only to compliance with the common law requirement of reasonable notice. If a 70 year person claims to be a labour tenant on a farm where she or he was born and has lived all her or his life and claims to have satisfied the requirements of paragraph (b); the legislature could not have intended the enquiry to be extended to determine what such person’s parents occupations had been or where they had been or where they had lived. In practice this would more often than not be impossible to determine or check or verify”.

Of more than six judgments dealing with the issue analysed by the Supreme Court of Appeal only two supported the disjunctive reading of the requirements of the definition. These were: *Tselentis Mining (Pty)* and *Another v Mdlalose* and others¹² and *Klopper and Others v Mkhize and others*¹³.

The judgment that rejected the disjunctive approach thought that such an approach would lead to absurdity. In the present writer’s view, the true reasons for the conjunctive approach was the fear that the disjunctive approach would lead a large number of beneficiaries. In eviction proceedings the applicant owner would often allege that the respondent was a farm worker whilst the respondent would allege that he or she was a labour tenant as defined .

¹² 1998 (1) SA 411 (N)

¹³ 1998 (1) SA 406 (N). Most of these judgments are noted by JM Pienaar “Labour Tenancy: Recent Developments” 1998 Stellenbosch Law Review 311

The SCA in the *Department of Land Affairs v Goedgelegan* was largely influenced by the approach of Moseneke DCJ in the *Brown v Mbhense and Another*, although in the latter case labour tenants were considered in terms of s 2(1)(d) of the Restitution of Land Rights Act, 1994. The SCA adopted a generous interpretation in the *Brown* case as the plaintiff did not satisfy all the requirements of (a) (b) and (c) as can be seen from the minority judgment of Nugent JA. Van Heerden JA, giving the majority judgment, stated that in deciding whether or not a person is a labour tenant, the court must have regard to the “combined effect and substance of all agreements entered into between the person who avers that he or she is a labour tenant and his or her parent or grandparent, and the owner or lessee of the land concerned”.

Purposive approach

In the *Department of Land Affairs v Goedgelegen* Tropical Fruits Moseneke DCJ advocated a purposive approach. In para 53 the Deputy Chief Justice stated:

“It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution ... In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation”.

Although in both cases the reliefs sought succeeded, it seems to the present writer that in view of the cut-off date of 31 March 2001 the new approach will be seen as a relief that can be characterized as being too little, too late as there might be few claims can would meet the cut-off date.



Prof RB Mqeke

Class of 2009



Angela Adams

"For we pay a price for everything we get or take in this world, and even though ambitions are well worth having, they are not to be cheaply won." Lucille Maud Montgomery



Lyndal Annandale

Call me butter coz I'm on a roll... :)



John-Carlos Atougua

"I want to be remembered for my hits not just my misses" FallOutBoy



Gavin Bandey

Eat, drink and be merry!



Kyle Felix

"You can always just work in groups of one" G. W. Barker



Roxanne Francis-Pope

If at first you don't succeed - destroy the evidence that you tried. Anonymous



Goscelin Gordon

"Lawyers and tarts are the two oldest professions in the world - and we aim to please!" John Mortimer



Melissa Groenink

Only once every tree has been felled, river polluted and fish caught will we realise that money cannot be eaten



Michelle Bate

"The starting point of all achievements is desire. Keep this constantly in mind as weak desire brings weak results" Napoleon Hill



Donovan Brown

Dream it, chase it and reap the rewards



Rufaro Chirwizo

"I am not afraid of storms for I am learning to sail my ship" L. M. Alesh



Luke Choate

"I like a man who grins when he fights" Winston Churchill



Eleph Gula-Ndebele

"I was always afraid but I never ran..."



Anthony Hanauer

Suggestions as to 2010 please let me know...



Blane Hansen

It's not WHAT you know, but WHO you know



Bongani hoho

Ukuba uyayi funa uqiniseke



Tarryn Cooper-Bell

When your life flashes before your eyes, make sure its worth watching



Robyn de Jager

Work hard, party harder!



Lumka Dlukulu

Put on your spectacles, step into the vision and out of the tunnel of ignorance and self-conceitedness.



Lutho Dzedze

"Courage is going from failure without losing enthusiasm" Winston Churchill



Virashmi Jeram

"The ends justify the means" N. Machiavelli



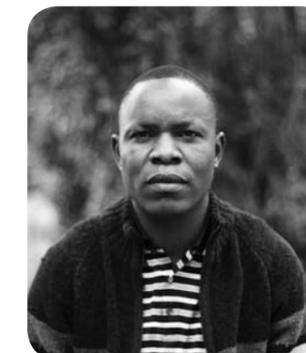
Sybil Julius

"I am always doing things that I can't do, that's how I get to do them" Picasso



Lonwabo Jwili

And so it was



Henry Kapalu

I have learnt from others. Forever I remain a student and indebted

Class of 2009



Zanoodene Kassim

Destiny is not a matter of chance, it is a matter of choice; it is not a thing to be waited for, it is a thing to be achieved. William Jennings Bryan



Paul-Michael Keichel

"Si hoc legere scis nimium eruditionis habes"



Gareth Latter

"Life is far too important a thing ever to talk seriously about" Oscar Wilde



Andrew Leaker

You can buy fish and chips but you can't buy experience!



Rufaro Mazvimbakupa

A lawyer with his brief case can steal more than a hundred men with guns...



Chris McConnachie

"That which is hateful to you, do not do to your fellow. That is the basis of law; the rest is elaboration." (With apologies to Hillel)



Donna McFarlane

"Success is not final, failure is not fatal, it's the courage to continue that counts" Winston Churchill



Mavundla Mhlambi

Calm seas never made a good sailor



Michelle Lowe

"Dream, diversify and never miss an angle" Walt Disney



Lindsay Luppnow

People who love sausage and respect the law should never watch either being made.



Gugu magwaca

"Our lives begin to end the day we become silent about things that matter" Martin Luther King



Kirhi Maharaj

Don't take life too seriously or you will never get out alive!



Mathapelo Moloto

Ke na le Modisa. Ke tla be ke tlhoka eng!



Philadelphia Mothupi

The measure of a man is not where he stands in times of comfort & convenience, but where he stands in times of controversy and challenges" Dr King



Godfrey Mutaya Msisha

"May the dice fly high"



Innocent Mtonga

Ours is a noble profession, one which it is an honour to belong to and to defend the interests of justice in spite of the reward.



G Mangope

I was freaked out about sale but when I opened the paper I truly understood that "huur gaat voor koop"



Amanda Mapanda

"Opportunity is missed by most people because it is dressed in overalls and looks like work" Thomas Edison



Claire Marais

"Do all you can with what you have, in the time you have, in the place you are" Nkosi Johnson



Tladi Marumo

"The preamble to the Constitution is not a throat clearing exercise" Sachs J



Despina Nicolau

Only those who dare to fail greatly can achieve. J.F Kennedy



Siphwe Whitney Nkala

To avoid being victims all the time, we need to change the system.



Andrew Roberts

You are what you do, so do the extraordinary



Kerry Rodgeron

To every set of facts, there are three stories: his, hers, and the truth.

Class of 2009



Melindah Sango
Venni Vittu Vicci



Peggy Schoeman
What a pleasure!



Kate Selwood
"Let us step into the night and pursue that flighty temptress, adventure" Albus Dumbledore



MP Shabalala
Never stop digging, u might stop 3 feet from gold.



Matthew Stroucken
"Treasure the good times and take strength from the bad, never disregard either, for we are the sum of our experiences"



Renaté Sypkens
Ek is tot alles in staat, deur Hom wat my krag gee



Rudo Tinarwo
A Candle loses nothing by lighting another candle. Lesson Learnt.



Tsepang Tlhapi
"Listen closely I'll tell you what I know, Storm clouds are gathering, the wind is gonna Blow. The race of man is suffering, and I can hear the moan 'Cause nobody can make it out here alone?" Maya Angelou



Natalie Shama
When two dogs fight for a bone, and the third runs off with it. There's a lawyer among the dogs :)



John Shija
He is no lawyer who cannot take both sides



Grace Sing Gen
Carpe Diem - Seize the day



Chipo Sitombe
Some say impossible, I say i'm possible.



Tarryn Travill
"We must overcome the notion that we must be regular... it robs us of the chance to be extraordinary" Uta Hagen



Chris Tucker
The more things change, the more they stay the same



Curtis van Heerden
"Research is what I'm doing when I don't know what I'm doing." Wernher Von Braun



Anchen van Wyk
"I am an idealist without illusions" JF Kennedy



Claire Small
Integrity is the ability to trust and be trusted



Rowan Stafford
"Every new beginning comes from some other beginnings end"



Jessica Staples
"Knowledge is realising the street is on way, wisdom is looking in both directions anyway"



Ryan Stewart
"Wasted youth is better by far than a wise man with nothing but old age"



Robyn Watermeyer
5 years of varsity, 2 degrees later. Law school taught me one thing: how two take two situations that are exactly the same and prove them different! Thus, law is a bottomless pit!



Kristy Emma West
"You can't litigate with a soccer team full of lawyers" GW Barker



Nikita Young
"When the going gets weird, the weird turns pro" Hunter S. Thompson

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from a caravan*

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