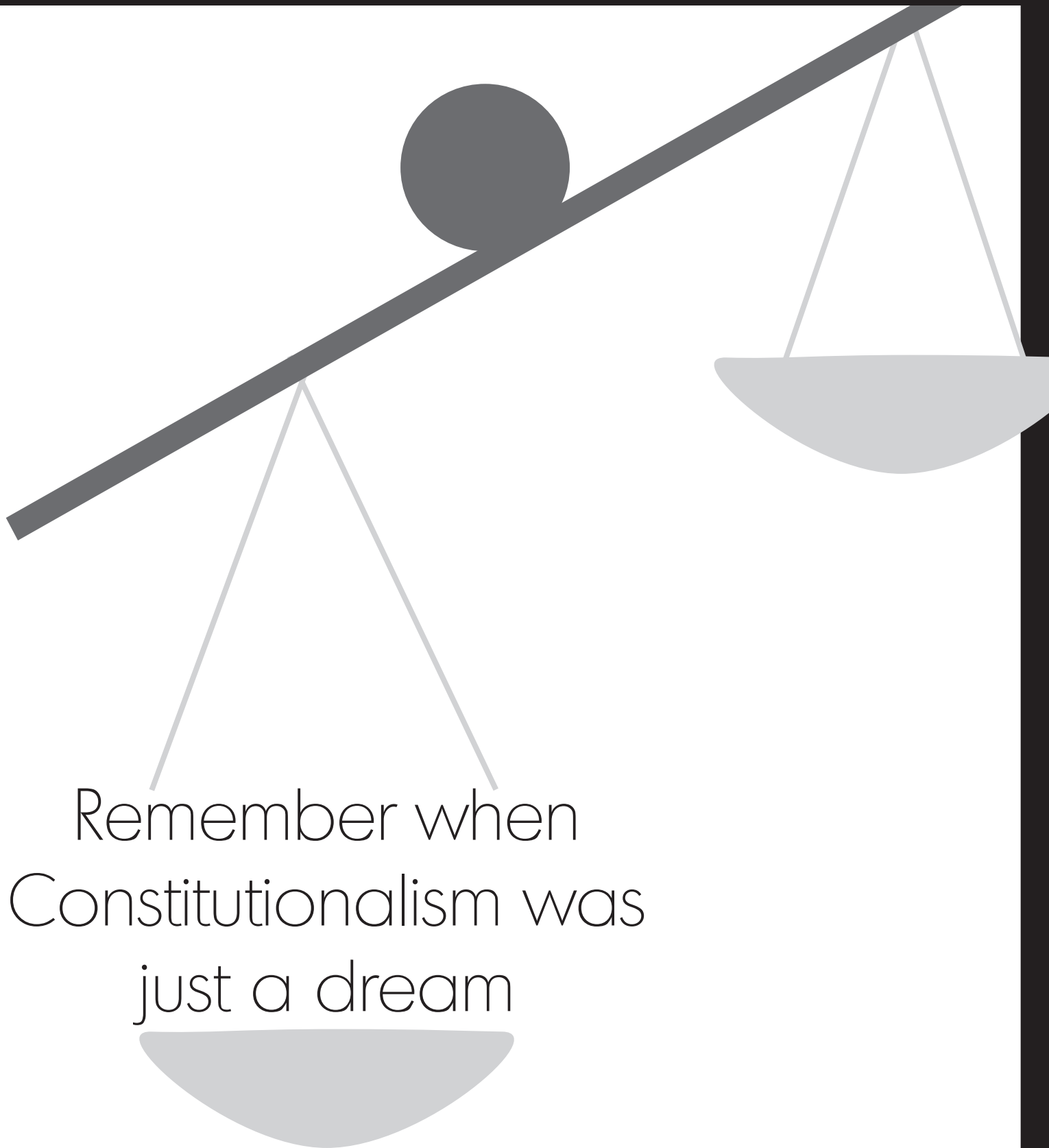


2011 In Camera



EDITORIAL



In the words of Charles Dickens, it has been “the best of times, and the worst of times”. These words truly epitomise the life of a typical Rhodes law student. For five years we have waited anxiously for that auspicious occasion when one’s transcript reads “LLB obtained” and we finally leave the law faculty. However, as we dawn upon the gates of freedom, we find ourselves in an area of uncertainty - not ready to let go of what we have become so attached to, but also apprehensive of what lies ahead in the ‘real’ world.

The five-year journey through law has been full of successes, challenges, and opportunities, all of which have helped mould us into the capable ‘Rhodents’ we have become. Most of us have experienced the wrath of a Glover assignment, convulsed (and cried in some cases) at the thought of a Les Roberts Evidence exam result, and had to soldier through many an all-nighter. However, what made it easier is what one has termed SOLIDARITY - knowing that there are fellow students who are in the same, desperate situation you find yourself in.

To those law students who are still coming through the ranks, Theodore Roosevelt once said: “Far better it is to dare mighty things, to win glorious triumphs even though checkered by failure, than to rank with those poor spirits who neither enjoy nor suffer much, because they live in the grey twilight that knows neither victory nor defeat.” The road to LLB may not be easy, but it is a rewarding one. The ingredients necessary are passion, commitment, discipline, loyalty and balance. Work hard, play hard ... take advantage of the numerous social networking opportunities.

People always say that Rhodents are arrogant; that we always have something to prove. We beg to differ. Rhodes law students have nothing to prove; we are born LEADERS. One ought to construe this to mean that by virtue of being a Rhodes law student, you already have a head start; that the opportunity to wear the purple and black gave you a competitive edge that is revered by many who are not as fortunate. Our time has come.

The task of putting together *In Camera*, an annual publication that seeks to showcase the Law Faculty and the Law Society here at Rhodes, has been a mammoth task. It was a task that turned two unwitting students into rabid, take no prisoners editors as we chased down content, advertising and everything else which contributed to the work, we are now proud to present.

Despite all the challenges we encountered as we took a dive into the deep end of legal journalism and publishing, it has been a worthwhile experience.

The over-arching goal of the Law Society in 2011 can be characterised by one word: reinvention. Throughout the year, the committee set about making notches on the post, as we surpassed all expectations. Thus the challenge to create an accessible, page-turning *In Camera*, in the extremely bright light of all of the society’s hard work throughout the year, was one we did not take lightly.

We began by combing through past editions of *In Camera*, drawing on the ideas of our predecessors which have shaped the publication in the past. Then we began looking forward, thinking so far outside of the box, that the box had become a small dot in our sphere of reference. But after a lot of brain storming we settled on a plan, a plan we knew, if achieved, would result in a body of work worthy to mark the end of a successful year.

We hope that this year’s edition of *In Camera* is an enjoyable, informative and thought provoking read for students, lecturers, academics and all who come across it. We hope it is accessible and begins a new era in the history of the publication. We thank our gracious sponsors, our supportive committee and the contributors who took the time out of their very busy schedules to provide the building bricks of the publication. Finally, we thank the *In Camera* team, without whom the 2011 edition would not be possible.

Enjoy.

Adwoa and Xhanti

CONTENTS

- 4 **Law Faculty Report:** Part 1: Teaching and Learning
- 5 **Law Society President:** Ricci's ramblings on law and life
- 7 An interview with **Théo Boutruche** visiting speaker for Constitution week.
- 9 Remember when constitutionalism was a dream
by **Max Boqwana**
- 12 Are you a real Springbok supporter, or are you just faking it?
by **Nishan Singh**
- 14 Career advice: working in a large firm vs small law firms
by **Philip Abrahams**
- 16 Entertainment Law
by **Unathi Malunga**
- 19 **Law Faculty Report:** Part 2: Staffing Report
- 23 Watching those who watch us
by **Adv. Craig Renaud**
- 25 The Criminal Prohibition of Prostitution in South Africa: The "Forced Prostitution" and "Adult Consensual Sex Work" Dichotomy
by **Fausto R. Di Palma**
- 28 **Law Faculty Report:** Part 3: Student News
- 30 **Student Submissions:** Zara Hammerschlag
Bibiana Mwape
Richard Dhaka
Haruperi Mumbengegwi
- 45 **Class of 2011** photographs
- 57 **Law Faculty Report:** Part 4: Community Engagement
- 58 Combining Service Learning, Legal Activism and Community Engagement at the Rhodes Law Faculty: Possibility or Utopia?
by **Prof. Jobst Bodenstein**

Co-editors:

Xhanti Mhlambiso &
Adwoa Ankoma

Designer:

LaSchandre Coetzee

Photographers:

Stephanie Meintjies

Contributors:

Theo Boutruche
Max Boqwana
Nishan Singh
Phillip Abrahams
Unathi Malunga
Craig Renaud
Fausto Di Palma
Zara Hammerschlag
Haruperi Mumbengegwi
Bibiana Mwape
Richard Dhaka
Prof J Bodenstein

Special thanks to all sponsors for the support; the faculty administrative staff for efficiency and logistical support; and Prof Glover for his continued support. A special thanks to Tammy Mullins, Daniella Janse van Rensburg, Popo Mfubu and Adv. Les Roberts for their kind submission of photos.

Growing up: Rhodes to Norton Rose



Ismail Laher

Associate - corporate, mergers & acquisitions

The bus pulled up to the Kimberley Dining Hall and out I got with my suitcases, wearing a pair of shorts and a t-shirt to my first taste of Rhodes University. It was a dark Sunday evening on the day before o-week started. I met the res warden who showed me to my room and then swiftly told me that the other first years had already left for a party at the Monkey Puzzle.

At that point and for the rest of my university career, I wasn't really sure what I wanted to do with my life. I just knew I wanted to go to Rhodes and had arbitrarily decided to do law. Fortunately, I really enjoyed my law subjects and decided to major in them and subsequently

completed a post-grad LLB followed by an LLM focusing on employment equity.

Six years, many stories and three degrees later, I drove to Johannesburg, relocating from Durban, to a begin career at Norton Rose. I arrived at the offices on the first Monday of o-week (which bore no similarity to a Rhodes o-week) with my briefcase, wearing a suit and tie. My hope was that I enjoyed being a lawyer and, if possible, to specialise in labour law.

“ Six years, many stories and three degrees later, I drove to Johannesburg, relocating from Durban, to a begin career at Norton Rose. ”

After finishing my two years of articles, I finally had an idea of what I wanted to do with my life. Fortunately, I really enjoyed being a lawyer and have stuck with it since. I was appointed as an associate at Norton Rose and specialise in corporate, mergers and acquisitions.

You do not need to plan every detail of your life now. Work hard to make sure the plan you eventually strive for is more easily achievable but don't let the rest of your life get in your way. Being a student is tough enough as is. You have to get out of bed for those lectures with registers and sometimes even miss your afternoon nap to write an assignment.

Enjoy university while you are able to but do not fear leaving. Enjoy being a child for a bit longer but do not fear growing up. Work hard but still dye your hair and paint yourself purple in September. There are exciting opportunities out there for each of you and, with some luck, hopefully those opportunities will find you at Norton Rose in the future.

Join us, and launch yourself into a new life!

2600 Lawyers

5 continents

1 career

Apply online

www.nortonrose.com/za/apply

Norton Rose South Africa (incorporated as Deney's Reitz Inc.)

Norton Rose South Africa (incorporated as Deney's Reitz Inc.) is a member of

Norton Rose Group, a leading international legal practice offering a full business law service to many of the world's pre-eminent financial institutions and corporations from offices in Europe, Asia Pacific, Canada, Africa and the Middle East.

LAW FACULTY REPORT

2010-2011

Part 1: Teaching and Learning

Introduction

The last year has been extremely productive and successful for the Law Faculty on all fronts: teaching, research and community engagement – as evidenced by this report. The core business of the Faculty is to provide our students with an enabling environment for quality legal education via teaching and learning, and all the Faculty's efforts have been geared to that end.

The academic year began with the Faculty Opening in February at which Mr Max Boqwana, a Port Elizabeth attorney, Co-Chairperson of the Law Society of South Africa and Law Faculty alumnus 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 2010 with the presentation of a number of awards and prizes.

Academic matters

In April 2011, 59 students graduated with LLB degrees, two of them with distinctions (Kathryn Abrahams and Ingrid Cloete) and four students graduated with LLM degrees, one with a distinction (Rowan Stafford). 83 students took up offers of acceptance into LLB this year, only 9 of whom registered for the four year LLB, thus indicating that 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 no adjustments to the LLB curriculum this year, however due to unforeseen staff changes three of our elective courses (Unjustified Enrichment, Environmental Law and Competition Law) were not able to be offered this year.

Company Law A and B were block taught in the 1st semester by Adv Renaud as he was on academic leave in the 2nd semester, and Administrative Law A and B were block taught in the 2nd semester by Ms van Coller in view of Prof Goolam's continued illness. Law of Evidence B was offered in the first semester.

The national LLB curriculum review by the Council on Higher Education undertaken during 2010 produced some interesting results, yet nothing conclusive in regard to the success or not of the four year LLB degree. The Rhodes Law Faculty remains convinced, however, that the five year programme is in general the preferred option for students, and will continue to encourage

students to pursue that stream, although the four year stream remains available to those students who choose it and who qualify for admission to it.

The penultimate and final year student reviews (evaluations) for both the second semester of 2009 and the first semester of 2010 were once again overwhelmingly positive. Lecturers were described as being knowledgeable and approachable, and programmes well structured. Much appreciation was expressed for excellent service from library and Faculty administrative staff.

Our library staff are doing all they can to manage the pressure on the library computers. To ease this pressure the library recently added an additional computer which is exclusively used by students to access the Library Catalogue (OPAC).

The following workshops / training courses were conducted during the course of the year: Library assistance training; Law database navigator training for postgraduate students; Conveyancing workshop (February 2011); Legal Theory 1 orientation workshops (February to March 2011). Furthermore, the Legal Theory 1 tutors conducted a workshop on electronic databases in August 2011.

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



By Prof Jonathan Campbell,
with contributions from
various staff and students



By Ricardo Pillay

Law Society

President 2011

Ricci's Ramblings on Law and Life

Aristotle once said "the law is reason free from passion". No offense to Aristotle, but in my 5 years at Rhodes University Law faculty I have come to find that passion is a key ingredient to the study and practice of law and of life. It is with passion, courage of conviction, and strong sense of self that we take our next steps into the world. Remembering that first impressions are not always correct, you must always have faith in people, and most importantly you must always have faith in yourself. Congratulations class of 2011 and my fellow Law Society Committee. We have pulled off an amazing 2011.

1) My Rhodes Law Experience

I had 3 goals for my time at Rhodes: (i) to learn, (ii) to lead, and (iii) to leave my mark. I have thoroughly enjoyed my many years at Rhodes. I have engaged with our University's rich diversity and have taken on its many opportunities to become a well rounded young leader.

Thank you to our approachable Rhodes Law staff members. You have inspired and enriched my experience at Rhodes. To Advocate Craig Renaud, a special thank you for your time and effort put into our Africa Trade Moot Competition. You have mentored me and have assisted me in becoming a more confident and passionate orator.

2) Rhodes Law Society 2011 Report

"Do not go where the path may lead; go instead where there is no path and leave a trail" (Ralph Waldo Emerson). A friend and ex-president of the SRC 2007, Ms Fatema Morbi, once told me this: if you want an SRC (in this case a Law Society) to succeed, make them take ownership of their society. This year, on a team with 6 other passionate law students each of them took ownership of their Law Society. To Melissa Hood, Vimbai Chikukwa, Tamlyn Mullins, Adwoa Ankoma, Xhanti Mhlambiso and Kea Seate,

thank you for all the hard work and effort dedicated towards making our society a success.

(i) Vision

Our Rhodes Law Society's vision for 2011 was to provide our members with vital additions to their life as law students including: (i) career development, (ii) social-networking, and (iii) academic prospects. My vision for the society was to create a legal fraternity: to create a Law Society with active members. I wanted our membership to become aware of topical legal issues affecting practitioners in South Africa. Further, I wanted to focus on our international law students and provide them with opportunities to engage in career development, as they have been marginalized in the past.

We were able to give effect to this vision by extending our committee duties to various subcommittees of our members. For Market Day, we focus on how our members could become intimately involved with the event. As such, members formed part of the Market Day Helpers' Team. This enabled members to assist various firms throughout the day thereby adding a personal touch to the Market Day experience. Further, for Constitution Week the International Humanitarian Law Sub-Committee was formed under the leadership of Ms Vimbai Chikukwa. This sub-committee was the driving force behind Rhodes Constitution Week.

(ii) Career Development (CV/ Interview Skills Workshop and Market Day)

Thank you to all our members who got involved in our career development initiatives. Attendance at the CV and Interview Skills Workshop exceeded our expectations. We hope it was useful for your Market Day preparation. Thank you to Advocate Niesing, and Ms Saronda Fillis for

the support and meticulous preparation that made Market Day a success.

(iii) Legal Awareness

This year marked the introduction of two campaigns: (i) The Legal Practice Bill Presentation and (ii) the Protection of Information Bill Campaign. We used these campaigns to engage our members with regard to topical legal issues affecting South Africans.

(iv) In Camera Magazine

Thank you to all our members who have used this in-house magazine as an opportunity to have your work published. Thank you to Adwoa and Xhanti for the effort and passion which they put into this publication.

In sum, we have achieved our vision of creating a legal fraternity with members that are active.

3) To the leavers

"You have brains in your head. You have feet in your shoes. You can steer yourself in any direction you choose. You're on your own. And you know what you know. You are the guy who'll decide where to go" (Dr Seuss). To my final year class I hope your dreams take you to the corners of your smiles, to the highest of your hopes, to the windows of your opportunities, and to the most special places your heart has ever known. We have worked incredibly hard on this degree; now go out into the world and give effect to the great Rhodes reputation.

4) To the stayers

To our penultimate years and up-and-coming law students, savour each experience: your first all-nighter, the first time you share your opinion and your first moot. My Rhodes Law experience has been an exciting adventure, filled with whimsy and memorable experiences. I have learned, lead and left my mark. Don't be afraid to do the same.



WE'RE NOT JUST LOOKING FOR ATTORNEYS
we're looking for depth

Becoming a successful attorney requires more than just knowing your stuff. You need depth. If you've got that something special that can turn good into great, we've got a spot for you. At Bowman Gilfillan, you'll get to work with the best in the legal world. Doing your articles with us means working on challenging deals, interacting with leading blue-chip clients and getting the exposure you need to fine-tune your skills. If performing at the highest level strikes a chord with you, go to www.bowman.co.za

BG ***Bowman Gilfillan***
Attorneys

An interview with Théo Boutruche

Théo Boutruche

PhD International Law
Graduate Institute
of International and
Development Studies,
(Geneva) and Aix-
Marseille Faculty of Law,
(France)

Current Position:

Amnesty International
Law Department
Researcher on the
Democratic Republic of
Congo (International
Secretariat in London)

Formerly:

Teaching and Research
Assistant (Public
International Law
Department of the Law
Faculty, Geneva)

International
Humanitarian Law/
Human Rights Expert
of the Independent
International Fact-Finding
Mission on the Conflict
in Georgia (European
Union)

Consultant To:

Save the Children

Diakonia IHL Programme

Field of Interest:

International Law

Achievements:

PhD thesis on "The
Prohibition of Superfluous
Injury or Unnecessary
Suffering in International
Humanitarian Law"

Awarded 2009 ICRC
Paul Reuter Prize
for International
Humanitarian Law

"The views expressed in this interview are solely those of the author and do not necessarily reflect those of the organisations and institutions, including Amnesty International, for which the interviewee works or has worked."

1. Introduction

I first wish to deeply thank the Dean of the Law Faculty and the IHL Committee for having invited me to participate in the Constitution Week at Rhodes University as well as all the people and sponsors who made this trip possible. It has been truly an unforgettable and very enriching experience for me to be invited to address such a dynamic and committed audience on such a variety of topics.

2. Define International Human Rights law for the law student who may not have a politics background or a background in international law.

International Human Rights Law is a branch of Public International Law that aims at protecting human dignity and the rights of all human beings in peace time. Traditionally it emerged as a body of norms imposing obligations towards the State vis-à-vis its own citizens but it is now considered also to be applicable to non-state actors. International Humanitarian Law (IHL) or the laws of war on the other hand is a body of norms applicable in times of armed conflict and that aims at protecting persons who do not take part in or who no longer take part in hostilities, (such as civilians or injured combatants) and which is regulating the means and methods of warfare. It is however now widely recognised that human rights law continues to apply in times of armed conflict and complements IHL norms under certain conditions.

3. Why did you choose to go into IHL?

While studying Public International Law, I got interested in IHL as a branch of international law that intends to regulate the conduct of actors in the most violent situations: war. I find it fascinating that IHL norms integrate through a fine balance of humanitarian imperatives and military necessity. IHL rules are also designed to take into account parameters and elements which at first sight would seem to be impossible to regulate. I think this is a really captivating area of international law to work on, where the interpretation and the implementation of rules face the constant challenges of the realities of war. Take for example the case of the principle of proportionality, which holds that an attack is considered indiscriminate and therefore prohibited if it may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Stating this rule is one thing but applying it in practice is another thing: it requires comparing two sets of elements that any human being would find impossible to decide upon. Within IHL I decided to study the norms on the regulation of weapons and methods of combat that combines philosophical questions, legal principles and norms, technology of weapons, and medical considerations: a fascinating mix!

4. Where does the politics stop and the law take over? How are the two married?

Law and Politics are actually intrinsically linked, by the mere fact that Public International Law is mainly a result of the will of States. There is definitely an element of politics in the making of international law. And politics also intervene when states are interpreting existing rules of international law. The whole debate of the so-called inadequacy of IHL norms in the infamous "War on Terror" is unquestionably tainted with political considerations. It would be missing the point to try to separate the two. The whole challenge for an international lawyer is to overcome political obstacles by using the law.

5. What is the most memorable moment of your career thus far? What has been your most challenging case?

I chose to work in the fields of IHL and human rights law, because these norms have a true human

dimension. So one of my most memorable moments would be the joy of teaching, and seeing students sharing my passion for international law. As for the most challenging case, it would also be the most emotional one, when I was interviewing victims of human rights abuses, and when you realize the limits of legal norms against traumatic experiences.

6. Our theme is "Remember when Constitutionalism was Just a Dream." Do you think this theme has resonance in international human rights law?

Definitely! After all, the whole underlying goal of human rights law is about limiting the powers and the authority of States towards its citizens by stating that human rights are not just an exclusively domestic matter that is not regulated by international law. The debate over whether a government loses its legitimacy if it commits mass human rights violations also demonstrates the bridges between constitutionalism and human rights law.

7. What kind of law student is ideal for a career in IHL?

There is no ideal law student to engage in a career in IHL. Students in political science combining a Master's in human rights law for example could also find their way in IHL. There are no strict boundaries in that matter. But I would say that students who wish to pursue a career in IHL may feel the need to experience field work to get a practical perspective and to get involved with helping victims.

8. What is South Africa or Africa's role in IHL, and has it lived up to its potential?

African countries contributed to the development of international law through the adoption of key instruments such as the African Charter on Human and Peoples' Rights and the Convention for the Protection and Assistance of Internally Displaced Persons in Africa and through regional mechanisms such as the African Union and the African Commission on Human and Peoples' Rights. There are also excellent African lawyers working in international criminal courts and tribunals and elsewhere. And I also want to mention the African civil society organizations that are playing a key role in holding governments accountable.

9. How would you summarise the African model on Truth, Justice and Reconciliation? Does it lend itself to all African cultures, and are there cultures or states beyond IHL?

Transitional justice may be defined as the range of processes and mechanisms by which societies come to together and address the legacy of past large scale abuses and human rights and IHL violations. Like in many other fields, there is no "one size fits all" approach in the area of transitional justice. It is rather a tailored and holistic approach combining various mechanisms that needs to be designed to take into account different aspects such as the characteristics of a given society and the types of abuses that took place. I can't see an African model that could work for all African situations. One can talk of models in the sense that African experiences brought very valuable lessons learned to help design a set of transitional justice mechanisms for a given situation. The recent call (See *The Guardian*, 13 October 2011) for a truth and reconciliation commission in Libya taking into account the specific context of that country to avoid the mistakes made with the "De-Ba'athification" in Iraq, illustrates this cautious approach. On the other hand, it is argued that only a Libyan version of South Africa's Truth and Reconciliation Commission can establish a culture of the rule of law and that Libyans must decide how far to purge public life of those linked to the old regime. So, for example, the South African experience is definitely a very useful experience to be adapted to the specificities of the situation in Libya.

10. How do you not let IHL and its challenges affect you personally? How do you stay happy and content with what you are doing in a field with so little victories? How does one stay motivated?

Indeed this is a constant challenge personally and emotionally. And I sometimes feel disheartened or frustrated, but making a difference means that small changes are as important as big ones. So maybe considering the full picture of human rights violations in the world or in a given country can be discouraging, but contributing to having impact at a smaller scale, helping a victim to get his or her rights respected, is also a way to see progress rather than always looking at the bigger picture and losing hope.

11. What would you say to the law student looking to follow your career path? What should they be doing? What country should they live in?

There is no particular recipe or country to live in; one needs committed and motivated young lawyers or students who studied political science to bring another perspective everywhere! They must not be afraid of going off the beaten track. Obtaining a Master's degree is one thing, but then you need to build an original profile, and get field experience!



By Max Boqwana
BA (Rhodes), LLB (Rhodes)

Position:
Senior Director at
Boqwana Loon &
Connellan Inc. Attorneys

Attorney of the High
Court of South Africa

Former Chairperson of
the Attorneys' Fidelity
Fund in South Africa

Former Co-chairperson of
the Law Society of South
Africa

Councillor of the SADC
Lawyers' Association

General Secretary of the
National Association of
Democratic Lawyers

Fields of Interest:
Collective Bargaining,
Practice/Business
Management, Alternative
Dispute Resolution,
Corporate Governance,
Strategic Planning,
The law relating to
Money Laundering and
Accounting for Non-
Financial Managers

Special Qualifications:
Advanced Corporate
and Securities Law

REMEMBER WHEN CONSTITUTIONALISM WAS A DREAM?

It is not given to every generation

that it should be present during, or participate in the act of creation. I believe that ours is privileged to occupy such historic space.

What will it take for this nation not to compel its citizens to write books like *Cry the Beloved Country*, *The Petals of Blood*, *Revolution That Lost Its Ways*, *How Can Man Die Better* and many more historic tragedies that have occupied our academic space, if not banned?

I am grateful to the editors of this very important magazine who invited me to trace our own journey, which was greatly shaped by the University and the Department that is its custodian. I do this with a sense of pride and elation, fully conscious that ours is a triumph over adversity.

I speak both of historic tragedies and the responsibilities of this generation, because, as we address this topic as requested, we are constantly mindful of the historic tragedies we speak about and our role in averting those.

As I ponder these issues, I must acknowledge the wisdom and inspiration of those who came before us. The glimpses of this inspiration can be inferred from the roles played by our forebearers in the struggle for constitutionalism: Pricley ka Seme, Charlotte Maxeke, Duma Nokwe, Robert

Sobukwe, Abraham Fisher, Victoria Mxenge, Oliver Tambo, Dullah Omar and many luminaries who have graced our


shores.

Many in our country still bear the scars of the Native (Urban Areas) Consolidation Act 25 of 1945, the legislation that provided for influx control, and which separated parents from their children, robbed African people of their citizenship, and destroyed their sense of self-worth and dignity. This, together with seriously unjust labour laws and migrant labour systems, completely destroyed what was once a value-based, respectful, diligent and humane family set up. Grown-up men turned into boys and women into girls and the children were robbed of parenthood by design and not by nature.

Our grandparents and parents passed through this earth without ever having a right to vote - a badge of dignity. Talk of equal rights for them was an act of treason.

Young people, some as young as 13 years old, were thrown into jail for making a simple demand - a right to quality education. These young people responded with anger to an education system designed to make them "hewers of wood and drawers of water".

Many amongst us never knew how it is to grow up in a house with electricity, running water or



sewerage. Schools were no different. These apparent basic rights were simply an unattainable dream.

Some amongst us endured police brutality, beatings, torture and mindless detentions without trial. All this happened to those who argued and agitated for human rights. Killings and massacres of innocent and unarmed protesters happened wantonly with no one in authority taking responsibility. Lawyers and judges became complicit to these by providing judicial justification to cruelty.

We have been witnesses to young lives turned into waste by drugs, alcohol and crime, whilst many escaped to exile to seek better lives in unknown destinations. They were also not spared the brutality of aggression by our erstwhile rulers, who deployed the of State Intelligent Services to spy on ordinary citizens and to manage the information flow in the name of state security.

During all these times, every conceivable leader of the people was jailed or exiled. Jail and exile were considered fortunate considering that the alternative that befell Abraham Fisher, Sobukhwe, Mxenge and Mlangeni, who were “permanently removed from society” simply because of their beliefs that one day the sun shall never set on this glorious country.

Throughout this period, the dreams of our forebearers continued to inspire and guide us. Even in difficult times, many believed that a day shall dawn that a Government based on the will of the people shall govern, and that there shall be peace and justice based on fundamental human rights.

“ So much effort thereafter went to the realisation of our dreams, codified in the Constitution. It put an end to our historic tragedies and set the country onto the path of reconciliation, unity and ubuntu. ”

Throughout this period in our country, the concept of constitutionalism remained a perpetual dream deferred. In essence, constitutionalism entails the Rule of Law and respect for human rights. Ours was Rule by Law with minimal reference to fundamental human rights. This had become our reality and for many generations from cradle to the grave.

The masses of our people, their collective suffering and efforts to rid themselves of the evil of oppression eventually ensured that the gates of prison were broken and friendship extended to our neighbouring countries. The longest arbitrary and capricious state of emergency came to an end. This gave hope that a new society based on a democratic constitution and human rights was in the offing.

So much effort thereafter went to the realisation of our dreams, codified in the Constitution. It put an end to our historic tragedies and set the country onto the path of reconciliation, unity and *ubuntu*.

When we cast back our eyes on our history, we are bold to say

our Constitution put an end to our foolishness. This generation faces none of the historic tragedies we speak about. We are then able to make bold statements that, in our own country, constitutionalism has become reality.

The Constitutional Court has on many occasions been called upon to confirm this reality.

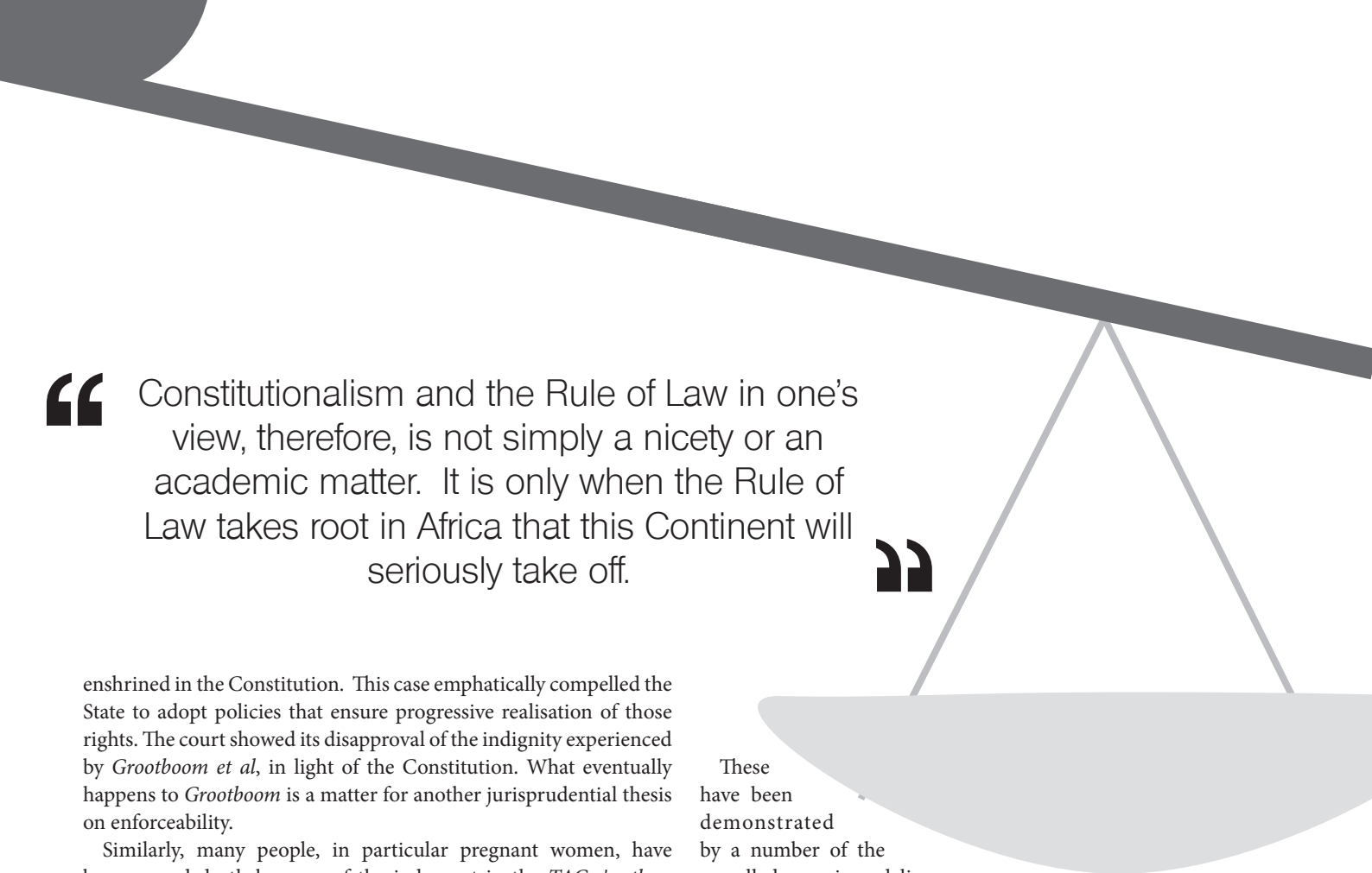
In the celebrated decision of *S v Makwanyane and another* (1995 (3) SA 391 (CC)), the court put an end to the final debate about the right to life; it confirmed the sanctity of that life to all persons, even those we believe subjectively do not deserve to live. These are difficult choices to make.

In the case of *August v IEC & others* 1993 (3) SA 1(CC) the court confirmed the right to vote. This was extended even to prisoners as a badge of human dignity, which many people have been denied for centuries. This recognised our entire role in shaping our own destiny.

In shaping the national psyche in the case of *AZAPO & others v President of the RSA & others* 1966 (4) SA 671 (CC), the court concluded that reconciliation is what this nation chose over retribution and vengeance. The court was well aware of the grave discomfort that many would feel if the perpetrators of evil deeds walked our streets with impunity and protected in their freedom by

way of amnesty, but, in dealing with these agonising choices, the court concluded that the reconstruction of our society is a better ideal to strive for. In a country that is generally conservative, whether influenced by African traditional values, Islamic fundamentalist tendencies or orthodox Judeo-Christian philosophy, gays and lesbians would have no place. But this was not to be so in the case of *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), which affirmed one's right to dignity. This case stated unequivocally that equality means equal concern and respect across difference. Now we live in a society where the antiquity of prejudice cannot be used as a justification for its survival and, finally, same sex marriage is recognised.

The court continued to confirm the entrenchment of socio-economic rights in the same way as civil liberties. This is no better illustrated than in the case of *Government of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC). For too long access to decent housing has eluded many South Africans, whereas this is



“ Constitutionalism and the Rule of Law in one's view, therefore, is not simply a nicety or an academic matter. It is only when the Rule of Law takes root in Africa that this Continent will seriously take off. ”

enshrined in the Constitution. This case emphatically compelled the State to adopt policies that ensure progressive realisation of those rights. The court showed its disapproval of the indignity experienced by *Grootboom et al*, in light of the Constitution. What eventually happens to *Grootboom* is a matter for another jurisprudential thesis on enforceability.

Similarly, many people, in particular pregnant women, have been spared death because of the judgment in the *TAC & others v the Minister of Health and other* 2002 (5)SA 703 (cc), where the Constitution affirmed the right to health and ordered that the state provide the required and life-saving drugs to persons with HIV/Aids. This case, once again, unequivocally entrenched the socio-economic rights as fundamental and enforceable.

Thankfully, the Constitution has shaped our judiciary's thinking in general to understand that their judgments are not to be based on the four corners of the Statute, but on consistency with the Constitution. In the Eastern Cape Division of the High Court there have been a number of judgments that have obliged the government to provide social grants of our most indigent persons.

Similarly, the recent judgments compelling government to do away with “mud schools” have put the issue of the right to education squarely in the Government's agenda.

Constitutionalism and the Rule of Law in one's view, therefore, is not simply a nicety or an academic matter. It is only when the Rule of Law takes root in Africa that this continent will seriously take off. Setting South Africa apart from the rest of the developing world is that the supremacy of the Constitution has been entrenched. This is no better illustrated than in the case of *Justice Alliance of South Africa & Others v President of the Republic of South Africa & Others* 2011(5) SA 388 (cc), where, essentially, the decision went against both the President of the Republic and the Head of the Judiciary. This confirmed the strength of the institutions to that of individuals, whatever status or position they occupy.

When all these happened, many of us are imbued with renewed hope and pride. All these though happen in a country with:

- the highest levels of inequality;
- extreme levels of poverty;
- unacceptably high levels of unemployment; and
- decaying moral standards, which goes hand-in-hand with rampant corruption that robs its citizens of real and genuine opportunities.

These have been demonstrated by a number of the so-called service delivery protests and the arrests of many high and supposedly responsible public figures. The reports of the Public Protector in the recent times and that of the National Monitoring Committee present serious worries, in particular if no urgent and decisive action follows.

In light of the current and very serious challenges facing our country, of which there is not enough time and space to chronicle them in this article, for many of our people constitutional promises remain a dream perpetually deferred and, maybe, a book like “*Things Fall Apart*” may once again be written.

We then need to come back to the role of the legal profession at this juncture, which must display unwavering commitment to constitutionalism, a profession that does not only believe in the correctness of its collective rhetoric, but also in commitment to actions.

Whilst we ponder our future together, we need to think far in advance and say we join the profession of honourable men and women of our country. If we stand on their shoulders, we will see very far. We need therefore to ask ourselves pointed questions:

- what will be the indelible mark that we will individually and collectively leave in our society?
- will the struggles of the poor and unemployed matter to us?
- will we make it our mission to make real the promises of our Constitution of justice, equality, redress, reconciliation and freedom for all?
- or are we to utilize our skills honed in this University to partake in the foolishness and stupidity of our society?
- will we be able to partake in commerce guided by a sense of social justice?

We ask these questions not out of a sense of altruism or charity or perhaps even class solidarity, but because the pursuit of justice demand of us to do so; it is a choice we must make.

Whatever our answers may be, let us be conscious of the privilege to occupy a unique historic space like we do.

ARE YOU A REAL SPRINGBOK SUPPORTER, OR ARE YOU JUST FAKING IT?

The Rugby World Cup 2011 kicked-off on 9 September 2011, but unbeknown to the organisers of the event, criminals were also preparing. On 18 August 2011, the South African Revenue Services seized 66 000 counterfeit rugby jerseys, which were estimated to have a street value of R43 million.

Despite this seizure, further counterfeit rugby jerseys have nevertheless infiltrated the marketplace and are available at almost every street corner. This nuisance was similarly experienced during the 2010 FIFA Soccer World Cup and goods were being

Initially, the counterfeiters targeted well-known international trade marks and products such as clothing, shoes, watches and sunglasses. More recently, the South African market has experienced an increase of this international epidemic and the range of products that are being copied has diversified to unlikely markets, including household detergents, cigarettes, automotive parts and even pharmaceutical products. The cost of dealing in counterfeit goods has therefore become a health risk!

Counterfeit goods have both economic and social

“ The growth of counterfeiting has been so exponential that certain industries find themselves in direct competition with the counterfeiters.

Advances in technology, increased international trade and emerging markets are factors that have contributed to the rapid increase in the prevalence of counterfeiting.

”

seized years before the tournament began in South Africa.

Mainly due to the nature of this menace, it is very difficult to obtain accurate statistics on counterfeiting, but it has been estimated that the South African counterfeit market value currently amounts to approximately R362 billion. Seizures of counterfeit goods reportedly increase by 46 per cent annually, which make counterfeit goods one of the fastest growing industries worldwide.

implications. The proprietors of the genuine goods obviously suffer economic harm, but consumers also suffer because they receive inferior quality goods and are exposed to health and safety dangers. Furthermore, counterfeiting is generally related to other criminal activities such as drugs and money laundering.

The growth of counterfeiting has been so exponential that certain industries find themselves in direct competition with the counterfeiters.



By Nishan Singh
LLB (summa cum laude)
(UKZN)

Position:
Senior Associate at
Adams & Adams

Trademark Attorney

Fellow of the South
African Institute of
Intellectual Property Law
(SAIIPL)

Fields of Interest:
Litigation relating
to trade marks,
copyright, unlawful
competition, domain
names, counterfeit
goods, company and
close corporation
name objections and
advertising disputes.

ARE YOU A REAL SPRINGBOK SUPPORTER, OR ARE YOU JUST FAKING IT?

Advances in technology, increased international trade and emerging markets are factors that have contributed to the rapid increase in the prevalence of counterfeiting.

While South Africa is not notorious for the manufacture of counterfeit goods, the presence of these goods in the market is undeniable. To combat this problem, measures have been provided to deal with all forms of trading in counterfeit goods in the Counterfeit Goods Act 37 of 1997 ("the Act").

Ideally, these goods need to be prevented from

file a different complaint to the Commercial Crime Unit of the South African Police Service, or with an Inspector who has been appointed as such in terms of the Act. If there are grounds to do so, the courts may be approached for a search and seizure warrant, which would permit removal of the goods from the marketplace. Again, criminal and civil prosecution may commence against the offender.

The Act has strict penalties which may be imposed upon counterfeiters in the event of their conviction. In

“ The rule of thumb is, if the cost of an item is too good to be true and it is not from a legitimate source, it is generally not the real thing! ”

entering South African's borders in the first place. The Act allows the proprietor of genuine goods to file an application to the Commissioner of Customs and Excise to seize and detain all counterfeit goods that are being imported into South Africa. In order to file such an application, the proprietor must furnish the Commissioner a specimen of the original goods and details of its intellectual property rights, which include copyright, or registered and internationally well-known trade marks. Once the counterfeit goods are seized, criminal and civil prosecution against the importer may commence.

However, due to the large volume of containers that are being imported into South Africa, only around five per cent of these containers are searched by customs officials. Therefore, counterfeit goods slip through into the marketplace. Once the counterfeit goods are in the market, the proprietor of the genuine goods can

the case of a first conviction, the counterfeiter would be liable to pay a fine which may not exceed R5000 for each counterfeit product, or imprisonment not exceeding three years, or both. Some of the more serious sanctions imposed by the courts have been a 5 year imprisonment and a R140 000 fine.

In order to win the battle against counterfeiting, there needs to be co-operation between the proprietor of the genuine goods and the enforcement agencies. The apparent quality of counterfeit goods has improved and it has become increasingly difficult for the police and customs officials to identify these goods. Furthermore, the modus operandi of the counterfeiters has become very innovative.

Ultimately, the responsibility lies with the end consumer. The rule of thumb is, if the cost of an item is too good to be true and it is not from a legitimate source, it is generally not the real thing!

CAREER ADVICE

working in a large law firm vs small law firms

Deciding on the legal environment you plan on working in one day can be a daunting task. The realities of working in a large corporate law firm versus a smaller, boutique law firm should be fully explored before reaching a decision as, like in any other professional environment, there are various pros and cons to these diverse legal practices. An important step in making a decision is to note the differences between commonly held expectations and the reality of what goes on behind the scenes.

While it may seem obvious to want to work in a well-

guaranteed higher compensation as higher salaries are rarely available for junior attorneys at smaller firms. Large law firms also tend to provide you with exposure to more challenging, high-profile matters and access to useful resources from talented and experienced team members. In addition, larger law firms generally attract a substantial and more diverse client database which can ensure that the firm will not suffer major financial difficulties. Larger law firms also have the ability to hire highly qualified legal assistants and support staff. An Associate in ENS' Intellectual Property department, who left a smaller firm to join ENS earlier this year, says

“After all, large and demanding settings may not be for everyone.”

established, corporate law firm, opting to work at a smaller, more specialised firm does have its advantages. After all, large and demanding settings may not be for everyone. It is important to know what you feel comfortable with and what will suit your needs and requirements. For someone starting off in the profession, there may be a danger of not being exposed to a number of different aspects of law, and possibly being forced into a niche that does not suit them. In addition, because so much is done for the practitioners at a large law firm, an attorney that has trained up in a large corporate environment may never gain the knowledge they need to know when it comes to running their own law practice and might end up feeling as if they have no choice but to stick to what they have been doing for many years before starting their own practice. On the flipside, a large portion of one's day may be spent on administrative issues in a small firm, and by necessity, one tends to have to practice much more common law, becoming more of a generalist rather than a specialist.

But what are the other pro's and con's involved? Let's take a look and see ...

Large law firms

Most corporate attorneys will tell you that one of the biggest draw cards when it comes to working at a big law firm is the money. You are almost always

the services department is definitely a “massive bonus”.

“It has been an absolute pleasure being able to delegate travel arrangements to a dedicated travel consultant, and to let them worry about the logistics of how I'm going to get from the office to the airport, and from the airport to the hotel while travelling for business trips. I also love the fact that whenever I have an IT issue I just pick up the phone and someone either talks me through the issue, or takes over my computer and sorts it out. These added services mean that I can spend far more time on billable hours as opposed to administration.”

Larger law firms also often come with the advantage of global perspective. Many large corporate law firms have international clients which exposes attorneys to worldwide opportunities that they may never have the privilege of experiencing if they were based at small firms; and then there is always the option of rotating to other departments to gain experience in other areas of specialisation. This, in turn, could lead to more opportunities for promotion, especially amongst women. Large law firms also tend to have well-established training and mentoring programs.

ENS, for example, prides itself on being one of very few law firms with its own in-house Practical Legal Training Course that has been accredited by the Law Society of South Africa. This enables the firm to combine formal lecturing with practical on-the-job training.



By Philip Abrahams
BA, LLB (Rhodes)

Position:
Candidate Attorney at
ENS (Edward Nathan
Sonnenbergs) Inc

CAREER ADVICE

working in a large law firm VS small law firms

By conducting the course internally, ENS makes sure that the training is of an excellent standard and pitched at the right level. ENS also has a formal mentorship programme specifically designed for young practitioners to be mentored and trained as world-class lawyers. By working closely with established experts in their fields, employees are exposed to top class work, gain an excellent base for knowledge sharing, and are encouraged by the firm to develop in areas where they demonstrate a particular talent and expertise.

Working for a large law firm may also include perks such as expense accounts, access to corporate boxes at sporting events and extravagant in-house functions.

However, while the pro's seem like they could outweigh the less glamorous side of working at a big firm, they often do have their disadvantages. For example, long hours are the norm at most large firms.

benefit of knowing a small set of colleagues intimately, making friends more easily and working more closely with senior lawyers at the firm, compared to who you would have the opportunity to associate with at a larger firm. A smaller environment may also mean that you will have fewer attorneys vying for matters and promotions meaning you are more likely to grow quicker in a smaller firm if the opportunity arises.

Working at a smaller firm may also mean that you are more likely to have the opportunity to work directly with all levels of clients from various backgrounds. You probably also have the opportunity to work with them on an almost daily basis on a wide range of legal matters. This means that you are likely to have more opportunity to do a variety of work, which could be more easily noticed and can potentially pave the way to more substantial and better opportunities in the long run.

“ A smaller environment may also mean that you will have fewer attorneys vying for matters and promotions meaning you are more likely to grow quicker in a smaller firm if the opportunity arises. ”

Fifty- to sixty-hour work weeks are not uncommon amongst corporate lawyers. Any corporate lawyer will tell you that there is immense pressure when it comes to billing and reaching set targets. For example, as a first year Associate, one would be expected to bill at least a couple of million rands, and even more than that as a Senior Associate. As such, weekend work and late nights are not uncommon, which often hinder the balance between work and play.

In some large firms, candidate attorneys and new associates may be the ones expected to perform unexciting tasks such as photocopying, reviewing documents and doing hours of research, leaving the best part of assignments to the more experienced members of their teams.

Small law firms

Working at a small law firm can be very rewarding. Though you would undoubtedly be expected to work hard, you are almost always guaranteed a cosier, more relaxed environment. You also have the potential

A smaller environment may also mean you have the opportunity to work flexible hours and a more relaxed dress code.

The disadvantages of working in a smaller firm are the opposite of the abovementioned – smaller law firms have lower budgets so you can expect to earn lower salaries. They also may have fewer resources meaning attorneys are forced to assume roles which include much admin involving office management, human resource management and financial management.

Small law firms may not be able to offer staff medical aid, pension funds or maternity benefits and often lack the prestige and brand recognition of larger corporations.

However, one of the biggest disadvantages of working at a small law firm is the fact that smaller firms are at a bigger risk of exposure to failure due to tough economic conditions. Smaller law firms often have smaller clients and the loss of clients could affect the growth or success of the firm.

ENTERTAINMENT LAW

What is it that sets companies such as 'Coca-Cola, Walt Disney, Sony' aside from other companies?

Most of us do not mind paying for a car. We walk out of the dealer and we have something tangible - that we can touch - that we own. Most of us may not mind paying even a small fortune for a Mercedes or a BMW. We understand that what we are paying for is not just the quality of the particular vehicle but the brand name and the image associated with it. How does one quantify or capture the value of a brand and other intangible assets?

Intangible assets are also known as 'Industrial property'. Industrial property may take many forms, such as patents to protect inventions, trademarks, commercial names, designs as well as copyright protection, to name but a few. But unlike 'real'

law gives me an exclusive right to my apple, that too makes sense. If you eat my apple then I cannot. Your use of my property ordinarily interferes with my use of my property. Your consumption reduces mine. In this case, the law then provides me an exclusive right over my personal and real property. If it did not, I would have little reason to work or produce it and not waste my time keeping you away from it.

However, with intellectual property, if you 'take' my idea, I still have it. You have not deprived me of it. Your consumption does not lessen mine. Lessig uses the example of a song - "if I write a song, you can sing it without making it impossible for me to sing it. Ideas can be shared with no reduction in the amount the 'owner' can consume" (Lawrence Lessig, Code, pg 181).

If a novelist cannot stop you from copying (rather than buying) her

“ Without protection of intellectual property, artists would not be compensated for their creations and our cultural vitality, as a society, may suffer. ”

property, (for example, if I eat my apple I deprive others of the apple) with intangible assets, if I apportion my apple amongst my friends, I have shared it with others without depriving myself of it. The same concept of protection applies to the world of ideas.

This is where Intellectual Property (IP) Law and Entertainment Law step in. We protect IP in the same way we protect real property - for real property, we protect the owner from harm and give the owner an incentive; with IP - we give the owner an incentive to keep producing the IP - whether it be inventions/creative ideas/a book etc.

Lawrence Lessig uses the example *"when property law gives me the exclusive right to the use of my house - if you used my house while I did, I would have less to use. When the*

book then there is little incentive to keep producing more books. Without protection of intellectual property, artists would not be compensated for their creations and our cultural vitality, as a society, may suffer. In the same vein, businesses would not be able to reap the full benefits of their inventions, which may lead them to focus less on research and development.

But the monopoly given to creators needs to be balanced, as with any right provided in our law, against the public interest. Rights in law are never absolute. The purpose of this protection is to promote the progress of science and the creative arts by providing the creator, for a *limited* duration, certain exclusive rights to their works in the same way that our system of 'private property' balances exclusive control



By Unathi Malunga
BA, LLB (Rhodes), LLM
(UCLA)

Position:

Independent Creative Industries Consultant, Associate at Bernardt, Vukic, Potash and Getz Attorneys

Attorney of the High Court of South Africa

Former General Manager:

Business Acquisitions at the SABC
Former CEO of Big Media

Fields of Interest:

Cultural Development, Entertainment Industry, Film and Television Productions, International co-productions, Music (Recording, publishing, composition), Sports agreements, sponsorship agreements, Licensing agreements, Commercial tie-ins, Product placement at live events

Special Qualification:
Entertainment Law

by an individual against the common interest or state interest. At the end of the limited duration the public must reap the benefits of the previously protected creative property.

Entertainment law deals, primarily, with a number of fields encompassing the cultural industries, such as film, radio and television; music (this can be recording, composition, publishing or live performances); Theatre; Multimedia as well as Visual Arts and Design (including Fashion and Advertising). It deals with any field which includes concept creation in general.

The cultural industries can be distinguished from other art forms by the commercial activity that is their prime motivating force. The characteristics of the cultural industries, as identified by our government,

or Live Earth concert; the *Blood Diamond* and *The Flood* movies; the *Lion King* theatrical production; a Jay Z music concert; a Laila Ali boxing match; drafting an agreement to broadcast the Olympic Games in South Africa; finding product placement for the movie *District 9*, the Coca Cola South Africa's 'Summer Yama SummAHHH' campaign or the 2010 FIFA World Cup Opening and Closing Ceremonies (including dealing with the production team, suppliers, talent, cast and crew).

Entertainment law is important for the following reasons:

"Most companies keep their 'creatives' in separate departments: they're the people who wear jeans and don't wear ties and come in late because they've been

“ The new economy that is emerging is based on information, and the competitive advantage will be human capital, creativity, innovation and knowledge. ”

are as follows:

- Knowledge intensive, involving highly skilled workers;
- Labour intensive, creating more than the average number of jobs;
- Differentiated, taking the form of Small and Medium Enterprises (SMMEs) and large enterprises and;
- Linked with close, interlocking but flexible networks of production and service systems, allowing the sector flexibility in the face of economic recession.

The Cultural Industries Growth Strategy has developed out of this context, and at its core lie three central premises:

- The ability of the cultural industries to create employment and wealth;
- The potential of these industries to create significant returns on investment;
- The ability of the cultural industries to drive our new economy by generating innovative and creative human capital.

Essentially, Entertainment law encompasses the effective marriage between business and creativity. It comprises legal services performed in relation to the entertainment industry and cultural industries and often involves other traditional areas of law, such as commercial, labour or tax law. Because it is mostly transaction-based, and forms part of a client's overall business strategy and operations, a strong commercial law and contract law foundation is needed as well as intellectual property law, the latter because it is the principal area which overlaps with Entertainment Law.

It is important to note that there is a lack of entertainment lawyers in this country. Most of the existing entertainment lawyers focus on one area of speciality, for example a 'music' lawyer or a 'film' lawyer, as there are four main sectors of entertainment: namely television, film and music and sport.

Our consultancy has not chosen to focus on any particular area but provide services in all the above fields, including sports and online publishing. To provide practical examples from our work, this includes dealing with a *Harry Potter* book translation; a 46664

struggling with an idea..."

Sir Ken Robinson, an author, speaker, and international advisor on education in the arts to government, non-profits, education, and arts bodies, and one considered a 'guru' on creativity, provides a poignant example of Gillian Lynne, the choreographer of "Cats" and "Phantom of the Opera" to illustrate that there is a problem with creativity. We don't quite understand it. We don't quite understand creative people. Most importantly, in South Africa, as in other parts of the world, traditional business support structures and packages are often unsuitable for the creative industries and the needs of these entrepreneurs and the unique characteristics of enterprises in these creative industries are not well-understood by banks, funding agencies or business support agencies.

But this is a problem because we now live in a new age of intellectual assets and a knowledge economy'.

"Throughout the world, organisations and companies are trying to compete in a world of economic and technological change that is moving faster than ever. As the axis shifts towards intellectual labour and services, they urgently need people who are creative, innovative and flexible. Too often they cannot find them. Businesses everywhere are spending large amounts of money trying to make people more creative..."

The new economy that is emerging is based on information, and the competitive advantage will be human capital, creativity, innovation and knowledge. Although government has recognised the significance of the cultural industries as a crucial area for growth, to contribute to economic gains and their recognition as a high priority sector, the intention is to support long-term growth in this industry. The collective aim is to work together on cross cutting issues, policies and programmes to ensure that the work of government is complementary and co-ordinated. Intellectual property and the content industry, world-wide, is a key growth area in the world economy.

Despite this, South Africa's participation in this global growth is minimal. This is a major concern in an era where a nation's ability to convert its knowledge into

“ Essentially, Entertainment law encompasses the effective marriage between business and creativity. ”

wealth has become a determinant factor in positioning that nation amongst others. It is also a major concern because the ability of an intellectual property owner to tap into the rich benefits of that intellectual property largely depends on the degree of protection granted to such property. The respect and aggressive protection of a country's intellectual property is a major contributing factor in driving foreign investment into that country and the ability to appropriately leverage and realise the value of intellectual property has become a critical priority, one which involves not only developing new technologies, but also new materials and processes, new ways of financing, marketing and distributing goods and new ways of organizing and managing business.

Yet, the role of intellectual property rights and intangible assets in business remains insufficiently understood. Intellectual property concepts and law are notoriously difficult and confusing. Many participants who deal with these concepts on a daily basis find themselves in the position where they are unable to understand the concepts and law, although they permeate every aspect of their business.

Our Constitution and its Bill of Rights form the cornerstone of our democracy. An obligation is also placed on the state to respect, protect, promote and fulfil these rights with respect to all people, regardless of their area of work. Creative people and the creative fields, no matter how misunderstood, should not be excluded. The development and growth of local creative talent, script writers, musicians, sportsmen and women, producers and directors is vital to a thriving local industry. The export of our local content, is not only an economic and trade issue, but is essential in promoting a country's culture to worldwide audiences.

I agree with Dr Phil Mjwara that while our

government discusses these issues in its various forums, *“it is important that we start to educate the masses of our people about IP matters. Such debates cannot be fruitful until such time as a greater part of our nation can be able to meaningfully participate in all different types of debates on intellectual property”*.

In conclusion, whilst SA is engaged in global policy-making initiatives, it is prudent to also focus on our domestic situation, within the framework of our international agreements, thereby taking cognisance of the fact that the pace and nature of development varies significantly across individual territories, with each market presenting its own set of unique characteristics and influences. South Africa has a lot of work to do domestically if we are to reap the benefits offered on the global front.

With the advent of our democracy, diverse participation in these cultural industries, as in all others was, and continues to be, renegotiated. Our government has other national imperatives that also dictate a renegotiation of our past: gender equity, black economic empowerment, skills transfer, legacy and the growth of entrepreneurship and intrinsic importance of small business enterprises. That is what these imperatives have been about. These imperatives will affect our IP debates, policies and regimes. However, there is a real danger that any changes may be superficial unless knowledge and skills of a sustainable nature are developed-on the ground

That is why I am heavily involved in the educational aspect of entertainment law - providing workshops and training in the field.

Only this will encourage a culture of innovation and promote the progress of the useful arts and it is the progress of innovation and the useful arts that lies at the very heart of intellectual property.

courses

· There is no one particular course that you should take in law school.

· Helpful courses:

- Contract law
- Entertainment and sports law
- Intellectual property
- Commercial law
- Tax and/or Labour law (optional)

finished law school?

- Network, network, network
- Take continuing education courses.
- Attend all entertainment based seminars.
- If you can't attend the seminar, try to get a copy of the materials that were presented.

who are potential clients?

The usual list:

- film producers
- television producers
- Artists
- Actors
- Writers
- Musicians
- Singers
- Sportsmen

The 'not so' apparent:

- Managers
- Directors, producers
- Business managers
- Internet and satellite providers
- Prop makers
- Music libraries
- Sports organizations

The Companies:

- Radio stations
- Television stations
- Music Labels
- Corporates

LAW FACULTY REPORT

Part 2: Staffing Report

Staff news

Staff on academic leave this year were Prof Mqeke (whole of 2011), Ms van Coller (1st semester) and Adv Renaud (2nd semester), with Ms Haller-Barker (from 8 August 2011) and Ms Niesing (from 12 September) on maternity leave for six months.

Ms Helen Kruuse resigned from Rhodes and left at the end of June, after her husband accepted an excellent position in Cape Town. Ms Kruuse is currently working part-time in the UCT Law Faculty. She is sorely missed by staff and students alike.

Prof Goolam suffered another stroke early in the year and was on sick leave and then temporary disability leave from 15 February 2011. He will remain on temporary disability leave for the remainder of 2011.

Several part-time staff taught in the Faculty this year, where specialist expertise was needed: Mrs Anita Wagenaar (Legal Accounting), Mr Richard Poole (Tax), Mr Andrew Pinchuck (numeracy), Ms Mutsa Mangezi (Civil Procedure A), and Ms Pam Maseko (isiXhosa for law).

As a result of all the staff absences referred to above, most of which were unforeseen, an unusually large number of part-time lecturers were employed to teach numerous courses or parts of courses on a part-time basis in 2011.

- Ms Lara Sittig – COL 101 (Introduction, interpretation and agency); COL 102 (Individual Labour Law); Law of Partnerships and Trusts; Course co-ordinator for COL 1.
- Mr Thomas Miller – COL 102 (business structures and Collective Labour Law)
- Mr Francis Khayundi – COL 102 (business structures)
- Mr Fausto Di Palma – COL 202 (company law and forms of payment)
- Ms Tammy Coutts – Law of Life Partnerships
- Adv Jock McConnachie – Law of Delict B and Law of Insolvency and Winding up of Companies.
- Prof Ivan Schäfer – Criminal Law B
- Mr Cameron McConnachie – Ethics and Professional Responsibility

Furthermore, the following lecturers stepped in at short notice to teach in the 2nd semester:

- Prof Graham Glover – Jurisprudence
- Prof Richman Mqeke – COL 202 (property, security, insurance, marketing and arbitration) – while on sabbatical leave.

The Law Faculty is deeply indebted to all the above part-time and permanent staff for stepping into the breach at this time, enabling all teaching and courses to continue seamlessly despite these challenges.

Adv Les Roberts retires from Rhodes at the end of 2011, having reached the mandatory retirement age of 65. Les completed his BA LLB degrees at Rhodes University in 1969, and then joined the Department of Justice as a prosecutor in 1970. He worked in various centres, going through the ranks, until promotion to the rank of Deputy Attorney-General in Pietermaritzburg in 1980, and he attained SC (Senior Counsel) status in the same year. After 13 years in Pietermaritzburg he was promoted to Attorney-General (subsequently Director of Public Prosecutions) of the Eastern Cape in Grahamstown in 1993. In terms of transitional arrangements for “old-order” office-bearers, Les retired early from the prosecuting service at the end of 2001. He started lecturing part-time in the Law Faculty in 2003, then switched to a full-time position in 2005. He was Deputy Dean of Law from January 2007 to June 2010. His teaching subjects have been mainly Criminal Procedure and Evidence. Les is married to Tanis (they will have their 40th anniversary next January!), and they have three children and three grandchildren.

Ms Gladys Vazi will be retiring at the end of 2011 after 35 years service to the Law Faculty. Gladys joined Rhodes in 1973 and has been working as a cleaner in the Law Faculty since 1977. She is in the unique position of being able to remember and talk about legal luminaries such as SCA Judge President Lex Mpati, Judge John Smith and Mr Max Boqwana, and captains of industry like Mr Vuyo Kahla when they were young students at her tea table. Gladys's presence will be sorely missed by staff and students, and the Faculty wishes her all the best for her retirement years.

Ms Sharlene Ramlall was appointed to a permanent position as lecturer from 1 September 2011. She was employed as a part-time lecturer in the Faculty of Law from 1 September 2008 as part of Rhodes University's Mellon Foundation Programme for Accelerated Development. During this time, she has successfully been involved in lecturing, completing aspects of the PGDHE, attending and presenting conference papers and writing for a PhD. Her PhD thesis concerns the role of corporate social responsibility in respect of socio-economic development in South Africa. Sharlene's teaching and research interests lie mainly in the fields of corporate law, banking law, labour law and human rights law. In addition she has been involved in strengthening ties with Utrecht University, the Netherlands. Sharlene is the Founding Director of the African Network of Human Rights and Good Governance. She now joins the growing pool of other Mellon lecturers who are now permanently employed at Rhodes University.

Ms Brahmi Padayachi has been appointed as senior lecturer and is due to commence work on 1 October 2011.

Mr Gustav Muller has been appointed as lecturer and will start work in January 2012. They will fill the vacancies created by the departures of Ms Kruuse and Adv Roberts.

2011 proved to be a year of change for the Law Library staff. Ms Lucky Mosia-Xaba assumed duties as the Law Librarian in January 2011, having previously worked as principal law librarian at the University of KwaZulu-Natal for 9 years. Ms Anne Warring joined the Law Library as admin/circulation assistant in November 2010.

Our administrative staff continued to produce excellent work and together form an exceptional administrative team. Ms Saronda Fillis achieved a 100% result for a 'Powerpoint: foundation to intermediate' course.

During the months June to August 2011 Rhodes University migrated to a new web system known as T4 (terminal four), which caused delays in updating the Faculty website during this period. Ms Fillis has attended training sessions on managing the new system and is currently in the process of updating the Law Faculty website.

Prof Jobst Bodenstein and Ms Mutsa Mangezi served on the 2011 Association of University Legal Aid in Institutions (AULAI) Winter Conference's Organising committee and have been re-elected as Vice-President and Secretary respectively of the executive committee of AULAI.

Mr Terwin de Vos was appointed as Law Clinic Administrator from January 2011.

Research publications

Publications by staff and postgrad students in the past year include the following:

- Prof G Glover published an article "In service to the law" in (2011) 128 *South African Law Journal* 51-62.
- Prof G Glover wrote the foreword to the publication entitled *Cumulative Index to the South African Law Journal 1998-2010* (published by Juta, August 2011).
- Prof N Goolam, Prof Slabbert (UNISA) and Mr Mnyongani published an article entitled "Religions generally support altruistic organ donations – should they condemn rewarded gifting? Law, religion and organ transplants" (2011) 76(2) *Koers*
- Prof L Juma published an article entitled "Going against the tide: Seeking regulations for private military/security companies in a globalised world" (2011) 32 (1) *Obiter* 63-82.
- Prof L Juma published an article entitled "Privatisation, Human Rights and Security: Reflections on the Draft International Convention on Regulation, Oversight and Monitoring of Private Military and Security Companies" (2011) 15 *Law Democracy & Development* (available at <http://www.ddd.org.za>).
- Prof L Juma published a chapter entitled "Putting old wine in new wineskins: The customary Code of Lerotholi and justice administration in Lesotho" in J Fenrich, P Galizzi & T Higgins (eds) *The Future of African Customary Law*, Cambridge University Press, 2011 129-152.
- Ms H Kruuse completed the ancillary material for the new edition of *Family Law in South Africa*.
- Dr R Krüger published an article entitled "Small steps to equal dignity: the work of the South African equality courts" (2011) 7 *Equal Rights Review* 27.
- Dr R Kruger published an article entitled "Equality and unfair discrimination: refining the Harksen test" (2011) 128 *South African Law Journal* 479.
- Dr R Krüger published a comment entitled "The buck stops here: costs orders in litigation against the state" in (2011) 25 *Speculum Juris* (forthcoming, accepted for publication).
- Dr R Krüger and Prof A Govindjee (NMMU) published a chapter entitled "The Basic Structure Doctrine Debate: South African Explorations" in *Re-arguing Keshavananda Bharati. A publication in honour of Shri Nani Palkhivala and Shri HM Seervai* (2011) (forthcoming, accepted for publication).
- Dr R Krüger and Prof A Govindjee (NMMU) published an article entitled "A question of interpretation: a comparative study of 'unenumerated' rights recognition in India and South Africa" *Journal of the ILS Law College* (2011) Pune, India (forthcoming, accepted for publication).
- Prof Mqeke published an article entitled "The Impact of Land Reform on African Land Tenure Practices in the Eastern Cape" in (2011) 25 *Speculum Juris* (forthcoming, accepted for publication).
- Ms L Niesing has submitted chapters for the *Law of Delict in South Africa* (OUP) 2nd edition, which is scheduled for publication mid 2012. Ms Niesing is one of five co-authors who contribute to this textbook.

Staffing

**LAW FACULTY
REPORT**

Research publications continued

- Ms EH van Coller published an article entitled “Godsdienstige Organisasies’ of ‘Geloofsinstellings’ ‘n Regsvergelykende Perspektief” in 2011 *Dutch Reformed Theological Journal / Nederduits Gereformeerde Tydskrif* 225-237.
- Dr K Muller (senior research associate) and Ms T Wilkerson (postgrad student) published an article entitled “An innovative approach to the use of intermediaries: lessons from Zimbabwe” in *Child Abuse Research South Africa* Vol 12(2).
- Dr K Muller (senior research associate) published a chapter entitled “Section 68(2) and Schedule: Repeal and amendment of laws – amendment of s158 of the Criminal Procedure Act 51 of 1977” in D Smythe and B Pithey (Eds) *Sexual Offences Commentary* 28-1.
- Dr K Muller (senior research associate) and Ms B Pithey published a chapter entitled “Section 18: Sexual grooming of children in D Smythe and B Pithey (Eds) *Sexual Offences Commentary* 28-1.
- Dr K Muller (senior research associate) has submitted a chapter entitled “Early marriages and the perpetuation of gender inequality” in *Insights into Gender Equity, Equality and Power Relations in Sub-Saharan Africa*, OSSREA.
- Dr K Muller published a book entitled *Prosecuting the Child Sex Offender*, Printridge, 2nd edition.
- Judge C Plasket (visiting professor) published a chapter entitled “Playing Catch-up: The South African Constitution, Administrative Law and Jurisdictional Facts” in Carnelley (Ed) *Essays in Honour of AS Mathews* (due to be published in September 2011).
- Judge C Plasket (visiting professor) published a chapter entitled “Administrative Justice in South Africa: A Snap-Shot Survey of Developments Since 1994” in Kidd and Hoorntje (Eds) *Stella Juris: Celebrating 100 Years of Teaching Law in Pietermaritzburg*: 2010 205.
- Judge C Plasket (visiting professor) published an article entitled “Law and the Judicial Function in South Africa Pre- and Post- 1994” in (2011) 25 *Speculum Juris* (forthcoming, accepted for publication).
- Mr K Obura (PhD postgrad student) published a chapter entitled “The duty to prosecute international crimes in international law” in CM Bheke and J Biengon (eds) *Prosecuting International Crimes in Africa* Pretoria University Press 2011.
- Mr J Tsabora (PhD postgrad student) published an article entitled “Prosecuting Congolese War Crimes” (2011) 23(2) *Peace Review* 161-171.
- Mr J Tsabora (PhD postgrad student) published an article entitled “Punishment of international crimes in failed states: the Somali piracy imbroglio” (2011) 20(3) *African Security Review* 67-83.

Papers presented at conferences

Papers were presented by Faculty staff and postgrad students at various conferences in South Africa and abroad:

- Prof J Bodenstein “Assessing Professional Skills” (SLTSA conference, Stellenbosch, January 2011).
- Prof J Bodenstein “Clinical legal education v access to justice: can law clinics do justice to both” (AULAI 2011 Winter Conference, August 2011).
- Prof G Glover “The interpretation of contracts: lessons from statutory interpretation?” (SLTSA conference, Stellenbosch, January 2011).
- Prof G Glover “Debating the effect of the Consumer Protection Act on the rule of risk in the law of sale” (NMMU Private Law and Social Justice Conference, August 2011).
- Prof N Goolam “Expanding human rights education in a commonwealth of diversity” (Commonwealth Legal Education Association (CLEA) Biennial Conference, Bangalore, India, January 2011).
- Prof L Juma “African Solutions to African problems: Investigating the role for African universities in peace endeavours” (Addis Ababa, Ethiopia, December 2010 - by invitation).
- Prof L Juma “Judicial independence and impartiality of international institutions” (SLTSA conference, Stellenbosch, January 2011).
- Prof L Juma “Traditional institutions and resource management in Lesotho” (National University of Lesotho, Roma, April 2011)
- Prof L Juma “Protection of property rights of internally displaced persons (IDPs) in Kenya” (IASFM 13, Kampala, Uganda, July 2011).
- Prof L Juma “Legal research methodology: an introduction” (Staff and post-graduate research workshop, University of Fort Hare, East London, September 2011).
- Dr R Krüger “When the going gets tough: a comparison of emergency provisions of three African constitutions” (Conference of the African Network of Constitutional Lawyers, Rabat, Morocco, February 2011).
- Adv L Roberts “Confess and avoid: admit and be damned: An examination of two related anomalies in the law of evidence” (SLTSA conference, Stellenbosch, January 2011).

Staffing

**LAW FACULTY
REPORT**

“ The Law Faculty is deeply indebted to all the above part-time and permanent staff for stepping into the breach at this time, enabling all teaching and courses to continue seamlessly despite these challenges. ”



Papers presented at conferences continued

- Ms S Ramlall will present a paper “Developing a pedagogical approach to plagiarism” at the Higher Education Learning and Teaching Association of Southern Africa (HELTASA) conference at (NMMU, November/December 2011).
- Ms HE van Coller “Administrative Authority and School Governing Bodies: The Case of School Governing Body v Ntilini” (SLTSA conference, Stellenbosch, January 2011).
- Ms HE van Coller: Submission and acceptance of an abstract to attend the Second ICLARS (International Consortium for Law and Religious Studies) Conference: Religion and Constitution (Santiago, Chile, September 2011).
- Mr F Di Palma (part-time lecturer and postgrad student) “The Criminal Prohibition of Prostitution: History and Terminology” at the 3rd IPGC (Rhodes University Inter-disciplinary Post-graduate Conference, September 2011).
- Mr K Obura (postgrad student) “The fight against competition: A reflection on strategy” (Law week: Gender, Law and Social Transformation, University of Limpopo, Polokwane, September 2011).

Other research activities

- Ms S Ramlall participated in the Venice School of Human Rights Research Seminar on Business and Human Rights from 29 June to 9 July 2011.
- Ms S Ramlall conducted a research visit to the Netherlands School of Human Rights Research, Utrecht In July 2011, where she spent time working on her PhD.
- Ms EH van Coller was on academic leave in the 1st semester for purposes of completing her LL.D thesis “The Impact of Administrative law on Religious Organisations” (University of Johannesburg). She expects to submit the final copy for examination by 30 November 2011 (University of Johannesburg).
- Mr F Di Palma and Mr F Khayundi (part-time lecturers and postgrad students) attended a conference on ‘Teaching law to non-law students’, University of Johannesburg in September 2011.

WATCHING those who watch us

This issue of *In Camera* is about a celebration of constitutionalism in South Africa. In our delight at the constitutional state in which we live, however, we must not lose sight of the need constantly to exercise vigilance in order to ensure that the freedoms and rights guaranteed by the Constitution are not eroded by the State which, however much we might like to believe the contrary, frequently, and in certain areas consistently, acts against the interests of its citizens.

One of the most important of the rights guaranteed by our Constitution is the right to privacy, often expressed as “the right to be left alone”¹. It was with this right in mind that I cast my eye over what is almost certainly the piece

almost all of us who own cell phones visited our cell phone service providers during the period leading up to the extended deadline of 30 June 2011 and provided the necessary information². The service providers are required to keep that information, and to be able to link it with the “communication-related information” which the service provider is required to collect and store in terms of section 30. That information includes the date and time of every call made or SMS sent and received, the number to which the call/SMS is made or from which it is received, and the location (identified by the nearest cell phone transmission mast) of the subscriber at that time. The cell phone providers are also required to provide law enforcement agencies with the means of listening in to telephone



By Adv. Craig Renaud
BA (Hons), LLB (Rhodes),
LLM (Stellenbosch)

Position:
Senior Lecturer in the
Rhodes Law Faculty

Advocate of the High
Court of South Africa

Fields of Interest:
Corporate and Trade
Law

“ It is unrealistic to suppose that the South African public will ever claw back the privacy rights diminished by RICA. ”

of legislation whose name is more familiar than any other to the South African public, RICA, the Regulation of Interception of Communications and Provision of Communication-Related Information Act of 2002. The government-produced poster explains RICA thus:

“RICA is a legal requirement from Government and all customers with cell phone numbers on cellular networks in SA must comply with the law.

You can help to make South Africa a safer place, as this law aims to help law enforcement agencies to identify the users of cell phone numbers and track criminals using cell phones for illegal activities.”

The critical section of RICA as far as cell phone users are concerned is section 40 which requires cell phone service providers to obtain and verify “the full names, surname, identity number and an address” of every cell phone subscriber, whether on a contract or pre-paid basis. For that reason,

conversations and reading text messages.

It goes almost without saying that such information could be misused by those with access to it (typically State employees, including the police and the security services, or employees of cell phone service providers), for example to eavesdrop on political opponents, or for commercial gain. That point is customarily met with the response that “if you have nothing to hide, you have nothing to fear” or some variation on that theme. The problem with that trite response is that it presupposes firstly that those with legitimate access to people’s personal information will not misuse that information, and secondly that the information will be safeguarded from unauthorised access. And history, both in South Africa and in older, more established democracies, tells us that that is by no means always the case.

RICA sets out procedures for obtaining what it refers to as “interception directions” which

resemble the usual procedures for obtaining search warrants and arrest warrants. The one significant difference is that the interception direction may be issued only by a “designated judge” rather than a magistrate as is the case with arrest warrants.

The Act envisages that designated judges will be retired members of the judiciary, appointed for this particular purpose by the Minister of Justice. Those of us who practise in the criminal courts know that it is very rare for a policeman’s application for a search or arrest warrant to be refused, and it is reasonable to suppose that interception directions in terms of RICA will similarly be granted in the majority of cases, if only because the designated judge will hear only one side of the story justifying the application – that of the law enforcement officer applying for the direction. That presents a real problem. In the case of a search or an arrest, the person who is the subject of the warrant, although not present to contest the issue of the warrant, will very rapidly become aware of it either because his home or business has been searched, or because he has been taken into police custody. With that awareness comes the possibility of challenging the legality of the warrant. In the case of an interception there is a strong possibility that the person whose movements are tracked or whose calls are listened to may never become aware of the

of s 36 of the Constitution, or given up entirely in appropriate circumstances. As an individual right it is set in contrast to the public good (the need to combat crime) and we all quite reasonably accept that the public good must prevail. But I should like to suggest that, paradoxically, privacy is not an individual right, but a collective one. The reason is that society has an interest in maintaining the privacy rights of its individual members, and the social fabric itself is degraded by the erosion of the privacy rights of individuals. If that is the case, then the justification for limiting the right to privacy in the interest of the public good becomes much more difficult. If both crime and the limitation of privacy are destructive of the social fabric, we need to choose between the lesser of those two evils, in the knowledge that both are evils. That is not a choice that has even been presented to the public in the context of RICA, because of the presentation of privacy as an individual right. (This individualisation of rights in order to facilitate their limitation does not apply only to privacy, but that must be a subject for another article.)

It is unrealistic to suppose that the South African public will ever claw back the privacy rights diminished by RICA. The legislative wind all over the world is blowing in the direction of the abrogation of rights in the interest of combatting crime or terrorism and it would

“ In our enthusiasm to fight crime, the majority of South Africans seem not to have noticed that we have surrendered a significant part of our right to privacy by accepting that we may be monitored and observed via our cell phones and e-mails, without our knowledge or permission, at any time. ”

fact that his privacy right has been breached. With no awareness that the right has been breached, there is no possibility of challenging the legality of the breach.

In our enthusiasm to fight crime, the majority of South Africans seem not to have noticed that we have surrendered a significant part of our right to privacy by accepting that we may be monitored and observed via our cell phones and e-mails, without our knowledge or permission, at any time. This permanent background threat of observation is itself a powerful tool in the hands of the State, even if no observation actually occurs. People who are uncertain as to whether or when they are being monitored tend to behave as if they are being monitored all the time, in other words, they self-censor. A vigilant “designated judge” might protect us from actual observation, but even the most vigilant judge cannot protect us from suppressing our own freedom of expression because of our fear that we may be under observation.

Our mass surrender of our right to privacy raises another important issue, namely the nature of that right itself. Both the

Constitution and the State, including the judiciary, generally regard privacy as an individual right which can be limited in terms

take extraordinary courage for the South African government to act in a contrary direction, even if there were a desire to do so. Other than a rather vague and entirely discretionary power contained in s 24 of RICA, in terms of which the designated judge may require the law enforcement official to report back on the progress of the communication interception, there is a startling absence of any provision for judicial oversight of interception and monitoring of communications in terms of RICA. The solution, I suggest, would be to introduce a system of automatic judicial review of all interception directions issued in terms of RICA, with wide powers granted to the reviewing judges to set aside the direction and if appropriate to inform the subject of the interception direction that his or her privacy right has been compromised. That in turn would allow the individual to claim damages from the State for an unwarranted or excessive invasion of his or her privacy right, in the same way that one may sue for damages for unlawful arrest or detention by the police. One would hope that the threat of damages claims would act as a deterrent to the over-zealous use of RICA to infringe the rights of citizens.

1 The phrase appears to have been coined by TM Cooley *A Treatise on the Law of Torts, or the Wrongs Which Arise Independent of Contracts*, 2nd ed. (Callaghan & Co, Chicago, 1880) 29. It was popularised by SD Warren and LD Brandeis in their famous article ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

2 According to media reports approximately 4% of subscribers did not register by the deadline, and consequently had their service terminated at midnight on 30 June 2011.

The Criminal Prohibition of Prostitution in South Africa: The “Forced Prostitution” and “Adult Consensual Sex Work” Dichotomy



By Fausto R Di Palma
BCom, LLB (Rhodes)

Acknowledgements:
Dr R Kruger
(Rhodes University)

Position:
Part-time Lecturer at
Rhodes Law Faculty, LL.M
Candidate

Law Faculty Postgraduate
Representative

Winner of the African
Human Rights Moot Court,
Cotonou, Benin, 2010

Participant in the
Commonwealth Moot
Court, Hyderabad, India,
2011

Fields of Interest:
Human Rights and
Constitutional Law

In South Africa, all forms of prostitution are criminalised through the Sexual Offences Act¹ as amended by the Criminal Law (Sexual Offences and Related Matters) Amendment Act.² The Sexual Offences Act does not define “prostitution” explicitly. However, s 20(1A)(a) of the Sexual Offences Act provides that “any person 18 years or older who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward...shall be guilty of an offence”. A definition of prostitution is implied in this provision; that is, that prostitution is the rendering of sexual services for reward, irrespective of whether the sex worker willingly renders these services.

It is therefore evident that the Act draws no

economic activity and expressed “grave doubts” whether the prohibition violated the right to privacy.⁸ Ngcobo J (as he then was), writing for the majority, stated that if privacy was implicated by the criminalisation of prostitution, “it lies at the periphery and not at its inner core”.⁹ Ngcobo J’s judgment has been rebuked for “disregarding the framework within which sex work takes place, especially the realities of female socio-economic standing...and sex worker rights and dignity”.¹⁰

Furthermore, Ngcobo J agreed with the minority judgment, written by O’Regan J and Sachs J, that s 20(1)(aA) does not violate the right to freedom and security.¹¹ O’Regan J and Sachs J held that s 11 of the Interim Constitution was not violated by the criminalisation of

“ The right to control one’s body and the right to privacy, as well as inherent human dignity of sex workers, must be fervently considered in this regard. ”

distinction between forced prostitution and voluntary prostitution (or adult consensual sex work). There are significant constitutional implications to the application of the criminal prohibition in its current form. The right to control one’s body³ and the right to privacy,⁴ as well as inherent human dignity of sex workers, must be carefully considered in this regard.

The constitutionality of this criminal prohibition in its original form (that is prior to the Criminal Law Amendment Act in 2007) was tested in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)*.⁵ The Constitutional Court (CC) held that the Interim Constitution⁶ applied because that Constitution was in force at the time that the acts giving rise to the proceedings were committed⁷. The CC decided that s 20(1)(aA) did not discriminate unfairly against women, did not infringe on the right to

prostitution because the conviction and sentence of those engaged in prostitution was conducted in accordance with a duly enacted criminal prohibition.¹² The learned judges remarked that the appellant’s arguments on this point was galvanised by s 12 of the 1996 Constitution, which was not the Constitution that applied in that particular instance.¹³ The two provisions relating to freedom and security of the person in the Interim and Final Constitutions are markedly different in content and scope. Section 11 of the Interim Constitution only protected the right to freedom and personal security.¹⁴ On the other hand, s 12 of the Final Constitution entrenches one’s right to bodily and psychological integrity, including the rights to make decisions concerning reproduction, to *security in and control over one’s body*, and not to be subjected to medical or scientific experiments without informed consent.¹⁵

Section 12 of the 1996 Constitution has broadened the scope of protection afforded to those who benefit from the protection of the Constitution, including sex workers. The question is whether a cogent argument can be formulated on the basis of the right to control one's body, a right that exists in the 1996 Constitution but which the CC in *Jordan* did not have the opportunity of considering. In short, due to the fact that *Jordan* was decided on the basis of the Interim Constitution, there were different considerations which occupied the Court. Even if we were to say that the considerations are similar, it is submitted that the judgment lacks an adequate analysis of these specific rights.

In re-evaluating the constitutionality of the criminal prohibition of all forms of prostitution, it is also necessary to consider the comprehensive Discussion Paper of the South African Law Reform Commission (SALRC), published in 2009 which outlined various issues concerning adult prostitution in South Africa.¹⁶ This Discussion Paper is the result of a much larger project undertaken by the SALRC to overhaul the criminal law relating to sexual offences in South Africa.¹⁷ The Discussion Paper explains that there are four policy frameworks that may be adopted to address the issue of prostitution: (i) total criminalisation; (ii) partial criminalisation; (iii) non-criminalisation (decriminalisation); and (iv) regulation (legalisation).¹⁸ The SALRC seems to suggest that selecting any one of these

the legalisation of sex workers for the duration of the World Cup only, and not thereafter, were really concerned for sex workers' rights.²⁶ Indeed, it would seem that their motives were limited to having "legal sexual pleasure available for foreigners and tourists" rather than protecting the rights of those sex workers.²⁷

The Sex Worker Education and Advocacy Taskforce (SWEAT) is one of the most active non-governmental organisations (NGOs) in South Africa lobbying government to decriminalise and regulate sex work on a more continuous basis.²⁸ For instance, SWEAT continued with its efforts despite *S v Jordan* and reaped a reward in *Kylie v CCMA and Others*.²⁹ The successful argument that was raised in *Kylie* illustrates how rights' analysis affects the sex work debate. In 2010 the Labour Appeal Court (LAC) in *Kylie* had to determine whether s 23 of the Constitution (the right to fair labour practices) should apply to sex workers as well.³⁰ Davis JA held that the right includes the right to be treated with dignity by employers and that a "generous approach to the range of beneficiaries of rights provided for in terms of s 23(1)" must be supported.³¹ The learned judge held further that the criminalisation of prostitution does not mean that sex workers are denied the protection of the Constitution.³² It was concluded that the argument that the worker seeking protection was conducting criminalised work was not an absolute bar to protection provided by the Labour Relations

“ The question is whether a cogent argument can be formulated on the basis of the right to control one's body, a right that exists in the 1996 Constitution. ”

frameworks would be constitutionally justifiable.¹⁹

The SALRC does not define prostitution, but instead calls on the public to comment on how best to do so.²⁰ My research endeavours to answer this call by arguing in favour of identifying the different sectors of the commercial sex industry currently targeted as illegal prostitution. In so doing, it is envisaged that by including adult consensual sex work within the ambit of the crime of prostitution referred to above, the State violates the Constitution and international human rights law.²¹ The right to control one's body is not explicitly analysed in the SALRC Discussion Paper.²² This right, together with the rights to dignity and privacy, demand a reconsideration of the current position in favour of a distinction between forced and voluntary prostitution.

The context within which the debate regarding sex work/prostitution takes place was further enriched by calls for the legalisation of prostitution for the duration of the 2010 FIFA World Cup™.²³ There were calls from the former National Police Commissioner, Jackie Selebi, "to free up police to deal with more pressing security issues" during the tournament.²⁴ The Masimanyane Women's Support Centre, Eastern Cape, went so far as to state that the legalisation of sex work would assist in curtailing trafficking of women.²⁵ However, it is questionable whether those who advocated for

Act (LRA) through the Constitution; indeed, such protection would reduce the "erosion of her dignity".³³ Therefore, it is important to bear in mind that sex workers' dignity has been recognised in the LAC as being relevant to a consideration of their labour rights as entrenched in the Constitution and fleshed out in the LRA.

The South African position concerning the criminalisation of prostitution is therefore still under scrutiny from sections of the public, government officials, NGOs representing sex workers and academics.³⁴ The debate in South Africa suffers from a deficiency which, among other things, stems from the lack of differentiation between voluntary sex work and forced prostitution. A rights-based analysis of the debate demands a distinction between the two forms of sex work. The right to bodily control and the right to privacy, as underscored by the principle of human dignity, *viewed together*, in the context of adult consensual sex work from an international and national perspective require a reconsideration of the blanket prohibition of rendering sexual services for reward. Such an understanding respects the principle that those who engage in voluntary sex work are entitled to make their own decisions regarding their bodies, without interference from the State.

The Criminal Prohibition of Prostitution in South Africa: The “Forced Prostitution” and “Adult Consensual Sex Work” Dichotomy

- 1 Act 23 of 1957.
- 2 Act 32 of 2007.
- 3 s 12(2)(b) of the Constitution of the Republic of South Africa, 1996.
- 4 s 14 of the Constitution.
- 5 2002 (2) SACR 499 (CC).
- 6 The Interim Constitution of the Republic of South Africa Act 200 of 1993.
- 7 *Jordan* para 4.
- 8 *Jordan* paras 19-20; 23-26 and 27-29.
- 9 *Jordan* para 29. The learned judge was referring to the continuum described by Ackermann J in *Bernstein and others v Bester and others* NNO 1996 (2) SA 751 (CC) para 77: that only if the intimate core of privacy is infringed will such an infringement be unjustifiable.
- 10 C Boudin and M Richter “Adult Consensual Sex Work in South Africa – The Cautionary Message of Criminal Law and Sexual Morality” (2009) 25 *SAJHR* 179 at 193; R Kruger “Sex Work from a Feminist Perspective: A Visit to the Jordan Case” (2004) 20 *SAJHR* 138 at 150.
- 11 *Jordan* para 31.
- 12 *Jordan* para 75.
- 13 *Jordan* para 75; Item 17 of Schedule 6 to the 1996 Constitution provides for retroactive application of its provisions if it is in the interests of justice. Wessel le Roux discusses the question why the CC (and, indeed, the parties) did not argue that the interests of justice necessitated the application of the 1996 Constitution, rather than the Interim Constitution. See W le Roux “Sex Work, the Right to Occupational Freedom and the Constitutional Politics of Recognition” (2003) 120 *SALJ* 452 at 453-455.
- 14 *Jordan* para 75.
- 15 s 12(2) of the Consitution.
- 16 South African Law Reform Commission Project 107: *Discussion Paper on Sexual Offences: Adult Prostitution*. For example, the document analyses various international human rights instruments to determine whether South Africa is living up to its commitment to these instruments in light of the current approach to adult prostitution. It also sets out the different approaches adopted by different jurisdictions from around the world in a comparative study.
- 17 Boudin and Richter 2009 *SAJHR* 180.
- 18 SALRC Project 107: *Discussion Paper on Sexual Offences: Adult Prostitution* 172-223.
- 19 “Justifiable” in this sense refers, primarily, to the limitation clause of the Constitution (s 36) and specific articles in the international instruments which permit State Parties to justify certain infringements of rights (for example, Article 27 of the African Charter).
- 20 SALRC Project 107: *Discussion Paper on Sexual Offences: Adult Prostitution* paras 1.16-1.19.
- 21 Essentially, adult consensual sex work is not the kind of prostitution which should be prohibited by the Sexual Offences Act. However, since no differentiation is made in the Act between the two phenomena, the ambit of criminal prohibition is unconstitutional.
- 22 SALRC Project 107: *Discussion Paper on Sexual Offences: Adult Prostitution* para 7.66.
- 23 J Surujlal and M Dhurup “Legalising sex workers during the 2010 FIFA Soccer World Cup” in South Africa” (2009) *African Journal for Physical, Health Education, Recreation and Dance* 79; S Pudifin and S Bosch “Prostituting the 2010 Soccer World Cup – A more practical approach to prostitution policy in South Africa” (2009) 42(3) *Comparative and International Law Journal of Southern Africa* 272.
- 24 C Getchell “Legalising Prostitution for World Cup 2010” <http://soccerlens.com/legalizing-prostitution-for-world-cup-2010/5660/> (accessed 29 March 2011).
- 25 Surujlal and Dhurup 2009 *African Journal for Physical, Health Education, Recreation and Dance* 84.
- 26 Surujlal and Dhurup 2009 *African Journal for Physical, Health Education, Recreation and Dance* 84.
- 27 Surujlal and Dhurup 2009 *African Journal for Physical, Health Education, Recreation and Dance* 84.
- 28 Surujlal and Dhurup 2009 *African Journal for Physical, Health Education, Recreation and Dance* 84.
- 29 2010 (4) SA 383 (LAC).
- 30 para 40.
- 31 paras 25-26, 39.
- 32 para 39, 44.
- 33 para 52.
- 34 This is evidenced by the four pillars upon which my research is built: (i) the *Jordan* case; (ii) the SALRC Discussion Paper; (iii) the World Cup; and (iv) the *Kylie* case.

LAW FACULTY REPORT

2010-2011

Part 3: Student News

Career guidance

During the week prior to Market Day, Mrs Liezel Niesing and the Law Society arranged a CV writing and interview workshop aimed at: writing professional CVs and covering letters; how to act and look professional during interviews; how to answer questions during interviews; and other pointers towards self-marketing. Mr Jurgen Kietzman (Director of the RU Careers Office), Mrs Niesing (careers portfolio-holder) and Prof Jobst Bodenstein (Director, Law Clinic) provided input. Student attendance from first year to final year was good, and many students used the evening as a springboard to get their CVs in order in time for Market Day at which they could submit their CVs for consideration by those institutions which were present. Feedback from students was very positive and students requested that such workshops be presented every year.

Market Day 2011

Sixteen delegate institutions attended Market Day in March, including large and medium sized law firms from all over the country, the Competition Commission, Price Waterhouse Coopers, Legal Aid SA and the Rhodes University Law Clinic, which each had stalls in a marquee on St Peter's Lawns, and were each assisted by student volunteers.

The day included a light lunch, sponsored by Eversheds, at which a representative gave a presentation about the firm. The lunch was well attended by law students from various year groups (from first years to final years). Dr Badat, the Rhodes Vice-Chancellor, also attended the function. The afternoon tea was sponsored by Phatshoane Henney Inc. During the luncheon and into the afternoon students visited the delegates' stalls and discussed potential career opportunities. Many students were able to submit their CVs, while other students attended interviews set up by the delegates for this day. The day was concluded with a charming cocktail party, sponsored by Deneys Reitz, now Norton Rose Group.

Feedback from students and delegates alike was overwhelmingly positive. Many students were invited to interviews and invited to attend vacation programmes at several of the firms that attended, indicating that the Market Day is achieving its purpose.

Linked to this initiative, Ms van Coller hosted two school visits in the second semester to market the Law Faculty.

Moot programme

We have had a very full moot programme in the past year:

- We are extremely proud of Ingrid Cloete and Fausto Di Palma who represented Rhodes and won the 19th African Human Rights Moot Court Competition, out of 71 participating African University law faculties. Ingrid also won the title of Best Oralist in the competition. They were accompanied by Prof Juma. The event took place at the University of Abomey-Calavi, Cotonou, Benin in October 2010 and was sponsored in part by Schindlers Attorneys to the amount of R15 000-00.
- As winners of the abovementioned competition, Ingrid and Fausto were invited to represent Southern Africa at the Commonwealth Lawyers' Association Moot Court Competition in Hyderabad, India in February 2011 and were ranked 4th in this competition. The students were accompanied by Prof Goolam.
- We are equally proud of our Rhodes Law Faculty team consisting of Haruperi Mumbengegwi, Rutendo Urenje and Robyn Jones, and coached by Prof Laurence Juma, who emerged as the overall winners of the African International Humanitarian Law Moot competition held in Arusha, Tanzania in November 2010. In addition Haruperi won the award for the best speaker and secured sponsorship to do an internship at the International Criminal Tribunal for Rwanda (ICTR).

- The final year moots took place in March, with staff members presiding. The two best final years were Haruperi Mumbengegwi and Melissa Bowens, who competed in the moot final on 29 March before a Bench of three judges comprising Judge Belinda Hartle, Adv Margaux Beard and Ms Mutsa Mangezi. The winner was Haruperi Mumbengegwi.
- Haruperi and Melissa, accompanied by Mr Fausto Di Palma (last year's winner and now a part-time lecturer) represented Rhodes at the 20th African Human Rights Moot Court Competition, which was held from 7 to 12 July 2011 at the University of Pretoria. For the Memorials section they scored 78% and for the Oral section they scored 75%. The Competition was really stiff with some teams being separated by a mere 2 decimal places. Haruperi was ranked 9th Best Oralist for the Anglophone category.
- The penultimate year moots took place in August. The top two students, Joanna Pickering and Michael Andersen, took part in the penultimate moot final on 6 September and argued before three judges: Adv Bevan Boswell, Ms Susan Smailes and Dr Rósaan Krüger. The winner was Joanna Pickering. After the conclusion of the moot, the judges gave very positive feedback to the students on their performances.
- In September 2011, a team of two Legal Theory 3 students, Dirk (Armand) Swart and Lara van Wildenrath, coached by Ms Coutts (part-time lecturer of the Law of Life Partnerships) did us proud in the Child Law Moot Competition held at the University of Pretoria by taking first place overall, with Armand also taking second place for best speaker. The competition is still in its infancy (this being the second year it has been held). Only four teams participated, namely Rhodes University, University of Pretoria, University of North West, Potchefstroom and University of Johannesburg. Rhodes outshone Potchefstroom in the preliminary round which gained them a place in the final against the University of Pretoria. The final round was held in the High Court of South Africa, Northern Gauteng Division. The teams were fortunate to argue before a panel of experts including a High Court Judge, a Magistrate and an admitted attorney and gained valuable experience from the panel with regard to mooting skills.
- In October 2011 two final year students, Ricardo Pillay and Rhulani Nkomo, accompanied by Adv Renaud (despite being on sabbatical leave) represented Rhodes at the African Trade Moot Competition at the University of Pretoria. The team achieved second place overall, out of 10 universities from three African countries (South Africa, Zimbabwe and Ivory Coast). Ricardo was judged best oralist and received a prize for this. The team's heads of argument tied for second place, only one per cent behind the winning heads.
- In October 2011 two penultimate year students, David Grenville and Zandile Ramalohlanye, accompanied by Mr Johnnie Jacobs from the Law Clinic, attended the LexisNexis Mock Trial Competition at the University of North West, Potchefstroom. Our team was ranked 10th out of fourteen teams from 12 Universities with an average of 73.5% (between the first 7 teams there was a 1.5% difference). The competition provided the students with an enriching experience as they learned how to conduct trials and they had an opportunity to put what they have learned so far in their LLB curriculum into practice. The presiding officers were all people who are in practice, with each having their own style. Thus as much as it was a learning experience it was also a 'reality' experience as they now know what to expect in practice. The winning team was from the University of Potchefstroom.
- In October 2011 four students, Mr Mbulelo Ncolosi, Mr Tanaka Chibanda, Ms Georgina Niven and Mr Johan Makhoathi, accompanied by Ms Davies and Ms van Coller, represented Rhodes at the intervarsity moot court competition for first year law students in the Supreme Court of Appeal, Bloemfontein. The team did not make it to the final round; however they argued well in the face of incredibly intensive questioning from the Bench. The winning team in the English section was the University of Pretoria while the overall winner was the University of North Carolina.

We have had four students on exchange in the first semester from Leicester University (Andrew Smith); Hochschule Osnabrück Univ, Germany (Nina Mertens); Bishops University, Canada (Sophia Faria) and Macquarrie University, Australia (Aurhett Barrie). One of our students, Sarah McQueen, was on exchange at Leicester University in the first semester.

Mr Xhanti Mhlambiso (final year LLB) was selected to attend the International Youth Leadership conference in Prague in January 2012, the selection have been based upon two essays he wrote.

At the time of writing the Law Society is preparing for the annual Law Ball at which Mr Théo Boutruche will be the guest speaker.

Students

LAW FACULTY REPORT

STUDENT SUBMISSIONS



By Zara Hammerschlag

Penultimate Year LLB
Student

The *societas universorum bonorum* and its relevance in the recent case of *Mncora v Butters, Butters v Mncora*¹ - what the Supreme Court of Appeal should consider

The recent case of *Butters*² has caused a stir among legal practitioners. Not only do the facts of this local case lend themselves to gossip, but the outcome has begged the question of where universal partnerships belong in our law. The facts, briefly, are as follows. Mr Butters and Ms Mncora were a couple for 19 years and had two children. Mr Butters bought the family home in Port Elizabeth and, although remaining in Grahamstown during the week, returned home every weekend. He proposed to Ms Mncora in 1998 but in 2008 it was discovered that he had married another woman in Grahamstown. Apart from advising him to open the business (Hi - Tech) in Grahamstown,

quo.

THE HISTORY OF UNIVERSAL PARTNERSHIPS IN SOUTH AFRICAN LAW

There are two distinct types of universal partnership in our law – the *societas universorum bonorum* (partnership 1) and the *societas universorum quae ex quaestu veniunt* (partnership 2). The continued existence of the former is subject to debate. In *V v De Wet*,⁴ De Beer JP acknowledged that authorities, such as Grotius and van der Linden, had reached differing conclusions as to the existence of partnership 1; the court, however, did not comment on its continued

“ The recent case of *Butters* has caused a stir among legal practitioners. Not only do the facts of this local case lend themselves to gossip, but the outcome has begged the question of where universal partnerships belong in our law. ”

Ms Mncora took no part in its running. In the Eastern Cape High Court Mr Butters applied to eject Ms Mncora and the children from the family home;³ simultaneously, Ms Mncora applied for an order declaring that she and Mr Butters had tacitly entered into a universal partnership. The court decided that a universal partnership had been brought into existence by the parties' prolonged period of cohabitation.

The outcome is problematic because it seems to have been arrived at in sympathy and not by the adherence to strict legal principles. In considering what the SCA ought to find when the matter goes on appeal, it is necessary to canvass three issues, namely: (a) the history of universal partnerships in South African law; (b) their role; and (c) whether courts have erred in conflating two separate forms of universal partnerships in recent cases. After dealing with the issues, I will argue why it is necessary and rational for the SCA to dismiss the appeal, and simultaneously reject the reasoning of the court a

existence.⁵ In the later case of *Annabhay v Ramlall*,⁶ it was held that so far as partnership 1 may still be recognised by our law it can only be entered into expressly. Although the words “may still be recognised”⁷ imply uncertainty, they suggest that such a partnership exists. In *Ally v Dinath*⁸ the Court took for granted that such a partnership exists in our law and found that the plaintiff was a party to one. Contemporary textbook writers such as Davis⁹ and Benade¹⁰ acknowledge that such partnerships are part of our law. Thus, for the purposes of this discussion it will be accepted that this is the position.

The existence of partnership 2 has not been subject to confusion. It is consistently applied to universal partnerships for parties who decide to treat all that they acquire during the partnership's continuance, from every kind of commerce, as partnership property.¹¹ The similarities between the two types of universal partnerships include the fact that they can be entered into expressly

or tacitly,¹² and that both are subject to a single list of requirements. These similarities have unfortunately contributed to their conflation in recent years.

THE ROLE OF UNIVERSAL PARTNERSHIPS IN OUR LAW-SEPARATING THE TWO TYPES

Universal partnerships are meant to provide an informal way for people to benefit by agreeing to pool their resources and skills together for a joint objective. In this regard, the two types are related but distinct sub-entities.

Partnership 1 is better suited to family law because it allows one to allege such a partnership in the absence of an actual joint business for profit (which is a requirement of proving a universal partnership¹³). An example of the partnership's suitability in family law is the case of *Ally*.¹⁴ The plaintiff alleged that she had been in a universal partnership with a man on the basis that they shared a joint household and pooled assets and income for their mutual benefit.¹⁵ The court held that from these facts it was clear that the parties intended to enter into a partnership because of the nature of

books and attending to the administrative side of the business.²⁰ In *Annabhay*,²¹ on the other hand, the court rejected the plaintiff's claim on the basis that she only assisted in the business occasionally, despite contributing financially to the household. It is necessary that the two types of partnerships be applied in different settings because their amalgamation results in anomalies, which are discussed below.

THE ERRONEOUS CONFLATION OF PARTNERSHIPS 1 AND 2 IN RECENT CASES

The cases of *Kritzinger v Kritzinger*,²² *Francis v Dhanai*,²³ *Botha NO v Deetlefs*²⁴ and *Butters*²⁵ serve to illustrate how partnerships 1 and 2 have been conflated in recent years. In *Kritzinger*²⁶ the court had to decide on the existence of a universal partnership but did not mention that there were two kinds, nor which one was alleged in the matter. In coming to a conclusion, Milne JA's reasoning was that although the parties' income went towards a common home, there was no question of the home being regarded as a joint business run for a profit.²⁷ Here the court's analysis is analogous to that in *Annabhay*²⁸ (above) as it considers the existence of a universal

“ Universal partnerships are meant to provide an informal way for people to benefit by agreeing to pool their resources and skills together for a joint objective. ”

their relationship.¹⁶ The court thus accepted that such a partnership was present even in the absence of a joint business.

Partnership 2 finds relevance in a commercial setting. This is because a plaintiff claiming to have been party to such a partnership must allege that s/he contributed resources to the business. This is also a requirement in partnership 1, but courts are more lenient as they allow claims to succeed when a plaintiff has only contributed resources to the joint home, for

example. The cases of *De Wet*¹⁷ and *Annabhay*¹⁸ illustrate this. In *De Wet*¹⁹ the plaintiff was successful in claiming to have been in such a partnership with the defendant because she contributed to their business by doing all the clerical work, keeping all the office

partnership only in relation to partnership 2. The Appellate Division in *Kritzinger*²⁹ set a precedent for the way in which courts deal with universal partnerships; following the judgment courts began to equate the concept of universal partnerships with that of partnership 2. In *Francis*³⁰ the court approached the concept of a universal partnership in the following way. The court refused to infer a universal partnership between the parties even though they had pooled their assets and income into a common home. It was held that a universal partnership could only exist when there is a common intention between the parties to conduct a joint commercial enterprise.³¹ Murugasen AJ went on to state that although the plaintiff had the court's sympathy, the findings could not be extended beyond the universal partnership pleaded.³²

It is submitted that the court is mistaken in its reasoning because if it distinguished between the two kinds of partnerships as suggested, it would not have to “go beyond the universal partnership pleaded,”³³ as a partnership could have been inferred in terms of partnership 1.

In *Deetlefs*³⁴ the plaintiff attempted to evict the defendant from a house the latter shared with the deceased. The defendant alleged that she and the deceased intended to form a universal partnership and thus had a right to remain in it. In this regard she argued that they administered a joint household and both contributed to its mortgage bond instalments.³⁵ Here the court, like in *Kritzinger*³⁶ and *Francis*,³⁷ did not mention that there are two types of universal partnerships in our law. On the facts there was no intention between her and the deceased to enter into a “joint commercial enterprise,”³⁸ nor did one exist. However the learned judge found that if there had been such a partnership, it would have terminated upon the partner's death and therefore the defendant was not entitled to remain in the exclusive occupation of the partnership assets.³⁹ The finding of Koen J is highly anomalous as he implies that there was a partnership between the parties even though one akin to partnership 2 was absent.

Finally in the case of *Butters*⁴⁰ a further anomaly occurs. Chetty J does not mention partnership 1 but decides the case as if it were such a partnership. The learned judge then turns to foreign jurisprudence to justify a finding that, in the absence of a joint commercial enterprise, a universal partnership still exists. The court held that the

STUDENT
SUBMISSIONS

“ The anomalous effects caused by conflating the two types of universal partnerships could be avoided if they were separated. The SCA should therefore do so in the interests of rationality and clarity. ”

objective of the accumulation of an appreciating joint estate is sufficient proof that the intention of the partners was to make a profit. Thus the court made the option of a universal partnership available even though the parties had no joint business venture apart from the fact of cohabiting. It is submitted with respect that this approach is erroneous because it changes the meaning of a universal partnership as it has been defined by the SCA. Furthermore, the court re-interprets the meaning of a universal partnership when doing so, which is unnecessary as an adequate interpretation exists with partnership 1.

Thus, if the courts separated the two kinds of universal partnerships, the anomalies referred to above would not occur; litigants would bring their claims under a universal partnership appropriate to their factual situation and courts would have clear guidelines as to how the principles apply.

THE PRESENCE OF PARTNERSHIP 1 IN BUTTERS⁴¹

The requirements of a partnership are as follows:⁴² (1) each party must bring something into the partnership; (2) the business should be carried out for the joint benefit of both parties; (3) the object should be to make a profit; and (4) the contract between the parties should be a legitimate one. In the case of partnership 1, requirement 3 is more lenient because there is no need to allege an actual joint business for profit between the parties. The court interprets profit as appreciation in the parties' joint estate because of the nature of their relationship.⁴³ In applying the requirements of a universal partnership to *Butters*,⁴⁴ it is clear that the SCA

ought to find a universal partnership, in the form of partnership 1, between the parties.

Firstly, both Mr Butters and Ms Mncora brought something to the partnership. The former contributed financial resources into building a family home while the latter took care of it, his family and Mr. Butters himself. Secondly Ms Mncora helped initiate the business which was carried out for the family's benefit, as is evident from the house, domestic worker and holidays, paid for by business profits. As stated, requirement 3 in this type of universal partnership is viewed flexibly. The party's object was to increase their joint estate as they both worked hard to do this; Ms Mncora raised their children and over time Mr Butters grew the business. Thus the object was to make a profit. Finally the contract, entered into tacitly, is valid because it can be inferred from the facts that both parties had the intention to form a universal partnership;⁴⁵ the parties pooled their assets and put them into a common home (Ms Mncora in the beginning of the relationship and later in her part time work, and Mr Butters through the business). The four requirements of a partnership are therefore fulfilled.

The anomalous effects caused by conflating the two types of universal partnerships could be avoided if they were separated. The SCA should therefore do so in the interests of rationality and clarity. It ought to dismiss Mr Butters' appeal, but not for the same reason as the court *quo*. Rather it should dismiss the claim because the facts of the case justify the inference of a universal partnership of the first type – a *societas universorum bonorum*.

1 [2010] ZAECPEHC 72.

2 [2010] ZAECPEHC 72.

3 Para 2.

4 1953 (1) SA 612 (O) 614.

5 *Ibid*.

6 1960 (3) SA 802 (N).

7 *Ibid*.

8 1984 (2) SA 451 (T) 452.

9 Davis et al *Companies and Other Business Structures in South Africa* (2009) 206.

10 Benade et al *Entrepreneurial Law* 4 ed (2008) 14.

11 *Isaacs v Isaacs* 1949 (1) SA 147 (C) 149.

12 *Annabhay v Ramlall* at 805.

13 *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) 634.

14 1984 (2) SA 451 (T).

15 *Ibid*.

16 *Ibid* at 452.

17 1953 (1) SA 612 (O).

18 1960 (3) SA 802 (N).

19 1953 (1) SA 612 (O).

20 616.

21 1960 (3) SA 802 (N) 808.

22 1989 (1) SA 67 (A).

23 [2006] JOL 18401 (N).

24 [2008] JOL 21373 (N).

25 [2010] ZAECPEHC 72.

26 1989 (1) SA 67 (A).

27 75-6.

28 1960 (3) SA 802 (N).

29 1989 (1) SA 67 (A).

30 [2006] JOL 18401 (N) 18.

31 19.

32 *Ibid*.

33 *Ibid*.

34 [2008] JOL 21373 (N).

35 3.

36 1989 1 SA 67 (A).

37 [2006] JOL 18401 (N).

38 19.

39 18-19.

40 [2010] ZAECPEHC 72.

41 [2010] ZAECPEHC 72.

42 *Muhlmann v Muhlmann* 1981 (4) SA 632 (W) 634.

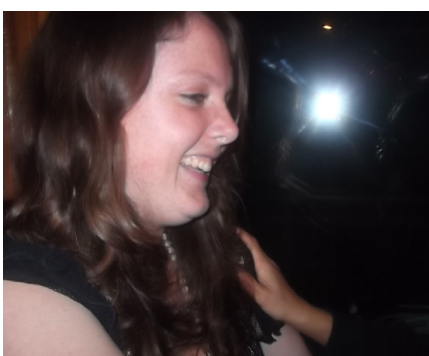
43 1984 (2) SA 651 (T) 652.

44 [2010] ZAECPEHC 72.

45 1984 (2) SA 651 (T).

STUDENT PHOTOGRAPHS

2011



STUDENT SUBMISSIONS



By Bibiana Mwape
Penultimate Year LLB
Student

Is there a need for a single apex court in South Africa?

INTRODUCTION

At the end of our second decade of independence it is imperative for us not only to evaluate whether the plan designed for our Republic has fulfilled and is still fulfilling its purpose, but also to ascertain whether there is a need for change. At the centre of such a vital enquiry is the issue of whether our current court structure has played and is playing its desired role. This sparks the heated issue of whether there is a need to restructure our court system. The vital question that needs to be answered is whether there is a need for a single apex court in contrast to what the founding fathers of the Constitution envisioned. Before reaching a conclusion about the way forward, it is imperative to first discuss what the current system is and to assess advantages and disadvantages of an apex court. In conclusion, I suggest an alternative court structure.

COURT STRUCTURES

Although, historically there are two systems of judicial or constitutional review that have evolved: the American model and the German system of judicial review; there is a third model found

is raised in an ordinary court of law, the matter is referred to the Constitutional Court to decide on the issue, after which it returns to ordinary court to make a decision upon the facts.⁸ This system makes provision for both concrete and abstract judicial review. In the French model, the constitutional council only deals with constitutional interpretation of legislation before it is enacted⁹.

The South African system under the Final Constitution represents a compromise between the two systems. It makes provision for the establishment of a specialist constitutional court which has exclusive jurisdiction over constitutional matters like the Germany system. As in Germany, the Constitution also makes provision for both the concrete and abstract review, for example section 38 (c) makes provision for relief under the bill of rights to be sought by a person acting in public interest. However, in other areas of constitutional adjudication the South African system functions like the American system in that it exercises appellate jurisdiction¹⁰. This entails that a provincial or local division of the Supreme Court is empowered to decide certain constitutional issues but subject to the final say of the

“Independence it is imperative for us not only to evaluate whether the plan designed for our Republic has fulfilled and is still fulfilling its purposes but also to ascertain whether there is a need for change.”

in France.¹ The American model entrusts judicial review in the hands of ordinary courts: this system is referred to as decentralised judicial review.² In the landmark American case *Marbury v Madison*³, it was held that although not explicitly stated, court's power to review legislation was inferred from supremacy of the constitution.⁴ Under the American system, a court may decide upon constitutional issues arising from an ordinary lawsuit. For example, if during a trial an accused raises a defence stating that evidence against him was obtained during a search of his home in violation of the Constitution, the court may make a decision on the issue as there is clear case before it.⁵ This is termed concrete judicial review as opposed to the abstract judicial review in which the courts do not issue 'advisory opinion' and the requirements for locus standi are strict⁶.

The German system is referred to as centralised judicial review where judicial review is entrusted to a Constitutional Court specialising in constitutional matter⁷. Under this system, if a matter

Constitutional court¹¹.

CURRENT SYSTEM

The Kempton Park negotiations resulted in the formation of the Constitutional Court and the Supreme Court of Appeal. The two courts have two different functions allowing them to perform the function assigned to them with excellence.

Section 167 of the Final Constitution¹² establishes the Constitutional Court independent of the Supreme Court as opposed to one of the earlier proposals that the constitutional court should be a chamber of the Appellate Division¹³. The Constitutional Court is the highest court in all constitutional matters¹⁴. The functions of the constitutional court include making the final decision on constitutional matters and matters in connection with decisions of constitutional matters. In addition, only the Constitutional court may decide whether parliament or the president has failed to fulfil a constitutional obligation¹⁵.

Section 168 establishes the Supreme Court of Appeal as the successor of the Appellate Division Court that existed prior to the Final Constitution. It is the highest court for appeal in all matters except in constitutional matters. Its functions include deciding on appeals, issues connected with appeals and any other matter that may be referred to it in circumstances defined by an Act of Parliament.

THE APEX COURT

Advocates for the introduction of a single apex court state various reasons for this. The first reason for dispensing the current system is that the interest of political legitimacy that was valid prior to the adoption of the Constitution is no longer valid¹⁶. The decision to have two apex courts was made on the basis that most South African judges had been schooled in the Westminster system, which emphasised legislative supremacy, literal interpretation and positivism thus making them less suited for the task of constitutional interpretation¹⁷. Therefore, there would have been a gap in the legal system as the judges were not trained to work with the new constitutional system. In addition it seems that there was also a

As a result of the perceived divide between constitutional and other issues, matters that eventually end up in the Constitutional Court are often presented differently as the arguments ought to have a constitutional dimension in order for them to be heard. As a result matters are never argued consistently under the current system, however if a single apex court existed matters brought to court would be argued including the constitutional dimensions from the start²⁰.

In addition, a single apex court would result in the reduction of money and time wasted as a result of multi-layers of appeal especially in matters of urgency²¹. The *New Clicks South Africa (Pty) v Tshabalala-Msimang NO*²² dealt with regulations relating to a Transparent Pricing System for Medicines and Scheduled Substances. The case was heard on the 1, 17 and 18 of June 2004 and judgement handed down on the 27 August 2004 despite the urgency of the matter²³. This should not be the course of events and will not be the case under the single apex system.

Opponents of the single apex court, argue that it will undermine

“ As a result of the perceived divide between constitutional and other issues, matters that eventually end up in the Constitutional court are often presented differently as the arguments ought to have a constitutional dimension in order for them to be heard. As result matters are never argued consistently under the current system. ”

certain degree of mistrust of these judges seeing that they had been involved in applying the laws of the old regime and thus it would not have been appropriate to give them the final say in the application of the new constitution, which incorporates the Bill of Rights¹⁸. The only solution to closing the gap was to have a twin apex court to deal with constitutional and other matters. In addition, at present the demographic of the court have changed, majority of the heads of court are almost all black thus this is no longer an issue that should have an impact on the court system¹⁹.

the valuable constitutional purpose set out by the Constitutional Assembly in the mid 1990s²⁴. The assembly carefully considered the effects of establishing a separate constitutional court, thus a decision was made to incorporate, with adaptations, a number of features from the German model system as it was concerned with socio-political issues.

Secondly, because the Constitution is the supreme law, its provisions were carefully considered in lengthy debates: Codesa and later the Constitutionally Assembly. Thus its provisions should not be casually amended to advance one or more individuals or even the government in order to advance their political agendas²⁵.

Thirdly, in order to ascertain whether there is a need for change one ought to establish that the current system has or is failing. The multitudes of cases dealing with citizens socio-economical rights illustrate that the Republic has a long way to go before it can provide citizens with the bare necessities. It is thus imperative that we have a specialised court in order to move towards our desired status. In addition, cases like *Gory v Kolver*²⁶ illustrate that even after fifteen years after the enactment of the Constitution there are still people whose rights are being trampled upon, therefore the Constitutional court still plays a vital role as guardian of the constitution as envisioned by the founding fathers.

Fourthly, the work engaged in by both courts is very different. The Constitution clearly states this in section 167 and 168. This is further evidenced by the fact that between 2009 and 2010 the Supreme Court of Appeal finalised a total of 42 criminal appeals, 196 criminal petitions, 187 civil appeals and 295 civil petitions, in that same period the Constitutional Court only handed down judgements²⁷ in 35 cases advances this sentiment²⁸. In addition, one cannot ignore the fact most of the issues dealt with by the Constitutional court are as a result of the shortfall of legislation enacted by Parliament despite the fact they have legal advisers²⁹.

Finally, in the event that the Constitutional Court becomes the single apex court, there would be an unnecessary work overload on

STUDENT
SUBMISSIONS

the court. Matters are often unresolved for many months, in some cases even years thus it would not be reasonable to add to the court's current work load as there would be a continued infringement of people's rights that would be left unresolved. In 2003, the Supreme Court of Appeal had a total of 172 cases on its roll³⁰. Evidently it is not reasonable to overload the Constitutional court with matters that benefit only the parties involved in the cases. The Constitutional court should be concerned with matters that affect the masses, as they do have the right to enjoy the benefits afforded to them by the Constitution.

CONCLUSION

Although the current structure is a relic of the past, it is still serving its vital purpose in the administration of justice. It is submitted that an alternative to the Constitutional Court becoming the single apex of the Republic, as Mtshaulana argues is the reformation of the court structure which should start at the lower levels first³¹. This structure entails that the High Court, Regional Court and Magistrate Court among others, should be merged to form a court of first instance. The court of first instance would have jurisdiction to deal with both civil and criminal matters, and to improve the quality of justice provided by the court, cases would be presided over by a High Court judge, with the current Magistrate Court judges sitting in on such cases as Puisne Judges³². This approach would improve delivery and reduce costs of justice to litigants and shorten the chain for those cases which need to go to the highest court^{33 34}. In addition, this approach does not undermine the fact that the Constitutional Court has generated intentionally recognised jurisprudence. Evidently, this approach will help further the constitutional imperative of everyone's right to access to court. In conclusion, it goes without saying that an apex court will undermine this constitutional imperative.

STUDENT SUBMISSIONS

1 WJ Hosten AB Edwards F Bosman and J Church
Introduction to South African Law and Legal theory 2
ed (2008) 1014.

2 Hosten et al *Introduction to South African Law and Legal theory* 1013.

3 1803 1 Cranch 137 (US)

4 page 5.

5 Hosten et al *Introduction to South African Law and Legal theory* 1015.

6 Hosten et al *Introduction to South African Law and Legal theory* 1015.

7 Hosten et al *Introduction to South African Law and Legal theory* 1015.

8 Hosten et al *Introduction to South African Law and Legal theory* 1015.

9 Hosten et al *Introduction to South African Law and Legal theory* 1015.

10 Hosten et al *Introduction to South African Law and Legal theory* 1015.

11 Hosten et al *Introduction to South African Law and Legal theory* 1015.

12 Act 108 of 1996.

13 Hosten et al *Introduction to South African Law and Legal theory* 1015.

14 S 167(3) (a).

15 S 167 (4) (e).

16 Lewis (2005) 21 SAJHR 519.

17 Hosten et al *Introduction to South African Law and Legal theory* 1015.

18 Ibid.

19 Lewis (2005) 21 SAJHR 519.

20 Lewis (2005) 21 SAJHR 519.

21 Lewis (2005) 21 SAJHR 519.

22 2005 (2) SA 530 (C).

23 Lewis (2005) 21 SAJHR 519.

24 IG Farlam "Why fix something that ain't broken?" (2011) Cape Argus <http://www.iol.co.za/capeargus/why-fix-something-that-ain-t-borken-1.1055652> (accessed 20 August 2011).

25 Farlam "Why fix something that ain't broken."

26 2007 (3) BCLR 249 (CC).

27 Constitutional Court judgements are internationally respected because the court is afforded the time to research and prepare these judgements and is not bombarded with a large volume of cases to judge.

28 Anonymous "Annual Report on Court Statistics" <http://www.info.gov.za/view/DownloadFileAction?id=132703> (accessed 16 August 2011).

29 P De Vos "Surely Mantashe must know better?" (2011) Constitutionally Speaking <http://constitutionallyspeaking.co.za> (accessed: 20th August 2011).

30 JM Reyneke J Henning "The Supreme Court in action: a statistical survey of the 2003 and 2004 terms." (2007) 124 SALJ 7.

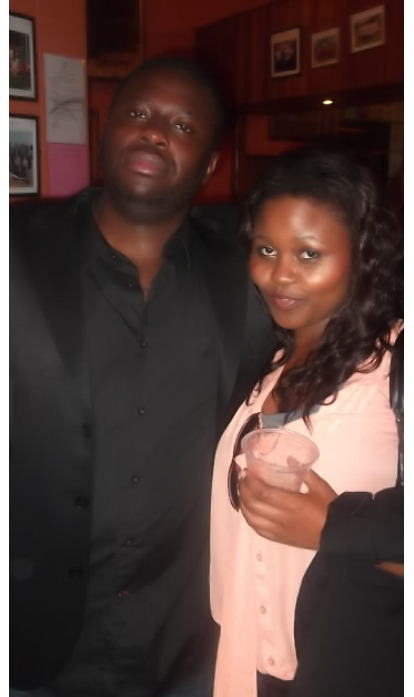
31 P.M. Mtshaulana "Changes to the structure of the judiciary" <http://www.sabar.co.za/law-journals/2008/december/2008-december-vol021-no3-pp02-03.pdf> (accessed 16 August 2011).

32 Ibid.

33 Ibid.

STUDENT PHOTOGRAPHS

2011



STUDENT SUBMISSIONS



By Richard Dhaka
Final Year LLB Student

The controversy surrounding the abortive attempt of the State President to extend the term of appointment of the Chief Justice and why there is cause for scrutiny

INTRODUCTION

On the 29th of July 2011, the Constitutional Court handed down a judgment that is remarkable in at least one respect: the time in which it took for the Court to hear the matter and hand down its judgment on the merits of the case. The speed with which the Court came to a speedy final determination belies the complexity and the importance of the questions the Court had to deal with. If the advocates for the efficient administration of justice will welcome this display of efficiency from the highest court in the land, the advocates for the separation of powers and judicial independence have greater reason to welcome the Court's finding on the seemingly innocuous issue of the extension of the Chief Justice's term of office.

This note examines the controversy arising from the attempt by the President to extend the Chief Justice's term, culminating in three separate applications challenging the purported extension. In

of the Chief Justice's term will be considered in the background of the principles underpinning the concepts of separation of powers and independence of the judiciary. Reference will be made to the provisions under which the President purported to act and from that foundation, it will be argued that the Constitutional Court properly found the extension to be unconstitutional.

BACKGROUND TO THE CONTROVERSY ABOUT THE REAPPOINTMENT OF THE CHIEF JUSTICE

The question of the constitutionality of the President's purported extension of the Chief Justice's term can only be appreciated in light of the provisions under which the President based the extension. In this regard, the logical starting point is s 176(1) of the Constitution which provides that Constitutional Court judges serve for one fixed 12 year term and may only continue in office where an Act of

“ The question that arises is why the President's attempt to extend the Chief Justice's term has to be scrutinised at all. ”

the development of the matter before the Court, the applications were dealt with together and, to the extent that there is substantial similarity in the relief the applicants sought against the respondents, the parties will be grouped together and where necessary, reference made to them as “applicants”, “respondents” or “*amici*”.¹

The question that arises is why the President's attempt to extend the Chief Justice's term has to be scrutinised at all? Former Constitutional Court Justice Mokgoro offers an answer:

“It may seem far-fetched, but the question of the appointment of judges has its relevance in the value of democracy in society, the importance of the idea of separation of powers, checks and balances in a democracy, and an independent judiciary to sustain that separation of powers”²

In support of the above view, the constitutionality of the extension

Parliament extends the term of office.³ The provisions of s 176(1) are echoed in s 3(1)(a) of the Judges' Remuneration and Conditions of Employment Act (the Act).⁴ In addition to these provisions, one must also look to s 8(a) of the Act the exact wording of which bears repeating:

“A Chief Justice who becomes eligible for discharge from active service in terms of section 3(1)(a) or 4(1) or (2), may, at the request of the President, from the date on which he or she becomes so eligible for discharge from active service, continue to perform active service as Chief Justice of South Africa for a period determined by the President, which shall not extend beyond the date on which such Chief Justice attains the age of 75 years.”

On the face of it, s 8(a) of the Act makes provision for the

extension of the Chief Justice's term of office by the President.⁵

In anticipation of the expiry of the Chief Justice's 12 year term, the President directed a written request to the Chief Justice to continue in office for a further 5 years.⁶ The Chief Justice duly accepted this offer and the President went ahead to effect the extension.⁷

The question that arises is whether the President's decision was constitutional? In view of the fact that the Constitutional Court has ruled on the question, finding against the constitutionality of the decision, the question is therefore whether in this writer's opinion the Court came to a correct finding.

PRINCIPLES THAT HAVE A BEARING ON THE CONSTITUTIONALITY OF THE PRESIDENT'S DECISION

As indicated above, the manner in which judges are appointed has important implications for the notions of the separation of powers, checks and balances between the pillars of state and independence of the judiciary (as an integral component to sustain that separation of powers). This may seem far fetched. However, one need only consider the scenario presented by the President's decision to see

bodies so separated are indeed separate from each other.⁸ Seen this way, it is apparent how the appointment of judges enters into play – one way in which the separation of powers would be undermined is if the mode of appointment of judges would be to render the judiciary beholden to the executive.⁹ Further understanding of the argument advanced here may be obtained from the view put forward by a group of advocates, notable among them Jeremy Gauntlet, SC, who note:

“One of the ways in which the Constitution seeks to strengthen and protect [judicial] independence is by stipulating, in detail, the processes by which Constitutional Court judges must be nominated and appointed. This process is open, transparent and inclusive of all interested parties [the absence of such a detailed and transparent process] would undermine the very basis of the constitutionally enshrined doctrine of separation of powers; and it would make a mockery of the founding value of the rule of law.”¹⁰

The above view is reinforced by the earlier view put forward by the former Chief Justice Chaskalson, who argues that the judiciary derives its legitimacy and authority from the open and transparent

“ The Constitution contains an in-built safeguard in that generally, the term of office of judges is fixed and non-renewable ”

the truth of this proposition. Indeed, one of the arguments raised in support of upholding the President's decision was that invalidating it would be an impermissible interference by the judicial branch of government in the domain of the executive. On the face of it, the President had the authority to take the decision to extend the Chief Justice's term, granted by the legislature. The question then is how far the Court could go in scrutinising the President's decision. The answer to that would ultimately depend on the independence of the Court and how it conceives its role as against the other branches, namely the executive and legislature.

Judicial independence is of particular significance in informing the present discussion. The significance lies in the fact, as Madhuku argues, that separation of powers only achieves efficacy if the

manner underlying the process of appointment.¹¹

The above views foreshadow the following argument: that the question whether the decision by the President to extend the Chief Justice's term boils down into the question whether the provisions the President relied on are consistent with the principles of separation of powers and its corollary, independence of the judiciary. Formulating this question in the perspective of Gauntlett and Chaskalson as outlined above, the question may be conceived in terms of the transparency of the appointment process as contained in the provisions under which the President acted. To extend the argument to its logical end – if the provisions relied on by the President do not provide a sufficiently transparent process, then the decision to extend the Chief Justice's term cannot pass constitutional muster.

It is premature to proceed to attempt to answer the questions posed above without further comment on the safeguards that are in place to ensure judicial independence. The Constitution contains an in-built safeguard in that generally, the term of office of judges is fixed and non-renewable.¹² This operates as a safeguard on two levels. In one way, fixed term non-renewable appointments close off the “conduit of executive influence over the judiciary”¹³ by ensuring that in relation to each judge, the possibility of appointment only arises once at the time of the first (and last) appointment. On another level, fixed term appointments, coupled with the stringent requirements upon which a sitting judge may be removed from office, serve to insulate the judges from being improperly influenced by anyone seeking to exploit the incentive of the possibility of a renewal of the judge's term to render the judge pliable in some way.¹⁴

The general rule that judicial appointments are for non-renewable fixed terms is subject to the exception that in some countries, South Africa included, the term may be renewed for a limited period in certain circumstances. Thus the exception is of relevance to the present discussion to the extent that the President's decision is a manifestation of the exception. What has been said above in relation to the requirements for appointments to be transparent also applies with stronger reason to reappointments. Writing about the appointment process in Zimbabwe, Madhuku convincingly demonstrates that the executive may easily undermine the independence of the judiciary by reappointing only those judges considered to be “good” – in the

**STUDENT
SUBMISSIONS**

sense of serving the ends of the executive.¹⁵ This factor serves to place more emphasis on the importance of having a transparent process whereby the reappointment of judges may be effected:

“[C]ompulsory retirement [...] takes away from the executive the power to grant a favourable judge the privilege of remaining in office longer than others as this would undermine the independence of the judiciary.”¹⁶

OPINION ON THE CONSTITUTIONALITY OF THE PRESIDENT’S DECISION

In this writer’s opinion, the President’s decision extending the Chief Justice’s term is unconstitutional because it was based on provisions that do not meet the requirements of transparency as informed by the need to preserve the independence of the judiciary. In forming this view, there is no intention to cast aspersions on the motives behind the President’s decision, having regard to what has been said above in relation to the potential of the executive seeking to influence individual judges by offering reappointment as an incentive on the judge. Rather, the proper context in which to consider the President’s decision is the fundamental principle of separation of powers and its corollary, independence of the judiciary. This view finds support in the following statement made in the case of *South African Association of Personal Injury Lawyers v Heath*:

“Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.”¹⁷

To amplify on the latter point, the injunction that courts must be, and be seen to be, independent is trite because is repeated so often. This must, however, not detract from the fundamental principle. In the context of separation of powers and independence of the judiciary appearances are as important as the reality. Public confidence in the administration of justice may be undermined where there is the slightest appearance of the improper appointment

empowering provision contains somewhat more detailed provisions outlining the manner of appointment of Constitutional Court judges, the Chief Justice included. Of particular note is s 174(3) which provides:

“The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice ...”

This provision stands in stark contrast to the scheme contained in s 8(a) of the Act which provides no guidance as to the circumstances in which the President may exercise the power to effect an extension

“ This provision stands in stark contrast to the scheme contained in s 8(a) of the Act which provides no guidance as to the circumstances in which the President may exercise the power to effect an extension of the Chief Justice’s term. ”

of judges, regardless of the fact that in reality that there may be proper separation of powers and the judges so appointed are actually independent.¹⁸ An appointment is improper if the process underpinning it is not sufficiently transparent.

At this juncture, sufficient foundation has been laid to consider the provisions under which the President acted. Of particular note is s 8(a) of the Act outlined above. As one reads the section, one’s attention is immediately drawn to notice the unlimited discretion the section confers on the President to extend the Chief Justice’s term. Curiously, the section is headed ‘Performance as Chief Justice by Chief Justice ... in certain circumstances.’ What those circumstances are, the section gives no indication save to stipulate that the Chief Justice may continue as such at the President’s request and for a period determined by the President. Nor is much assistance obtained from considering the rest of the Act. The rest of the Act deals with matters pertaining to the remuneration of judges and the provisions are of no assistance whatever in expanding on the circumstances under which the Chief Justice may be reappointed.

In contrast to the scanty fashion in which the Act deals with the reappointment of the Chief Justice in s 8(a), the Constitution as the all

of the Chief Justice’s term. The argument put forward here should not be misunderstood as implying *per se* that that the President’s decision is unconstitutional solely because the President did not consult as envisaged in s 174 of the Act. Rather, the subtle point sought to be put forward by reference to s 174 is that the Constitution envisages an inclusive process in the appointment of the Chief Justice, and indeed, all the other judges of the Constitutional Court, a process made transparent by the fact that the President is required to make the appointments after consultation and in accordance with a predetermined procedure. It is conceivable that the framers of the Constitution might have had this process in mind when stipulating in s 176(1) that the term of the Chief Justice, as one of the judges of the Constitutional Court, could be extended by an Act of Parliament. That is beside the point.

What is difficult to argue with, however, is the proposition that while leaving it to Parliament to authorise or not, as the case may be, the reappointment of Constitutional Court judges, the framers of the Constitution must be taken to have envisaged the Act of Parliament to contain as a minimum, a transparent process that would ensure the independence of the judiciary. In this regard, it

STUDENT
SUBMISSIONS

is important to recall the argument made earlier – the appearance of independence is as important as the reality of independence. The argument is strengthened if one accepts that:

“It is not beyond human ingenuity, however, to devise a system which, without interfering with the executive power of appointment, will be consistent with the traditions upon which the administration of [South African] justice is based.”¹⁹

It bears repeating that in the post-1994 dispensation one of the traditions relates to the independence of the judiciary. As it is currently framed, s 8(a) of the Act creates the appearance that the extension of the Chief Justice’s term is a matter entirely in the hands of the President. This appearance is confirmed by the manner in which the President went about effecting the extension. Notably, the President only communicated the decision to the Judicial Service Commission and leaders of the political parties in the National Assembly after the fact.²⁰ This manner of effecting the extension was not underlined by any process at all. It is doubtful that, absent the litigation that followed, the President’s motives in extending the Chief Justice’s term as revealed in the letter to the latter,²¹ laudable though they may be, would have been put forward for public scrutiny.

The consequence of the lack of transparency in the provisions of s 8(a) of the Act and the manner in which the President effected the extension is to leave one with an uneasy feeling of the susceptibility of the provisions of the Act to abuse. One must keep in mind the argument made earlier:

“The process of appointing judges is a key factor in guaranteeing the independence of the judiciary. Where the appointment process is entirely in the hands of politicians, the likelihood is high that judges

will be appointed on the basis of political [or some other] allegiance, thus creating a judiciary which is unlikely to be independent of the executive.”²²

The reality of this likelihood is amply demonstrated by Madhuku in his close analysis of the appointment process in Zimbabwe, cited throughout this opinion. To reinforce the argument in relation to South Africa in general and the President’s decision in particular, s 8(a) of the Act provides no checks whatsoever to serve as a counterweight to the President’s preferences in reappointing the Chief Justice. The decision of the President alone matters. However, in the event that no transparent process is in place to shed more light to the public on how the decision is arrived at, the lack of transparency taints the President’s decision and renders it incapable of reconciliation with the principles of separation of powers and independence of the judiciary.

In conclusion, it is noted that many if not all the arguments made in this opinion find support in the judgment of the Court in the challenge against the President’s decision. In particular, the Court correctly gives due weight to the principles of separation of powers and judicial independence.²³ The question was posed earlier whether the Court’s finding ought to be seen as correct. The answer is in the affirmative. In coming to its findings, the Court could not avoid looking at a wider range of issues – such as the issue of delegation of power by the legislature to the President to extend the Chief Justice’s term. What the above discussion demonstrates is that there is another basis on which the court could have exclusively approached the matter and still come to the same conclusion – separation of powers and the independence of the judiciary.

1 The unreported judgment of the Court was issued under the reference: *Justice Alliance of South Africa v President of the Republic of South Africa* 2011(5) SA 338 (cc). The parties in all the matters are as follows: in the first matter the applicant is the Justice Alliance of South Africa (‘JASA’) and the first respondent is the President of the Republic of South Africa, joined with the Minister for Justice and Constitutional Development and Chief Justice as second and third respondent respectively; in the second application the applicant is Freedom Under Law (‘FUL’) and in addition to the respondents as in the first application, FUL also joined the Director-General of the above-named second respondent’s ministry; In the third matter, the applicants are the Centre for Applied Legal Studies (‘CALS’ – 1st applicant) and the Council for the Advancement of the South African Constitution (‘CASAC’ – 2nd applicant) and the respondents are the same as in the first matter. The amici curiae are, respectively: the National Association of Democratic Lawyers (‘NADEL’), the Black Lawyers Association (‘BLA’) and Mario Gaspare Oriani-Ambrosini, MP (‘the MP’).

2 Y Mokgoro “Judicial Appointments” (2010) *Advocate* 43 at 43.

3 Constitution of the Republic of South Africa, 1996 (the Constitution).

4 47 of 2001.

5 *Justice Alliance of South Africa v President of RSA* para 5.

6 *Justice Alliance of South Africa v President of RSA* paras 6-7.

7 *Justice Alliance of South Africa v President of RSA* paras 9-10.

8 L Madhuku “Constitutional Protection of the Independence of the Judiciary: A Survey of the Position in Southern Africa” (2002) 46 *JAL* 232 at 232.

9 *Ibid*.

10 J Gauntlett, M du Plessis and A Coutsooudis “Ex Parte Freedom under Law in RE: The Appointment of the Chief Justice” <http://constitutionallyspeaking.co.za/ful-proposes-changes-to-appointment-of-chief-justice/> (Accessed 12 September 2011) paras 57-58.

11 A Chaskalson “Address at the Opening of the Judges’ Conference” (2003) 120 *SALJ* 657 at 665.

12 Section 176(1) of the Constitution.

13 L Madhuku “The Appointment Process of Judges in Zimbabwe and Its Implications for the Administration of Justice” (2006) 21 *SAPR/PL* 345 at 350.

14 For removal of judges from office, s 177(1) provides: “A judge may be removed from office only if [1] the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and [2] the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.”

15 Madhuku 2006 *SAPR/PL* 349-350.

16 Madhuku 2002 *JAL* 243.

17 2001 (1) SA 883(CC) para 25.

18 WH Hurlburt “Appointment of Judges” (1968) 6 *Alta L Rev* 175 at 175; see too Madhuku 2006 *SAPR/PL* 369 who says that: “The impartiality of the judiciary is recognised as the most significant component of the delivery of justice. An eminent court recently emphasised that a judge must not only be impartial, but must also be seen to be impartial.”

19 Hurlburt 1968 *Alta L Rev* 177.

20 *Justice Alliance of South Africa v President of RSA* para 10.

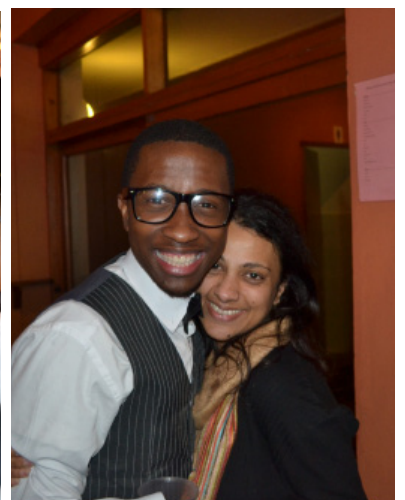
21 *Justice Alliance of South Africa v President of RSA* para 7.

22 Madhuku 2002 *JAL* 234.

23 *Justice Alliance of South Africa v President of RSA* para 20-40.

STUDENT PHOTOGRAPHS

2011



STUDENT SUBMISSIONS



**By Haruperi
Mumbengegwi**
Final Year LLB Student

Moots 2011

Every year, the top two final year Moot Finalists at Rhodes University, are sent to represent the University at the African Human Rights Moot Competition. This year I had the honour together with Melissa Bowins of representing the University at the 20th African Human Rights Moot Competition hosted at the University of Pretoria. Students from all Faculties of Law across Africa are invited to send teams to argue a hypothetical matter centred on the African Charter on Human and Peoples' Rights. It is the largest annual gathering on the continent of students and lecturers of law. It was established in 1992 and so far 975 teams from 129 universities, representing 48 African countries, have participated over the last 20 years. This year was a unique year as it commemorated the 25th anniversary of the Centre for Human Rights and the 30th anniversary of the adoption of the African Charter on Human and Peoples' Rights.

This year, the hypothetical matter involved the Republic of Dosmoon. Within the State of Dosmoon there is a specific group or people, The Dosmi People. They are divided into the Northern and Southern Dosmi and live in the Dosm Forest. The Southern Dosmi were relocated by the government through a mining company to

time and research goes into extracting the issue and formulating legal arguments. Working with Melissa, we divided the issues and embarked on an incredible journey into the realm of International Human Rights Law. Fausto Di Palma supervised the process and gave us structural guidance, and memorials were submitted.

On the 7th of July 2011, over 50 teams from across Africa converged in Pretoria for one of the biggest events on the African Human Rights calendar. One cannot fathom the invaluable experience of meeting your peers from all the corners of the continent. From South Africa to Namibia to the DRC, Niger, Egypt and Guinea Bissau; it was a cultural collage of the brightest legal minds from around Africa. It was a humbling experience.

The competition takes the form of 4 rounds in which one argues for the Applicant twice and for the Respondent twice over a period of two days. Teams are divided into an Anglophone pool, a Francophone pool and a Lusophone pool. You appear in four different court rooms with 4-5 judges in each one. The first round was daunting experience as we did not know what to expect. At times it would appear that the judges are trying to obliterate your

“ One cannot fathom the invaluable experience of meeting your peers from all the corners of the continent. From South Africa to Namibia to the DRC, Niger, Egypt and Guinea Bissau; it was a cultural collage of the brightest legal minds from around Africa. ”

which a prospecting licence had been granted to begin extraction of Coltan. Over a period of 5 days the Southern Dosmi were relocated to an area of 30 km from the forest where they were provided with schools, access to water, roads and health facilities, all of which they had not been afforded before. They however had a spiritual tie to the forest and its fauna and flora. There was also suspicion surrounding the Environmental Impact Assessment upon which licence was granted as it was not made public and no investigation had been carried out pertaining to allegations of corruption in the granting of the licence.

Preparing for the moot was probably one of the most challenging events of my LLB career; possibly worse than a Prof. Glover exam. Teams are expected to prepare memorials (extensive heads of argument) for both the Applicant and the Respondent. The average length expected is about 20-25 pages per side. A large amount of

argument; at times it also appeared that the judges had not read the hypothetical scenario themselves! As the rounds progressed, our arguments came together culminating in an excellent performance in the final round with scores ranging over 90%. Although we did not make it to final, we performed very well overall, and I managed to rank as a Top 10 oralist.

The saying goes “all work and no play makes Jack a dull boy” and the University of Pretoria ensured that we had a day of play when we were taken on a tour of Soweto. This was an opportunity to interact with other teams and get to know each other on a more personal level. Even with language barriers in some instances, a shared African experience resonated across the group as we visited the Hector Pieterse Museum and 8115 Vilakazi Street (Mandela's former home).

One of the highlights of the Competition was a conference to

commemorate the 30th anniversary of the entry into force of the African Charter on Human and Peoples' Rights which was held to coincide with the 20th Moot Court. The Conference '30 Years of the African Charter: Looking forward while looking back' was opened by Judge Abdulqawi Yusuf from the International Court of Justice. Adv. Reine Alapini Gansou, the Chairperson of the African Commission on Human and Peoples Rights, also offered invaluable insight. It was an honour to be addressed by some of the most prominent African Human Rights Jurists on the continent. There were a number of parallel sessions addressing various topical human rights issues.

Before I left for my first International Moot Competition in 2010, I was told that these things change your life. To be honest I did not believe it. It is very difficult to understand how a competition

where you put forward some legal arguments can change your life. However, being privileged enough to have been able to attend two Moot competitions on the continent during the course of my LLB, I can confidently say that my life has been changed. I now have a legal perspective on human suffering on the continent from the competition itself and a network of equally passionate individuals from across the continent. Students do not understand the exposure one gets from competitions of this magnitude. What I plan to do with my LLB has changed, all because of my moot experience. If I find myself back at Rhodes next year for an LLM, I want to help coach teams to get to even bigger moot competitions like the Jessup and perhaps even the Jean Pictet. Not only do these things put Rhodes on the map, but they mould individual students into legal minds and orators to be reckoned with.

STUDENT PHOTOGRAPHS 2011



CLASS OF 2011



Adwoa "Adji" Ankoma

Live life in a sun filled daze with rainbow coloured dreams.



Alice "Alie" Maureen Mobbs

Your ambitions should always be doing push ups even while you sleep.



Ben Lemmer

A great education affords a life time of great opportunities.



Bradley "Brad" Marais

"The quality of a person's life is in direct proportion to their commitment to excellence, regardless of their chosen field of endeavour." Vince Lombardi



Caitlin Bookless

"A man is a success if he gets up in the morning and gets to bed at night, and in between he does what he wants to do." Bob Dylan

Charlotte Adie

"We don't inherit the earth from our ancestors, we borrow it from our children." David Brower



Chris "Sewry" Sewry

"You cannot create criminals from scratch." Adv. Roberts with regard to entrapment



Christi Haworth

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



Christopher "Stoffel" Quinn

Never let the fear of striking out keep you from playing the game.



Corrine Dalglish

"Find out who you are and do it on purpose." Dolly Parton



CLASS OF 2011



Daniella "Ella" Janse van Rensburg

A person shows who they are by what they do with what they have.



Faeza "Faiz" Asmal

"Success is not final, failure is not fatal: It is the courage to continue that counts." Winston Churchill



Gift Ntando Dube

Law is not for the lily-livered.



Gillian "Gilly" Griffiths

"Sometimes you're the windshield, sometimes you're a bug"



Graham Crocker

"You only live once; but if you live right, once is enough."

Gugulethu "Gugz" Ncube

People succeed not because they are clever or privileged but because no matter how many times they fall they rise up, and press on.



Haruperi "Haru" Rudo Mumbengegwi

"I hate quotations. Tell me, what do YOU know?" Ralph Waldo Emerson



Jacques de Villiers

It takes a big man to cry, but an even bigger man to laugh at that man.



Jacyn "Jay" Mitchley

"Risi, didici, vixi." J. Mitchley



Justin "Juzzi" Faure

"Blessed are those who can give without remembering and take without forgetting."

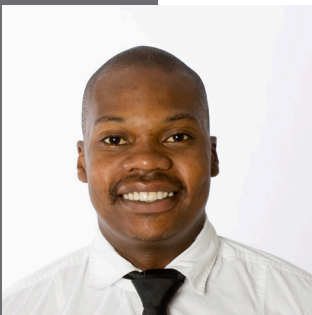


CLASS OF 2011



Justin Sloane

"Do not follow where the path may lead. Go instead where there is no path and leave a trail." Harold R. McAlidon



Kabelo "Jake" Matlala

"We do what we have to, so that we can do what we want to."



Keabetswe "Kee-kee" Seadimo Seate

Positive energy activates constant elevation.



Khanyisile "Khanyi" Khanyile

"Without goals and plans to reach them, you are like a ship that has set sail with no destination." Fitzhugh Dodson. I was going to be successful; the only question was how I was going to get there. KS Khanyile



Leah "Lee" Waters

Goals are just dreams with a plan to achieve them.

Leanne van Rensburg

"The world is a book and those who do not travel only read a page." St Augustine

**Matthew Lehman**

"For God wished women to be smooth and to rejoice in their locks alone growing spontaneously, as a horse in his mane. But He adorned man like the lions, with a beard, and endowed him as an attribute of manhood, with a hairy chest—a sign of strength and rule." St Clement of Alexandria

**Matthew Xola Mpahlwa**

Let them be investigated.

**Melissa "Mel" Bowins**

"Veni, Vidi, Vici" Julius Caesar

**Melissa-May "Missy" Hood**

"Give a girl the right shoes, and she can conquer the world." Marilyn Monroe



CLASS OF 2011



Mzokuthula Mbuyisa

The South African Law Society is complaining about the quality of law graduates in South African universities are producing. I leave this question to Rhodes law students: What kind of future lawyers will syndicate notes produce: the ones that the society is complaining about, or not?



Naphtali "Bob" Ejumu

Never underestimate the predictability of stupidity.



Natalie Gina Marais

"Be miserable. Or motivate yourself. Whatever has to be done, it's always your choice." Wayne Dyer



Nicole "Nicky" Abbott

"The mind is not a vessel to be filled, but a fire to be ignited!" Anonymous.



Nigel "Tawi" Mahachi

The kingdom suffers violence and the violent taketh by force.

Philippa "Pips" Bruyns

"It is of practical value to learn to like yourself. Since you must spend so much time with yourself you might as well get some satisfaction out of the relationship." Norman Vincent-Peale



Popo Wavela Mfubu

"Legalise it"



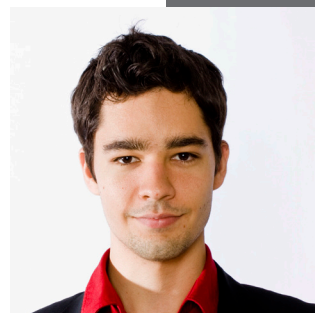
Precious "Presh" K.T. Garayi

"Take pride in how far you have come, and have faith in how far you can go."



Raul "Mr Ai Ai Ai" Andrei Dimitriu

I came. I saw. I conquered.



Rhulani "Rhuly" Nkomo

"Our strategies and journeys may be different, but the destination is the same, so do not judge or underestimate those who strategise differently to you or take the path that does not appeal to or work for you, they may be the very ones who are greater than you." "Black woman are the future!"



CLASS OF 2011



Ricardo "Ricci" Pillay

"Walk like it's for sale and the rent is due tomorrow."



Richard M Dhaka

I will see you in court!



Robyn Jones

No true fiasco was ever caused by the pursuit of mere adequacy.



Roxanne "Roxy" Fietze

"It is better to light a candle than to curse the darkness."



Rumbi "Rumbz" Ziyambi

I came, I observed, I took over, I conquered #Fabulosity.

Rutendo "Rue" A Urenje

"Likewise urge the young... to be sensible, in all things show yourself to be an example of good deeds, with purity in doctrine, dignified, sound in speech which is beyond reproach, so that the opponent will be put to shame, having nothing bad to say about us." Titus 2:6-8



Sinal Govender

Those who say that nothing tastes as good as skinny feels have obviously never had bacon!



Tamlyn "Tam" Wells

"If you find something you love to do you will never have to work a day in your life ." Anonymous



Tammy Mullins

"The trick is growing up without growing old."



Tavonga "Cobias" Jordan Zvobgo

I have nothing to say... honestly... nothing. Words and their meaning are for those who believe they have attained wisdom and understanding. The true beauty of life lies in nothing, knowing what we do not know and learning from it. Experience is thereby the only consequence of a well spent year. Our lives – our choice." TJ Zvobgo



CLASS OF 2011



Thokozani Mayana

"The difference between a successful person and others is not a lack of strength, not a lack of knowledge, but rather a lack of will." Vince Lombardi



Tiiso "Tis Tis" Makakane

"By three methods we may learn wisdom: first, by reflection, which is noblest; second, by imitation, which is easiest; and third by experience, which is the bitterest."
Confucius



Tony Taverna-Turisan

"A ship in harbour is safe, but that is not what ships are built for."



Tyron Theessen

An average day's fishing is better than a good day in the office, anyday!



Vimbai "Vimbles" Chikukwa

"Our deepest fear is not that we are inadequate. Our deepest fear is that we are powerful beyond measure. It is our light, not our darkness that most frightens us. We ask ourselves, whom am I to be brilliant, gorgeous, talented, fabulous? Actually, who are you not to be? You are a child of God. Your playing small does not serve the world."
Marianne Williamson

Viwe "Vista" Didishe

"Life has no smooth road for any of us; and in the bracing atmosphere of a high aim the very roughness stimulates the climber to steadier steps, till the legend, over steep ways to the stars, fulfills itself." WC Doane "I am Legend"



Wesley "Weezy" Verwij

Some people say we only use 10% of our minds. I think we only use 10% of our heart.



Wiseman "Wyzee Que" Qinani Ngubo

Everything I'm not makes me everything I am!!!



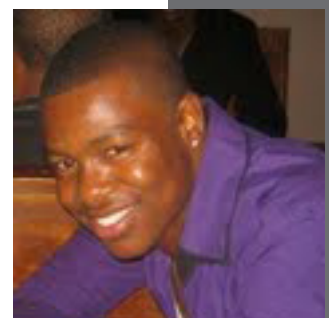
Khanti "X" Mhlambiso

Don't be humble, you're really not that great." Golda Meir



Zanethemba "Zane" Sogcwayi

Don't count the days, make the days count." - Ali



LAW FACULTY REPORT

Part 4: Community Engagement

The Law Clinic undertook a number of community engagement activities in the past year (besides regular legal service provision and advice office work):

- **Labour Law:**
21 paralegals attended the Law Clinic's labour law training in Grahamstown from 22 to 26 November 2010, assisted by the Black Sash. This was the most intensive training presented by the Law Clinic to date, and required homework to be completed by paralegals daily. There were also multiple assessments, including a role play interview and a post course assignment.
- **Financial Management and Auditing Preparations:**
A 'road show' training workshop for paralegals was conducted during 2011 in four different venues across the Eastern Cape Province - namely Grahamstown, Graaff-Reinet, Queenstown and Mthatha. A total of 65 participants attended, an important objective of this and similar initiatives being to make training more accessible to paralegals.
- **Human Rights Day at Nthlangaza Great Place:**
During the March Transkei circuit visit, the Mqanduli Advice Office invited the Law Clinic to attend and contribute to the Human Rights Day program that they were arranging at the Nthlangaza Great Place, 26 kms from Mqanduli. Approximately 700 people attended the event at which there were many cultural activities, including Xhosa dance and music, by people of all ages. Guest speakers (including Mr Siyasanga Giyose of our Queenstown branch office) addressed the gathering on topics related to human rights issues.
- **Training of Facilitators/ Street Law:**
 - (a) A number of paralegals were invited to join Law Clinic staff and activist students in a two day Street Law training workshop held in Grahamstown in August 2010. Participants were trained in facilitation participative skills, using Street Law methods for advancing active and critical participation in community workshops. The workshop, accredited by Street Law SA, was co-facilitated by the Director, Prof Bodenstein, and Ms Desia Colgan of Wits University.
 - (b) In March 2011 Prof Bodenstein trained Law Clinic staff and members of the Legal Activism Society.

The core function of the Ntuthuko Legal Activism Society is to conduct workshops in the Grahamstown Community, and this year no effort was spared in this regard. The first term started promptly with a 'train the trainer' workshop run by Prof Bodenstein, Director of the Rhodes Law Clinic. The purpose of the exercise was to acquaint the society's new members with some important techniques for the running of workshops.

The society also expanded into new areas with the creation of an environmental law portfolio. This group has been exceptionally active throughout the year organising a number of events, including a debate at the Grahamstown Festival on the proposed hydraulic fracturing of the Karoo.

Early in the second term, the society again collaborated with the Law Clinic in order to provide thorough training to each of the society's portfolio group leaders. Over the course of two days these leaders were exposed to the Street Law approach to running workshops as well as extensive practical experience.

The society has hosted a record number of 24 workshops this year, engaging with more than 750 people across a wide range of legal issues, such as: rape and domestic violence; HIV and AIDS; wills and estates; labour law; and micro-lending. The society hopes to continue to grow and increase its impact in the Grahamstown community and beyond.

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 Human Dignity and it will feature a keynote address by Mr Théo Boutruche, a consultant on International Human Rights and International Humanitarian Law.

Combining Service Learning, Legal Activism and Community Engagement at the Rhodes Law Faculty: Possibility or Utopia?



By Prof. Jobst Bodenstein
BA (Stellenbosch) LLB,
LLM (UKZN), Trustee Dip.
(Institute of Bankers), Dip.
in Project Management
(NWU)

Position:

Director of the Rhodes
Legal Aid Centre and
Associate Professor of Law
in the Rhodes Law Faculty

Conveyancer and
Attorney of the High Court
of South Africa

Fields of Interest:

Human Rights, Clinical
Legal Education,
Management of law
Clinics, Street Law,
Management of projects
involving access to justice,
Forensic medicine and the
law, Training programmes
in Legal and Human
Rights related fields.

"And as we let our own light shine, we unconsciously give other people permission to do the same." (Nelson Mandela)

Based on my interaction with many law students during the past two and half-years since arriving at Rhodes, I have formed a number of impressions as to why they decided on pursue their law studies at this Faculty. There is of course the general view of spending student life in a picturesque small town, albeit at a University that prides itself with having the best undergraduate pass and graduation rate in the country. A strong factor also appears to be based on the perception that the Rhodes Law Faculty produces law graduates who are held in high esteem and sought after by especially large national commercial practices. This perception necessarily begs a number of questions: is the law clinic's objective of facilitating access to justice to disadvantaged communities reconcilable with students' supposed expectation of a quality law

'community engagement' was added as a third goal of universities. The latter also involves 'service learning', which presupposes interaction with communities as a scholarly activity, whereby 'we enhance learning through rendering a service to communities'.

Service learning occurs in the Legal Practice module, whereby all intermediate LLB students 'learn from doing' in the Clinic's attorneys' practice which is directed at disadvantaged communities. I must make special mention of the increasing number of faculty members rendering valuable services to the Clinic. Faculty members serve on the Clinic's management committee, appear on behalf of Clinic clients in the High Court and provide opinions to the Clinic's professional staff and students. However the experience at the Rhodes Law Clinic is more than practical

“The legal profession all over the world is tainted by perceptions of being self-serving and motivated by greed, power and control and that lawyers main raison d'être is financial gain and status.”

degree, albeit with a strong commercial law focus? Apart from legal services to the poor, the law clinic also provides training and support to paralegals in the Eastern Cape and is engaged in community education/Street Law. Is there scope for student involvement and especially in the form of 'service learning' in the clinic's community engagement projects?

Traditionally, universities in South Africa focused on learning and teaching (disseminating knowledge) and on research (producing knowledge). With regard to learning, Rhodes' goal is to ensure that students can think 'imaginatively, effectively and critically', that they have a 'broad knowledge of other cultures' and an understanding of and experience about moral and ethical problems' (Dr Saleem Badats annual 2010 report). During the late 1990's

application of knowledge gained in substantive and procedural law. In seeking solutions to clients' problems, students are encouraged to consider, where appropriate, forms of interventions other than litigation. Through lectures and their interaction with the clinic's attorneys, students are also exposed to practicing the law within the context of diverse racial and cultural groups and encouraged to develop a critical approach towards the role of the law and of lawyers in upholding human rights and achieving justice for all. The legal profession all over the world is tainted by perceptions of being self-serving and motivated by greed, power and control and that lawyers main raison d'être is financial gain and status.

Another important initiative concerning community engagement is Legal Activism/Nthuthuko, which was established in 2007 by the

“Combining Service Learning, Legal Activism and Community Engagement at the Rhodes Law Faculty: Possibility or Utopia?”

initiative of students. At a time in this country's history where student activism, which reached its peak between the mid-1970s until the early 1990s, has waned and often replaced by egocentric and self-serving pursuits, the commitment and passion of members of Rhodes Legal Activism must be commended. Legal Activism sets a sterling example to the student body in general. The past few years have seen an increasing symbiosis and cooperation between Legal Activism and the Law Clinic. Legal Activism members have been trained in the 'Street Law' participative facilitation skills methodology, the Clinic is assisting Legal Activism in gaining access to surrounding communities and workshops co-facilitated between Activism members and Clinic staff are held on an ongoing basis.

But before succumbing to undue euphoria and contentment, we would be wise to adopt Franz Kafka's admonition:

“ In conclusion, I submit that to combine service learning, legal activism and community engagement in the Rhodes Law Faculty is not and should not merely be a utopian pipe dream. ”

“Always draw fresh breath after outbursts of vanity and complacency”.

I believe that there are indeed further avenues deserving serious consideration:

- During the recent Law Clinic strategic planning meeting, the idea of the clinic taking on one or two minor impact litigation cases was discussed. Law clinics in South Africa have generally focussed on the individual rather than community and do not have the necessary capacity to engage in impact litigation. This could be beneficial not only to the local community, but could also of great educational value to both staff and Legal Practice students;
- Given proper planning, the Clinic has the potential to offer legal internships especially during the winter and summer vacations to students who have successfully completed Legal Practice. Students have the opportunity to take on more complex cases and to accompany the professional staff to court. They could possibly also accompany clinic staff on their visits to paralegal advice offices, thereby acquiring a totally different perspective on the practice of law, albeit in a relatively primitive setting and in conjunction with paralegals;
- The Law Clinic is involved in a variety of community projects, the main one involving paralegal-training; re-granting administrative and legal support in excess of 50 advice offices throughout the Province. The desirability to engage in research on the impact of the Clinic's services has been under discussion for some time¹. Opportunities beckon for the Clinic to collaborate with external research organisations, the Rhodes Research and Development Department, Rhodes affiliated research units and staff of the Law Faculty, to engage in qualitative research on the impact of the Clinic's advice office programme. Law students wishing to acquire research skills could be trained as field workers and assist in interviewing focus groups and paralegals during their vacations.

In conclusion, I submit that to combine service learning, legal activism and community engagement in the Rhodes Law Faculty is not and should not merely be a utopian pipe dream. With possibilities abound, coupled with the will to succeed, we have the power to open up previously untapped opportunities to the enrichment of our students, the Clinic, Faculty and ultimately our community beneficiaries.

“There is no passion to be found playing small-in settling for a life that is less than the one you are capable of living.” (Nelson Mandela)

¹ Including a follow-up on research conducted in 2006 “Report on the state of community-based paralegal advice offices in South Africa” Jobst Bodenstein/ National Steering Committee/ICJ (Sweden).

Introducing Eversheds, a truly international law firm

*46 offices worldwide,
immeasurable knowledge*

Your law degree will take you places. Why not let it be at a law firm with international scope, where you can practice alongside not only some of our country's top lawyers, but also gain knowledge from around the world.

If you have this kind of vision for your future, call us on 011 523 6101 or email professionalstaff@eversheds.co.za. We'd like to see where your journey could take you.

www.eversheds.co.za



EVERSHEDS

