Letter from Editors

Sometimes the best way to celebrate the present is to reflect on the past. *In Camera*, since its first issue has over the years grown from strength to strength and has, as a publication, come into its own and is now somewhat of a household name in the Rhodes University Law Faculty.

Looking back over the years the earliest edition portrays somewhat humble roots as a simple paperback document, but even so the spirit and strength of the Law Faculty at Rhodes was clear. However lack of funding prevented the publication from being able to utilise newly developed publishing technology in the media field. This all was altered when the publication was heavily subsidised not only by the Rhodes University Law Student's Society, but also receiving a contribution from the law Faculty. As well as firms who in exchange for advertising space generously agreed to sponsor space in the magazine. This not only assisted the publication financially, but it also allowed readers of the magazine access to information about opportunities within these top firms.

At the same as opening doors for improvements in the general appearance and design of the publication this in addition allowed editors of the magazine to access various academics and professionals opinions' on pertinent legal matters. Not only has this assisted in broadening the scope of the magazine, but it has also broadened the target audience extending to all levels of legal theory students as well as appealing to academic staff and top law firms receiving the publication.

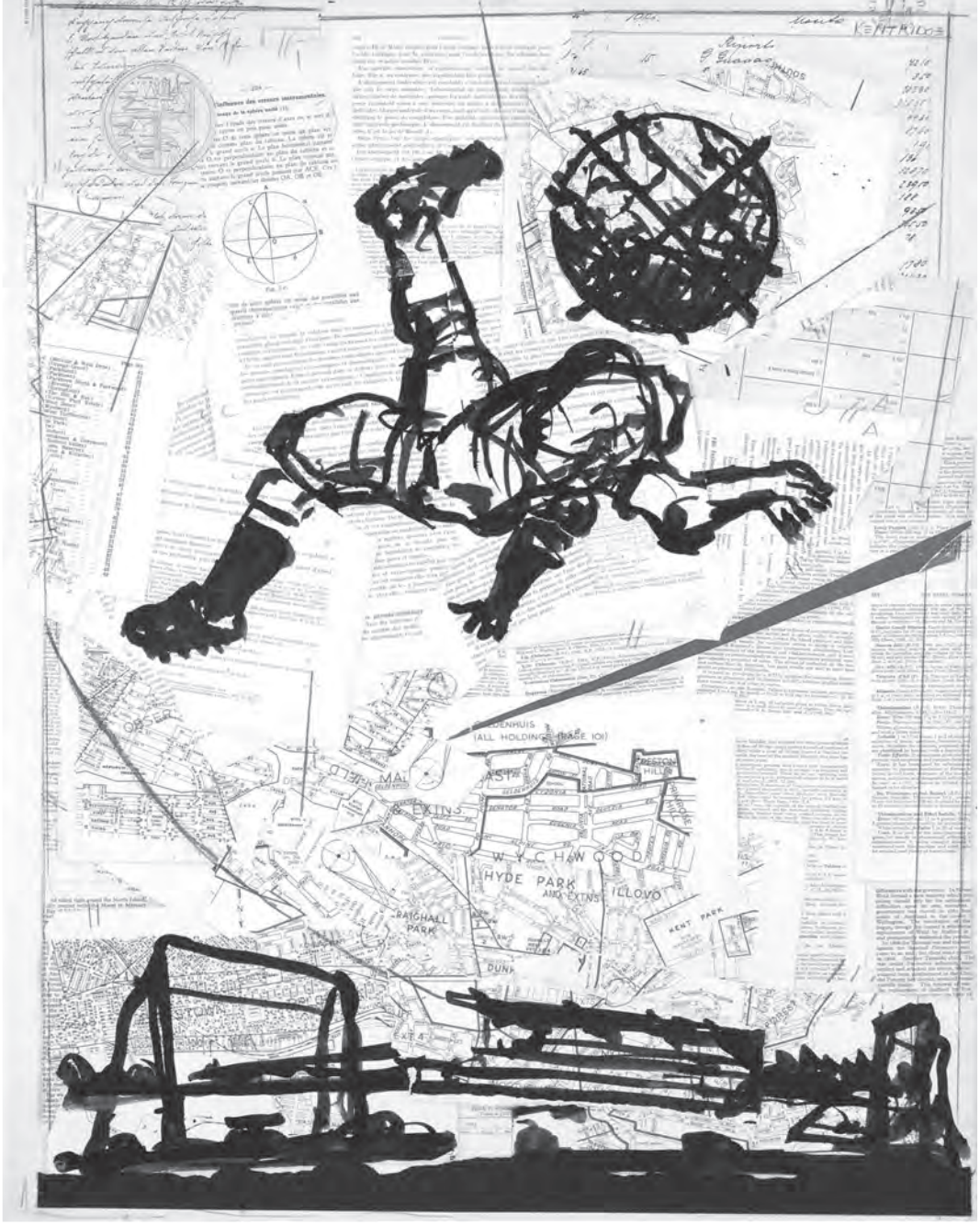
As editors we are extremely proud to present to you the 2010 issue of *In Camera* and it is our feeling that this issue firmly roots *In Camera* as a publication that not only has endless potential, but is clearly here to stay and will not stop until boundaries are pushed and legal issues are exposed and put to rest. It is our hope that this publication will not only be appreciated by law students at Rhodes University, but that in the years to come students, staff, academics and professionals alike will turn to this publication to feed their desire to explore the law. This issue of *In Camera* seeks to expose its readers to different view points and perspectives on the law.

On a personal note we would like to thank all our generous sponsors for making the 2010 possible as well as all the contributors for enriching this year's issue.

Lastly we would like to wish the class of 2010 all the success that they deserve. It has been a long five years, with much hard work, but now is your time to reap the rewards that each and everyone you so unquestionably deserve.

We would like to dedicate this issue to the class of 2010

Lauren and Keri



William Kentridge – Bicycle Kick. 2009.

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BRINK COHEN LE ROUX

Editors
Lauren Cloete and
Keri Hattingh

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

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

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contents

Presidents report

We are almost finished. We are close to the end of this hard-earned degree. To the Class of 2010 – what a year to end off our LLB studies! I look forward to meeting all of you in the business world some day. We have a very diverse, passionate, highly motivated and powerful class just aching to make a difference. I thank you for making my experiences here that much more valuable. It is unfortunate that I am not able to write about the experiences which Ingrid and I will have at the All-Africa Moot in Benin, West Africa in October; I am sure that would have added some flavour to this report.

I will commence by giving a synopsis of what LAWSOC did this year to add value to the Faculty and student life. Law Market Day was held earlier than normal this year to accommodate the early deadline of Candidate Attorney and Vacation Work applications to the major law firms. It was made an even bigger success with firms such as *Deneys Reitz, Bowman Gilfillan* and *Spoor and Fisher* generously donating funds to the various events of the day. My thanks particularly to Dominic Hodge, Helen Kruuse, Liezel Niesing, Jurgen Keitzmann, Saronda Fillis, Phumla Cuntswana, and Yolanda Itamba for their attention to detail and tremendous accomplishment in this regard.

After Sign-up Evening the Committee was eager to host our Welcome Event which was held at Equilibrium on New Street. A spitbraai was provided

and the event was well attended, the only quirk of the evening being the contents of the punch, or the lack thereof. Due to the short length of the second term – so that we could all enjoy the World Cup – and the manner in which studies had to be crammed into such a short time, it was not possible to host another major social event in the first semester. Instead, we focused on organising an evening where students could improve their CV and interview skills. Again, Jurgen Keitzmann is to be thanked for his ever-present enthusiasm; it was an eye-opening experience from which I am sure many students benefited.

In the beginning of the second semester, we held another social event at House of Pirates on African Street. This time we did not hold back. The Committee learnt that sometimes, depending on the purpose of the function, it is better to have more liquid than sustenance. Social networking is an important part of University life that benefits you today and in the future. It is highly probable that many of the students will become colleagues or competitors in the near future, and they will already have had an opportunity to start that relationship here at Rhodes.

During the 1st to the 3rd of September 2010 the Law Faculty hosted a conference entitled 'The Eastern Cape Bench and Social Justice'. I represented the Law Students Council on the Conference Steering Committee along with David Grenville who represented Legal Activism. I am sure that he will agree with me when I say that I learnt a thing or two about organising such prestigious events. The amount of planning and hard-work shown by all the Staff involved was very inspiring and, indeed, the main reason why it was such a success. Well done! The Conference itself honoured former Judges Somyalo and Jones for their contribution to Eastern Cape jurisprudence. Papers were presented on the broad topics of Administrative law, Social Security law, Enforcement of Judgments and Cost Orders and Land Reform. I am proud to have been educated in a place from which such jurisprudence has emanated, and as Wandisile Mandlana aptly stated, the Eastern Cape judges have been 'pioneers' in the law.

Studying at Rhodes University is a greatly rewarding experience. We live in an environment so conducive to learning and socialising that all aspects of our lives receive attention as we yearn to strike a balance. (Whether or not we succeed in striking a balance is a different story altogether.) However, it is important to note that we try, and eventually we succeed – and when we do not succeed, we try even harder.

I would like to share with those who were not at the 2009 AGM, an insightful and valuable message which I have carried with me since my Matric year (2005). This particular motivational 'scheme' was showen to me by my mathematics teacher, Louise Hopkins. It has helped me shape the way in which I undertake new and exciting tasks, and has added to my enthusiasm.

"If you assign every letter of the alphabet with a numerical value corresponding to its position in the alphabet, for example, A=1, B=2, C=3 and so forth, the sum value of the letters in particular words produce a percentage. So, the question I pose to you is this: 'What is the <u>best</u> formula for success and happiness?'

Is it 'HARD-WORK? No, this only adds up to 80%. Is it 'DILIGENCE'? No, this only adds up to 68%. What about 'ATTITUDE'? Well, if you add up the values of these letters you get 100%."

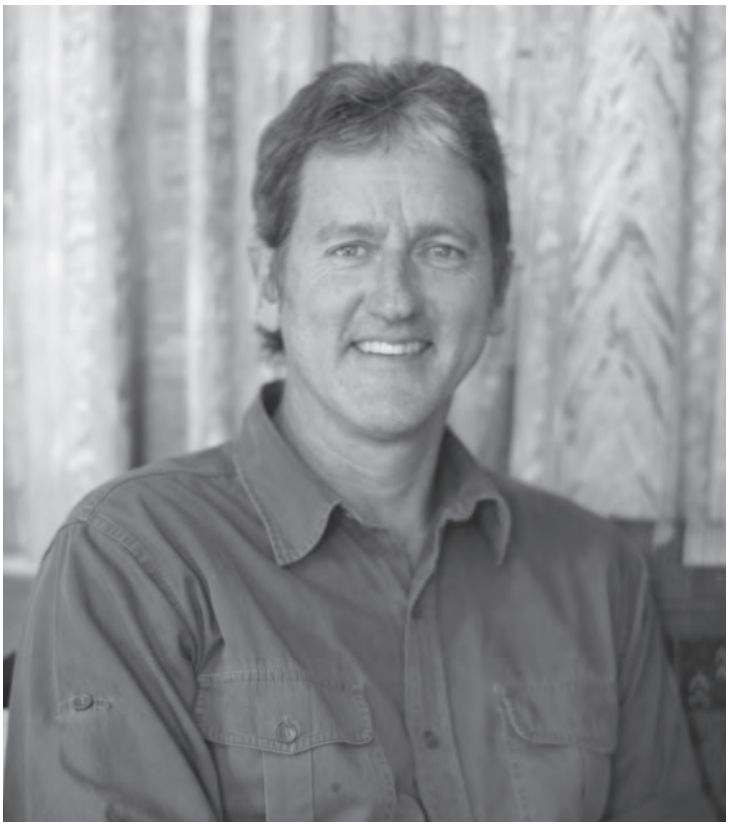
Attitude is the king of the jungle. With the right attitude you can do anything. Your attitude aligns you positively with your goals. It is not, by any measure, the only ingredient for success, but I would go so far as to say that it is the most important because all the others – hard-work, diligence, discipline, passion, etc. – are reliant on 'attitude' to maximise the user's potential. Therefore, I challenge you to challenge yourself. Enjoy the journey that is life, and seize every opportunity that may come your way. *Carpe diem*!

My message to current and future LLB students, potential candidates for the Law Society and Law Students Council committees, and anyone for that matter is this:

Do not avoid responsibility simply because you think that you cannot handle it. You may be right, but the fact that you have managed to come as far as you have, handling all kinds of pressure is testament to yourself that you can learn how to take on that responsibility. Naturally, as young students with immeasurable ambition, responsibility should be in high demand. Whoever you are, make it your priority to set goals and embark on various opportunities. As Richard Branson said, *"The brave may not live forever – but the cautious do not live at all!"*

At this point, I would like to thank my Committee for being such a great team. I know there were rocky times, but we trudged through them, and are more mature and astute because of them. I have learnt from all of you, and could not have asked for a more passionate and committed team. If I could re-live this entire year, I would not change a thing; except, perhaps, my Law of Sale test mark. I also want to express my gratitude to the entire Law Faculty Staff for their outstanding commitment to making our law studies an enlightening journey.

Fausto Di Palma



By Professor Jonathan Campbell,
Dean of Law
BA, LLB, LLM

LAW FACULY REPORT 2009-2010[1]

1 This report covers the period October 2009 (when the 2009 *In Camera* was published) to mid-September 2010.

After much change in early 2009, the Law Faculty now has a much more settled leadership, administration, and academic and law clinic staff complements. It has to a large extent been a year of further consolidation of the core business of the Faculty, which is to provide our students with an enabling environment for quality legal education via the teaching and learning 'partnership'.

The academic year began with the Faculty Opening in February, at which Mr Peter Harris, human rights lawyer and acclaimed author, gave a most stirring and insightful address. In short, he challenged students to strive to make a difference to social justice in the future South Africa. We were also able to recognise our high achievers from 2009 with the presentation of a number of awards and prizes.

Academic matters

In April 2010 74 students graduated with LLB degrees, three of them with distinctions (Goscelin Gordon, Chris McConnachie and Jessica Staples). 81 students took up offers of acceptance into LLB this year, only 6 of whom registered for the four year LLB, thus indicating that well over 90% of our law students continue to choose the 5 (and occasionally 6) year stream, entering the LLB only after completing an undergraduate degree.

There were a number of adjustments to the LLB curriculum this year. With the many changes brought about by the new Companies Act, our corporate law courses were extensively restructured and content adjusted:

Business Structures A was renamed *Law of Partnerships and Trusts*;

Business Structures B was renamed *Company Law A*;

Company Law B was introduced (a compulsory penultimate LLB course), incorporating the content of the previous by *Capita Selecta Corporate Law*;

Forms of Payment was renamed *Law of Banking and Payments*, and became an elective course;

Competition Law was introduced as a new elective.

The corporate law electives proved to be extremely popular with students.

Law of Delict A and *B* were offered to penultimate LLBs, and for this year both penultimate and final years did the courses. Despite the large class sizes, the courses were a great success. *Administrative Law A* and *B* are now, in turn, final year LLB courses.

The *Legal Skills* course was given over both semesters for the first time, thus spreading the work load of the penultimate class more evenly over both semesters. With the moot programme being run in the second semester, this change served its purpose very well.

The national LLB curriculum is currently under review by the Council on Higher Education at the request of the South African Law Deans Association, and the results of the review are expected in November 2010.

The penultimate and final year student reviews (evaluations) for both the second semester of 2009 and the first semester of 2010 were overwhelmingly positive. Lecturers were complimented on their knowledge and teaching skills, and the library and Faculty administration were singled out for high praise. Academic staff have attempted to pro-actively address student concerns raised, although little could be done about the adverse consequences of the shortened first semester and more congested exam period resulting from the soccer World Cup.

The Alastair Kerr Law Library remains an extremely busy academic hub for law students and staff, and is proud to be a fully-functioning branch library which is open for over 90 hours per week. The library staff continue to do all they can to manage the pressure on the library computers and on study space during examinations, which is easing with the opening of the new main library.

In May this year we hosted Prof Dr Tom Zwart from Utrecht University, an expert in international human rights law and Director of the Netherlands School of Human Rights Research. He delivered lectures and interacted with Rhodes staff in an effort to strengthen ties with Utrecht University.

In the fourth term this year students will be able to enjoy the experience and insights of our visiting professors Judge Clive Plasket, Adv Wim Trengove SC and Dr Tim Burrell.

Research publications[1]

Publications by staff in the past year include the following:

Ms van Coller contributed a chapter "Administrative Law" in *Introduction to South African Law*.

In April 2010 74 students graduated with LLB degrees, three of them with distinctions (Goscelin Gordon, Chris McConnachie and Jessica Staples). 81 students took up offers of acceptance into LLB this year, only 6 of whom registered for the four year LLB, thus indicating that well over 90% of our law students continue to choose the 5 (and occasionally 6) year stream, entering the LLB only after completing an undergraduate degree.

Ms Kruuse published a chapter entitled "Mentall illness, physical disability, and the influence of alcohol and drugs on capacity" in *The Law of Persons in South Africa*.

Prof Kerr and Prof Glover have completed the updating of the chapter on "Sale" in LAWSA.

Prof Glover jointly edited a book entitled *Law and Transformative Justice in South Africa* which is expected to be published later this year.

Ms Niesing has completed the ancillary material for the new edition of *The Law of Delict in South Africa*.

Ms Kruuse had an article published entitled "Drawing lines in the sand: *AM v RM*" (in Speculum Juris).

Prof Mqeke had a note published entitled "Guidelines for determining the constitutional injunction to

1 Publications, papers presented at conferences and other research activities exclude those reported on in the 2009 *In Camera* report, which may have been published in the last year.

In February 2010 Prof Glover was appointed as managing editor of the *South African Law Journal,* South Africa's premier law journal, within a year of his first appointment to the editorial team.

apply customary law in the new South Africa" (in the SALJ).
Prof Mqeke had a comment published entitled "The transformation of customary law by traditional leaders" (in Speculum Juris).
Prof Juma published a novel titled *Kileleshwa: a tale of love, betrayal and corruption in Kenya*.

Papers presented at conferences

Papers were presented by Faculty staff at various conferences in South Africa and abroad:
Dr Kruger "A question of interpretation: a comparative study of 'unenumerated' rights recognition" (co-presented with Prof Govindjee at the 4th S.P.Sathe Memorial Conference in Pune, India, February 2010.
Prof Juma "The role of the African Union in addressing the use and misuse of private military and security companies in Africa" (Privatisation of security: implication for Africa conference, Addis Ababa, Ethiopia, March 2010.
Ms Ramlall "Corporate social responsibility in post-apartheid South Africa" (9th international conference on corporate social responsibility, Zagreb, Croatia, June 2010).
Ms Mangezi "Enhancing Student Learning through Assessment in Clinical legal Education" (International clinical legal education journal conference, Newcastle, UK, July 2010).

Prof Mqeke "Purposive interpretation in labour tenancy disputes – too little, too late" (Annual property law conference, Stellenbosch, October 2009).

Dr Kruger "The buck stops here: costs orders in litigation against organs of state" (The Eastern Cape Bench and Social Justice conference, Rhodes University, September 2010).
Prof Mqeke "The impact of land reform on African land tenure practices in the Eastern Cape" (The Eastern Cape Bench and Social Justice conference, Rhodes University, September 2010).
Prof Juma "The shifting notions of what law is or is not in contemporary African thought" (The Universities of the Western and Eastern Cape Seventh Annual Law conference, Nelson Mandela Metropolitan University, January 2010).
Prof Campbell "The *in duplum* rule: relief for consumers of excessively-priced small credit legitimised by the National Credit Act" (International conference on over-indebtedness and credit regulation, Pretoria University, August 2010).

Other research activities

In February 2010 Prof Glover was appointed as managing editor of the *South African Law Journal*, South Africa's premier law journal, within a year of his first appointment to the editorial team. In the past year Ms Kruuse saw through the publication of the 2009(1) and 2009(2) editions of *Speculum Juris* (a joint publication of Rhodes University and the University of Fort Hare) – the latter a special family law edition – prior to resigning to join the *SALJ* as notes editor. Dr Kruger was in turn appointed as technical editor of *Speculum Juris* and publication of the two 2010 editions is expected within the next six months.
Ms van Coller was a guest researcher at the Vrije Universiteit Amsterdam (January-March 2010), during which she delivered a seminar titled "Bestuursrecht en kerkgenootschappen" (Administrative law and religious communities) and a public lecture titled "Gelden bestuursrechtelijke normen voor geloofsgemeenschappen (kerken)?; een Zuidafrikaans perspectief op de verhouding kerk-staat/vrijheid van godsdienst" (Are administrative law principles applicable to religious organisations? A South African perspective on State/Church relations and freedom of religion).
Ms Ramlall conducted a research visit to Utrecht University in June-July where she co-lectured on

selected aspects of South African constitutional law at the Summer School of Global Justice, attended seminars and participated in the activities of the Africa Network of Human Rights and Good Governance. She and Ms Young attended a seminar on King III and the New Companies Act at Wits Law School in March.

Dr Kruger is actively involved as secretary of the teaching group of the African Network of Constitutional Lawyers, which is in the process of conducting a questionnaire into the teaching of constitutional law in Africa in an effort to facilitate assistance to under-resourced constitutional law teachers.

Prof Goolam presented two lectures at the 2010 UCT Summer School in January 2010 entitled 'Understanding Islam, Islamic Law and Freedom of Expression in Islam'.

Community engagement

The renamed Rhodes University Law Clinic (previously Legal Aid Clinic) undertook a number of community engagement activities (besides the regular legal service provision and advice office work):

Prof Bodenstein trained law professionals, teachers and students in clinical law and street law in Isfahan, Iran (October 2009);

40 paralegals from community advice offices received valuable training in the law relating to wills and succession, the Traditional Courts Bill and the Legal Practice Bill (November 2009);

Nine paralegals from newly established advice offices attended a workshop on the writing of fundraising proposals to the Foundation for Human Rights (April 2010);

A total of 85 paralegals attended repeated workshops in Graaff-Reinet, Mthatha, Queenstown and Grahamstown on financial reporting and proposal writing (June 2010);

21 law students, law clinicians and paralegals received training in street law facilitation skills (August 2010).

The Ntuthuko Legal Activism Society signed up a record 350 members this year, developed a new constitution and established a website. The year started with a welcome dinner which presented an excellent opportunity for new members to become acquainted with the goals and vision of the society.

As part of the University's Human Rights Week, Legal Activism and the Law Society co-hosted a panel discussion on the topic: *Realising the right to basic education: a call to act!* The speakers were Dr Andre Keet (commissioner for Gender Equality), Dr Kenneth Ngcoza (lecturer in the Education Faculty), and Mr Cameron McConnachie (attorney from the Legal Resources Centre).

The core function of the society remained to conduct workshops in five key areas of law, namely: wills and estates, labour law, micro-lending, HIV/AIDS, and rape and domestic violence. The material is presented in the simplest and most interactive way possible, and attempt to relate the law to the everyday lives of participants.

Finally, at the time of writing preparations are under way for the University's Constitution Week involving several Law Faculty and Law Clinic staff and students. The theme of the week is *Freedom of Expression*, which is most pertinent given the controversy around the *Protection of Information Bill*, and it will feature a keynote address by former Constitutional Court Judge Kate O'Regan.

'The East Cape Bench and Social Justice' Conference

In the September vacation the Law Faculty hosted this conference which set out to celebrate the progressive jurisprudence of the Eastern Cape Bench of the past 16 years, and also to honour the Honourable Judges Somyalo (former Judge President) and Jones who retired from active service in April. There were about 100 delegates from all over South Africa, including judges, law practitioners, law academics and about ten students.

There were four subject sessions informed by this court's work, namely Administrative Law, Enforcement of judgements and costs orders, Social security law, and Land reform. Twenty prestigious invited discussants and speakers addressed the conference in these four areas. Judge Clive Plasket (Eastern Cape Bench), the programme convenor, gave the keynote address, Judge Lex Mpati (Rhodes alumnus and President of the Supreme Court of Appeal) addressed the gala dinner, and Judge Craig Howie (former President of the Supreme Court of Appeal) provided the closing address. It is envisaged that the papers will be published in the 2011(1) edition of the journal Speculum Juris.

The conference was by all accounts a resounding success, the excellent papers providing for rigorous

academic and intellectual interaction. This was due in large measure to an excellent team effort by the organising committee comprising many academic and administrative staff (most notably Ms Saronda Fillis), and two law students (Fausto di Palma and David Grenville).

Student news

In February the Faculty hosted a highly successful market day, attended by numerous prestigious firms, state legal service agencies and non-governmental organisations. A further opportunity for students to explore employment possibilities was the Law and Accounting market day in August, which included a first-time visit by the international law firm Eversheds. Five law students participated in a gruelling interview process with The Monitor Group, an international consulting company, two of whom did extremely well to be shortlisted for later rounds of interviews. Ms Niesing has been in regular communication with the University's Careers Office in order to assist our students who have not yet found employment. Linked to this, Ms van Coller made various visits to schools throughout the year to market the Law Faculty, including the DSG Careers Day in April.

We have had a very full moot programme in the past year:
In October 2009 four students represented Rhodes at the intervarsity moot court competition for first year law students in the Supreme Court of Appeal, Bloemfontein, and acquitted themselves admirably. They were Seepheepe Matete, Kirsty Hall, Armand Swart and Maxine Smith.
The final year moots took place in March, with staff members presiding. The two best final years were Ingrid Cloete and Fausto Di Palmer, who competed in the moot final on 18 March before a Bench of three judges comprising Adv Murray Lowe SC, Prof Ivan Schäfer and Prof Richman Mqeke. The winner was Ingrid Cloete. Ingrid and Fausto will represent Rhodes at the African Human Rights Moot competition in Cotonou, Benin in October 2010, accompanied by Prof Juma.
The penultimate year moots took place in August. The top four students took part in the moot final on 24 August, arguing in teams of two, but being assessed for their individual performances. The finalists were: Philippa Bruyns, Robyn Jones, Haruperi Mumbengegwi and Rutendo Urenji. There were three judges: Adv Nicola Redpath, Prof Laurence Juma and Adv Craig Renaud. The winner was Haruperi Mumbengegwi, with Rutendo Urenji as the runner-up. Haruperi, Rutendo and Robyn will represent Rhodes at the International Humanitarian Law moot competition in Arusha Tanzania, in November 2010.
Two third year students, Joanna Pickering and Sarah MacQueen (the top two students from the Law of Persons course), will compete in the Child Law Moot Competition in Pretoria in September, trained and accompanied by Ms Young.
Finally, Kathryn Abrahams and Allison Moore (final years) will represent Rhodes at the World Human Rights Moot Competition in Pretoria in December.
At the time of writing all these moot teams are hard at work in training, with various staff members assisting them with their preparation, spearheaded by Prof Juma.

> The academic and administrative staff complement has become settled with no changes since the beginning of 2009, providing a stable foundation for our academic work.

We have had two students on exchange in the second semester from Leicester University (Andrew Smith) and ICES, France (Francois-Xavier Gicquel). Four of our students are on exchange in Europe to Leicester University (Douglas de Jager and Thandeka Kathi), Utrecht (Faizel Badat) and Keele University, UK (Gillian van Heerden).
Other notable student activities and achievements include the following:
Dorothy Makaza (LLM student) attended the German Federal Agency for Civic Education 'Go Africa, Go Germany' education seminar in Germany

in August, comprising 26 participants (13 from Germany and 13 from all over Africa). Participants have commenced work on a common paper on the topic "Youth Entrepreneurship in Africa and Germany" which they are to research and draft as a group, and which will be presented to policy makers for implementation.
Dorothy has also been shortlisted for an Internship with the United Nations.
Daniella Ellerbeck (final year LLB) attended the International Youth Leadership Conference (one of only 100 students worldwide) in Prague, Czech Republic in July, the conference theme being "A cross-cultural exchange of ideas concerning the future of world leadership".
At the time of writing the Law Society is preparing for the annual Law Ball at which Judge Johan Froneman of the Constitutional Court will speak

Staff news

The academic and administrative staff complement has become settled with no changes since the beginning of 2009, providing a stable foundation for our academic work. Dr Kruger (first semester) and Ms van Coller (first term) were on academic leave, with Ms Kruuse and Ms Ngele (secretary) on maternity leave for six months.

Several part-time staff taught in the Faculty 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), Ms Pam Maseko (isiXhosa for law). Master's students Ms Amanda Mapanda, Mr Keith Kachambwa and Ms Nikita Young taught a number of courses or parts of courses on a part-time basis.Our administrative staff continued to produce excellent work and together form an exceptional administrative team. Ms Relize Frieslaar ably stepped into the shoes of Ms Patience Ngele while she was on maternity leave. Ms Saronda Fillis successfully completed a supervisors' course in April.Ms Luise Ostler was appointed as attorney in the Law Clinic following the departure of Ms Jika. There were four new candidate attorneys appointed this year in the Grahamstown office: Ms Tarryn Cooper-Bell, Ms Nonkululeko Shenxane, Ms Jaylynne Hillier and Mr Guguletu Ngodwana. In the Queenstown office Mr Siyasanga Giyose was appointed as an attorney.

Whilst there is still some way to go, the Law Faculty has thus far had a most productive and successful year.

2010 proved to be a year of change for the Law Library staff. Ms Jill Otto was appointed from 1 May as Principal Librarian (Commerce and Law) in the Faculty Liaison Services of the Main Library. Until November (when her replacement begins work) she will continue to divide her time between the Law Library and her new position in the Main Library. Ms Yvette Williams left the Law Library at the end of July to take up a position in the Registrar's Division, and Mr Sam Simango was appointed on a temporary basis until 31 October, when Ms Anne Warring will join the Law Library as admin/circulation assistant. Ms Otto was also fortunate to be selected as one of six Rhodes University Librarians to attend the Carnegie Corporation's Research Libraries Academy in Stellenbosch in April. This was an intensive two week academy where the participants were exposed to all aspects of academic research. In addition, each librarian was required to produce a research report on an aspect of librarianship relevant to their work.
Other notable achievements by staff include the following: Ms Kruuse and Ms Haller-Barker graduated with the Postgraduate Diploma in Higher Education, both with distinctions; Ms van Coller was admitted as a member of the International Consortium for Law and Religious Studies, 2010 and the Law and Religion Scholars Network, 2010; Ms Ostler passed the notary examinations of the Law Society.

Conclusion

Whilst there is still some way to go, the Law Faculty has thus far had a most productive and successful year. I wish all students well in the November exams, and to those who will be leaving us next year, may you have enjoyable and rewarding legal careers, and never forget the Rhodes Law Faculty!

By Graham Glover
Associate Professor
BA, LLB, PhD

The Supreme Court and the Appellate Division 100 years ago years ago

Introduction

The year 2010 was not only significant because of the World Cup; the unified country of South Africa also celebrated its 100th birthday this year. The Act of Union (the South Africa Act of 1909), which established the Union of South Africa from the British crown colonies of the Cape, Natal, the Transvaal and the Orange River Colony, came into force on 31 May 1910. For political as well as sporting reasons, the milestone seems to have passed with little acknowledgment this year. So a brief retrospective seemed like a suitable topic for this year's *In Camera*.

The South Africa Act – Judicial Aspects

The body responsible for negotiating the Act of Union, the National Convention, had relatively little trouble establishing the judicial arm of the new Union. It was agreed that the various former colonial courts should be unified into one Supreme Court, and that there should be an appeal court for the whole country. Part VI of the Act ultimately established the Supreme Court of South Africa, with the various provincial and local divisions forming the basis of its structure. It also created an Appellate Division. There were only three matters that caused the National Convention some difficulty. First was the status of some of the more far-flung colonial courts, most noticeably the Eastern Districts Court in Grahamstown (ironically, in the light of current events). The Grahamstown Court ultimately survived to fight another day. Secondly, there was the composition of the appellate judiciary, and finally, where the seat of the Appellate Division was to be located. These two matters will be expanded upon below.

The Appellate Division

Since the colonial courts had existed for a long time, for these courts it was simply a matter of settling into a new constitutional and judicial regime. But it was specifically the Appellate Division that was created in 1910, and which (under its new moniker, the Supreme Court of Appeal) celebrates its 100th birthday this year. The current name would not have been appropriate in 1910, in the same way that it is inappropriate today. The Appellate Division was established as an intermediate court of appeal; the final court of appeal remained the Judicial Committee of the Privy Council in London until 1950, when such further appeals were abolished. A hundred years later, the court again has its original status. *Plus ça change, plus c'est la meme chose.*

A matter that provoked much interest was the appointment of the Chief Justice and the Judges of Appeal. It was stated that "the five most qualified experts in Roman-Dutch law in South Africa" should be appointed, but whether this was the result at the end of the day was a matter of dispute at the time. The first three positions filled were at least uncontroversial: Sir Henry de Villiers, Chief Justice of the Cape since 1873, and the most dominant judicial personality in the country was the obvious choice as Chief Justice. In honour of his nomination, he was created a Baron of the Realm, earning him the title Lord de Villiers of Wynberg – the only South African domestic judge ever to hold such a title. The next two positions were filled by Sir James Rose Innes and Sir William Solomon, outstanding judges of the Transvaal Division. Interestingly, both had been schooled just up the road from Grahamstown, in the small town of Bedford, and were life-long friends.

The final two positions (at the time described as Additional Judges of Appeal) were filled by the Judge President of the Cape, CG Maasdorp, and Jacob de Villiers, Judge President of the Transvaal. Only the final appointment evoked real outcry: many had hoped that the long-time Chief Justice of the South African Republic, John Kotzé (after whom the Rhodes res "JK" is named) would become an appeal court judge. But his poor relationship with Lord de Villiers (most notably his legal feud with the

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new Chief Justice about the role of consideration in the law of contract) wrote off his chances. He would have to wait until 1922, after 45 years as a judge, for a taste of life as an appeal court judge, long after De Villiers's death, and after his views on the basis of South African contract law had been vindicated in the seminal case of *Conradie v Rossouw* (1919 AD 279). Others who were nominated were JBM Hertzog (later Prime Minister of South Africa), who preferred to remain in politics, and WP Schreiner KC of the Cape Bar (younger brother of famous author Olive Schreiner). Had Schreiner been a successful nominee, it would have allowed the little Bedford School (now known as Templeton High School, which is celebrating its 145th anniversary in 2010) to count an extraordinary three of the first cohort of appeal court judges among its alumni.

Most people know that the chosen seat of the Appellate Division was Bloemfontein, as a political compromise. But some may not know how problematic this turned out to be. The Appellate Division sat for the first time on 4 June 1910, in Bloemfontein. On that day, the Chief Justice laid down some basic rules of practice (see 1910 AD iv-vi) and the court then heard and decided its first matter, an application for leave to appeal in *Fichardt Ltd v Faustman* (1910 AD 1). Job done for the day, the bench seems to have considered the political compromise duly acknowledged. None of the newly appointed judges of appeal viewed working in Bloemfontein favourably, and from then on the court began to sit almost exclusively in Cape Town. (In fact, an examination of the reported cases in 1910 shows that barely any cases were heard in Bloemfontein at all.) This was possible because s 109 of the Act of Union stipulated that a case could be heard elsewhere than Bloemfontein "at the convenience of suitors". It became a joke that this meant "at the convenience of the Chief Justice", for the direction to hear the matter in Cape Town tended to come from Lord De Villiers himself; he made no secret of the fact that he found travelling to, and staying in, Bloemfontein distasteful. Naturally, this upset the Free Staters (especially Hertzog, who was at the time Minister of Justice), and in 1912 Parliament amended the Act to say that the court could only sit outside Bloemfontein "in exceptional circumstances". Lord de Villiers was so upset that he actually tendered his resignation, and had to be placated and convinced to continue by the Prime Minister, Louis Botha. In truth, not much changed until De Villiers CJ passed away in 1914, and was replaced by Innes as Chief Justice. But the court still continued to sit more regularly in Cape Town than the literal interpretation of "exceptional circumstances" would suggest (at least a third of the time). One of the sticking points was a lack of a separate home for the court – it was only in 1929 that the magnificent Appeal Court building was completed. But still the problem remained. Finally, matters came to a head in 1933. The Bloemfontein newspaper *The Friend* published an anonymous letter (reputed to have been written by the then Judge President of the OPD, FET Krause) attacking the judges of appeal for deciding to hear a case in Cape Town in summer on the grounds that the Free State heat would damage their health, and that of counsel. The letter writer said that this was spurious, and called for the judges' resignations if they could not honour the rule of law as articulated in the South Africa Act. Although the editor of *The Friend* ended up being prosecuted for contempt of court, the arrow found its mark: since 1933, the court has sat permanently in Bloemfontein, as we are accustomed to today.

The 100-year history of particularly the Appellate Division is a fascinating story, but space precludes further discussion here. For those whose interest is piqued, have a look at the commemorative articles in the April edition of this year's *Advocate* magazine, Professor Hugh Corder's book *Judges at Work*, and the review to be found in part 4 of this year's *South African Law Journal* for more fulsome discussion.

Nazeem Goolam
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BA, LLB, MCL, PhD

The meaning of 'spouse' in South African law

– the dire need for uniformity and clarity.

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 in my life 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 the 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 a 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 thoughts 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 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 n 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"

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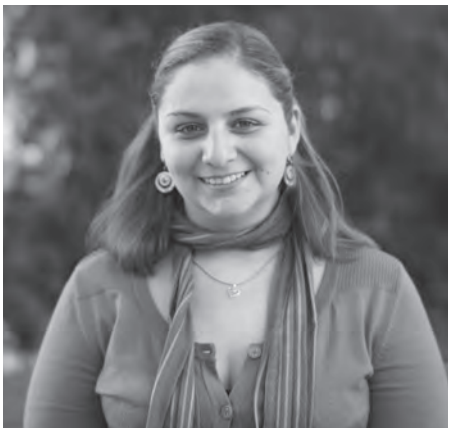

Kathryn Abrahams
Student

Mistake as to Mistake of Law?

Mistake of law, prior to 1977, was not a recognised defence in South Africa, as the position was governed by the *ignorantia iuris neminem excusat* rule, which presumes that everyone knows the law.[1] However, this position was changed in the landmark decision of *S v De Blom*.[2] This development forms the basis of the current enquiry as the court recognised the defence. This enquiry is not concerned with the defence in its entirety, but the manner in which it operates in relation to crimes requiring intention.

The defence of mistake of law is available for both crimes of intention and negligence; however the tests applicable differ based on the fault requirement needed. For crimes requiring intention, a purely subjective test is adopted; while for crimes requiring negligence, an objective test is adopted.[3] The focus of this essay goes to the subjective test used for crimes requiring intention. The subjective test requires consideration as to the "state of mind" of the accused to determine whether the accused was mistaken as to the law. If the court finds that the accused lacked knowledge of the law, the mistake will act as a defence.[4]

The issue with the subjective test is that the court is required to place itself in the position of the accused to determine whether the accused knew the law or whether the accused acted out of a mistake of law. The court is not required to determine whether the accused *should* have known the law, but rather, whether the accused subjectively knew the law.[5] The concern with this test is whether it effectively and sufficiently ensures that the mistake was avoidable, or reasonable, as is the approach used by other countries, including Germany, from where this rule originated.[6]

While the concern raised is clearly one in theory, it is submitted that the concern is also one in practice. This is demonstrated by the cases of *S v Molumbi*[7] and *S v Coetzee*.[8] These cases will be discussed to demonstrate how the courts have deviated from the subjective test, to ensure the accountability of accused persons.

In *Molumbi* the appellant was charged with assault,[9] which falls within the scope of this *De Blom* discussion.[10] The appellant denied his guilt as he had no knowledge of the offence; however it was held that the appellant[11] was "expected to have the knowledge of the law applicable."[12] Therefore, the appellant was found guilty using an objective test,[13] in that he was expected and ought to have known the applicable law. This is clearly not a subjective enquiry. Therefore the court's approach therefore circumvented the subjective test, to ensure liability of the accused. Similarly, in *Coetzee* the court adopted an objective

1 CR Snyman *Criminal Law* 5ed (2008) 203.
2 1977 (3) SA 513 (A).
3 MA Rabie "Error iuris: principle, policy and punishment" (1994) 7 *SACJ* 93 at 96.
4 Snyman *Criminal Law* 189.
5 Snyman *Criminal Law* 189.
6 M Grunhut "The Reform of Criminal Law in Germany" (1961 – 1962) 2 *The British Journal of Criminology* 171 at 173.
7 1988 (2) SA 576 (B).
8 1993 (2) SACR 191 (T).
9 Requiring intention as the form of fault (1988 (2) SA 576 (B) 577 H).
10 As a crime requiring intention.
11 A tribal policeman (1988 (2) SA 576 (B) 579 F).
12 1988 (2) SA 576 (B) 579 G.
13 1988 (2) SA 576 (B) 579 H.

The writers argue that the combination of a subjective and objective enquiry needs to be applied – a subjective test into the accused person's knowledge of the law; then an objective test to determine whether the mistake was reasonable and avoidable.

test with the offence of the unlawful and intentional physical violation of a corpse.[14] As opposed to using a subjective test, the court applied an objective test. Again, it is submitted that the court adopted an objective test so to ensure that the appellants would not escape liability for their conduct. These cases demonstrate how the courts have incorrectly applied *De Blom* so as to circumvent the subjective enquiry into crimes of intention.[15] This being said and the concern established, the question is then what available alternatives to the subjective test there are. There appear to be three main options.

Dlamini writes that perhaps all objective enquiries, in relation to mistake of law, should be removed. He is of the view that it is impossible to attain the high standard of the reasonable person.[16] Amirthalingam provides the second alternative which is that a distinction must be drawn between ignorance and mistake. He argues that mistake of law[17] should operate as a defence using a subjective test, but only reasonable ignorance of law[18] should be a defence.[19]

With respect to these two writers, neither of the options is sufficiently capable of dealing with the concern, and may even potentially aggravate it. Therefore, these alternatives provide no assistance in the South African context. It is, however, submitted that the third alternative is a viable option in South Africa.

Snyman and Whiting's approach is that mistakes of law should operate as a defence, if the mistake is reasonable and unavoidable.[20] They argue that the purely subjective test is insufficient to establish liability, and that a degree of objectivity is needed in order for the defence to operate effectively and fairly.[21] This approach recognises the rationale behind applying a purely subjective test to determine the mental state of accused persons in crimes of intention; but that the interests of society, in holding accused persons accountable, should outweigh this.[22] "One cannot determine a person's culpability by merely measuring him against, or comparing him to, himself; one must measure him against a standard *outside* himself."[23] The writers argue that the combination of a subjective and objective enquiry needs to be applied - a subjective test into the accused person's knowledge of the law; then an objective test to determine whether the mistake was reasonable and avoidable.[24] "The reasonable person should be placed *in the circumstances* in which [the accused] found himself at the critical moment"[25] – combining the subjective and objective test. It is submitted that this approach is the most feasible and practical option available in South Africa. It would be capable of circumventing the concern, whilst still providing a degree of subjectivity.

This forms the basis of the paper. It is submitted that the status quo is insufficient to ensure the liability of accused persons when raising the defence of mistake of law, as is evident from the cases discussed. It is further submitted that the best option available is the one provided by Whiting and Snyman of a subjective-objective test.

14 1993 (2) SACR 191 (T) 194 A.
15 1977 (3) SA 513 (A) 532 A.
16 CRM Dlamini "In defence of the defence of ignorance of law" (1989) 2 *SACJ* 13 at 17.
17 Certain degree of understanding as to the law, but an understanding nonetheless.
18 Total lack of knowledge as to the law.
19 K Amirthalingam "Distinguishing between ignorance and mistake in the criminal law in defence of the *De Blom* principle" (1995) 8 *SACJ* 12 at 14.
20 Snyman *Criminal Law* 208.
21 ME Badar "Mens Rea - Mistake of Law and Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals" (2005) 5 *International Criminal Law Review* 203 at 244.
22 RC Whiting "Changing the Face of Mens Rea" (1978) 95 *SALJ* 1 at 6.
23 Snyman *Criminal Law* 206.
24 Snyman *Criminal Law* 208; Whiting 1978 *SALJ* 6.
25 Snyman *Criminal Law* 217.

By Advocate Craig Renaud
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Can the right to privacy protect us from ourselves?

Long before the right to privacy was enshrined in s.14 of the Constitution, South African law recognised privacy as an interest worthy of protection. In the seminal case on the subject[1], heard in 1954, Watermeyer AJ relied directly on principles of Roman law to find that the unauthorised publication of a person's photograph could (and in the circumstances of that case did) constitute an assault on that person's privacy, and thus on their dignity. So one could be forgiven for believing that this area of law is now well established and holds no great interest.

The advent of social networking over the internet – what I suppose we could call the Facebook society – has however revived the privacy debate. We have all heard the stories of people being fired for having made derogatory comments about their bosses on Facebook, and indeed there has been some well-publicised litigation in these cases, especially in the United States and the United Kingdom. Similarly, derogatory comments about, or images of, any other person posted on the internet would undoubtedly constitute a wrongful intrusion on that person's rights to privacy and dignity. A more interesting situation arises however when a person is caused harm by their own on-line indiscretions about themselves. This issue was thrown into the public arena in 2007 in the US case of *Snyder v Millersville University*[2], in which the plaintiff alleged that she had been refused a degree by the defendant because of an unflattering photograph of herself which she herself had posted on the MySpace website. The court in that case avoided dealing with the privacy issue, and found for the defendant on other grounds. The problem remains however that in the age of the internet any indiscretion, once published on-line, becomes public property forever. The days of forgetting, forgiving, and moving on are at best numbered, and may already be over for those who already live their lives in public through social networking sites, blogs and tweets. It has recently been confirmed by a US court[3], and I suspect that a South African court faced with the same issue would come to the same conclusion, that a reasonable expectation of privacy disappears as soon as information is knowingly published by e-mail or on the internet to anyone other than a specific intended recipient. In such circumstances, the web of constitutional and common law protections of dignity and privacy rights so eloquently described by O'Regan J in *Khumalo and Others v Holomisa*[4] looks strained at best, and I suggest that that in fact they would not assist a plaintiff. It is hard to imagine a court saddling a defendant with liability when all the defendant has done is to provide the plaintiff with an on-line platform on which to make him or herself look foolish. If we were to follow that path we might have to extend liability to the manufacturer of the camera which took the incriminating photograph, and would quickly be on the slippery slope towards limitless and unquantifiable claims.

1 *O'Keeffe v Argus Printing and Publishing Co Ltd and Another* 1954 (3) SA 244 (C).
2 Case no. 2:2007cv01660, Pennsylvania Eastern District Court.
3 *Rehberg v Paulk and Others*, case no. 09-11897, US Court of Appeals, Eleventh Circuit (judgment delivered 11 March 2010).
4 2002 (5) SA 401 (CC) at [27].

This ability of society to forget and forgive is an integral and important part of civilisation. As we stand at present however, an 18 year old who in an unthinking moment tweets on the internet that he has smoked or sniffed some illegal substance may find himself forever damned, the incriminating tweet to be pulled out and held against him for the rest of his life at job interviews, by consular officials considering visa applications, or by anyone else who wishes him ill.

Neither will indiscreet bloggers and posters of photos of themselves be protected by the forthcoming Protection of Personal Information Act. Still a draft Bill before parliament[5], the Act in its current form specifically exempts from its ambit what might otherwise by regarded as invasions of privacy in cases where the "data subject" (the individual concerned) has himself or herself deliberately made the information available (which would clearly include embarrassing personal information which one has posted about oneself on a website).[6]

So if the law cannot protect us from our own on-line foolishness, what is to be done? The Truth and Reconciliation Commission in South Africa, and similar bodies in other nations which have been torn by internal conflicts, recognised the importance of allowing people, in appropriate circumstances, to wipe the slate clean of past misdemeanours and move on with their lives, thus providing emotional healing both for the individuals and for the society. This ability of society to forget and forgive is an integral and important part of civilisation. As we stand at present however, an 18 year old who in an unthinking moment tweets on the internet that he has smoked or sniffed some illegal substance may find himself forever damned, the incriminating tweet to be pulled out and held against him for the rest of his life at job interviews, by consular officials considering visa applications, or by anyone else who wishes him ill. Such situations cannot be in the interests of society as a whole.

The solution, I suggest, can only come from legislation and regulation. And given the borderless nature of the internet, that legislation and regulation must be international and universally enforced and enforceable. This is a tall order in a world where getting even the 27 member states of the European Union or the 15 member states of SADC to agree on and abide by a common set of rules is still a major problem. But the fact that universal rules may be difficult to enact and enforce does not render the attempt to introduce them any less worthy or important. Neither is it necessarily futile, as is demonstrated by the almost universal adoption and enforcement of another piece of initially contentious international legislation – the United Nations Convention on the International Sale of Goods (the "CISG").

Like the CISG, international regulation of the internet would need to take the form of a UN-sponsored treaty, which once adopted could be incorporated into domestic legislation by each state. Besides regulating the normal privacy rights which are already protected by most domestic legal systems, the legislation should address the need for societal forgetfulness. In other words, the need for information to be erased automatically from electronic databases after a certain number of years, unless the person affected by the information makes a positive request to the contrary. In such a way, the internet will be brought closer to mirroring the society of which it is now an integral part.

5 B9-2009.
6 Section 32(e) of the Bill.

By Professor Richman Mqeke
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A manifestation of ubuntu in Residents of Joe Slovo Community, Western Cape v Thubelisha Homes.[1]

1 2009 (9) BCLR 847 (CC). The other case is Occupiers of Olivia Road and 197 Main Street Johannesburg v City of Johannesburg and others 2008 (3) SA 208 (CC)

This has been demonstrated in the court's application of the requirements of meaningful engagement and reasonableness as prerequisites for the eviction of the homeless when the organ of state is the applicant in the eviction proceedings.

In two recent Constitutional Court judgements it was made abundantly clear that meaningful engagement and reasonableness were prerequisites for the eviction of homeless people (unlawful occupiers) particularly if the applicant in the eviction proceedings is an organ of state. These cases are:

Residents of Joe Slovo Community, *Western Cape v Thubelisha* Homes[2] hereafter referred to as residents of Joe Slovo Community and Occupiers of 51 Olivia and 197 Main Street, Johannesburg v City of Johannesburg and Others[3] referred to, hereafter, as The Occupiers of 51 Olivia Road. In the latter case Yacoob J in par 19 at 217 stated that one of the factors that a court should take into account to ensure compliance with section 26 (2) of the Constitution is whether there has been a meaningful engagement between the parties. The learned judge further stated that lack of meaningful engagement between the parties might be a factor militating against the grant of an ejectment order.

In the same case the court pointed out that that the duty to engage with the people who may be rendered homeless is grounded in section 26 (2) of the Constitution. One senses an element of inconsistency with regard to the actual source of the requirement of engagement because some judges of the same court regard section 26(3) of the Constitution as the source. For example, Ngcobo J in par 230 in the case referred to 26 (3) of the Constitution and the provisions of PIE. In both judgments heavy reliance was made on the previous Constitutional

2 See footnote Note I above
3 2008 (3) SA 208 (CC)

Court judgments in the *Government of the Republic of South Africa v Grootboom and Others*[4] and *Port Elizabeth Municipality v Various Occupiers*.[5] Grootboom which dealt, inter alia, with the issue of access to housing emphasised the requirement of reasonableness with regard to the State's housing programme. It stated that all levels of government must ensure that the housing programme is reasonably and appropriately implemented in the light of all the provisions in the Constitution. It also stressed that all implementation mechanism and state action in relation to housing falls to be assessed against the requirement of section 26 of the Constitution and that the reasonableness of state action should take account of the inherent dignity of human beings. In par 43 the court said that the government's programme should be comprehensive, coherent and co-ordinated. It should also be balanced and flexible.

Sandra Liebenberg "Socio-Economic Rights: Revisiting The Reasonableness Review/Minimum Core Debate"[6] has provided some illuminating comments on the standard of reasonableness. She quotes with approval the following comments of O'Regan J in Rail Commuters Action Group v Transnet ltd t/a Metrorail[7] where she said:
"in adopting this standard of reasonableness the court requires that the bearer of Constitutional obligations should perform then in a manner which is reasonable. This standard strikes an appropriate balance between the need to ensure that constitutional obligations are met, on the one hand, an recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all circumstances".

The Port Elizabeth Municipality case emphasized the element of engagement between the parties to replace the arm's length combat by intransigent opponents. The court encouraged face to face engagements or mediation through a third party.
The court also emphasized the fact that the judicial approach to the eviction of homeless cannot be the same as in the dark days of apartheid when the homeless were dealt with as in terms of the Prevention of illegal Squatting Act[8] which has since been repealed by The Prevention of illegal Eviction from and Unlawful Occupation of Land Act.[9] The latter has introduced "humanised procedures that focused on fairness to all. People once regarded as anonymous squatters now became entitled to dignified and individualized treatment with special consideration for the most vulnerable".

> In the same case the court pointed out that that the duty to engage with the people who may be rendered homeless is grounded in section 26 (2) of the Constitution. One senses an element of inconsistency with regard to the actual source of the requirement of engagement because some judges of the same court regard section 26(3) of the Constitution as the source.

It is worth noting that the court in dealing with the problem of homelessness is relying on its precedent, for example, in the Port Elizabeth Municipality case the court paid deference to the approach of *Ackerman J in First National Bank of SA ltd t/a Wesbank v Minister of Finance*[10] where the court dealt with the purpose of the Property Clause and how section 25 should be interpreted. Again in the Port Elizabeth Municipality the court spoke about the need to establish an appropriate constitutional relationship between section 25 dealing with property rights and

4 2001 (1) SA 46 (CC)
5 2005 (1) SA 217 (CC)
6 In Stu Woolman & Micheal Bishop (eds) Constitutional Conversations, Pretoria University Press (2008) 303
7 2005 2 SA 359 (CC), 2005 (4) BCLR 301 (CC)
8 52 of 1951 (PISA)
9 19 of 1998 (PIE)
10 2002 (4) SA 768 (CC)

section 26, concerned with housing rights and the need for the balancing of the conflicting interests.
In par 23 the court signalled the new judicial approach emphasizing that the Constitution imposes new obligation on the courts concerning rights relating to property not previously recognised by the Common law. "It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home..."

This paper celebrates the positive influence of Grootboom and Port Elizabeth Municipality in the property jurisprudence and how the Court strives to balance the conflicting interests of the organ of state as the legal owner and those of the homeless people. The emphasis will be on the purpose and the practical effect of the implementation of these two requirements in eviction proceedings affecting the homeless. The writer shall deal briefly with the facts of each case separately and state how the court in each case dealt with the two requirements. The common feature in the two cases is that both dealt with the relocation of the homeless from point A to B and the court laid down some guidelines to how such processes should be conducted.

Occupiers of 51 Olivia Road.

This case concerned an application for leave to appeal against a decision of the Supreme Court of Appeal (in a judgment reported as *City of Johannesburg v Rand Properties* (Pty) ltd And Others.[11]
The appeal challenged the correctness of the judgment and order of the SCA authorising the eviction of more than 400 occupiers of two buildings in the inner City of Johannesburg. The eviction order was granted at the instance of the City of Johannesburg based on the finding that the buildings in question were unsafe and unhealthy. The City had acted in terms of the National Building Regulations and Building Standards Act[12] and the provisions of the Health Act[13].

The High Court in City of Johannesburg v Rand Properties (Pty) ltd And Others[14] dealt with an application for the ejectment of the occupiers as well as a counter application by the occupiers for an alternative accommodation or housing as a pre condition to their eviction. The court found that the city's housing programme fell short of what was required in terms of the Constitution and ordered it to devise and implement, within its available resources, a comprehensive and co-ordinated programme to progressively realise the right to adequate housing for people in the inner City of Johannesburg who were in crisis situation or otherwise in desperate need of accommodation.

"Pending the implementation of the programme referred to in par 3 above, alternatively, until such time as suitable adequate accommodation is provided to the respondents, the applicant is interdicted from evicting or seeking to evict respondents from the properties in this application".

The SCA set aside the High Court judgment and granted the order of eviction but simultaneously ordered the City of Johannesburg to provide those occupiers in need of housing assistance with relocation to a temporary settlement area. In the Constitutional Court Yacoob J noted that the broad question initially raised in the application for leave to appeal were whether the order for the eviction of the occupiers ought to have been granted and whether the City's housing programme complied with the obligations imposed by section 26 (3) of the Constitution. The judge further noted that the application also raised in the public interest, the provision for housing for those thousands of people who were said to be in desperate conditions in the inner city of Johannesburg.

Two days after the application for leave was heard the Constitutional Court issued an interim order aimed at ensuring that the City and the occupiers engaged each other meaningfully on certain issues in order to resolve differences with regard to the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned. The parties were ordered to file affidavits before a certain date reflecting the results of the engagement.
The parties did comply with the order and entered into an agreement of settlement. The court noted that the agreement between the parties made explicit and meticulous provision for measures aimed at making both properties safer and more habitable. The agreement obliged the city to provide all occupiers with alternative accommodation in certain identified

11 2007 (6) SA 417 (SCA) 2007 (6) BCLR 643;[2007] 2 ALL SA 459.
12 103 of 1977
13 63 of 1977 (S20)
14 2007 (1) SA 78 (W)

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buildings. It also defined with reasonable precision the nature and standard of the accommodation to be provided and determined the way in which rent was to be calculated. The court expressed the view that the agreement represented a reasonable response to the engagement process and the court satisfied was happy with the way the parties dealt with the issues. It set aside both the High Court order and that of the SCA.

Residents of Joe Slovo Community.

This case concerned a relocation order obtained by three respondents, Thubelisha Homes, the agency that had been tasked [given the task] to develop the housing at the Joe Slovo informal settlement, the national minister responsible for Housing, the second respondent and the Western Cape member of the Executive responsible for Housing as the third respondent.

The order involved the relocation of about 386 households consisting of approximately 20,000 residents from a large informal settlement known as Joe Slovo to a place called Delft. The City of Cape Town did not participate in the eviction process. The informal settlement started in the 1990's when homeless people occupied an undeveloped piece of land which belonged to the City without the latter's consent. The numbers of the unlawful occupiers grew considerably in 1994. The City of Cape Town later began to provide basic services such as water, container toilets and rudimentary cleaning facilities. It later provided tap water, refuse removal, roads, drainage and electricity. In addition each household was given a number. In view of overcrowded conditions the government introduced the N2 Gateway project which is part of the national breaking New Ground Policy aimed at the eradication of informal settlements.

In 2004 the City began to persuade the residents to relocate to another area to facilitate a new housing development. Initially the project received approval of the residents but later they were disagreements with regard to the amount of rentals to be paid and whether all the residents would be allocated accommodation at the developed Joe Slovo settlement. Residents expected that about 70% of the houses to be built in Joe Slovo would be allocated to the relocatees. The Respondents disagreed. In

> What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land

the Constitutional Court proceedings there was a considerable debate as to whether the residents of Joe Slovo were unlawful occupiers as the term is defined in the PIE Act. There was a considerable disagreement among the Constitutional Court judges in this regard. There was, however, a consensus that although the residents occupied the land with the tacit consent of the legal owner (the City) when the residents were required to relocate the initial consent was terminated and they then became unlawful occupiers. Again two issues that came to the fore were whether the respondents in relocating the residents acted reasonably and secondly whether meaningful engagements about the relocation had taken place.

The objectives of engagement

In the Residents of Joe Slovo Community Ngcobo J in par 242 pointed out that in implementing a programme to upgrade informal settlements, the primary objective of engagement must be to provide the residents with the details of the programme, its purpose and its implementation. These details include the following:

(a) The purpose of the programme
(b) The purpose of relocation
(C) Arrangements, if any, for the temporary residential units where possible;
(d) How and when relocation will take place
(e) The consequences of relocation and whether the government will help to alleviate any dire consequences.

In par 242 Ngcobo J stated that the process of engagement does not require the parties to agree on every issue but requires an element of good faith and

reasonableness on both sides.

Legal significance of meaningful engagement

It is clear from the approach of the Constitutional Court in the two cases under consideration that meaningful engagement and reasonableness are prerequisites for the granting of an eviction order in cases where the applicant is an organ of state. The court wishes to ensure compliance with the provisions of section 6(3) of PIE which reads thus:

"In deciding whether it is just and equitable to grant an order for eviction, the court must have regard to

(a) The circumstances under which the unlawful occupier occupied the land and erected the building or structure.
(b) The period the unlawful occupier and his or her family have resided on the land in question; and
(c)The availability to the unlawful occupier of suitable alternative accommodation or land...."

In order to give effect to the justice and equity requirement of section 6 Sachs J in the *Port Elizabeth Municipality v Various Occupiers,* supra in paras30-1 pointed out that the particular vulnerability of occupiers referred to in section 4 (the elderly, children, disabled persons and households headed by women) could constitute a relevant circumstance under section 6. "Similarly, justice and equity would take account of the extent to which serious negotiations had taken place with equality of voice for all concerned. What is just and equitable could be affected by the reasonableness of offers made in connection with suitable alternative accommodation or land, the time scales proposed relative to the degree of disruption involved and the willingness of the occupiers to respond to reasonable alternatives put to them..."

From the reading of the various judgments it seems to the writer that the insistence on compliance with the two requirements seeks to ensure compliance with section 26(3) which places a duty on the state to facilitate access to adequate housing. The state shall have complied with its constitutional duty if it can be shown, as decided in Grootboom case, supra, to have established "a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means".
According to Ngcobo J in par 226 "legislative measure adopted by the government must be supported by policies and ..... And policies adopted must be reasonable both in their conception and implementation". Reasonable measures are those that take into account the degree and extent of the denial of the right they endeavour to realise..."
In par 233 Ngcobo J emphasized that PIE was intended to give effect to section 26 (3) of the Constitution and its manifest objective was to overcome the abuses of eviction. It seeks to ensure that evictions take place in a manner consistent with the values of the Constitution. O'Regan J made substantially the same points as Ngcobo J but she placed emphasis on section 26(2) of the Constitution. In par 269 she pointed out that in order for government to obtain an eviction order in circumstances such as those presented by the facts of the case, the government needs to show that the eviction is one within the contemplation of PIE and that in seeking the eviction in the manner it does, it is acting reasonably with the meaning of section 26(2) of the Constitution. The learned judge also expressed the view that unless it was found that the respondents acted reasonably in seeking the eviction, they were not entitled to an eviction order. All the judgements concurred in the order made by Yacoob J because it took into account the efforts made in ensuring a meaningful engagement.
In conclusion it seems to the writer that Grootboom and Port Elizabeth Municipality cases paved the way for the new approach and thus managed to give content to section 26(3) of the Constitution, namely, the so-called section 26(3) rights. The insistence on meaningful engagement also gives a meaning to the value of Ubuntu in dealing with people in desperate need. The High Court judgment in the City of Johannesburg v Rand Properties (supra) in paras 62, 63 and 64 dealt at length with the value of ubuntu in dealing with destitute people. In par 62 it stated:

"Our Constitution requires a court in matters such as the present to weave the elements of humanity and compassion with the fabric of the formal structure of the law. It calls upon us to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern".

Advocate Les Roberts

Trial by battle: the case of *Ashford v Thornton*

Lawyers are accustomed to metaphors that dramatise the legal process as a contest or battle: of wits, skills, endurance, etc. Although tempers can flare and temperatures rise, most lawyers today would be horrified at the thought that the outcome of a legal dispute could be decided by way of actual physical contest, even to the point of death.

Yet that situation almost materialised in England less than 200 years ago, in the celebrated case of *Ashford v Thornton* (1818) 106 ER 149 (KBD). Mary Ashford, a young working class woman, had been found dead in circumstances consistent with murder. Owing to less than satisfactory investigative resources at the time, there was some uncertainty about cause and circumstances of death. Thornton, a young man from a wealthy family, was arraigned before a jury on charges of murder and rape. He denied guilt. The case was built on circumstantial evidence, but the jury acquitted the accused on both charges after only seven minutes of deliberation. Ordinarily that would have been the end of the matter, on account of the rule against double jeopardy. The brother of the deceased, however, invoked a rare and ancient procedure, known as a "writ of appeal", which entitled a family member of the deceased to prosecute privately by way of retrial in such circumstances. The accused was duly arraigned in London before four judges of the King's Bench Division on an indictment of murder. The quaint language of the indictment alleged that "the said Abraham Thornton not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil ... did make an assault ... and did then and there feloniously, wilfully, violently, and of his malice aforethought, cast, throw, and push the said Mary Ashford into the pit of water aforesaid ... [she] was then and there choaked, suffocated, and drowned ... and [the accused] did kill and murder against the peace of our said lord the King his Crown and dignity."

Unfortunately for the appellant brother of the deceased, the ancient procedure he had invoked came with what one of the judges, Bayley J, euphemistically termed an "inconvenience attending this mode of proceeding" (*Ashford v Thornton, supra*, at 168). The accused (called the "appellee"

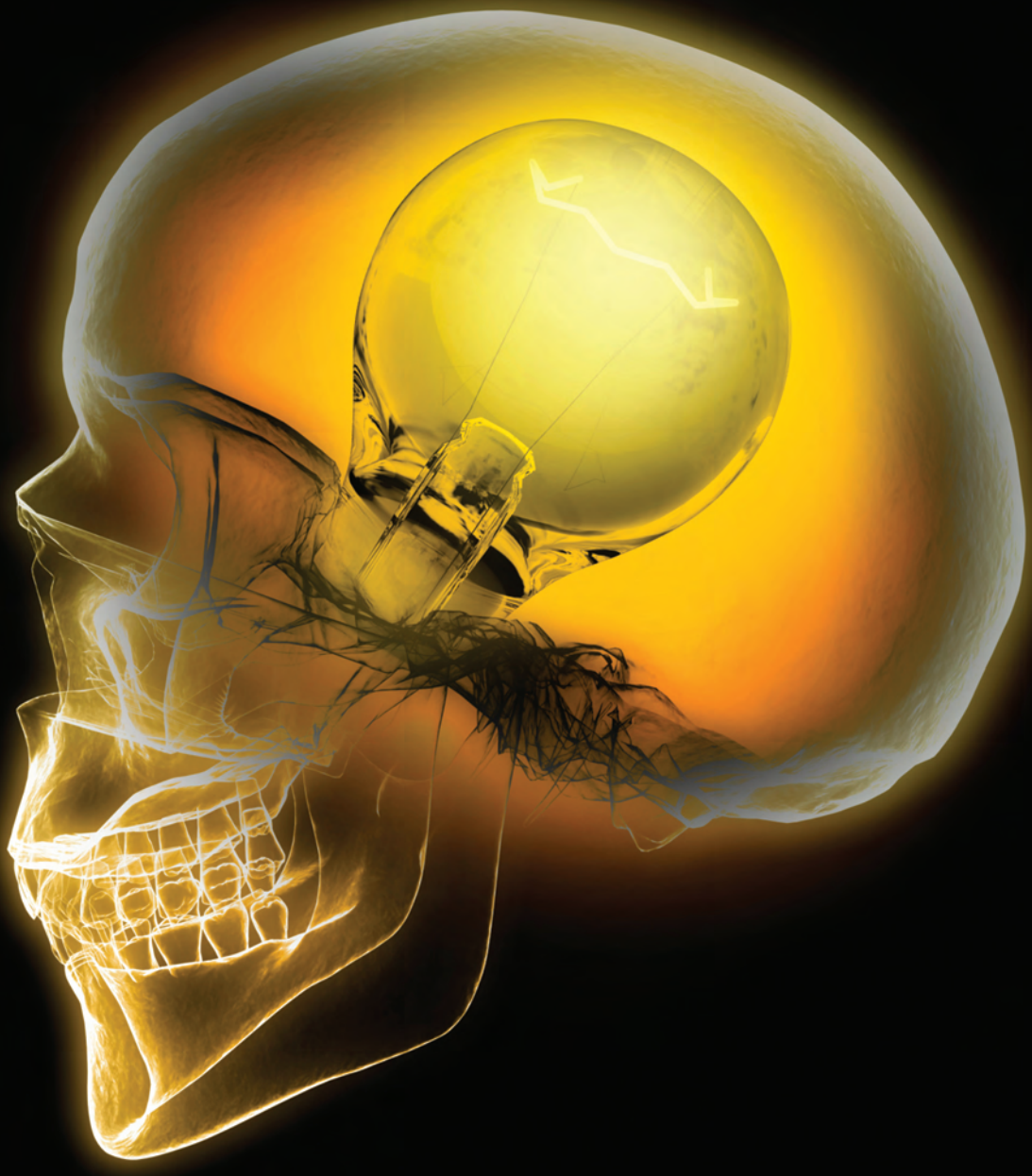
Trial by ordeal and trial by battle worked on the principle that God would indicate innocence or guilt by granting or denying success in the ordeal or battle. Trial by battle involved a duel by the parties with clubs before judges of the King's Bench. Counsel persuaded their client to resort to this procedure, which he ceremonially did by removing and throwing down his glove in court.

in the proceedings) was in such a situation entitled to invoke the ancient procedure of "trial by battel". Counsel for the accused, who had obviously done their homework, had discovered that this ancient procedure, a relic from the medieval "trial by ordeal" system that antedated jury trials, was still on the books, although it had last been invoked in 1638. Trial by ordeal and trial by battle worked on the principle that God would indicate innocence or guilt by granting or denying success in the ordeal or battle. Trial by battle involved a duel by the parties with clubs before judges of the King's Bench. Counsel persuaded their client to resort to this procedure, which he ceremonially did by removing and throwing down his glove in court. After much argument the court resolved that the procedure was still part of the law, and could be resorted to unless the incriminating evidence was so overwhelming that there could be no verdict but guilty ("great and violent presumptions of guilt", as Lord Ellenborough CJ described it at 168), or unless the appellant was an infant, disabled, elderly or a woman. The puny young appellant unfortunately did not fit into any of these categories, and as the evidence was not strong enough to constitute "great and violent presumptions of guilt", the court unanimously ruled that the accused was entitled to his "trial by battel". In the words of Lord Ellenborough CJ (*Ashford v Thornton, supra*, at169): "The general law of the land is in favour of the wager of battel, and it is our duty to pronounce the law as it is, and not as we may wish it to be. Whatever prejudices therefore may justly exist against this mode of trial, still as it is the law of the land, the Court must pronounce judgment for it."

The rules of battle determined that appellant and appellee should fight it out with clubs. If the appellee won, or if he was still undefeated by the time "the stars appeared", he was acquitted. If, however, he lost, he was immediately taken off and hanged. (See Sir James Fitzjames Stephen: *A History of the Criminal Law of England* (1883: London; MacMillan & Co, 246.)) The appellant requested time to consider his stark options, and, after an adjournment, indicated that he was not prepared to accept the challenge. This made sense, as there was a considerable disparity in size and strength in favour of the accused. The court then formally discharged the accused.

The legislature quickly stepped in to abolish the type of procedure invoked by the appellant, and thereby also the possibilty of "trial by battel": Stephen, *supra*, at 250.

According to Gary R Dyer of Brandeis University (*"Ivanhoe*, Chivalry and the Murder of Mary Ashford" (1997) 39 *Criticism* 383 at 383 – 384) the trial caused a sensation in London at the time. Dyer shows (at 384 – 385) that Sir Walter Scott, himself a barrister, was so struck by the event that he gave trial by battle a central role in his novel *Ivanhoe*, which was published two years later. In the novel the eponymous hero takes up the challenge on behalf of a young woman charged with witchcraft, and does battle with the accuser. Of course, the stouthearted champion of the damsel wins, and she is acquitted.
A final word of warning: the report of *Ashford v Thornton* is not for the faint-hearted. Verbosity, obscurity and lengthy Latin quotations abound. Today's students who feel aggrieved at being made to read "difficult" cases should console themselves by considering what their forerunners of 200 years ago had to endure.



Dylan Bradford
Student

The *Lacuna* in South African Legislation dealing with the recovery of arrear maintenance under a reciprocal maintenance order

This paper discusses the lacuna in South African legislation which deals with the recovery of arrear maintenance under a reciprocal maintenance order. The current position of South African legislation needs to be shown in order to identify whether there is indeed a gap therein, which resultantly inadequately caters for the recovery of arrear maintenance.

Scenario

In 2002 two spouses get divorced. Along with the divorce order, the High Court orders that the ex-husband pays R2000 per month for the maintenance of his two minor children who reside with his ex-wife. To avoid his maintenance obligations the ex-husband absconds. In 2010 the ex-husband is finally located in England. The ex-wife now wants to recover the arrear maintenance which is due (approximately R190 000).

Application of South African law

In terms of the scenario, any maintenance obligations which arise on an international basis will be dealt with in terms of the Reciprocal Enforcement of Maintenance Orders Act[1] (henceforth referred to as the Act). However, there are no provisions in the Act which allows for the recovery of arrear maintenance. The Act primarily deals with the registration and enforcement of reciprocal maintenance orders between South Africa and certain "proclaimed countries" scheduled in the Act.[2] Due to the omission in the Act, recourse to South Africa's common law is best used to clarify the position towards the collection of arrear maintenance under a reciprocal order.

In *Marendaz v Marendaz*[3], a decision which preceded the promulgation of the Act, the court held that arrears which accumulated prior to the registration of a reciprocal maintenance order may not be claimed.[4] The *ratio decidendi* was that courts will only deal with the collection of future maintenance from the time the reciprocal order is made. Furthermore, the court held that it would not act as a collecting agent for sums which fell due during a period where there was no effective order. Alongside the registration of a reciprocal maintenance order being prospective in nature, courts are unwilling to transmit claims for arrear maintenance on the basis that they are not final orders. In *Estate H v Estate H*, the court held that a claim for arrears is always variable and may be reduced on the ground that the payer's financial position has deteriorated or upon good cause shown.

Alternative ways to claim "arrears"

Presently there exists no tried and tested mechanism to recovery arrear maintenance from a person abroad. However, an attempt to recover "arrears" may be sought through what is known as the recovery of contributions or alternatively, under the common law of the foreign country. Attempting to recover "arrears" under the common law of a foreign country may not be financially feasible as the party will have to hire attorneys abroad to peruse their

1 Act 80 of 1963.
2 S 3; s 7.
3 1955 (2) SA 117 (C).
4 *Marendaz v Marendaz* 1955 (2) SA 117 (C) 129A.

claim. Submitting to another country's laws brings into consideration conflicting legislation regarding the recovery of arrears and maintenance law in general. An order for the recovery of contributions may prove as an alternative means to claim a portion of the arrear maintenance. The recovery of contributions is not synonymous with the recovery of arrear maintenance. A claim for the recovery of contributions is a claim for the reimbursement of contributions by one of the parents against another for the maintenance of their minor child.[5]

Where the purpose of an order for periodical payments in not to maintain another person, but to reimburse another person for having maintained a third person, the order does not qualify as a maintenance order.[6] In this regard, the recovery of contributions is a recovery for a debt as apposed to the recovery of arrear maintenance.

Obtaining an order for the recovery of a debt allows for that order to be transferred in terms of the Enforcement of Foreign Judgements Act[7] to a foreign country. However, there are a number of ways which a party may run into difficulty when attempting to obtain and transfer an order. Firstly, as both parties reside in different countries, courts may be reluctant to make an order without the defending party being present. Secondly, there is a distinct lack of legal president which a party may follow in order to be successful in obtaining this type of order.

Proposed changes

In order to make the process for the recovery or "arrears" more accessible amendments to the current statutory position are needed. One option would be to bring the Reciprocal Enforcement of Maintenance Orders Act in line with article 11 of the Hague Convention on the Recognition of Decisions Relating to Maintenance Obligations.[8] This article stipulates that a maintenance order will only be recognised if the enforcement of the order is granted with respect of payments which are already due.[9] Amending legislation to include the transmission of a claim of arrears alongside a reciprocal order would not contrast any other law which is in place. Furthermore, this amendment would go a long way in bringing the Act in line with the values and rights enshrined within our Constitution.[10]

Attempting to recover "arrears" under the common law of a foreign country may not be financially feasible as the party will have to hire attorneys abroad to peruse their claim. Submitting to another country's laws brings into consideration conflicting legislation regarding the recovery of arrears and maintenance law in general.

Section 28(2) of our Constitution expressly states that in every matter concerning a child, the best interests of the child are of paramount importance. In terms of this, the state is required to create the necessary legal and administrative infrastructure to ensure that children receive the protection they are entitled to under this section.[11]

Conclusion

It is my submission that in terms of the current position in South Africa law, children's rights are not being protected as there is no feasible means to recover arrear maintenance on an international level. There is certainly a gap in South Africa legislation which must certainly needs to be filled in order to prevent the aforementioned scenario from occurring.

5 *S v Frieslaar* 1990 (4) SA 437 (C) 439I.
6 439I.
7 Act 32 of 1988.
8 Hague Convention on the Recognition of Decisions Relating to Maintenance Obligations (1973).
9 Art 11.
10 The Constitution of the Republic of South Africa, 1996.
11 *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) para 24.

Daniel Breier,
Candidate Attorney, Cape Town

Lets get down to business

the law of contract v2.0

In last year's In Camera, fellow ex-Rhodent Kate Scott-Shaw described her experiences in the action packed world of High Court Litigation. In the 2010 edition, we are featuring the world of commercial law; the only time most of these lawyers step into a courtroom is when they have forgotten to pay their traffic fines!

Larger firms such as Deneys Reitz have a number of specialised departments. The Commercial Department focuses on providing expert legal advice in non-litigious matters. This article aims to provide an honest and cliché-free view of why Commercial Law could be the career for you. We will also be featuring a brief illustration on a practical application of the law.

Be Creative

As a member of a team of Commercial Lawyers, you will be actively involved in the growth of the South African economy. Working together with your colleagues you will be involved in piecing together the complex arrangements that allow bridges, hotels and power stations to be built. If everything goes right, you could be a part of a bridge that stands for hundreds of years.

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Commercial Lawyers generally favour business suits for the working week, but you may still don the wig and gown on the weekends if you wish. Our clients do not want to know about the law on cessions in securitatem debiti, they want to know what this law means for their business in plain English. This is another great challenge, keeping our advice practical and understandable while staying on the cutting edge of the law.

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Commercial law encourages people to specialise and stay up to date with the developments in the law. At a large firm such as a Deneys Reitz, the library staff will ensure that you are notified of all the latest changes. As an expert in your field, clients may also wish you to assist in preparing submissions to government on any proposed legislation affecting their business.

Working together

Much of our work as commercial lawyers involves working together with clients on one side and with business partners and their lawyers on the other. While your duty is to make sure that your client's interests are looked after, this does not prevent good relations amongst all concerned. Litigation lawyers are generally only called in once relationships have broken down and work on an adversarial basis.

A network of equals

Working in the Commercial Department, you will have the privilege of dealing with other intelligent people. Our clients have the necessary foresight to seek legal advice before problems occur. Working with intelligent and efficient clients and colleagues reduces frustration and makes for a satisfying working life.

The Law of Contract v2.0

You will be surprised to learn that the classic cases you studied in Legal Theory 1 are still relevant to 21st century commerce. Although business looks somewhat different in 2010, these basic principles still work when provided with an "upgrade" from time to time.

Consider the case of Kergeulen Sealing And Whaling

Co Ltd v Commissioner for Inland Revenue (1939 AD 487). The year was 1934 and a Cape Town based whaling company (a subsidiary of I&J) was negotiating with Unilever in London for the sale of whale oil. I&J sent a man over to London to negotiate the deal. While in London, I&J's man had sent a series of messages over a mysterious 'cable' to his superiors in Cape Town. Clearly being charged per word, I&J's man chose to forgo the rules of grammar in order to save a few pennies when sending cable messages such as:

"interviewed Pearson Blom this afternoon best proposal obtainable is entire catch two years present and next season £8 10s. per ton number one usual contract Stop Urgent reply necessary"

On concluding negotiations, I&J's man returned to Cape Town with a written contract signed by Unilever which would then be signed by the directors of I&J in Cape Town. Of course, as you learnt in Legal Theory 1, this case confirmed the decision in Cape Explosive Works Ltd v South African Oil and Fat Industries Ltd (1921 CPD 244) that the expedition theory applies to contracts concluded by post. The contract was thus held to have been concluded at the time and place that I&J had posted their signed copy of the contract to Unilever in London.

In 2010 some things are different. For one, I&J are better known for their fish fingers than their whale oil. However, how much has commerce really changed? Instead of sending "cables", business people are more likely to be emailing their head offices from their mobile phones while sitting on the Gautrain. Yet despite not having to pay per word, grammatically incorrect and incomplete sentences are still the norm. The major difference is that in 1934 the contract for whale oil was concluded by the signature of ink on paper. Nowadays it is more likely that the contract would be entered into directly through electronic communications. In the 2010 business world, people in cities around the world enter into contracts worth millions of rands, rupees and rubles without any ink touching paper. Accordingly, South African law has done its best to catch up with the changing context.

The case of Jamieson v Sabingo (2002 (4) SA 49 (SCA) at para 5) dealt briefly with contracts concluded by faxes, Farlam JA held that:

"Parties who communicate by telephone, telex or telefacsimile transmission are 'to all intents and purposes in each other's presence' and the ordinary rules applicable to the conclusion of contracts made by parties in each other's physical presence apply, viz the contract comes into existence when and where the offeree's acceptance is communicated to and received by the offeror."

The Electronic Communications and Transactions Act 2005 ("ECTA") develops the law further. Section 22 (2) of ECTA clearly stipulates that the reception theory applies to agreements concluded by way of data messages. A "data message" is defined as "data generated, sent, received or stored by electronic means..." and "data" is defined as "electronic representations of information in any form".

As it stands, the law on when and where a contract is concluded is relatively clear. However, the Law of Evidence presents an additional requirement for when the contents of a contract are relied upon in litigation. This requirement is that the original contract must be produced - Singh v Govender Brothers Construction (1986 (3) SA 613 (N)). Although the Courts may allow copies to be presented in certain instances, the question arises in modern day transactions "what is the original contract"? In the 1934 situation it is clear that the document containing both original signatures was the original contract. What about contracts concluded by means of data messages? S15 of ECTA provides that data messages are admissible as evidence and s14 provides a means for assessing whether the data message is in its original form. Furthermore, s14(5) provides that a copy, printout or extract from a data message shall be admissible.

What this shows is that new rules have been developed to govern new methods of doing business. Nevertheless, each situation must be judged on its own merits. Where a party signs a contract on paper, scans it and uses email as a form of "post" then the paper contract may well constitute the original contract as it did in 1934. Where contracting parties exchange electronically generated and unsigned contracts then the electronic version of the contract as it exists on the system of the receiver may constitute the original contract. These issues have yet to be decided on by a South African Court.

By staying up to date with the latest developments in the law, while having the old precedents in the back of your mind, you will be in an ideal position to assist your clients in their transactions. This is what the business of commercial law is all about.

By Daniela Ellerbeck
Student

Understanding the jurisprudential impact the trial of Charles Taylor

In understanding the jurisprudential impact the trial of President Taylor has had on international law, it is wisdom to first start with the context:

Charles Ghankay Taylor was the democratic president of Liberia from 1997 until August 2003 when he left office due to political pressure.[1] He is also currently being prosecuted by the Special Court for Sierra Leone (SCSL) on charges of 11 counts of War Crimes (WC), Crimes Against Humanity (CAH) and other Serious Violations of International Humanitarian Law committed in Sierra Leone from 30th November 1996 to 18th January 2002.[2]

The SCSL issued an indictment and arrest warrant for Taylor on the 7th March 2003 and these were disclosed on the 4th June 2003[3]- thus while Taylor was still in office as Liberia's head of state. Taylor was finally caught and delivered to the SCSL on the 29th March 2006.[4]

As a head of state at the time of the indictment and arrest warrant being issued, Taylor had various classes of immunity attaching to him, one being that of immunity *ratione personae*, also known as personal or sovereign immunity.[5] This is immunity that automatically attaches to a limited class of high-ranking state officials, based on their status.[6] Immunity *ratione personae* is absolute and it cloaks the person it attaches to from arrest by foreign states.[7] It hence covers the official and protects him from prosecution for acts committed prior to and during his time in office[8]- applying even to international crimes, irrespective of the nature of the crime[9]- but as it attaches to the person based on his status, once that person ceases to hold office, this immunity ceases to attach to him.

It is in light of this immunity, that Charles Taylor launched an application to have the indictment and warrant quashed.[10] His defence interlinked the core question of immunity *ratione personae* to the central question of the nature of the SCSL and its lack of Chapter VII powers.[11]

The SCSL was concluded by agreement between the Government of Sierra Leone and the United Nations after the Security Council passed a Resolution authorising the Secretary-General to conclude such an agreement for the establishment of the Court.[12] It is important to note here that this resolution therefore only empowers the Secretary-General to

1 The Open Society Justice Initiative "Who is Charles Taylor?" http://www.charlestaylortrial.org/trial-background/who-is-charles-taylor/ (accessed 18 February 2010).
2 The Open Society Justice Initiative "Who is Charles Taylor?" http://www.charlestaylortrial.org/trial-background/who-is-charles-taylor/ (accessed 18 February 2010).
3 The Open Society Justice Initiative "Who is Charles Taylor?" http://www.charlestaylortrial.org/trial-background/who-is-charles-taylor/ (accessed 18 February 2010).
4 The Open Society Justice Initiative "Who is Charles Taylor?" http://www.charlestaylortrial.org/trial-background/who-is-charles-taylor/ (accessed 18 February 2010).
5 M Frulli "The Question of Charles Taylor's Immunity: Still in Search of a Balanced Application of Personal Immunities?" (2004) 2 *Journal of International Criminal Justice* 1118 at 1125.
6 Frulli 2004 *Journal of International Criminal Justice* 1125.
7 Frulli 2004 *Journal of International Criminal Justice* 1125.
8 Frulli 2004 *Journal of International Criminal Justice* 1125.
9 *Qaddafi 125 ILR 456 (France); Castro: A Cassese International Criminal Law (2003) 272 (Spain); Sharon (2003) 42 ILM 596 (Belgium); Mofaz (2004) 53 ICLQ 771 (UK); Mugabe (2004) 53 ICLQ 769 (UK)* as seen in Dugard *International Law* 252.
10 Frulli 2004 *Journal of International Criminal Justice* 1118.
11 Frulli 2004 *Journal of International Criminal Justice* 1119.
12 CS Igwe "The ICC's favourite customer: Africa and international criminal law" *CILSA* (2008) XL 294 at 303; Frulli 2004 *Journal of International Criminal Justice* 1120; SMH Nouwen "the Special Court for Sierra Leone and the Immunity of Taylor: the *Arrest Warrant* Case Continued" *Leiden Journal of International Law* (2005) 18 645 at 649.

negotiate an agreement with the Government of Sierra Leone; the Resolution itself does not establish the SCSL.[13]

Therefore the legal basis for the SCSL's existence is the agreement between the UN and the Government and not the Resolution. It is on **this** point that the SCSL differs drastically from other international criminal tribunals such as the ICTY and ICTR which were created by the Security Council exercising its Chapter VII powers under the UN Charter- for maintaining international peace and security- by adopting a mandatory resolution for their creation.[14] As a result of these resolutions being adopted in the exercise of Chapter VII powers, these resolutions and the attached statues for the tribunals are mandatory and bind all UN member states.

Thus although the SCSL has international characteristics, its legal nature is that of a treaty-based court. (In this respect the SCSL shares its legal nature with the International Criminal Court which is also a treaty-based court). [15] The problem with being a court based on agreement or consensus is that the court is not endowed with Chapter VII powers.

The significance of this is that the agreement establishing the SCSL is therefore not binding on third party states, but only on Sierra Leone and the UN organisation- as the UN is more than the sum of its members it is also its own individual and independent international organisation.[16] Thus the agreement is not binding on individual UN member states and they remain outsiders or what is known as third parties to this agreement.[17] Thus these third party states are not bound to the agreement establishing the SCSL or the annexed SCSL statue that contains Article 6(2) which removes immunity attaching to accused persons.

Recognising this possible door of escape for Charles Taylor, the Appeals Chamber of the SCSL in their judgment on his application to have the charges quashed did try to establish the basis of the SCSL as being under Chapter VII.[18] However, in purporting this view, the Appeals Chamber had to advocate a very disconnected view of the relevant articles of the UN Charter. Furthermore, there is the fact that the Security Council has on two occasions actively declined to bestow Chapter VII powers upon the SCSL that further fails to support this view.[19]

Lastly, the Appeals Chamber tried to classify itself as falling under the "certain international criminal courts" that were mentioned by the International Court of Justice (ICJ) in its *Arrest Warrant* judgment in which it held that immunity *ratione personae* does not attach to the specific person in respect of criminal prosecution in front of "certain international criminal courts". The SCSL held that the reason that immunity fails to apply in front of these courts is because they derive their mandate from the international community as a whole.[20] However, this is a very weak and imprecise criterion, bearing in mind that state practice shows that unless the UN exercises its Chapter VII powers its agreements bind only it and the specific contracting state.[21] Therefore, it is rather submitted that the "certain international criminal courts" that the ICJ was referring to were courts that were established under Chapter VII and whose statutes and jurisdiction all member states thus had to obey.

In light of all of this, it can only be concluded that the SCSL was compelled to over-reach in its powers to indict President Charles Taylor as Liberia was a third party state and **not** a party to the agreement establishing the Court. Thus Taylor's application should have been upheld.[22]
It is hence recommended that to avoid such over-reaching in the future by similar treaty-based courts, the Security Council should realise the value of endowing these with Chapter VII powers, enabling them to legitimately prosecute perpetrators of crimes in their territories, immunity or not.

13 R Cryer, C Warbrick & Dominic McGoldrick "A 'Special Court' for Sierra Leone?" (2001) 50 *The International and Comparative Law Quarterly* 436.
14 Igwe *CILSA* 303; Frulli 2004 *Journal of International Criminal Justice* 1120; Nouwen *Leiden Journal of International Law* 649.
15 Frulli 2004 *Journal of International Criminal Justice* 1124.
16 Frulli 2004 *Journal of International Criminal Justice* 1124.
17 Frulli 2004 *Journal of International Criminal Justice* 1124.
18 *Prosecutor v Taylor,* case No SCSL-2003-01-I, Judgment of 31 May 2004 para 37.
19 Nouwen at 649 makes mention of the fact that on two separate occasions the SC declined to confer Chapter VII powers upon the SCSL- the first being when the SG during the establishing of the SCSL requested the SC to grant the Court Chapter VII powers, and the latter when the former President of the Special Court in the operational phase himself requested the SC to endow the Court with such powers.
20 *Prosecutor v Taylor* para 38.
21 Nouwen *Leiden Journal of International Law* 657, Zsuzsanna Deen-Racsmany "*Prosecutor v Taylor:* The Status of the Special Court for Sierra Leone and Its Implications for Immunity" (2005) *Leiden Journal of International Law* 299 at 312.
22 Nouwen *Leiden Journal of International Law* 656.

What will get *you* the job?

Most firms will have a list of skill requirements that identifies what they consider the ideal candidate for a job. For example, when recruiting candidate attorneys at Eversheds we are looking for LLB graduates with a variety of skills such as:

- Excellent communicators, both written and verbal
- Good interpersonal skills (listening skills, powers of persuasion)
- Ability to use initiative/creativity
- Ability to analyse, problem solve, research and negotiate
- Work well under pressure and meet deadlines
- Excellent time management skills
- Strong work ethic and ability to function well in a team
- Self-motivation, drive and energy

This may be a typical list of requirements for the ideal candidate in many law firms, yet this is not all. A perfect match between candidate and employer goes beyond these requirements. Candidates need to fit in with the culture of a firm and be able to identify with their values, philosophy and mission.

Long-term objectives should be to build a career where both parties benefit, which means when applying for a job the applicant should make sure that there is synergy between their and the firm's long-term goals.

Just as important as the inherent skills required to do the job is the right attitude. "What's in it for me?" is just not the right approach. It's not about "give and take", but how much both parties can contribute and add value right from the start and continue to do so.

Understandably, new candidate attorneys will have to undergo training and will be taking more away than they are contributing during that time – at least measured in terms of fee generation. But if they have an attitude of willingness to go the extra mile and to assist beyond the strictest sense of the job requirements, this will soon translate into career advancement. Opportunities open for those who show willingness and drive.

Many firms, such as Eversheds, offer vacation work programmes for third year law students, which are an ideal opportunity to "test the waters" and get to understand the workings of a law firm. During that period the candidates should ask themselves questions such as:

- Is this the environment in which I can see myself working for many years to come?
- Can I see myself as part of this particular firm and its unique culture?
- Can I make a difference here?

Once these mundane but important questions are answered, only then the focus should be on matching career prospects and long-term goals.

Information provided by Eversheds

Ms Helen Van Coller
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The role of the school governing body in the appointment of school principals:

SCHOOL GOVERNING BODY OF NTILINI J.S.S AND OTHERS V MAKHITSHI AND OTHERS (615/2008) [2009] ZAECMHC 23 (2 July 2009)

Public shools are juristic persons, vested with autonomous self-governing powers. They are in charge of their own school governance and govern themselves through the school governing body, which is a statutory body created by statute and derives all its powers and authority from the South African Schools Act 84 of 1976 and the Constitution[1]. They are also 'organs of state'[2] in that they are functionaries exercising public power and performing public functions in terms of legislation and these powers and functions are exercised by the school governing body in the best interest of the school and all its learners.It has been stated that 'the success of any country's education system depends to a large extent on the mutual trust and co-operation exsiting between all partners.'[3] These partners include the Department of Education (DoE), school governing bodies (SGB), the principal, staff, learners, parents and the broader community.

Especially with regard to SGB's, a balance must be struck between the authority of the SGB on the one hand and the authority of the state on the other hand. The role and responsibilities of both the DoE and the SGB are clearly set out in the South African Schools Act and the Federation of Governing Bodies of South African Schools (FEDSAS)[4] clearly are in favour of establishing and maintaining healthy relationships between all the important partners in education and supports the 'maximum transference of school governance to governing bodies of public schools.'[5]

Although the school remains subject to the overall control by the national education government, it is an autnonomous entity in charge of its own governance. This note focuses on the decision by the Eastern Cape High Court (Mtatha) in *School Governing Body of Ntlini J.S.S and Others v Makhitshi and Others*[6] and will focus on the powers and important role of both parents and teachers as duly elected members of the SGB in the appointment of school principals.

Brief facts of the case

A vacancy for the principal's position at the Ntilini Junior Secondary School arose in 2007 and was advertised in the prescribed manner. Normally the SGB would appoint a interviewing panel from its membership to conduct interviews. This interviewing panel should comprise of both parents and teachers. The panel conducts interviews and reports back to the SGB which then make a recommendation to the HoD. Due to infighting between teachers and the SGB, the interviewing commitee and the short listing commitee were irregularly constituted and was consequently rejected by the District Director in charge of the school.The SGB then

1 The Constitution of South Africa, 1996.
2 Section 39 of the Constitution.
3 Clase, Kok and van der Merwe "*Tension between school governing bodies and education authorities in South Africa and proposed resolutions thereof*" 2007 South African Journal of Education 27(2) 243.
4 FEDSAS "*Submission on the Education Laws Amendment Bill*" 2002 Government Gazette No 23327.
5 Clase *et al* 2007 *South African Journal of Education* 242
6 (615/2008) [2009] ZAECMHC 23 (2 July 2009)

resolved to delegate its authority to short-list and conduct interviews to the District Director. The Superintendent General for Education in the Eastern Cape Province appointed Mr L as school principal without the recommendation of the SGB.
The Department of Education thus took over the statutory powers of the SGB to short-list, interview and appoint a candidate.

Question and decision

It was submitted that the SGB abdicated its duty and unlawfully delegated it to the HoD who in fact had the authority to appoint a principal *only* upon a recommendation from the SGB and that the appointment was irregular and unlawful.

The decision by the DoE to appoint Mr L was sought to be reviewed and set aside in terms of section 6(2)(a)(i) and (ii) of PAJA:
(2) A court or tribunal has the power to judicially review an administrative action if
(a) the administrator who took it-
(i) was not authorised to do so by the empowering provision;
(ii) acted under a delegation of power which was not authorised by the empowering provision;
The court *a quo*[7] has dealt extensively with the question of delegated authority and held that:
"the SGB had no right to delegate its statutory powers. It is simply not empowered to do so by the Employment of Educators Act. The HOD should not have accepted the delegated power. In my view, the delegation of power by the SGB is unlawful as it is against the *maxim delegatus delegare non potest*."[8]

This common-law rule was explained in *Foster v Chairman, Commission for Administration*[9] as follows:

'It is trite principle of our law that where a power is entrusted to a person to exercise his own individual judgement and discretion, it is not competent for him to delegate such power unless he has been empowered to do so expressly or by necessary implication by the empowering statute.'

One of the most important administrative law principles is that the exercise of power must be authorised by law.

On appeal, Ndengezi AJ approached the question with an emphasis on the rights of educators and in his view teachers had a 'substantial' interest in the appointment of a school principal and should be represented in the body that governs the school and that has the power to recommend the appointment of a school principal.[10] The SGB has no right to delegate such a power to the DoE.

Discussion

One of the most important administrative law principles is that the exercise of power must be authorised by law. In terms of section 15[11] of the Schools Act, a public school is a legal person. Like all juristic persons, it must act through its duly appointed agent and section 16(1)[12] of the Schools Act stipulates that the governance of every public school is vested in its SGB.

The SGB consist of the principal, representatives of the parent community, educators, other members and learners.[13] Parents make up the majority of members on the SGB and therefore demonstrates the importance of their involment in school governance.[14] In terms of section 20(1)(i)[15] of the Schools Act, the SGB of a school has to recommend

7 Para 17.
8 Section 6(3)(a) of the Employment of Educators Act 76 of 1998 specificaly states that...(any) appointment, promotion or transfer to any post on the educator establishment of a public school or a further education and training institution, *may only be made on the recommendation of the governing body of the public school...* [my emphasis]
9 1991 (4) SA 403 (C) at 412.
10 See para 14.
11 [a84y1996s15]Every public school is a juristic person, with legal capacity to perform its functions in terms of this Act.
12 (1) Subject to this Act, the governance of every public school is vested in its governing body and it may perform only such functions and obligations and exercise only such rights as prescribed by the Act.
13 Section 23(1) & (2) of the South Afican Schools Act.
14 Section 23(9) The number of parent members must comprise one more than the combined total of other members of a governing body who have voting rights.
15 Section 20(1) Subject to this Act, the governing body of a public school must (i) recommend to the Head of Department the appointment of educators at the school, subject to the Employment of Educators Act, 1998 (Act 76 of 1998), and the Labour Relations Act, 1995 (Act 66 of 1995);(my emphasis)

to the Head of Department the appointment of educators at the school. It is argued that the parent representatives 'are in the best position to determine the specific employment needs of the school.'[16] They have an obligation towards the school community to recommend the best qualified, motivated and committed educator and according to Maree and Lowenherz[17] 'international experience demonstrates that outstanding educators are the most important factor in the quality of education.' This is also in line with the view taken by Ndengezi AJ that not only teachers, but parents have a 'substantial' interest in the appointment of school educators and principals. The SGB is further entitled to establish committees to assist it in the performance of its functions and duties and these committees are responsible to the governing body and exercise only those functions allocated to it by the governing body. A SGB would further normally appoint a committee or panel of three to five members from amongst its membership to conduct the interviews. This committee comprise of parents and teachers and parents should exceed the latter by one. After the committee has conducted the interviews, it reports to the SGB and the SGB makes a recommendation to the HoD.

In *Kimberley Junior School v The Head of the Northern Cape Education Department*[18] Brand JA found that the recommendation by the SGB is an objective jurisdictional fact and in the absence of such jurisdictional fact or a recommendation by the SGB the HoD had no authority to make an appointment. A 'jurisdictional fact' under the common law referred to a necessary precondition that must exist before an administrative power can be exercised an in the absence of such a precondition or jurisdictional fact, the administrative authority is not authorised to act at all[19]. Section 6(2)(a)(i) and 6(2)(f)(i) of PAJA reflect the position at common law by allowing judicial review of administrative action where the administrator who took it "was not authorised to do so by the empowering provision" or the action itself "is not authorised by the empowering provision". In terms of PAJA[20] this means that without any recommendation by the SGB, the HoD was not authorised by the empowering provision to make an appointment. The appointment of the principal was accordingly set aside. Brand JA declined the request by the school to appoint their preferred candidate as principal in the absence of the correct procedures, stating that

'Apart from the principal if separation of powers, which dictates that a court should be hesitant to usurp executive functions, there was not a proper recommendation by the SGB.'[21]

This view was correctly followed by the court in *Ntlini*[22] and the appointment accordingly set aside.

Conclusion

It is clear that the Schools Act attempts to involve all role players in school governing bodies. SGB's have one function only and that is to govern the school in terms of the provisions of section 16(1) and (2) in the best interest of the school and all its learners.The fact that parents make up the majority on the SGB 'demonstrates the importance of their involvement and constitutes the principle of partnership and mutual responsibility in a public school.' It also implies that parents have a very strong and decisive voice in matters such as recommendations to the Head of Department regarding the appointment of educators and principals.

Ntilini clearly emphasised the important role and powers of both teachers and parents as representatives in the SGB that governs the school, to recommend the appointment of a school principal. The SGB has no right to delegate such a power to the DoE and the Department has no power to usurp such a power of the school, although it may decline the recommendation of the governing body but only if one or more of five defined sets of circumstances are found to exist in terms of Section 6(3)(*b*) of the Employment of Educators Act 76 of 1998.

The court in *Ntlini* correctly found that the SGB had no right to delegate its statutory powers, but also that the HOD should not have accepted the delegated power and that the delegation of power by the SGB was accordingly unlawful.

16 Prinsloo "State interference in the governance of public schools" 2006 South African Journal of Education 26(3) 363.
17 As quoted from Prinsloo 2006 *South African Journal of Education 363*.
18 [2009] 4 All SA 135 (SCA) para 19.
19 see eg *Paola v Jeeva* NO 2004 (1) SA 396 (SCA) paras 11, 14 and 16.
20 6(2)(a)(i) and s 6(2)(f)(i).
21 Staff reporter "Court rules in favour of city school" 1 June 2009 Diamond Field Advertiser 3.
22 See para 16.

By Ms Anjanette Haller-Barker
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CSI Meets the CPA? A double Bill

The mention of crime scene analysis, fingerprints and DNA evidence will elicit, for many law students, thoughts of the television series CSI (Crime Scene Investigation). The series recently won the prestigious International Television Audience Award for a Drama TV Series at the 50th Monte Carlo TV Festival, with statistics showing that it has more than 73.8 million viewers worldwide. Newspapers have heralded it as "the most watched television series in the world". The show, and others like it, has brought into the public consciousness the potential of forensic evidence in bringing offenders to book. It is taken almost for granted now that fingerprint comparisons and DNA evidence can definitively link perpetrators to crimes. This has been aided by more diverse scientific methodology and computer technology, which allows for rapid comparisons of fingerprints and DNA. However, there are a host of legal considerations that must be brought to bear on this type of evidence. It must be collected legally, analysed appropriately, it must be admissible in court, and it must be reliable enough to withstand rigorous scrutiny during trial, bearing in mind that, in the end, the guilt of the accused must be proven *beyond reasonable doubt*. And what happens to that evidence once the investigation or the trial is over? How, then, is forensic evidence regulated in South African law? This note will focus on the law relating specifically to the taking of fingerprints and DNA.

Current legislation

The taking of fingerprints and blood samples (which can be used for DNA analysis) falls under section 37 of the Criminal Procedure Act 51 of 1977 (CPA), which regulates the "ascertainment of the bodily features of an accused person". The section gives police the power to, *inter alia*, obtain fingerprints and to have a blood samples taken. It also empowers

a court to order the taking of prints or blood. Notably, the taking of fingerprints is not compulsory, even where a person has been convicted of an offence.[1] Where fingerprints are taken, but the person is not prosecuted or not convicted, the CPA mandates the destruction of fingerprints. The South African Police Service (SAPS) currently has access only to fingerprints stored on the SAPS AFIS[2] system. There is no legal entitlement for them to access the Department of Home Affairs HANIS[3] system, or the eNaTis[4] system of the Department of Transport. This means that fingerprints from crime scenes can currently only be compared against the fingerprints of convicted offenders on the SAPS database – a limited sample size in comparison to the number of fingerprints available on the other databases. Databases are important tools. Fingerprints or DNA left at a crime scene are of little use if they cannot be compared against other samples in a database to determine the identity of unknown perpetrators or, conversely, to eliminate suspects and prevent wrongful convictions.

…fingerprints from crime scenes can currently only be compared against the fingerprints of convicted offenders on the SAPS database – a limited sample size in comparison to the number of fingerprints available on the other databases.

The CPA does not currently provide for the collection of DNA evidence, and there is no legislation providing for the establishment of a DNA database. DNA analysis is particularly important in relation to the crimes of murder, rape, sexual assault and common assault. It has been reported that seventy percent of the cases handled by the biology unit of the Forensic Science Laboratory of the SAPS relate to sexual assault (see B Omar (2008) 23 *SA Crime Quarterly* 29). In the absence of a database, the DNA of a particular suspect can be linked to biological evidence collected from the crime scene or from the victim. This type of evidence is used extensively in South Africa. In *R v Orrie,* 2004 (3) SA 584 (C) at par 19, Bozalek J noted that "testing for DNA is increasingly being recognised by our courts as a valuable evidentiary tool, not least in criminal cases." The issue in this case turned on whether the two accused could be compelled to submit to the blood samples for DNA profiling against their will. The court found that the involuntary taking of a blood sample for the purpose of DNA profiling is "both an invasion of the subject's right to privacy and an infringement, albeit slight, of the right to bodily security and integrity" (at par 20), but that these rights could be justifiably limited via the medium of s.37 of the CPA. Whilst such decisions bolster s.37, a lacuna exists in the law concerning the collection, storage and use of DNA samples. As a result, challenges in court tend to be based on technical aspects (see *S v Maqhina* 2001 (1) SACR 241 (T)).

Legislative reform

The Criminal Law (Forensic Procedures) Bill, B2-2009, (the Bill) was drafted to address shortcomings in the CPA and other legislation, particularly in respect of fingerprinting and DNA evidence. The Bill initially comprised three chapters: ascertainment of the bodily features of persons; storage and use of finger-prints, body prints and photographic images of persons; and establishment, administration and maintenance of the National DNA Database of South Africa (NDDSA).

Several aspects of the Bill were contentious in terms of their constitutionality. For example, the Bill allowed for fingerprint and DNA samples to be taken from a broad range of people, with the result that convicted persons were treated in the same

1 S.37(1) states that any police official may (a) take the fingerprints.....
2 Automated Fingerprint Identification System.
3 Home Affairs National Identification System. This houses the fingerprints of approximately 31 million citizens and 2.5 million foreigners. See http://www.home-affairs.gov.za/brc_project.asp.
4 The electronic National Traffic Information System (eNatis). This holds the thumb prints of approximately 6 million people. See http://www.enatis.com.

way as those who never had proceedings brought against them. This evidence could then be retained indefinitely - regardless of whether a conviction resulted. The fingerprints and DNA profiles of innocent people could therefore also be retained on the databases. This was particularly contentious in relation to DNA, which requires the taking of blood or tissue samples, and is therefore an inherently invasive procedure. Further, DNA potentially yields information on all of the physical and physiological characteristics of a person. Thus issues of bodily integrity and privacy were raised. Furthermore, no distinction was made between minors and adults. Although provision was made for the imposition of safeguards and strict penalties to ensure that fingerprint and DNA samples are only used for the detection of crime, the investigation of an offence, or the conduct of a prosecution, the Bill had few built-in safeguards to ensure this.

As a result of concerns raised, the processing of the Bill was split. The first part (Phase 1) has been re-drafted and regulates bodily features, body prints, fingerprints and photographic images of accused and convicted persons; all references to DNA have been excluded. Since the Bill amends s.37 of the CPA, and in the absence of specific DNA legislation, some provision must still be made for the collection of samples that may yield DNA evidence. In this respect the Bill no longer refers to blood samples, but rather to "intimate" (a sample of blood other than a blood finger prick, and pubic hair) and "non-intimate" (hair, nail, mouth and blood finger-prick) samples, and provides for the collection of these.
The re-worked Bill makes it mandatory for police officials to take the fingerprints of both accused and convicted persons under certain circumstances. The police may also take finger prints without a warrant if they reasonably suspect the person to have committed a schedule 1 offence and they believe that the prints will aid their investigation. The Bill provides for the storing of fingerprints on a database located within the Division: Criminal Record and Forensic Science Service of the SAPS, and allows for speculative searches against other databases, including those of the Department of Home Affairs and the Department of Transport. Fingerprints will no longer be retained if the accused is not prosecuted, or in the case of an acquittal. Further provision has also been made for the safeguarding and security of the database.

The re-worked Bill makes it mandatory for police officials to take the fingerprints of both accused and convicted persons under certain circumstances. The police may also take finger prints without a warrant if they reasonably suspect the person to have committed a schedule 1 offence and they believe that the prints will aid their investigation.

The second part of the Bill (Phase 2) will regulate DNA profiles, and has been referred back to the drafters. The splitting of the Bill thus allows for the implementation of the fingerprint and other provisions, whilst challenges to the constitutionality of the collection, storage and use of DNA evidence are dealt with.

This note only scratches the surface of the issues and implications arising from the Bill, and we still have a way to go before forensic evidence is adequately regulated. In the end a careful balance must be achieved between the pressing need to control crime on the one hand and the fundamental rights of individuals on the other. Once the legislation is in place, South Africa will still have to develop the infrastructure, expertise and personnel to achieve the purpose of the legislation. We can only hope that in our real-life version of CSI, all of the impressive evidence collected can so efficiently be used to catch all the bad guys.

By George Kahn
Student

A Conversation between Holmes, Nietzsche and a South African lawyer: Legal Realism in a Constitutional Democracy.

There is presently a debate raging about how legal judgments are arrived upon in our present legal system, and whether the personalities of judges are not derailing the principles of certainty and objectivity that are meant to be central to our legal logic and sense of Justice.[1] The debate, in essence, revolves around the nature of judges and their judgments in our legal systems, in terms of how the judge arrives upon his/her final judgment.[2]

This debate is best captured by an American jurisprudence movement called Legal Realism, and fathered by Holmes, wherein these realists argue that judges are not disinterested parties which are capable of removing their own bias, experiences and values from the judgment process.[3] In effect realists argue, in contrast to what we may call legal formalism, that a final decision, of a judge, is arrived upon first and then the necessary law to justify the decision is sought by the judge to rationalise his/her 'desired' decision.

Thus the personality of the judge is a crucial element that must be considered when trying to predict a courtroom outcome; just as the personality of a king was critical in determining what his ruling would be, when kings still had absolute power. The only difference is that judges must disguise their true motives by using laws to justify their judgments, while absolute monarchs did not have to do this necessarily.

Ordinarily we would expect our judges to act similarly to physicists and/or engineers attempting to solve some complex problem, by punching in the variable evidence into discovered natural law-equations that are related to the specific evidence so that the correct answer is outputted. In courtrooms, however, we would expect the only difference to be that the natural law-equations are substituted by statutes, customary law and the common law, and the answer is usually binominal in nature – guilty or acquitted. In this respect we demand certainty and objectivity from our judges in that the identity and history of a particular judge should be irrelevant to final judgment, wherein the judge's identity was never part of the legal-equation and should never bear any influence upon the equation's output. Indeed, in an ideal legal formalist world we would be able to substitute any judge with another from a previously given judgment and still obtain the same judgment originally provided.

However, truth be told, we all expect certain kinds of judgments from particularly well known judges, such as O'Regan J and Sachs J, and law students

1 C Roederer & D Moellendorf *Jurisprudence* (2007) Juta & Co.: Cape Town.
2 *Ibid.*
3 See for instance *S v Makwanyane*, *Masiya v Director of Public Prosecutions* and *Minister of Health v New Clicks South Africa (Pty) Ltd.*

quickly learn to identify certain judges' thinking styles and can almost predict a judge's final judgment without having any grasp of the actual legal issues but by relying solely upon their understanding of the judge's personality alone.[4] However, this then removes our ordinary understanding of certainty and objectivity from our legal system, since judges are incapable of separating their personal agendas from their judgments and empathic psychologists would, it seems, make more capable lawyers than the hyper rational, abstract and non-empathic thinker.

However, another philosopher, Nietzsche, would explain that the legal formalism kind of objectivity is as impossible as an eye trying to look in no particular direction at all.[5] Instead Nietzsche would advocate that the only real form of objectivity is one based upon consideration of all perspectives, experiences and values – a summation of all personal narratives rather than one seeking to exclude any personal bias.[1] Thus Nietzsche would advocate that the best mechanism of attaining an objective ruling would be to include as many different views as possible, in some way or another. Additionally, certainty could be saved by our commonsense understandings of the world as related to a Nietzschean sense of objectivity. Coincidently, this is more or less what our present Constitutional Democracy accomplishes, in an indirect manner, by having our democratically elected president appoint judges after a thorough screening process that includes probing into a potential judge's personality, which in the past has included questions related to political ideology and even theology.[6] Thus Nietzsche, perhaps ironically, would approve of the president's opportunity to appoint the new personalities on the bench after having been elected himself/herself by the presently dominate personality of the nation. Thus the president not only signs legislation into the law, but also specifically selects the kind of judgments that will arise out of those laws.

Additionally, since it is parliament that creates law then the personality of the nation would be reflected in that enacted legislation, since parliament is democratically elected from the entire populace of the country where even the worst off in our society are entitled to vote, provided they are citizens. Thus Legal Realism only becomes a problem when the overall personality of the judiciary is so out of sync with the general nation's personality that laws are created by a democratically elected parliament that judges strain themselves to be able to avoid by using mental gymnasts.

Finally, if the judgments of judges, and thus effectively their personalities as well, were deemed massively inappropriate by the majority of the nation then laws could be enacted or amended by parliament and/or the judge/s could even be removed. Otherwise democratically appointed judges should be seen as implementing legal-equations that they potentially would have written themselves had they been in parliament, and vice versa. Thus despite many people perhaps not liking the judgment of *S v Makwanyane*, its character still seems to be in line with RSA since nobody has amended the Constitution of the Republic of South Africa, 1996, to alter the present capital punishment position in our law.

4 F Nietzsche *On the Genealogy of Morals* (2000) Modern Library Classics: New York.

5 *Ibid.*

6 See s 174 of the Constitution and Mail & Guardian "JSC thinking leaves us in the dark" *Mail & Guardian* 23 April 2010.


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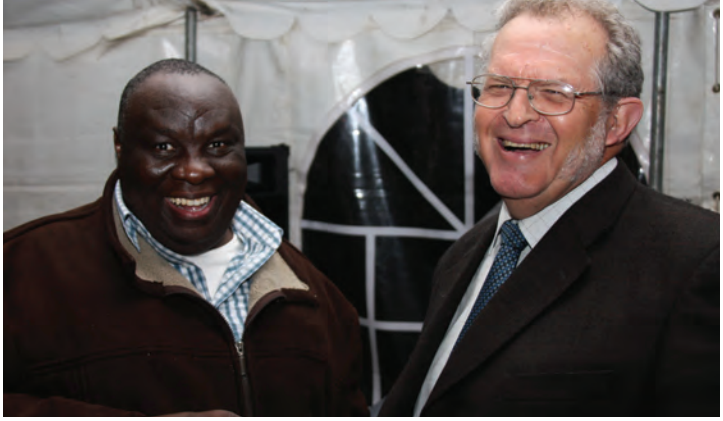
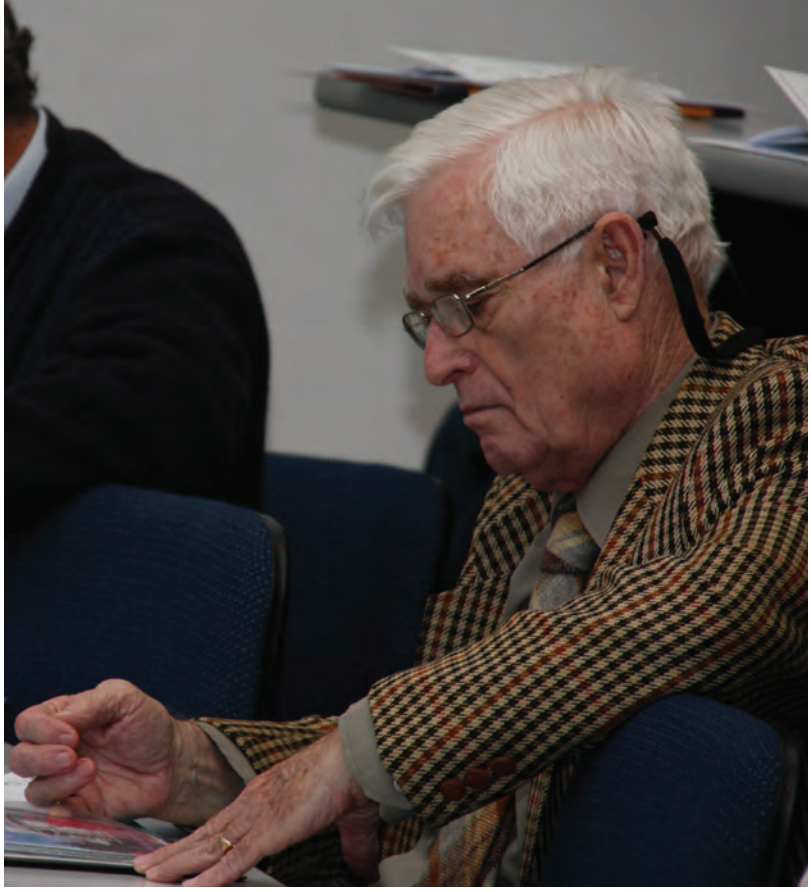




"Reflection on the Eastern Cape Bench & Social Justice Conference 2010"

Dave Grenville & Daniëla Ellerbeck

The acknowledgement that the inception of the Constitution of the Republic of South Africa, 1996 marked a remarkable turning point for this country is by now a truism. What, however, has not yet been fully appreciated is how this document is going to have real effects for the people of this land. One of the ways to achieve this change, as the Constitution itself envisages, is through the courts. The judiciary is thereby empowered to interpret and, more importantly, to give effect to the values and dictates of the Constitution. This will only be possible, if our courts are staffed with judges who are willing to give judgments that promote freedom, equality and dignity in order to realise true social justice.

Two such judges retired from the Eastern Cape Bench in April of this year. Judge President Somyalo and Judge Jones each represent sterling examples of devotion at the highest level to the Constitution, social justice, and the people of South Africa. Between them they have amassed an exceedingly vast number of the progressive judgments that this country, and more specifically the Eastern Cape, so desperately requires.

Coupled with this, the Eastern Cape bench, a small Provincial Division, has over the past 16 years, provided far more than its proportional share of ground breaking cases and has contributed immensely to the realisation of the country that the Constitution so desperately dreams for. The Rhodes Law Faculty, therefore, found it appropriate to honour these immeasurable contributions and, on 1-3 September, 'the Eastern Cape Bench and Social Justice' Conference was proudly hosted.

As well as paying tribute to Judges Somyalo and Jones, this conference was aimed at addressing four key areas of law, over which the Eastern Cape Bench has had particular influence. These were: administrative law; enforcement of judgments and cost orders; social security law and land reform.

The first day of the conference opened with the administrative law section featuring: Professor Hoexter from Wits University; Advocate Budlander from the Johannesburg Bar; Professor Quinot from Stellenbosch University and Mr Kruuse representing Rhodes University. This session, featuring Professor Corder from the University of Cape Town as the discussant, made it abundantly clear that the Eastern

Cape Bench has successfully grappled with every opportunity that it has been given in this area of law to develop a constitutionally desirable framework for dealing with administrative action. Professor Hoexter notes that the, "Eastern Cape Bench has contributed richly to the development of South African administrative law". This is in line with Professor Quinot's recognition that the Constitution, in making a break from the past, now requires a culture of justification. Both advocate Budlander and Mr Kruuse were then able to compliment this theoretical framework with a recount of their practical experiences with administrative functioning in this country.

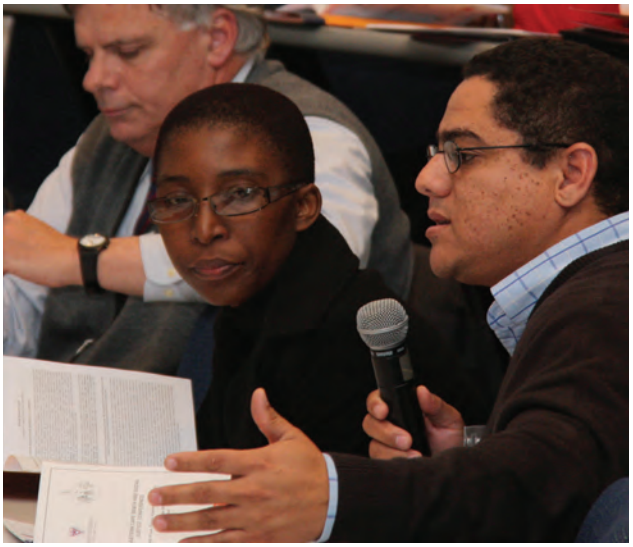
The second session, enforcement of judgments and court orders, featured Professor Midgley from the University of Fort Hare as the discussant with speakers: Mr Mandlana from Bowman and Gilfilan; Dr Krüger from Rhodes University; Professor Matlana from Matlana Attorneys and Mr Ngcukaitobi from the Legal Resources Centre.

As Mr Mandlana pointed out, in recent times, when a litigant is successful against the state, very often the result is that the state is ordered to pay money. The problem with this, however, is that the state very often fails to carry out this obligation and thereby acts contrary to the Rule of Law. This position was further extrapolated by Dr Kruger who examined the approach of the Eastern Cape Bench to these concerns and argues that, the "proactive stance" of this division has reduced unnecessary litigation and thereby even saved some of the taxpayer's money. Professor Matlana also noted that the use of a structural interdict, as derived from the constitution, has been employed by this Bench to ensure outcomes that are just and equitable. Mr Ngcukaitobi concluded the session with a critical assessment of the courts' ability to effect real social change. His argument that lasting social change can only come from the people ourselves, as a true realisation of democracy in its fullest sense, sparked a rigorous debate that may mark the beginning of a rejuvenated approach to the role of the courts under the Constitution.

That evening a banquet dinner was held in honour of the two remarkable judges mentioned earlier. The address was made by non less than the Honourable Justice Lex Mpati, President of the SCA. The gala dinner was an emotional event as the judges personally delivered messages sharing their feelings by being honoured in such a memorable way.

The final day saw both sessions 3 and 4 taking place in the morning. Session 3 raised Social Security Law issues. The discussant was none other than our own Judge Plasket. Professor Okpalubafrom the University of Limpopo; Professor Govindgee from Nelson Mandela Metropolitan University; Mr Khoza from Bowman Gilfillan and Professor Olivier from the North West University made for interesting academic opinions, with papers on ways the Eastern Cape Bench's judgments have contributed towards trying to overcome bureaucratic delays to achieve social justice, unemployment and the right to social security as well as discussions on trying to improve South Africa's social security system in general.

A short tea-break was followed by session 4 which dove into the much disputed topic of Land Reform. Discussant was Professor du Plessis from North West Nuiversity, with papers delivered by Ms. Pope from the University of Cape Town; Professor



Pienaar from Stellenbosch University; Professor Mqeke from Rhodes University and Mr Kahanovitz from the Legal Resource Centre. Much was said about eviction, PIE and the evolution of approaches in jurisprudence to these matters. Tenure reform in South Africa was discussed as well as the impact Land Reform has had on African Tenure Practices in the Eastern Cape.

Judge Craig Howie concluded the day with a hearty closure speech which managed to eloquently draw together the different aspects and opinions raised and tie them together in light of the purpose of the conference.

The event was a huge success and a credit to Rhodes University as people from across the legal field and indeed, the country with different areas of expertise came together to celebrate the invaluable contributions of Judges Somyalo and Jones as well as the success of the Eastern Cape Division itself. With reports of thanks and congratulations returning to the Rhodes Law Faculty from across the country it would seem that the conference has left an indelible mark of excellence on this region.

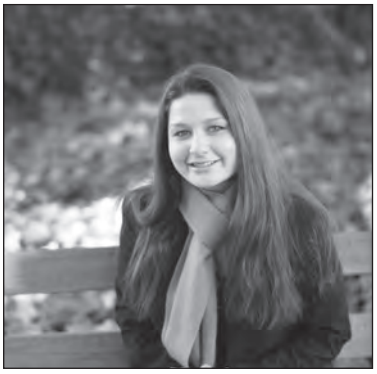
Society Photos 2010


Heineken


henney
henney

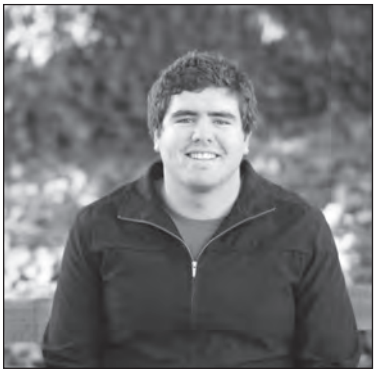

champions

Class of 2010



Lara Sittig

You may never know what results come from your action, but if you do nothing there will be no result



Mark Ross

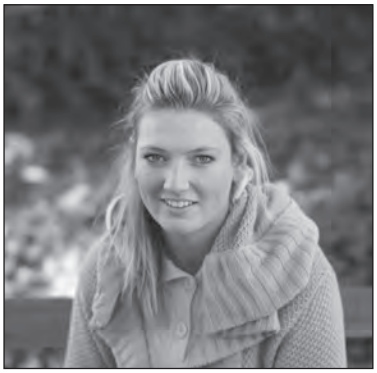
Laugh at yourself first before anyone else can -E. Maxwell

Dominic Hodge

Dream like you`ll live forever, live like you`ll die tomorrow

Sekoetlawe Jacob Phamodi

Rudi Vink



Victoria Smith

John Ndlovu

Papama Magqwashe

Don`t let the noise of others` opinions drown your own inner voice

Asanda Chuma

Happiness is not the constant pursuit of happiness, it is the by-product of other activities -Aldovs Huxley

Tshegofatso Raphuti

Prashiunne Hansraj

Ingrid Cloete
Wherever you go no matter the weather, always bring your own sunshine-Anthony D`Angelo

Daniela Ellabeck

The brave may not live forever but the cautious do not live at all

Dylan Bradford

What we do for ourselves dies with us what we do for others around the world remains and is immortal

Tiffany Potts

The stumbling block in the path of the weak become the stepping stone in the path of the strong

Jeff Dunlop-Jones

Be good if you can`t be good be lucky

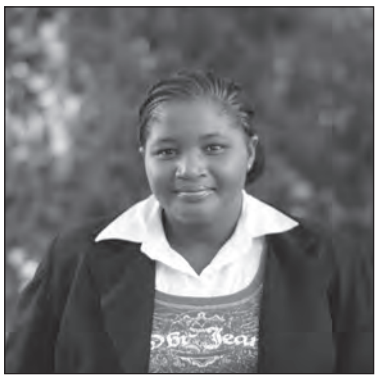
Dane Maharaj

It is better to live one day as a lion than to live a thousand years as a lamb

Amanda Sityana

Chivonne Erasmus

One of the greatest discoveries a man makes is to find the can do what he was afraid he could not do



Chantel Dabishi

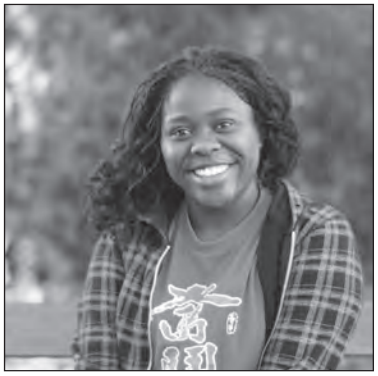
In the future we become in the moment we overcome

Jenaleigh Beukes

Even if success is illogical failure is still not an option

Rufano Mupandasekwa

Plan ahead it wasn`t raining when Noah built the Ark

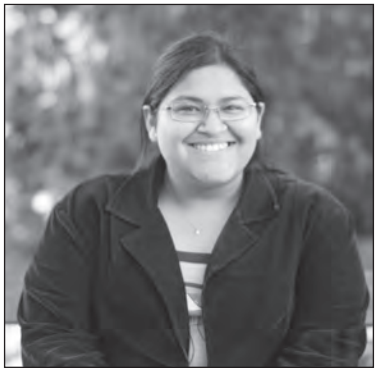


Sithulisiwe Wabatagore

Life is like a box of chocolates – Forest Grump

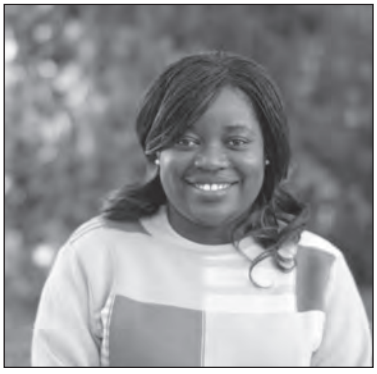
Emma Drury

If you say something silly one hundred times, it doesn`t make it sensible – Gordon Barker



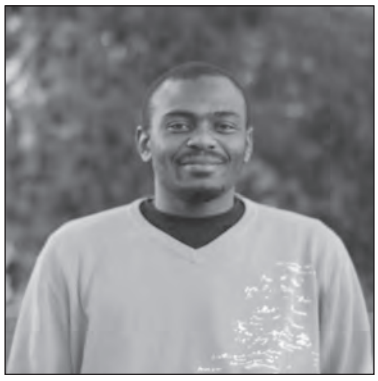
Raeesa Asmal

Your mistakes do not define you they tell you who you are not – Three doors down.



Tapuwa Magwere

If you plant hard work you`ll reap success

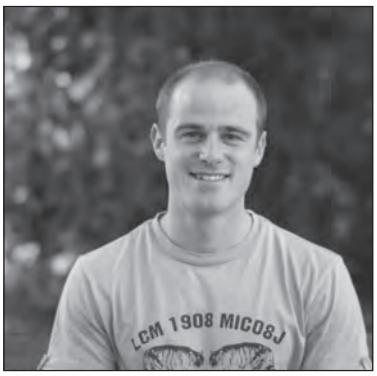


Kelvin Guveya

Never rest on past laurels

Hillary Brennan

Today is the tomorrow you worried about yesterday

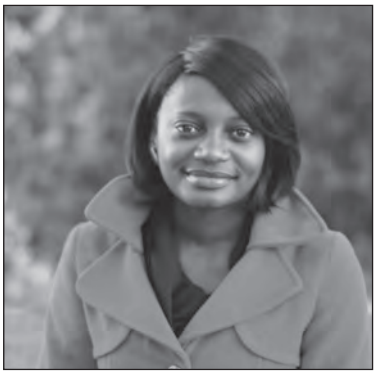


Chris Walton

I hope somebody we'll put away our fears and prejudices and just laugh at people – J. Handley.

Sarah Davies

Not all those who wander are lost. –J.R.R. Tolkien

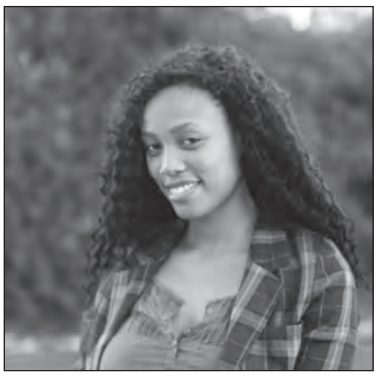


Yolanda Itamba

…if you are too afraid to take the first step then your dreams will always be big and remain bigger than you

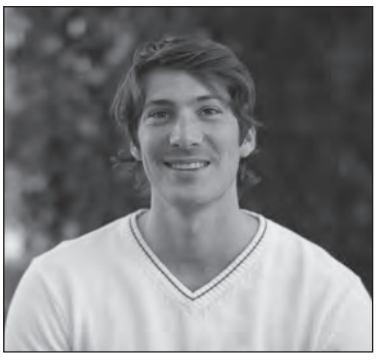
Primrose Zvinavashe

Through our greatest advertises comes our greatest successes – Marcus Auretius



Chippo Taongai

I`ve enjoyed life more by saying yes than by saying no ,say yes



Spencer Samuel

If your life is an occasion , rise to it –Susan Wehr

Gareth Randles

Ilza van Jaarsvrldt

No rain …no rainbows

Fausto Di Palma

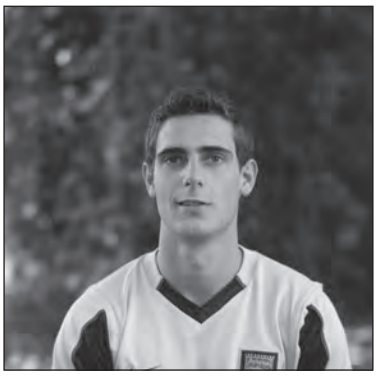
Things turn out best for the people who make the best out of the way things turn out – John Wooden

Lindsey Thorpe

I`d rather regret the things I have done than the things I haven`t done

Nicky Tennent

Go confidently in the direction of your dreams .Live the life you have imagined.



Nigel Wright

Through our greatest advertises comes our greatest successes – Marcus Auretius

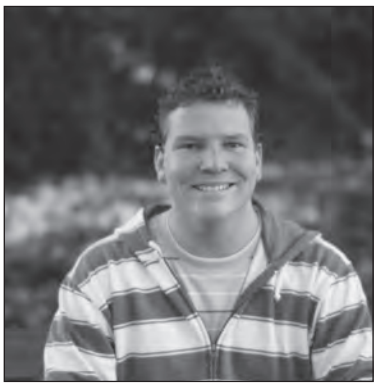
Jessica van Zyl

There is no respect or dignity in intoxication and being violently ill- SRC 2010

Linda Jacobs

Experience is the best school but the fees are expensive

Ruvimbo Kaseke



Barry Edwards

George Kahn

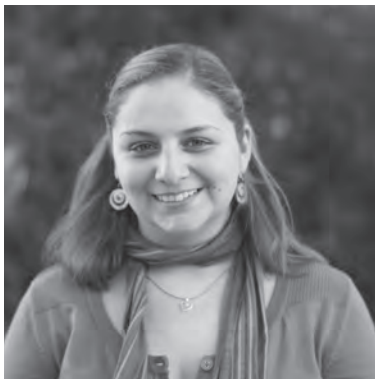
Love must be centre to justice and law and if it is not then Justice is hollow and law becomes oppressive

Catherine Eddy

Don’t say the world owes you a living. The world owes you nothing . It was here first

Hayley Read

There is always a way to be honest without being brutal –Arthur Dobrin

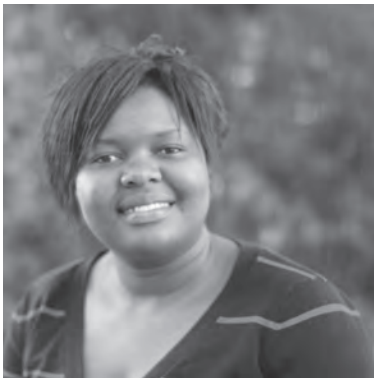


Kathryn Abrahams

Studying law has taught me how to take identical situations and show how they are different

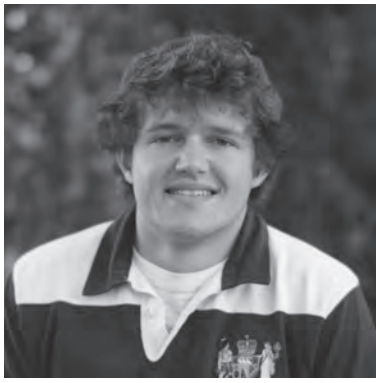
Farai Nyabereka

In life like in law , the good guys finish last



Rutendo Mudarikwa

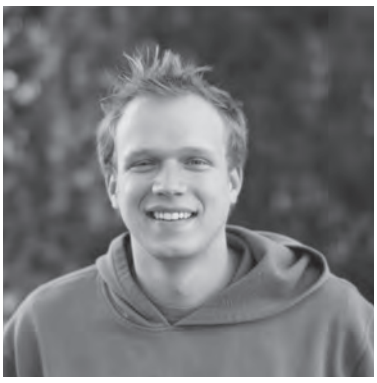
If anyone can do it I can do it better and well better is not good enough but my best is yet to come



Philip Raw

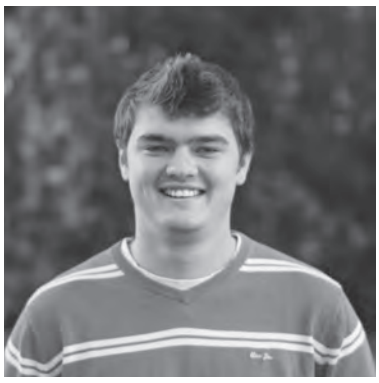
If you are going through hell , keep going – Winston Churchill

Steven Manthey



Jerome Brink

Steve needs help!



Karl Hoffmann

Live the life you love , love the life you live

Kirst Crawford

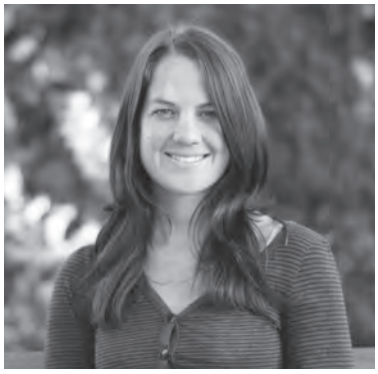
Never sit down with a light bulb in your back pocket

Keri Hattingh

The difference between possible and impossible lies within man`s determination

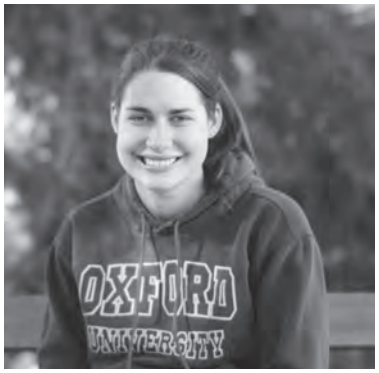
Lauren Cloete

Do something worth remembering
-Elvis Presley



Allison Moore

Animals have feelings too



Jess Boast

Thomas Miller

The greatest happiness of the greatest number is the foundation of morals and legislation. –Jeremy Bentham