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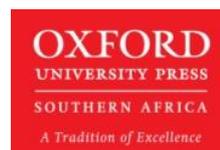
Supreme Court, Grahamstown.

‘THE EASTERN CAPE BENCH AND SOCIAL JUSTICE’ CONFERENCE

Faculty of Law, Rhodes University, Grahamstown

**1-3 September 2010
Eden grove**

Proudly sponsored by:



'The Eastern Cape Bench and Social Justice' conference

A conference to celebrate the progressive jurisprudence of the Eastern Cape Bench of the past 16 years, and to honour the Honourable Judges Somyalo (former Judge President) and Jones who retired in April 2010.

MESSAGE FROM THE DEAN, FACULTY OF LAW, RHODES UNIVERSITY



The Rhodes University Law Faculty has a long association with the Bench of the Eastern Cape Division of the High Court. The tradition of co-operation between the two institutions during the Law Faculty's 105 year history runs extremely deep, manifest in a number of practical ways. There is an informal, mutually beneficial arrangement in terms of which the well-resourced High Court and Law Faculty libraries are available to Faculty staff and judges alike. Judges are frequently asked and freely give of their time to assist with Faculty educational activities, including external examination, presiding in moots and mock trials, providing guest lectures in a range of courses, and making speeches at several important Faculty functions. Law students are exposed to the work of the Bench through cases undertaken by the Faculty's law clinic and visits to the High Court, which are often facilitated by presiding judges. The benefits to law students and staff from this kind of interaction are immense, and help to root the academic legal project firmly in the world of practice – especially given that the LLB is a professional degree.

It is against this background that the Law Faculty wishes to acknowledge the work of the Eastern Cape Bench of the past 16 years. The decisions of the Bench during this period informed the choice of the four subject sessions, which remain highly relevant and topical both in the Eastern Cape and throughout South Africa. In preparation for the conference we have worked closely with Judge Clive Plasket of the local Bench, who is a former Associate Professor in the Law Faculty. Judge Plasket is the programme convenor of the conference, and will provide the keynote address. It is also fitting that we should use this opportunity to honour former Judge President Cecil Somyalo and former Judge Jos Jones, who both retired in April 2010 from active bench duty after distinguished careers (and who both, co-incidentally, still serve on the Rhodes University Council, Judge Jones as Chairperson).

This conference would not have been possible without the financial assistance of the following:

- Juta Law, Lexis Nexis Butterworths, Oxford University Press and the Professional Provident Society of South Africa.
- The offices of the Vice-Chancellor, Rhodes University, and of the Deputy Vice-Chancellor: Research and Development, Rhodes University

I would also like to acknowledge the enormous contributions of Ms Saronda Fillis (conference administrator), Ms Carolyn Stevenson-Milln (Rhodes conference office) and the Law Faculty conference committee. It has indeed been a wonderful team effort. Finally, thank you to all invited speakers and discussants for making this conference possible.

Welcome to the Rhodes University Law Faculty, and thank you for your participation in this conference. I trust that our deliberations will be constructive and fruitful, and that the conference will prove to be a great success.

Jonathan Campbell

Dean, Faculty of Law

PROGRAMME

DAY 1

Wednesday, 1 September 2010

TIME	EVENT	SPEAKER	VENUE
18:00	Cocktail Function <i>(Sponsored by Lexis Nexis Butterworths)</i>	Welcome by the Vice-Chancellor, Dr Saleem Badat	Law Faculty lawns, St Peter's campus (marquee tent)

DAY 2

THURSDAY, 2 September 2010

TIME	EVENT	SPEAKERS	VENUE
08:00 – 09:00	REGISTRATION		Eden Grove Glass Box
09:00 – 10:00	KEYNOTE ADDRESS	Honourable Judge Clive Plasket (East Cape High Court)	Eden Grove Blue
10:00 – 10:30	TEA <i>(Sponsored by Oxford University Press)</i>		Eden Grove Foyer
10:30 – 13:00	SESSION 1 Administrative Law Discussant: Prof H Corder (UCT)	<p>Prof C Hoexter (Wits) “The Contribution of the Eastern Cape Bench to South African Administrative Law since 1994”</p> <p>Steve Budlender (Advocate at the Johannesburg Bar) “Rules of procedure for judicial review of administrative action.”</p> <p>Prof G Quinot (Stellenbosch) “The Right to Reasons for Administrative Action as a Key Ingredient of a Culture of Justification.”</p> <p>Mr J Kruuse (Rhodes) “Promoting social justice and good governance using access to information laws - a reflection on case law emanating from the Eastern Cape Bench.”</p>	Eden Grove Blue

13:00 – 14:00	LUNCH <i>(Sponsored by Lexis Nexis Butterworths)</i>		Eden Grove seminar room
14:00 – 15:00	SESSION 2 Enforcement of judgements and costs orders Discussant: Prof R Midgley (UFH)	Mr W Mandlana (Bowman Gilfillan) “An overview of the jurisprudence of the Eastern Cape Bench in respect of the Enforcement of Court Orders against the State (1994 – date).” Dr R Kruger (Rhodes) “The buck stops here: costs orders in litigation against organs of state.”	Eden Grove Blue
15:00 – 15:30	TEA <i>(Sponsored by Oxford University Press)</i>		Eden Grove Foyer
15:30- 17:00	SESSION 2 (continued)	Prof D Matlala (Matlala Attorneys) “Structural interdicts and the Eastern Cape Bench.” Mr T Ngcukaitobi (Legal Resources Centre) “Social change in the Eastern Cape: The potentiality of law.”	Eden Grove Blue
19:00	GALA DINNER <i>(Sponsored by Juta Law)</i>	Address by the Honourable Justice Lex Mpati, President of the Supreme Court of Appeal	Alan Webb Dining Hall, St Peter’s Campus

DAY 3
FRIDAY, 3 SEPTEMBER 2010

TIME	EVENT	SPEAKERS	VENUE
08:00 – 10:15	<p>SESSION 3 Social Security Law</p> <p>Discussant: Judge C Plasket (East Cape Bench)</p>	<p>Prof C Okpaluba (National University of Lesotho) “Bureaucratic delays in processing social grants: An evaluation of the contributions of the Eastern Cape Judiciary to contemporary South African public law.”</p> <p>Prof A Govindjee (NMMU) "Assisting the unemployed in the absence of a legal framework: the next frontier for the Eastern Cape Bench?"</p> <p>Mr F Khoza (Bowman Gilfillan) “The right to access to social security and the private pension provision for vulnerable workers: the case of employees in the private security sector in South Africa.”</p> <p>Prof M Olivier (NWU) "Towards a comprehensive social security system: Critical perspectives on addressing vulnerability in South African social security".</p>	Eden Grove Blue
10:15 – 10:45	<p>TEA <i>(Sponsored by Oxford University Press)</i></p>		Eden Grove Foyer

10:45 – 13:00	SESSION 4 Land Reform Discussant: Prof W du Plessis (NWU)	Ms A Pope (UCT) “A retrospective evaluation of trends and patterns in eviction jurisprudence – 1996 – 2010.” Prof J Pienaar (Stellenbosch) “Tenure reform in South Africa: New developments.” Prof R Mqoke (Rhodes) “The impact of Land Reform on African Land Tenure practices in the Eastern Cape.” Mr Steve Kahanovitz (Legal Resources Centre) “Engaging with PIE”	Eden Grove Blue
13:00 – 13:30	CLOSURE OF CONFERENCE	Judge Craig Howie	Eden Grove Blue
13:30	LUNCH <i>(Sponsored by Lexis Nexis Butterworths)</i>		Eden Grove seminar room

Thanks to all our sponsors.

We would also like to acknowledge Mrs Dorothy (Dimmie) Randell for the graphic of the High Court building that she kindly let us use.

SPEAKERS¹

(in subject session order)

Administrative Law

Discussant: Prof. Hugh Corder (University of Cape Town)

PROF. CORA HOEXTER (WITS)



Cora Hoexter is a Professor in the School of Law at the University of the Witwatersrand, Johannesburg. Cora started her academic career as a researcher at the University of South Africa. She then taught at her alma mater, the University of Natal (Pietermaritzburg), for several years before moving to Wits, where she was appointed to a Chair in 2000. Cora teaches subjects including constitutional law and legal philosophy, but her first love and main research interest is administrative law. Her most recent book on the subject is *Administrative Law in South Africa* (Juta, 2007), and she will soon start on a new edition of that work.

Professor Hoexter is a former member of the South African Law Reform Commission and of the NRF's Specialist Committee for Law. She served for ten years on the editorial team of the *South African Law Journal* and has also been Editor-in-Chief of the *Annual Survey of South African Law*. She recently joined the editorial board of the series *Cambridge Studies in Constitutional Law*.

The Contribution of the Eastern Cape Bench To Administrative Law Since 1994

As Ivan Evans has recorded, the 'dreary burden of apartheid' was that 'it had to be constantly administered' (*Bureaucracy and Race* (1997) 1). Administrative law was thus thoroughly embroiled in the oppressive enterprise of apartheid. Since 1994 this branch of the law has had to reinvent itself in line with the inspiring promises of the democratic constitution – which, amongst other things, envisages an administrative system that is responsive, accountable and respectful of human rights.

In this paper it is suggested that the Eastern Cape Bench has contributed richly to the development of South African administrative law over the last sixteen years, and that in the furtherance of social justice its members have made particularly good use of the administrative-law opportunities that have been presented to them. The paper expands on this claim in relation to the rights now contained in s 33 of the Constitution of the Republic of South Africa, 1996 and the national legislation that gives effect to those rights, the Promotion of Administrative Justice Act 3 of 2000. While its account is necessarily a partial and selective one, the paper highlights various areas of administrative law in which a notable contribution has been made by the Eastern Cape Bench. These include the concept of administrative action, various grounds of review, the law relating to standing and, perhaps most importantly, administrative-law procedures and remedies.

¹ Information about each speaker has been given when it is available

MR STEVE BUDLENDER (ADVOCATE AT THE JOHANNESBURG BAR)



Steven Budlender is an advocate at the Johannesburg Bar.

He completed his BA and LLB degrees at Wits University and was a member of the two person team that won the World Championship Round of the Philip C. Jessup International Law Moot Court Competition in 2002. He subsequently completed an LLM in General Studies at NYU Law School in 2003/4, on a Hauser Global Law School Scholarship. His LLM focused on competition law, constitutional law and public interest litigation.

Steven spent 18 months as law clerk to the Chief Justice of South Africa, Arthur Chaskalson at the Constitutional Court of South Africa. He then spent a few months as an Associate at consulting firm McKinsey & Co before joining the Johannesburg Bar.

Steven has litigated a wide range of cases, with a particular focus on constitutional, administrative and media law.

He is also the co-author of a substantial strategic evaluation of public interest litigation in South Africa over the past 15 years, funded by The Atlantic Philanthropies. He has made presentations arising out of the evaluation in the Republic of Ireland, Northern Ireland and United States.

The new rules of procedure for judicial review – a threat to administrative justice and accountability or a necessary response to the burden on the state?

In October 2009, the Rules Board enacted the Rules of Procedure for Judicial Review of Administrative Action. These new rules, when they come into effect, will replace Rule 53 of the High Court Rules which previously governed the review of Administrative Action. The new rules substantially alter the manner in which judicial review will take place. In particular, they will significantly curtail the applicant's ability to insist on being provided with a complete copy of the record relating to the decision under review.

This paper considers the likely effect that these changes will have on the ability of citizens to enforce their rights to administrative justice as well as the principle of accountability. It also considers the cogency of the justification advanced by the State for the new rules – namely to avoid the burden on the state.

PROF G QUINOT (STELLENBOSCH)



Geo Quinot (BA LLB (Stellenbosch) LLM (Virginia) LLD (Stellenbosch)) is Professor in the Department of Public Law at Stellenbosch University. He mainly teaches administrative law as well as constitutional law and public procurement law. His research focuses on general administrative law, including a particular focus on the regulation of state commercial activity. He is the author of various articles in academic journals and electronic publications such as *Juta's Quarterly Review of South African Law* to which he contributes quarterly updates on public procurement law, chapters in book publications such as the recent contribution "Globalisation, State Commercial Activity and the Transformation of Administrative Law" in M

Faure & AJ van der Walt (eds) *Globalization and Private Law* (Edward Elgar Publishing, 2010), and two recent books, viz. *Administrative Law Cases and Materials* (Juta & Co, 2008) and *State Commercial Activity: A Legal Framework* (Juta & Co, 2009). Geo is currently involved in a British Academy funded project on public procurement regulation in Southern Africa as lead African partner in partnership with the Public Procurement Research Group at the University of Nottingham, with Sue Arrowsmith as project leader. He is also the editor of the *Stellenbosch Law Review*. Geo studied law at the University of Stellenbosch, where he obtained his doctorate in 2007 on a dissertation focusing on government contracting, and at the University of Virginia School of Law in the United States as a Fulbright fellow.

The Right To Reasons for Administrative Action as a Key Ingredient of a Culture of Justification

In his well known 1994 article, *A Bridge to Where? Introducing the Interim Bill of Rights* (1994) SAJHR 31, Etienne Mureinik identified our constitutional transition as one from a culture of authority to a culture of justification, where 'every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command' (32). He argued that within such a culture, constitutional rights 'are standards of justification - standards against which to measure the justification of the decisions challenged under them' (33). Clearly central to this understanding of the Bill of Rights and our constitutional transition in general is the need for government to provide justification for decisions. Under a culture of justification it is the obligation to explain decisions that provides the key to the realisation of fundamental rights. In citizens' daily lives this key is for the most part guaranteed in section 33(2) of the Constitution of the Republic of South Africa, 1996, which provides for a right to reasons for administrative action that impacts on a person's rights. This right, as fleshed out in section 5 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) (and its rules and regulations), has thus not surprisingly become an important feature of administrative justice in South Africa as is evident from a considerable number of judgments where the right has effectively facilitated constitutional scrutiny of public action. The most important substance given to the constitutional right to reasons in PAJA is the adequacy standard that is adopted in section 5 of the Act. However, PAJA does not provide any detail on this standard and it has been left up to the courts to determine what the norm of 'adequate reasons' means. In this regard there have been important developments over the last decade, many of them emanating from the Eastern Cape bench. However, questions remain regarding the exact test under the adequacy standard. PAJA has also qualified the right to reasons in several respects and while some of these qualifications, like the request-driven approach of section 5, may be justifiable, others are more problematic. In particular, the most recent development that has seen the procedure for requesting reasons under PAJA move from the general Regulations on Fair Administrative Procedures, 2002 to the 2009 Rules of Procedure for the Judicial Review of Administrative Action arguably narrows down the (potential) role of the right to reasons for administrative action in building a culture of justification.

MR JAY KRUUSE (RHODES UNIVERSITY)



Jay Kruuse is an attorney and head of the Public Service Accountability Monitor (PSAM) which is based at Rhodes University. The PSAM produces research which considers public resource management, governance and accountability. Jay has a keen interest in socio-economic rights, access to information and public interest litigation.

Promoting Social Justice and Good Governance Using Access to Information Laws - A Reflection on Case Law Emanating from the Eastern Cape Bench.

This paper asserts that social justice, good governance and fundamental human rights can only thrive when there is meaningful public participation informed by timely access to relevant information. The paper draws on the experience of the Public Service Accountability Monitor ('PSAM') which has litigated before the Eastern Cape Bench using the Promotion of Access to Information Act 2 of 2000 (PAIA) in order to secure the release of records which have been withheld by the Eastern Cape provincial government.

The court's instructive jurisprudence is considered alongside PAIA's role in ensuring improved public participation and good governance. The paper concludes by emphasising the consequences that weak implementation of PAIA will have on our democratic order and the increased burden which such conduct will place on South Africa's judiciary, especially where conduct is inconsistent with the Constitution which seeks to build an open and accountable state which is responsive to people's needs.

Enforcement of Judgments and Costs Orders

Discussant: Prof. Rob Midgley (University of Fort Hare)

MR WANDISILE HAPPY MANDLANA (BOWMAN GILFILLAN)

Wandisile Mandlana is a practising attorney and currently is an Associate at the Public Regulatory group of Bowman Gilfillan Attorneys. His areas of expertise are constitutional law, administrative law, mining law and environmental law.

Prior to joining Bowman, Wandisile was a law lecturer for 4 years at Rhodes University where he *inter alia* taught Administrative Law, Environmental Law and Criminal Law.

Education

2002	Master of Laws (LLM) in Environmental Law, Natal University (as it then was)
1999 – 2000	Bachelor of Laws (LLB), Fort Hare University
1996 – 1998	Bachelor of Law (B.Juris), Fort Hare University

An Overview of the Jurisprudence of the Eastern Cape Bench in Respect of the Enforcement of Court Orders Against The State (1994 – Date)

Enforcement of court orders against the State has been subject of litigation in the recent years. This was triggered by the fact that litigants against the State would obtain an order ordering the State to do something or pay litigant an amount of money. The State would simply fail to carry-out the order or ignore it. This undesirable state of affairs forced the courts in general to come up with ways and means of ensuring that the State complies with court orders and that the Rule of Law is protected. The remedies which the courts developed to ensure that court orders were complied with by the State include structural interdicts/supervisory jurisdiction of the courts, incarceration of State functionaries for failure to give effect to courts' orders; permitting execution against state property to satisfy judgment debts and declaration of constitutional invalidity of statutes which do not permit execution against State property to satisfy judgment debt.

This paper considers the Eastern Cape Bench jurisprudence on the enforcement of court orders and the impact the Eastern Cape Bench jurisprudence has had in the enforcement of orders against the State. In this regard, various Eastern Cape Bench decisions will be considered and these will include *Mjeni v Minister of Health and Welfare, Eastern Cape*,² *East London Transitional Local Council v MEC for Health, Eastern Cape & others*,³ *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government*,⁴ *S v Mfezeko Zuba & 23 other cases*,⁵ *Vumazonke v MEC for Social Development, Eastern Cape and three similar cases*,⁶ *Jayiya v MEC for Welfare, Eastern Cape*,⁷ *Kate v MEC, Department of Welfare, Eastern Cape*,⁸ and *Magidimis NO v Premier of Eastern Cape*.⁹

² 2000 (4) SA 446 (Tk).

³ 2001 (3) SA 1133 (Ck).

⁴ 2001 (2) SA 609 (E).

⁵ 2004 (4) BCLR 410 (E).

⁶ 2005 (6) SA 229 (SE).

⁷ 2004 (2) SA 611 (SCA).

⁸ 2005 (1) SA 141 (SE).

⁹ 2006 JOL 17274 (Ck).

The impact these decisions have had on other South African High Courts' jurisprudence is considered in this paper. In this regard, the following cases will be considered: *Federation of Governing Bodies of South African Schools (Gauteng) v Member of the Executive Council of Education, Gauteng*,¹⁰ *Lombard v Minister van Verdediging*,¹¹ *York Timbers Ltd v Minister of Water Affairs and Forestry & Another*,¹² and *Nyathi v MEC for Department of Health, Gauteng, and Another*.¹³

The paper also considers how the Eastern Cape Bench decisions on enforcement of court orders against the State have been received by the Supreme Court of Appeal and the Constitutional Court. More specifically this paper will consider whether the Eastern Cape Bench decisions on enforcement of court orders achieved anything in ensuring that successful litigants have an effective remedy against executive disregard of court order and enforcement of judgments against the State.

DR ROSAAN KRÜGER (RHODES UNIVERSITY)



Rosaan Kruger lectures parts of the Legal Theory 1 course as well as Constitutional Law and Constitutional Litigation at Rhodes University. Rosaan holds a BA, an Honours degree in Political Science and an LLB degree from Potchefstroom University. She joined Rhodes University after serving her articles at the Centre for Community Law and Development of Potchefstroom University and was admitted as an attorney in 2001. In 2006 she obtained her PGCHE and in 2009 her PhD, both from Rhodes University. Her research for her PhD considered the application of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 at the level of the magistrates' courts with specific reference to complaints of racism. Rosaan's

research interests are in the fields of constitutional theory and human rights law (specifically the right to equality).

The Buck Stops Here: Costs Orders in Litigation Against Organs of State

The social assistance litigation industry that clogged the court rolls of the Eastern Cape until fairly recently cost the taxpayer millions of rands per year in unnecessary legal expenses. These expenses were incurred as a result of 'indolence and/or incompetence on the part of public servants' (*Ndevu v MEC for Welfare, Eastern Cape Provincial Government* case no 597/02, SECLD, undated per Erasmus J at 6). The Eastern Cape bench reacted to the flood of applications with Rule 21 of Practice Directive 1 of 2007. This rule details the management of social grant applications in the Eastern Cape and may have saved the taxpayer some money by avoiding unnecessary enrolment of such matters. However, a complete end to unnecessary (or even imprudent) litigation by public officials in the Eastern Cape and further a field remains elusive. Decisions to defend actions for damages or applications for review of administrative action unnecessarily and the resultant wastage of public funds are constitutionally indefensible (*viz. President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 133).

Following from the proactive stance of the Eastern Cape bench in social assistance cases, I consider the bench's approach to costs orders *de bonis propriis* as a means of ensuring compliance with constitutionally set standards for public administration. In doing so, I consider the constitutional framework regulating government administration, the general principles governing awards of costs (including costs *de bonis propriis*) and comparable jurisprudence from other divisions, especially that of the bench in KwaZulu-Natal. Essentially, the paper considers whether these orders are not only appropriate but also possible in the light of the jurisprudence under review.

¹⁰ 2002 (1) SA 660(T).

¹¹ 2002 (3) SA 242 (T)

¹² 2003 (4) SA 477 (T)

¹³ 2008 (5) SA 94 (CC).

PROF. DAVID MATLALA (MATLALA ATTORNEYS)

David Matlala is an adjunct professor of law at the Nelson Mandela Faculty of Law, University of Fort Hare and a practising advocate at the South Gauteng High Court, Johannesburg. He started his teaching career at Vista University, Soweto Campus, where he taught commercial law. He later joined Wits University, University of Venda and University of the North, now University of Limpopo. His field of interest is corporate and tax law but over the twenty years of his academic career he taught various branches of commercial and mercantile law, ranging from introduction to commercial law to tourism law. At the moment he spends most of the time litigating motor vehicle accidents (mva) claims while he is at the same time a part-time BMA lecturer at the University of Limpopo where he offers business law. He is also a contributor to the De Rebus' law reports column.

Structural Interdicts and the Eastern Cape Bench

A typical interdict is a restraining order in terms of which the respondent is prohibited from doing or carrying out a threatened unlawful action. However, an order granted against the respondent may also be in the form of a mandamus, in terms of which the respondent is required to do something. The requirements for an interdict, both for an interim and a final order, are common cause. Accordingly, only a brief outline thereof will suffice, except that a quick point will also be made on the requirement of balance of convenience which does feature in some cases, although traditionally not much emphasis was put on it.

An interdict is not a new remedy in our law, it being also well-known under common law. Because of the provisions of the Constitution though, it does take a new dimension. For example, s 2 of the Constitution provides that this founding document is the supreme law of the country and that a law or conduct inconsistent with it is invalid. The power of the courts to deal with invalid law or conduct is found among others in s 172(1) of the Constitution which empowers courts, when declaring law or conduct invalid, to make an order which is just and equitable, to limit the retrospectively of the declaration or suspend the invalidity for a given period. In terms of s 172(2)(b), when making a declaration of invalidity the court may grant a temporary interdict or other temporary relief. Thus in terms of the Constitution the courts are given fairly wide powers to be innovative.

A structural interdict is more than just a straight forward injunction or mandamus. In particular it derives from the Constitution which gives courts flexibility to do what is just and equitable. This becomes especially so when a law or conduct, be it of the national, provincial or local government, is declared invalid. It should not be forgotten that until declared invalid, the impugned law or conduct is valid. Again, as soon as the declaration is made, invalidity is retrospective. This has the result that all action taken on the basis of that law or conduct is condemned, no matter how many years things could have been done on that basis. The difficulties that can be expected when a long standing law or conduct of government is declared invalid are enormous. With the national government the most common challenge is that of a law being found invalid. With the provincial and local government, the question of challengeable appointments to positions and the award of tenders is a feature of life. For no apparent reasons, the Eastern Cape Province features high on the list of transgressors. As a result, the High Court in this province had to deal with the recurrent problem of actions on the part of provincial and municipal officials which were found wanting.

If the presentation were to be limited to the Province of the Eastern Cape it could that helpful input from other divisions of the High Court, including that of the SCA and the Constitutional Court, would be left out. Doing so would be giving an incomplete picture of developments in this area of the law, an undesirable approach indeed.

MR TEMBEKA NGCUKAITOBI (LEGAL RESOURCES CENTRE)

Director, Constitutional Litigation Unit, Legal Resources Centre

Social change in the Eastern Cape: The potentiality of law

What is the actual potentiality of the law to deliver social change? The Eastern Cape bench has, for the past 16 years built an impressive body of judicial pronouncements on socio-economic rights. The ability of the Bench is bolstered by a supreme Constitution, which incorporates justiciable socio-economic rights and grants expansive powers to the courts. The Bench also draws inspiration from the Constitutional Court's approach to socio-economic rights. These factors may create the illusion about the potentiality of law to foster social change. But, these factors are only endogenous--concerned primarily with the inner deployment of the law. The law's *potential*, however, must be measured through consideration of exogenous institutional factors, which place law in a political context.

The purpose of this paper is to discuss the potentiality of law by evaluating the effectiveness of juridical outcomes against their impact on a range of external players. The paper is divided into two parts. The first is an overview of groundbreaking decisions delivered by the bench in the past 16 years. This part also discusses the space for progressive change created by these decisions. The second deals with the institutional changes in the conduct of the players affected by the decisions. Broadly two main players are potentially affected by judicial decisions: the institutional and the non-institutional. For the institutional, I focus on the state—a powerful institutional force—which bears the constitutional mandate of social transformation. I ask whether the state has responded positively to judicial decisions and the justifications for any negative responses. For the non-institutional category, I explore the impact of decisions on organs of society, like NGOs: whether they have improved their strategies as a result of judicial decisions.

Finally, the paper will explain the persistence of poverty despite the radical judicial decisions. The explanation is the failure to place the judicial role in a socio-political context. When the role of the law is understood in these terms, we can explain the conditions *necessary* for social change through the medium of law. Thus, the potentiality of law can be understood.

Social Security Law

Discussant: Judge C Plasket (East Cape Bench)

PROF C OKPALUBA (NATIONAL UNIVERSITY OF LESOTHO)

Chuks Okpaluba, born in Nigeria and educated in the Universities of London (LLB (Hons) LLM) and the West Indies (PhD) is currently, Professor of Law, National University of Lesotho and Adjunct Professor, Nelson Mandela School of Law, University of Fort Hare. His academic career commenced some four decades ago in the University of the West Indies. He has since held positions as Professor of Jurisprudence and Director, School of Law, University of the North; Professor of Law, University of Swaziland; Professor and Dean, Nnamdi Azikiwe University, Awka, Nigeria; founding Dean of Law, University of Jos, Nigeria. Professor Okpaluba has presented papers in Conferences, Seminars and Workshops locally, regionally and internationally. Recently, on 6 May 2009, he delivered a public lecture entitled 'Fraud, bad faith and misfeasance in public office: *Gore* in retrospect' under the auspices of the ***African Scholar Series***, College of Law, University of South Africa. He has been actively involved in legal research and has published widely in *Law Journals* in England, Caribbean and the USA in the fields of Labour Law, Administrative Law and Constitutional Law. His articles include the more recent series on 'Justiciability and Constitutional Adjudication' published in notable South African Law Journals (*THRHR*, *CILSA*, *Obiter*, *SAPR/PL* and *Speculum Juris*).

In addition to the books Professor Okpaluba published on West Indian Labour Law (1975-1980) and those dealing with aspects of Constitutional Law in Nigeria (1982-1996), his books in the Southern African region include: (a) ***Human Rights in Swaziland: The Legal Response***, Department of Law, University of Swaziland 1997 (co-edited); (b) ***Law & Contemporary South African Society (ed)***, New Africa Education (NAE), Cape Town, 2004; and (c) ***Government Liability: South Africa & the Commonwealth*** (with Professor PC Osode) Juta & Co, Cape Town, 2010.

Bureaucratic Delays in Processing Social Grants: An Evaluation of the Contributions of the Eastern Cape Judiciary to Contemporary South African Public Law

Since its judgments in *Bushala*, *Ngxuza* and *Kate*, through to *Njongi*, the judges of the Eastern Cape High Bench have manifestly disapproved of the 'gross ineptitude', 'manifest lack of capacity', 'unlawful conduct' and the 'disaster' that afflicted the provincial department of welfare in the administration of social assistance grants designed to provide much needed financial assistance to the poor and indigent members of society. This unpalatable state of affairs led to deprivations of the substantive rights enacted in national legislation and violated several of the values enshrined in the South African Constitution. Unabashed, the administrators have attempted, in literally every claim, to deny the hapless claimants access to the courts to enforce their rights by resorting to such anachronistic common law concept as standing and the statutory prescription of debts in civil litigation. The Eastern Cape High Court has stood firmly between the poor and the wielders of administrative power in the province. Yet, the court neither has the purse nor the sword. But that which it has – judgment - it delivered through the enforcement of the constitutional rights of claimants by granting them 'appropriate relief' including 'constitutional damages'. In evaluating the contributions of the Eastern Cape Judiciary to the realisation of social justice in the constitutional state, this paper focuses on the issue of standing to bring class action to enforce the rights to social grants, prescription of the claims owing to delays in lodging them, and the appropriate relief to be granted the applicants unlawfully denied social grants. It, inevitably, concludes that while the court has made tremendous strides in the fight against poverty and thereby contributing to the development also of the concept of administrative justice, the problem besetting the administration of social grants in the province, and quite recently, nationally, is located in the lack of well-trained manpower to implement the laudable legislative measures.

PROF. AVINASH GOVINDJEE (NMMU)



Avinash Govindjee is an Associate Professor and Deputy Head of the Labour and Social Security Law Unit at the Faculty of Law, Nelson Mandela Metropolitan University, Port Elizabeth, South Africa. He holds the BA and LLB degrees from Rhodes University, obtained his LLM degree in Labour Law (*cum laude*) at the University of Port Elizabeth and was awarded his LLD degree in 2005 from the NMMU. Avinash is an attorney of the High Court of South Africa, practising as a consultant to the firm Burmeister de Lange Soni Incorporated in Port Elizabeth. He serves the Commission for Conciliation, Mediation and Arbitration on a

part-time basis as a senior commissioner and arbitrates disputes for various bargaining councils. Avinash has contributed chapters to over a dozen books, authored over 15 articles published in accredited South African law journals and presented papers at over twenty five local or international conferences or seminars. Avinash loves to travel and has spent two periods of six months in India with his family as a Visiting Professor.

Assisting the Unemployed in the Absence of a Legal Framework: The Next Frontier for the Eastern Cape Bench?

The Constitution strives to establish a society based on democratic values, social justice and fundamental human rights, so as to improve the quality of life of all citizens and free the potential of each person. The constitutional right to have access to social security is a key socio-economic right designed to contribute towards the achievement of these constitutional goals. A number of people, particularly in the Eastern Cape, unfortunately remain exposed by the current social security framework, being unemployed yet unable to access unemployment benefits while simultaneously being ineligible for any social assistance grant. It is this 'uncovered group' of people that is the focus of the proposed paper.

Government has committed itself to the creation of 'decent work' as a key priority to address the plight of the uncovered group. Public works programmes, in particular, enjoy a great deal of governmental support because they are seen as complementary to the existing social welfare programme. While social protection initiatives in South Africa are generally well regulated, with detailed legislation and government policy flowing from constitutional imperatives, it appears anomalous that the state strives to generate and stimulate the creation of employment opportunities in the absence of a proper legal framework for this.

The first part of the paper accordingly focuses on the notion of a "right to work" and the impact of its exclusion as a human right in South Africa on social policy. The paper will explore the important relationship and distinction between social security and employment creation policy mechanisms and suggest that government has erroneously conflated the two in exercising its policy-making function, possibly in contravention of section 27 of the Constitution which promises appropriate *social assistance* for everyone who is unable to support themselves or their dependents. It will specifically consider the significance of employment creation policy making in the absence of a proper constitutional and statutory framework giving effect to a right to work.

The paper's second part contemplates the parameters and difficulties of a hypothetical legal challenge on the part of unemployed work-seekers who are uncovered by the country's social security system. In particular, the effect of an allegation that the current employment creation policy is unreasonable in its conception and implementation is considered. The role of the courts when faced with such situations is then discussed against the backdrop of landmark decisions of the Eastern Cape bench, as well as applicable foreign cases, which have succeeded in ensuring social justice despite the existence of a deficient legal environment. Assuming that the Constitution will not be amended to give effect to a right to work and that the *status quo* remains, the paper considers various legal arguments in order to assess whether it will be justifiable for the court to

craft appropriate relief for the uncovered group in the face of the numerous other social protection initiatives attempted by the state, the absence of an enumerated right to work in the Constitution and the lack of legislation directed specifically towards employment creation. The paper specifically contemplates an expansive interpretation of, in particular, the rights to human dignity, equality and life so as to derive a right to work, as well as the role of international law in the debate. Support for a fresh approach, which would see the courts carefully innovating, where required, in order to give effective protection to a previously unrecognised and unenumerated right, has the potential to enhance a social justice agenda. This could arguably be justifiable given the urgency of the situation, the transformative nature of the Constitution and the values upon which South African society is based.

MR FRANCISCO JABULANI KHOZA (BOWMAN GILFILLAN)

Francisco Jabulani Khoza is a partner in the corporate department at Bowman Gilfillan Inc, specialising in pensions and investment management law. He has worked for the Pensions Group at Linklaters LLP in London. Francisco has experience in advising on the corporate aspects of pensions law, including drafting: scheme rules; transfer agreements; administration agreements; outsourcing agreements; sale of business and sale of shares transactions; and IPOs etc. Francisco also specialises in the legal aspects of investment management, general financial services and the investment aspects of pensions law. He also has experience in advising pension scheme trustees, pensions administrators, investment managers and investment consultants on matters relating to investing assets in funds that invest in property of all types- equity securities, private equity, derivatives, financial instruments and real estate.

Francisco is currently the Deputy Chairperson of the Private Security Sector Provident Fund, a position he was appointed to by the Registrar of Pension Funds under section 26 of the Pension Funds Act, 1956. He the Vice Chairperson of the Pension Lawyers Association (Northern Region Committee)

The Right to Access to Social Security and the Private Pension Provision for Vulnerable Workers: The Case of Employees in the Private Security Sector in South Africa.

Section 27 (1) (c) of the Constitution of the Republic of South Africa provides, among others, that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance. In terms of section 27(2) the state is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of the right to have access to social security. The paper will focus on the social security aspect of section 27(1) (c).

The paper will explore the reasonableness of the legislative measures adopted by the state in order to ensure that vulnerable workers have access to social security. In this regard, social security refers to, “insurance schemes to which workers and employers contribute for the purposes of financial old-age pensions, medical and unemployment insurance” (See Currie I *et al* (2001) The Constitutional and Administrative Law at page 400).

This paper will focus on employees in the private security sector industry, as an example of a vulnerable group of employees. Private security sector employees refers to those people that guard or protect fixed property, premises, goods, persons or employees including monitoring and responding to alarm at premises which are guarded by persons or by electronic means, including car guards. In the context of a high crime rate in South Africa employees in the private security sector are exposed to the real risk of death and disability. In fact the prospects of employees

reaching retirement age (typically age 60) are normally remote. Employees in this sector are likely to lose their employment due to retrenchment, disability and death, all of which are events that usually give rise to the payment of retirement benefits. Also, employees in this sector are among the lowly paid group of employees in South Africa, with an average salary of R2000.00 per month. What makes employees in the private security sector even more vulnerable is the high rate of retrenchments as a result of the fixed term contractual nature of the business of the employers in the private security sector. As such, employees in the private security sector are arguably an appropriate example of a vulnerable group of workers

The paper will explore the reasonableness of measures adopted by the state in order to ensure the provision of pension fund arrangements for vulnerable workers like employees in the private security sector who are paid low wages, confronted by minimal job security and confronted by the real risk of retrenchment, death and disability.

Section 27(2) requires the state to take reasonable legislative measures. “‘Reasonable’ must also imply more than statistical progress. There must be sufficient weight towards the most needy and vulnerable, so that they can live in conditions of dignity, equality and freedom guaranteed by the bill of right” (Cheadle *et al* (2002) South African Constitutional Law: the Bill of Rights at p 476).

The Pension Funds Act No 24 of 1956 applies to every pension fund operating in the Republic of South Africa but has restricted application to pension funds in which the state contributes.

Employees in the private security sector are obliged to belong to the Private Security Sector Provident Fund, a provident fund established in terms of Sectoral Determination 6: Private Security Sector, South Africa (Government Notice No.32524, 25 August 2009). The sectoral determination was issued under the Basic Conditions of Employment Act No.75 of 1997. The sectoral determination specifically states that the Private Security Sector Provident Fund shall operate in accordance with its rules and the Pension Funds Act No. 24 of 1956.

The paper will focus on the following: (i) section 27 (1)(c) and (2) with particular focus on private pension fund provision;(ii) jurisprudence emerging from or judgments of the Constitutional Court and the High Court in the Eastern Cape in relation to the implementation of socio-economic rights with particular reference to section 27 (1) (c);(iii) defining a vulnerable worker and looking at the private security sector (iv) considering the framework created by the Pension Funds Act No. 24 of 1956 in relation to the provision of private retirement benefits for vulnerable workers; (v) considering the framework established under the Pension Funds Act and whether it meets the requirements envisaged by section 27(1)(c) and (2) in relation to the measures aimed at vulnerable workers like those in the private security sector (reference to the jurisprudence from the Constitutional Court and the High Court in the Eastern Cape will be used for purposes of testing the appropriateness of the framework under the Pension Funds Act in relation to vulnerable workers); and (vi) the retirement fund reforms proposed in discussion document issued by National Treasury in March 2007 entitled Social Security and Retirement Reform. The retirement fund reform paper represents a fundamental re-think on the role of government, the private sector and individuals in ensuring financial security in old age and in the context of other life-time crisis such as unemployment, disablement and the death of a breadwinner.

PROF. MARIUS OLIVIER (NWU)



Marius Olivier is the director of the (International) Institute for Social Law and Policy, and holds several part-time academic positions: Extraordinary Professor, Faculty of Law, Northwest University (Potchefstroom campus); Adjunct-Professor: School of Law, University of Western Australia, Perth, Western Australia; Adjunct-Professor: Socio-Legal Research Centre, Faculty of Law, Griffith University, Brisbane, Australia. He is also the chairperson of the SADC Core Group of Social Security Specialists. He has been specialising in labour law, social security law and related fields, in particular constitutional and public international law – initially in a full-time academic capacity, including as director of a university centre, and since 2009 as director of two institutes focusing on research, policy development,

advice and capacity building in the area of social law and policy. He has written extensively, in particular in the areas of labour law and social security, both nationally and internationally.

Towards a Comprehensive Social Security System: Critical Perspectives on Addressing Vulnerability in South African Social Security

A proper understanding of vulnerability is central to the notion of a comprehensive social security system. Establishing such a comprehensive system is an objective apparent from the current reform agenda of the South African government and is, it is suggested, also constitutionally supported.

Vulnerability is also a central theme in the protective and regulatory framework informed by the South African constitutionally entrenched constellation of fundamental rights. In addition, vulnerability is a core determinant in the human rights dispensation endorsed by international standards embodied in a range of UN and other international, including regional instruments.

Vulnerability in the constitutional and human rights sense has clearly underpinned the jurisprudence of the Eastern Cape bench. This is evident from the judgments dealing with the plight of the vulnerable in the areas of social security service delivery as well as social security substantive and procedural rights, including access to justice.

This contribution reflects on vulnerability in South African social security from the perspective of deficiencies in the sphere of social security coverage, which have an impact on the comprehensiveness of the South African social security system. Coverage in social security has an extended meaning. For purposes of this contribution, focus is placed on certain deficiencies in both the personal sphere and the procedural sphere of coverage.

As regards the deficient personal sphere of coverage, the contribution investigates the position of non-citizens in South African social security. It discusses shortcomings in the coverage of various categories of non-citizens from the perspective of the different branches of social security in South Africa, encompassing social assistance and social insurance. It interrogates the need to adopt alternative approaches to the coverage of non-citizens, with reference to constitutional prescripts and international standards, bearing in mind the vulnerable status of non-citizens generally and of particular categories of non-citizens specifically.

As far as the procedural sphere of coverage is concerned, the contribution considers deficiencies in access to justice to which users of in particular the social assistance system (notably applicants and beneficiaries) are exposed to. Despite ground-breaking judgments emanating from the Eastern Cape bench, and limited recent statutory attempts to reform social assistance dispute resolution, the current legislative and policy environment does not provide adequate access to justice in this area. The contribution critically analyses some of these deficiencies and argues that a substantial overhaul of the current (inchoate) social assistance dispute resolution system is required in accordance with the constitutional mandate and international best practice.

LAND REFORM

Discussant: Prof. W du Plessis (North West University)

MS ANNE POPE (UCT)



Anne Pope is a Senior Lecturer in the Private Law Department at the University of Cape Town, where she teaches Law of Property and also Bioethics courses. She holds a Diploma in Librarianship from Stellenbosch University, BA LLB from Rhodes University and a Postgraduate Diploma in International Research Ethics from UCT. She is currently seconded full time to the Research Office at UCT, briefed to establish an Office of Research Integrity for the university.

She has published several articles on aspects of Property Law and other topics; she has presented papers at conferences and has contributed to three major texts on Property Law. Her research interests include Property Law, Indigenous Law, Family Law and the interface between health care and law, especially as it concerns bioethical matters. She is often called upon to make presentations about research ethics in various contexts both within the university and in the broader community.

A Retrospective Evaluation of Trends and Patterns in Eviction Jurisprudence – 1996-2010

Finding and maintaining an appropriate balance between principle and policy in the context of evictions has been a difficult task at times for the courts. The concepts and principles outlined in s 25 of the Constitution, the Prevention of Illegal Eviction and Unlawful Occupation of Land Act must be contrasted with the often pressing need and desperation of people driven to occupy land or buildings unlawfully. In attempts to meet the challenges of latter instance, policy-driven decisions may override principled approaches. Deciding whether equity and fairness support an eviction or not is one thing; another is taking account of the practical effects of a decision to evict but simultaneously to require the local authority to find a humane solution to sometimes intractable problems when socio-economic rights of unlawful occupiers are held to outweigh principle, at least temporarily. This paper attempts a thematic evaluation of eviction jurisprudence, paying special attention to that of the Eastern Cape Bench, to reveal whether a consistent and coherent approach to a thorny issue is apparent.

PROF JUANITA PIENAAR (STELLENBOSCH)



Juanita M Pienaar is a professor in Private Law and Head of the Department of Private Law, Stellenbosch University. She obtained the following degrees: B.Iuris (cum laude), LL.B, LL.M and LL.D from the North-West University (Potchefstroom). She lectures Customary Law, Property Law and Advanced Property Law. Her research focus is Property Law in general and Land Reform and related matters in particular. She has co-authored some of the standard Property Law publications, including *Silberberg and Schoeman's Law of Property* (with Badenhorst PJ and Mostert H) and *Principles of the Law of Property* (Mostert H and Pope A (eds)). She is also responsible for the Land Reform section of the "Land" title in *LAWSA* (2010, with Mostert H and Van Wyk J), the "Land" chapter in *Constitutional Law of South Africa* (with Brickhill J) and has co-authored the "Law of Property" in the *Annual Survey* with Cornie van der Merwe since 1994. She is also an acting judge in the Land Claims Court. She is married to Eduard Pienaar and they have two children.

Tenure Reform: Overview and Challenges

"Understanding how land works with people is, therefore, no easy task. But no self-respecting land administrator would jump in first with a proposal that tenure be fundamentally changed without a clear grounded preliminary evaluation and well conceived, clear, follow-up measures."¹⁴

Sixteen years into the overall land reform programme, tenure reform is again under the search light. In the course of 2010 the Department of Rural Development and Land Reform published its Strategic Plan for the period of 2010-2013. Land Reform in general and tenure reform (linked with rural development) in particular, have been identified as key components for the success of rural development. Although an all-encompassing Green Paper on Tenure Reform and corresponding legislation are envisaged, the policy documents and legislation have not been published yet.

Why is Government embarking on a new tenure reform initiative in 2010? What are the problems and challenges experienced? How are these challenges to be addressed? These are some of the issues to be dealt with in the presentation. In order to understand the present difficulties of tenure reform, it is necessary to provide a brief historical background that explains the need for tenure reform in the first place. Thereafter a brief exposition of the most important legislative measures that deal with tenure reform will be provided. Within this context the current challenges and difficulties will be discussed. Some problem-areas relate to existing legislation, for example, difficulties in implementing legislation effectively (eg tenure security by way of ESTA and complexity issues related to CPA's), establishing the exact scope of particular legislative measures like ESTA, labour tenancy legislation and PIE, while simultaneously questioning whether the multitude of legislative measures is really necessary and effective. Another challenge lies in addressing the issue of communal land in light of the recent unconstitutionality finding of CLARA. It is within this context that the need for intervention and the possible scenarios that may be expected, will be explored.

¹⁴ Jude Wallace "Managing social tenures" in Godden L and Tehan M *Comparative perspectives on communal lands and individual ownership* Routledge (2010) 39.

PROF R MQEKE (RHODES UNIVERSITY)



Professor RB Mqeke B Juris. LLB, LLM, LLD, Professor of Law at Rhodes University. He acted as Dean of Law at Rhodes and the University of Transkei (now known as Walter Sisulu University). He also became Registrar Academic at the University. He has several publications to his credit and has published two books, entitled *Problem Solving in Customary law*, Grocott's & Sherry (1997) and *Customary Law and the New Millennium*, Lovedale Press (2003).

The Impact of Land Reform on African Land Tenure Practices in The Eastern Cape

Ever since the advent of the British Colonial rule subsequent to the defeat of the Xhosa Chiefs during the Frontier wars, the reform of African land tenure has undergone three important phases. The first phase covers the period 1835 – 1990. The outcome of the process was a mixture of African land tenure and western forms of tenure.

The second phase covers the period 1991 – 1993. In this phase there has been a strengthening of the precarious African tenure system. The third phase covers the period 1994 – to date. In this phase there was a continuation of the incorporation process until the enactment of the Communal land Rights Act 11 of 2004 which had the effect of revolutionising the African Communal tenure system. Fortunately that system was brought to an abrupt end in the recent judgement of the Constitutional Court in *Tongoane and others v Minister for Agriculture and Land Affairs and others* which declared the Act in its entirety to be unconstitutional and invalid.

MR STEVE KAHANOVITZ (LEGAL RESOURCE CENTRE)

Steve Kahanovitz is a practising attorney at the Legal Resources Centre Cape Town and previous director of the organisation. He has acted on behalf of the occupants of many informal settlements concentrating on the realisation of their housing rights contained within the Constitution. Most recently he has been instructing attorney for the occupants of Joe Slovo, and for amici in the Olivia Road and Modderklip cases. He has a BA from UCT, a LLB from WITS, a LLM from LSE and has spent sabbaticals on fellowships at the Harvard Human Rights Program and NYU.