

In Camera 2013

The Environmental edition

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From the Editor



Rapid changes to our environment have occurred over the past century. The advent of new technologies and greater access to information is largely responsible for this, and it is widely accepted that the information we acquire today may not be relevant in five years' time. This fact inspired us to theme this year's issue of the *In Camera* 'The Environment' as an ode to the times in which we live and as a snapshot of the changes affecting us.

Unfortunately, these changes are not all positive. Our cover star is Thandi, a rhino from a local game park Kariega Game Reserve which survived a poaching attempt. Her indomitable spirit and will to live after undergoing this trauma is inspirational. Unfortunately her story is not a unique one. As of 05 September 2013 the number of rhinos poached in South Africa this year is a staggering 618. This is up from 333 in 2010. 165 poachers were arrested in 2010 whilst only 191 have been arrested during the course of this year. *In Camera* contains two articles dealing with this - one from a practical perspective and another from a legal perspective. We hope that by drawing attention to what could be done to save these magnificent creatures, they will survive to the next century.

Having addressed an issue that is of concern, we also recognise that our environment extends beyond nature. As law students and future legal practitioners, our main areas of interest lie in our learning environment and the changing legal world. Our writers have highlighted

important changes in both of these areas, seeking to provide clarity amidst confusing times. For those people who will be leaving South Africa altogether, or who may just have a fascination with other legal systems, we have included a section on the international environment. This provides insight into two systems which are likely to impact the most on Rhodes students - China because of its rise as a world power, and Zimbabwe because of its proximity as a neighbour to South Africa and the sheer number of law students who hail from there.

In Camera started as a student driven publication and we are proud to carry on that tradition as we are very privileged to have a large number of student contributors in this issue. The hard work they put into researching and writing their articles is greatly appreciated. The labour that goes into the publication of the magazine is reinforced by the calibre and enthusiasm of the writers. This includes the busy professionals who took time out of their schedules to prepare pieces for us and to whom we would also like to extend our heartfelt thanks. Our grateful thanks are also extended to our sponsors without whom the publication of this issue would have been impossible.

Finally, we hope that in reading this edition of *In Camera*, you come away with new knowledge and a greater appreciation for the times in which we live. It may serve as a good reference point in five years' time, for where we once were.

LAW SOCIETY REPORT 2013

Courtney Cader



2013 has been a phenomenal year for the Rhodes University Law Society. With a membership base of 215 passionate law students, all of our events were extremely well supported.

The Law Faculty Market Day took place in the first term, and was hailed as the most successful Market Day to date. Twenty firms and organisations from all corners of South Africa attended the event. We received generous sponsorships from Edward Nathan Sonnenbergs, Norton Rose Fulbright, Webber Wentzel, Adams and Adams, Phatsoane Henney, Routledge Modise, Werksmans and Smith Tabata. A curriculum vitae, interview and covering letter skills workshop, hosted by Werksmans and the Rhodes University Career Centre, was warmly received by the students, and proved to be an invaluable advantage in the interviews that were conducted before, during and after the day. The festivities lasted long into the warm summer evening at the traditional cocktail function, where students got to mingle informally with ex-Rhodents representing their current firms as well as directors, partners, associates and graduate recruitment officers from all the firms that attended.

Following the Market Day, we had the honour of hosting the University of Venda's equivalent of our own society for a week. These students attended our lectures and we engaged in many informal discussions about our respective societies, the academic curriculum and the compulsory work done in the Law Clinic by penultimate year students as part of their studies. We had a lot to teach one another and learn from one another. The University of Venda students were gracious and modest and we sincerely hope our two institutions will encourage more initiatives like this in future.

Our second term initiative took the form of a synthesis between an exhibition debate and a moot. The topic was formulated around the Minister of Health's

proposal to amend the legal age for purchasing alcohol to 21 years old. The participants were four of our very own enthusiastic lectures: Professor Bodenstein, Advocate Renaud, Doctor van Coller and Doctor Kruger. The judges for the evening were 3 final year students who put the lecturers through their paces. When Advocate Renaud was asked what his source was for a particular submission, he held up his cuff links which said 'Trust me, I'm a Lawyer.' Both sides of argument were very well formulated and put forward, providing students with a humorous yet pertinent insight into this contentious societal issue.

I was privileged enough to attend the Law Society of South Africa's 'LLB: Education in crisis?' Summit held in May. The main issues raised at this summit centred on generic skills deficiencies in reading, writing, basic arithmetic and computer literacy. I can confidently affirm that Rhodes has been ahead of the *avante garde* in relation to the issues which the legal profession has raised over the quality of LLB graduates. A favourable lecturer/student ratio, exquisitely tailored inter-faculty curricula, coupled with a high academic standard and dedication to excellence means that Rhodes students graduate with a degree of the highest calibre.

In the third term, we hosted a 1920s - inspired Law Ball, graciously sponsored by Norton Rose Fulbright, which has contributed a great deal to our initiatives this year. It is very encouraging to receive such unwavering support from this prestigious firm. A big thank you must be extended to Lynsey Schonfeld for her patient consideration in these matters. The Honourable Justice Froneman and his lovely wife were the special guests of the evening, and all 150 attendees were amazed by their down to earth humility.

Justice Froneman spoke from the heart and charmed us all with his words concerning the future of this country and our place as young legal professionals in it. To complete the evening we released Chinese Lanterns into the Eastern Cape sky, surrounded by friends that have become family and buoyed by relationships that will last a lifetime.

Due to the growth in society membership as well as the scale of projects undertaken, our Constitution was amended at the Annual General Meeting to include the position of Vice-President, a welcome addition to the society committee.

Congratulations must be extended to our sister society, Legal Activism, for the great contribution it has made to the Grahamstown and surrounding community this year. Legal Activism received the highest accolade given by the Rhodes University Community Engagement Office for their laudable efforts.

The law students were on form this year, with 14 of us making the Investec Rhodes Top 100. Law students were acknowledged in the following categories: Dean of Students Leadership Award, General Excellence, Community Engagement and Academic Excellence.

Last but not least I wish to acknowledge the overwhelming support of our classmates and the Faculty staff, who have been beside us every step of the way on this incredible journey. They were always willing to listen and give advice, or step in at the last minute, and as a whole they are responsible for the great success we have achieved this year. To the 2014 Committee, we wish you the best and know that you will serve the Faculty with distinction. To the leavers of 2013, onwards and upwards my friends. It has been a honour studying with you.

LAW FACULTY REPORT

2012-2013¹

By Mr Gordon Barker, with numerous contributions from a number of staff and students

Introduction

2013 has been a productive and successful year for the Law Faculty.

The year had scarcely begun when the news came that an alumnus of whom the Faculty of Law is very proud, Hon Justice Lex Mpati, President of the Supreme Court of Appeal, had been appointed to the office of Chancellor of Rhodes University. The Inauguration ceremony that followed in April was a fitting occasion. We wish Judge Mpati well in this new role and we look forward to maintaining our close link between the Faculty of Law and himself for many years to come.

The academic year began with the Faculty Opening in February at which Mr Mbuso Mtshali: Head Legal, Compliance & Company Secretary of Sanlam Investments gave an inspiring address on his student life at Rhodes, his career, a few challenges facing the legal profession and possible solutions and concluded with the Eight Essential Lessons of True Success. Mr Mtshali's speech can be found at the following link: <http://www.ru.ac.za/law/events/2013news/>. We were also able to recognise our high achievers from 2012 with the presentation of a number of awards and prizes.

Academic matters The following students graduated on 4 April 2013:

- 87 students graduated with LLB degrees, four of them with distinctions (Joanna Pickering, David Grenville, Monde Coto and Christy Lelean);
- Three students graduated with LLM degrees, two of them achieved distinctions, namely Leanne Janse van Rensburg – thesis title: 'The violence of language: Contemporary hate speech and the suitability of legal measures regulating hate speech in South Africa'; and Alex Johns – thesis title: 'A descriptive analysis of statements taken by police officers from child complainants in sexual offence cases that examines the degree to which the form and content of the statements accord with best practice across a range of variables';
- One student graduated with a PhD degree: James Tsabora – thesis title: 'The application of the Rome Statute of the International Criminal Court to illegal natural resource exploitation in the Congo conflict' Supervisor Prof L Juma.

The Law Faculty celebrated graduation with students, partners and parents at a lunchtime function held at the Faculty, at which 42 final year students (50% of our 87 LLB graduates) were awarded Dean's list certificates in recognition of academic achievement, in that they attained an average of at least 65% for all their final year courses.

The following individual prizes were also awarded at the graduation function:

- **LexisNexis Book Prize** (Internal book prize for moot winner in the Final Year): **Viren Raja**
- **Judge Phillip Schock Prize** (Best final year LLB student): **Joanna Pickering**
- **Juta Law Prize** (Best final year LLB student, based on results over penultimate and final year LLB): **Joanna Pickering**
- **Brian Peckham Memorial Prize** (Best student in Environmental Law): **Andrew Pattinson**
- **Rob and Trish Midgley Prize** (to the student who has contributed substantially towards a holistic educational experience for law students at Rhodes): **Kabwela Chisaka**
- **Spoor & Fisher Prize** (Best student in Intellectual Property (Patents & Copyright)): **Monde Coto**
- **Tommy Date-Chong Award** - the award is named after Tommy Date-Chong, a former law student with a keen interest in the Law Clinic who was sadly killed in a car accident in the late 1980's. (to the student who made the greatest contribution to the Law Clinic in their penultimate and final years of student): **Tlamele Mothudi**
- **Phatshoane Henney Incorporated medals** (Awarded to students who obtain their LLB degrees with distinction): **Joanna Pickering; David Grenville, Monde Coto and Christy Lelean**

In addition Ms Alex Johns (LLM graduate) won a gold award for community engagement and the 'Student volunteer of the year award' in 2012.

84 students accepted offers into LLB this year, only 11 of whom registered for the four year LLB, thus indicating that about 87% of our law students continue to choose the 5 (and occasionally 6) year stream, entering the LLB only after completing an undergraduate degree.

There was one minor adjustment to the LLB curriculum this year in that Administrative Law, a final year course for the LLB degree, was de-semesterised and offered over the whole year as a single course. It aims to enable students to know the important and sophisticated body of law governing the exercise and control of public law in South Africa. Students in Administrative law should be able to formulate and identify the most appropriate and legally correct administrative action

in a given situation. In order to do that, students should be able to identify an administrative action as well as the specific rules of administrative law applicable in the given set of facts. These are general as well as particular rules of administrative law (both statutory as well as common law rules) and cannot be compartmentalised to support the artificial split between Administrative Law A and Administrative Law B. It includes being able to formulate the most appropriate action in the circumstances and to be able to identify deficiencies in the action, process and procedures. Administrative Law will pilot as a single course in 2013 and 2014. .

A new elective on International Human Rights and Humanitarian Law, taught by Prof Juma, was offered for the first time in 2013.

The penultimate and final year student reviews (evaluations) for both the second semester of 2012 and the first semester of 2013 were once again overwhelmingly positive. Lecturers were indicated to be knowledgeable and approachable, and programmes well structured. Much appreciation was expressed for excellent service from the library and Faculty administrative staff.

The following workshops / training courses were conducted by the Law Librarian, Ms Lucky Xaba during the course of the year: Library assistants training; Law database navigator training for postgraduate students (February 2013); Conveyancing workshop (July 2013).

During the course of this year students were able to enjoy the experience and insights of our visiting professors Judge Clive Plasket, Adv Wim Trengove SC and Mr Max Boqwana, whose knowledge and experiences were wonderfully enriching.

In addition the Faculty was at the forefront of contemporary legal issues, when it hosted a debate on the draft Legal Practice Bill between Mr Max Boqwana and Adv Izak Smuts SC. The Faculty was also delighted to host a former colleague, Professor Emeritus Wouter de Vos of the University of Cape Town. He presented a public lecture on 'The recognition of a general class action in South Africa' as well as two lectures to the LLB civil procedure classes.

In May, the Faculty hosted Prof Hennie Strydom, professor of international law, University of Johannesburg and NRF Chair in International Law, under the Visiting Distinguished Professor Programme of Rhodes University. Prof Strydom spent three weeks in the Faculty, giving specialist lectures to final year LLB students registered in the Human Rights and International Human Rights elective. He also made a presentation to staff and post-graduate students on emerging themes in international law research.

We also enjoyed the visit of Prof Robin Fretwell Wilson, the *Roger and Stevie Joslin Professor of Law and Director, Family Law and Policy Program* at the University Of Illinois College Of Law, made presentations to our students and staff in family law and research ethics issues.

Research publications¹

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

- **Prof G Glover** published an article 'The end of the Road for the Roman rule of risk in sale?' 2012 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 650-669.
- **Prof G Glover** published an article 'An unprecedented 'precedent'? *Phodclinics v Pinehaven*' (2013) 76 THRHR 302-312.
- **Prof L Juma** published a book *Human Rights and Conflict Transformation in Africa* (Langaa RPCIG, Cameroon, 2013).
- **Prof L Juma** published an article 'An overview of normative frameworks for the protection of development-induced IDPs in Kenya' (2013) *African Journal of Legal Studies* 17-47.
- **Prof L Juma** published an article 'Chieftainship Succession and Gender Equality in Lesotho: Negotiating the Right to Equality in the Jungle of Pluralism' (2013) 22 (1) *Texas Journal of Women and the Law* 101-162.
- **Prof L Juma** published an article 'Protection of development-induced IDPs under the African Charter: The case of the *Endorois* community of Northern Kenya' (2013) *ICILSA* 1-24.
- **Prof L Juma** published an article 'Waiver of the Right to Judicial Impartiality: Comparative Analysis of South Africa and Commonwealth Jurisprudence' (2013) 28 (1) *SA Public Law* 1-21 (with C Okpaluba).
- **Mrs H Kruuse** published a chapter 'You reap what you sow: Regulating Marriages and Intimate Partnerships in a Diverse, Post-Apartheid Society' for B Atkin (Ed) *International Annual Survey of Family Law* (2013) Jordan Publishing Bristol.
- **Mrs H Kruuse** published an article 'From the grave to the cradle: the possibility of post-mortem gamete retrieval and reproduction in South Africa?' (2012) 28 *South African Journal of Human Rights* 582.
- **Mrs H Kruuse** and Sloth-Nielsen (UWC) published an article 'A maturing manifesto: The constitutionalisation of children's rights in South African jurisprudence 2007-2012' *International Journal of Children's Rights* (forthcoming 2013) (co-author – captured as a UWC publication).
- **Mrs H Kruuse** and Mwambene published an article 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa' *Acta Juridica* (forthcoming 2013)
- **Ms H van Coller** published an article 'Religious Institutions and Fundamental Rights: Applicability, Interaction and Limitations' in Cianitto, C et al, *Law, Religion, Constitution*, 209-226. Ashgate, England.

Papers presented at conferences

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

Prof J Bodenstein presented a paper 'Access to Justice in South Africa: 2012 – taking stock', International GAJE Conference, Durban, 10-12 December 2012.

Prof J Campbell presented a paper entitled 'Access to Justice and Law Clinics' at an Association of University Legal Aid Institutions (AULAI), Port Elizabeth, 3 July 2013.

Prof G Glover presented a paper entitled 'Lumping or splitting? Improperly obtained consensus in contract law and the value of institutional doctrine', Private Law and Social Justice Conference, NMMU, 19-20 August 2013.

Prof L Juma presented a paper entitled 'Protection of property rights of internally displaced persons (IDPs) in Kenya', IASFM 14 Kolkata, India, 6-9 January 2013.

Mrs H Kruuse presented a paper entitled 'You reap what you sow: Regulating marriages and intimate partnerships in a diverse post-apartheid society', Miller Du Toit Family Law Conference, Clock Tower, V&A Waterfront, Cape Town, April 2013.

Mrs H Kruuse researched and presented a paper on behalf of JA Belinda van Heerden with Sloth-Nielsen entitled 'The constitutional family: Developments in South African child and family law 2003-2013', Parentage, Equality and Gender Family Law Conference, London Metropolitan University, London, July 2013.

Mrs H Kruuse presented a paper entitled 'Comparing apples and pears? Arbitrary recognition of conscientious objection in the public sphere in South Africa – the solemnisation of same-sex unions and terminations of pregnancy', Private Law and Social Justice Conference, NMMU, August 2013.

Mrs H Kruuse presented a paper entitled 'Sailing between Scylla and Charbydis: *Mayelane v Ngwenyama and Another* 2013 (4) SA 415 (CC) (30 May 2013)', University of the Free State, September 2013.

Dr G Muller presented a paper entitled 'Developing the law of evictions and the common law of joinder', Inaugural Poverty and Injustice Seminar, University of Pretoria, 17 October 2012.

Ms B Padayachi presented a paper entitled 'Restorative mediation in a pluralistic setting: A rights based approach to public education, conflict management and the promotion of social cohesion in the vulnerable domains of family law', 'African Customary Law': Contemporary Issues Conference, Centre for Indigenous Law, UNISA, Pretoria, 11-12 July 2013.

Dr H van Coller presented a paper entitled 'Religious organisations and autonomy: the tension between private and public, profit and non-profit, and secular and religious', Impact of Religion: Challenges for Society, law and Democracy Conference, Uppsala, Sweden, 20-22 May 2013.

Dr H van Coller presented a paper entitled 'Religious Autonomy: The need to Respect, Promote and Protect Religious Diversity and the Autonomy of Religious Institutions in a Pluralistic Society', Law and Religion in Africa: Comparative Practices, Experiences and Prospects Conference, University of Ghana in Accra, Ghana, 14-15 January 2013.

Other research activities

Prof J Bodenstein coordinated and co-drafted a final submission on behalf of the Association of University Legal Aid Institutions (AULAI) on the 2012 Draft Legal Practice Bills.

Prof J Bodenstein is coordinating a quantitative research project on behalf of the Association of University Legal Aid Institutions (AULAI): annually collecting data of law clinics in South Africa and producing electronic data.

Prof J Bodenstein was the 'Contents Coordinator' of the 2013 AULAI Winter Workshop / Imbizo held in Port Elizabeth, July 2013.

Prof G Glover attended a training course in editing and proofreading for academic purposes, organised by the Dictionary Unit of South Africa (DSAE) and presented by John

Linnegar, 22-25 January 2013.

Prof G Glover has continued his role as Editor of the South African Law Journal during the period covered by this report.

Ms V Heideman attended the Second African International Economic Law Network Conference at Wits, 7-8 March 2013.

Dr G Muller attended a training course in editing and proofreading for academic purposes, organised by the Dictionary Unit of South Africa (DSAE) and presented by John

Linnegar, 22-25 January 2013.

Dr G Muller attended a Meaningful Engagement Roundtable Discussion, School of Government, University of

the Western Cape, 30 May 2013.

DR G Muller attended the Alumni Week of the South African Research Chair in Property Law, Faculty of Law, Stellenbosch

University, 29 July – 2 August 2013.

Dr H van Coller attended a Facilitation Skills training workshop (Train the trainer's course on Human Rights and the Law), 12-13 April 2013.

Dr H van Coller attended a training course in editing and proofreading for academic purposes, organised by the Dictionary Unit of South Africa (DSAE) and presented by John Linnegar, 22-25 January 2013.

1. This report covers the period from October 2012 (when the 2011 In Camera was published) to the end of August 2013.

2. Publications, papers presented at conferences and other research activities exclude those reported on in the 2012-2013 In Camera report, which may have been published in the last year.

THE PROPOSED LEGAL PRACTICE BILL

A QUEST FOR A TRANSFORMED SINGLE REGULATORY SYSTEM FOR THE SOUTH AFRICAN LEGAL PROFESSION

Max Boqwana

This year, 2013, marks the thirteenth year since the discussions about a transformed, single regulatory legal profession commenced. There have been more than 12 drafts produced by the Department of Justice and unfortunately no agreements could be reached. Ironically at the centre of such failure is exactly what the Bill seeks to cure, the disunity between the attorneys division and the advocates division of the profession.

To paraphrase Emperor Haile Selassie's words – in a very real sense, the legal profession in South Africa is unmade. It still awaits its creation and its creators. Wherefore, the debate that the Rhodes University seeks to have about this very important subject is timely as we ponder the questions, once again paraphrasing Emperor Selassie:

- of what should this making of the legal profession or its creation consist; and
- who the creators will be.

In our submission to the Law Faculty of Rhodes University on the 16th May 2013 and many other fora we have attempted to respond to these difficult questions forthrightly.

The cynics may ask a seemingly legitimate philosophical and conceptual question: why change the way attorneys and advocates are governed and regulated? In order to respond to this, we need to appreciate that context is everything. The correctness or otherwise of our analysis must be based on the correct understanding of both the historical and contemporary South African legal context.

The legal profession in South Africa to date stands on two very unfortunate pillars - outdated colonial values and despised Apartheid division. This is so, both in form and content.

The attorneys profession is largely governed by the Attorneys Act which does not recognise South Africa as a single country. Instead, it views the country as divided into four Republics, contrary to the current constitutional demarcations. This is further compounded by the embarrassing recognition of Bophuthatswana, Venda and some parts of the Transkei Attorneys Act. None of these 'countries' exist anymore. The current governance of the attorneys profession is made up of agreed quotas of black and white lawyers, represented by the so-called statutory members of the profession, who are invariably White on the one hand, the National Association of Democratic Lawyers (NADEL) and the Black Lawyers Association (BLA) on the other hand. Rules of conduct differ from 'Province' to 'Province' and the expense of governance is unnecessarily duplicated with

the attendant financial inefficiencies.

The situation is not in any better when one considers the position of advocates. This division of the legal profession is governed by the Advocates Act.¹ This Act is a total anathema to public interest, in that a graduate from the best or worst law faculty in the Republic can approach the High Court to be admitted as an advocate and the following day can open a practice. Members of the public are misled into believing that this person is a suitably qualified lawyer. Unfortunately, this practice is not an exception but a norm, to the extent that there are more advocates outside the more formal, restrictive and largely well organised structures of the General Counsel of the Bar than there are within it. Admission to the Bar being the preferred method of entry to the practice of law as an advocate is also unattractive to the poor since it is based on patronage and to date can be correctly characterised as an 'Old Boys Club.' Neither of these two structures are regulated in any way or form. There is no rational basis for this lack of regulation and this is indefensible.

It is also important to underscore the fact that we practice law in Africa, in a poverty stricken country - not only with a huge unemployment rate, but a hopelessly unequal society. Legal services are generally beyond the financial reach of an average South African, even for those who are above the Legal Aid Board threshold of indigency.

The legal profession cannot shackle its responsibility in this context, but it is unable to break free in its current shape.

What then should be the basis a re-created legal Profession

It is important to understand that South Africa is a constitutional democracy, where the rule of law is supreme. There is no better guardian for this critical proposition than a legal profession. The basis of such a profession should be one that is:

- united and strong: it should be able to speak in one voice at least in one thing - the defence of our constitutional democracy, but also one that uses its resources, both intellectual and material, to better its lot.
- an independent legal profession: it has been stated ad nauseam that an independent legal profession from which the judiciary can draw is an important cornerstone of constitutional democracy.
- a transformed legal profession: this goes beyond race and gender representations, but that broadly reflects the various cultural and class backgrounds of our

society and the advancement of progressive jurisprudence consistent with the demands of our Constitution. This is important in that, in the eyes of the public, such profession will have legitimacy.

- one that encourages access to the profession: it is important that young people with the relevant academic qualifications, requisite aptitude and potential are not unnecessarily barred from entering the profession on grounds such as class, race, gender and socio-economic background.
- one that promotes access to justice: only a profession that is accessible to the populace can have the respect and recognition necessary to engender true access to justice. It is important that the profession itself collectively decide methods of access to justice beyond those that are provided by the State.

Various attempts have been made in the past thirteen or so years to realise this objective. The Department of Justice has produced a Draft Legal Practice Bill,² which has been a subject of intense debate. There is not enough space in this submission to go clause by clause through the current draft. It suffices to record and acknowledge that the current draft is a far cry from the previous proposals. Essentially:

- it limits the role of the Minister of Justice, whose prominence in the previous drafts was regarded as an attack to the independence of the profession;
- the Bill seeks to deal with only attorneys and advocates but not para-legals, a position which would make matters untenable;
- there is no more recognition of voluntary associations with regulatory powers, an instance which would only perpetuate further divisions;
- the Bill correctly refers to a conveyancer as a qualified attorney and does not open this up to anybody including Estate Agents;
- it finally puts an end to all the unnecessary remnants of the Apartheid era structuring of the legal profession;
- it defines the movement between the two divisions of the profession (attorney and advocates) as simply administrative and therefore unnecessary barriers of change within the Profession would fall away.

The Bill, though, still displays some glaring gaps that seem to be universally unacceptable:

- The remaining aspects relating to the role of the Minister of Justice are an intrusion to the independence of the profession. Section 14 of the Draft Bill proposes that the Minister be empowered to dissolve Council. This is an affront not only to the principle of independence but also to a democratic principle as, although the Council is elected by members of the profession, this right can be undermined by a ministerial prerogative.

- The constitutionality of the Bill as it stands is in doubt. The Bill envisages a super regulator with no democratic accountability to take over assets of the existing structures of the profession.
- The attempt to specifically deal with fees may be rhetorically and politically sound, but it is fraught with difficulties and confusion. This is compounded by various decisions taken by the Competition Commission - this can at best be dealt with in Rules rather than an Act of Parliament.
- The Bill envisages the role of attorneys and advocates at a regional level, but the disunity between these two branches of the profession is a threat to quicker realisation of the objectives of the Bill.

The inflammatory opposition from various quarters of our profession does not help the process, especially when workable alternatives are not provided. The following submissions, for example, are misleading and calculated to cause confusion:

- The issue that the Bill is a threat to advocates' existence is far from being true. The recognition of the two branches in the Bill is entrenched and the debate about the fusion of the profession does not even arise at this stage.
- The notion that advocates are different profession deliberately distorts the debate and result in incorrect conclusions.

In my view, the emphasis of self-interest above public and national interest is at the centre of the disharmony.

Who would then be the creators of a new legal regime? Without doubt the current crop of attorneys and advocates are the ones tasked with this historic mission. But only if:

- they can unite and speak with one voice and not past each other;
- they can identify issues of commonality emphasise on them and deal with their differences guided by what is in the public interest;
- they commit to a genuine dialogue to find these solutions;
- they recognise that the greater importance is to find practical ways within the legislative context on how to ensure that all the principles enunciated above find expression.

The alternative is to abdicate this responsibility to the politicians and in my view there can be no greater betrayal of this generation of lawyers' mission.

The history of our country has taught us that our own blessing is our capacity to think and to act, to understand our reality and to change it. The question that all of us - attorneys, advocates and intelligentsia (academics and students) - need to answer is whether we have learnt anything at all from our own history.

1. 64 of 1964.

2. B-20 2012.

LEGAL ETHICS IN SOUTH AFRICA

Sarhanna Hassim



The legal profession in South Africa is divided into advocates and attorneys. Advocates will belong to a Bar situated at a provincial or local High Court division after they have completed pupillage and have passed an entrance exam. All Bars fall under the General Council of Bars. Attorneys, after completing a period of candidacy, will write exams set by their local law society that falls under the Law Society of South Africa.¹ A core component of both of these exams is Ethics.²

There are several instruments that provide for ethical and professional conduct in South Africa. Law Societies play a particularly central role in ensuring ethical conduct amongst their members. An example of this is illustrated by the Cape Law Society Rules,³ which devotes a section to professional conduct. This includes a caution that members must be truthful and upright whilst acting in the interests of the court, their client and justice.⁴ Councils also carry out disciplinary enquiries after the investigation of a complaint against a member.⁵ The Council may on the recommendation of the Disciplinary Enquiry Committee take action such as making an application to the High Court for the attorney to be struck off the roll or suspended.⁶ Alternatively the Council could

decide not to adopt the recommendation made.⁷ This is echoed in the Attorneys Act,⁸ which states that a local law society may inquire into any alleged unethical or unprofessional conduct of an attorney.⁹

The General Council of the Bar of South Africa has Uniform Rules of Conduct that advocates are expected to adhere to. In the event that they face an ethical problem, they are to approach the Bar Council, a senior advocate or a member of the Bar Council for assistance.¹⁰ The rules cover the various duties of an advocate as well as the general conduct that is expected of them. This includes pupils and new advocates introducing themselves to every other member of the Bar.¹¹ It provides for fellow counsel making complaints relating to the misconduct of other members, but specifically states that this extends only as far as professional conduct.¹² The personal conduct of the advocate does not factor into the rules.¹³

A study conducted by the Professional Provident Society Insurance Company revealed a declining confidence level by South African legal professionals in their own profession. Of the legal professionals surveyed, there was only a 52% confidence in the courts' competence and in the administration of justice.¹⁴ One of the main points made was the growing lack of concern for ethics amongst professionals as they strive to make a living. It has been described as 'the proverbial elephant in the boardroom'.¹⁵ A push is being made for stronger ethical practices with the view to benefitting the economy as a whole, according to spokespersons of the Law Society of South Africa. They also stated that legal practitioners are aware of the problem and are uneasy about it, leading to the push for more stringent rules.¹⁶

The Proposed Changes

The much debated Legal Practice Bill¹⁷ proposes a 'super regulatory' body in the form of the South African Legal Practice Council. All advocates and attorneys would fall under the jurisdiction of the Council.¹⁸ Amongst the objectives of the bill is the desire to uphold the good name of profession and ensure that it is increasingly unified, responsible and autonomous.¹⁹

More importantly for the purposes of this essay is the focus on agreeing upon, putting into place and upholding regulations on ethical and professional conduct.²⁰ This will be enforced by a Code of Conduct.²¹ This code must be published and made available to the public. It will contain the standards by which legal practitioners are expected to conduct themselves and failure to do so would amount to misconduct.²² The Council will be responsible for establishing disciplinary bodies and putting measures in place for the investigation of complaints.²³ It will also conduct disciplinary

hearings which may be taken on review to the Legal Services Ombuds²⁴ or taken on appeal to an appeal tribunal.²⁵ Notwithstanding any of these provisions, the High Court would still have power in matters concerning the conduct of professionals.²⁶ Furthermore any relief sought based on misconduct may be obtained directly from the High Court.²⁷

The idea of an overarching body of ethical rules is not a new one. An example can be found in Australia. The Australian Law Council developed the Australian Solicitors Conduct Rules (ASCR) in an attempt to unify the rules of the profession in each State. The aim is to create a more unified legal profession across Australia that is bound by the same ethical considerations and obligations to the court, the client and fellow practitioners.²⁸ It must be noted that the ASCR is not a code - rather it is an aid to practitioners of what is expected of them ethically. It should be consulted together with the common law and with due regard for justice.²⁹ Currently only two states, (Queensland and South Australia) have adopted the rules.³⁰ There are 43 clauses in the ASCR. They are arranged under topics ranging from the essential duties of a solicitor to relations with clients, relations with other solicitors, relations with other people, litigation and advocacy, and law practice

management.³¹ The rules are clear and straightforward and give no general guidance beyond what is expected of a practitioner. The most important duty is set out in Rule 3 which states that the solicitor's primary duty is to the court. Where another duty conflicts with this, the duty to the court will always prevail.³² Other key ethical duties include the need to be fit and proper,³³ to act in the best interests of the client and to prevent making concessions to honesty.³⁴ The rules relating to advocacy and litigation are very similar to the Barristers' Rules to ensure uniformity.³⁵ Breaching the rules laid down in the ASCR may amount to professional misconduct or unsatisfactory professional misconduct and this can be taken up by the relevant regulatory body in the State. However, third parties may not bring an action based on the ACLR.³⁶

The argument for an overarching body of ethical rules is strong. With the South African profession already under attack for poor ethical standards, a disparate system can be easily confusing and can result in a further decline in confidence. Ethical rules need to be easily available for the public to consult in order for them to ascertain what conduct is acceptable and what is not. Having to read through many different sets of rules will not assist in achieving this.

1. University of Cape Town 'Professional Qualifications' <http://www.law.uct.ac.za/about/lawinSA/> (accessed 21 August 2013). The Admissions of Advocates Act 74 of 1964 as well as the Attorneys Act 53 of 1979 provide more information relating to the admission requirements of advocates and attorneys respectively.
2. Law Society of South Africa 'The Attorneys' Admission Examination (2013 Issue)' <http://www.lssa.org.za/upload/ADMISSION%20EXAM%20SYLLABUS%202013.pdf>; General Council of the Bar of South Africa 'National Bar Examination Board' <http://www.sabar.co.za/law-journals/2003/april/2003-april-vol016-no1-pp07-08.pdf> (accessed 21 August 2013).
3. The Law Society of the Cape of Good Hope Rules: GG 5255/76.
4. Rule 14.
5. Rule 15.
6. Rule 15.12.1. This is also found in s 22 of The Attorneys Act.
7. Rule 15.12.2.
8. Act 53 of 1979.
9. S 71.
10. The General Council of the Bar of South Africa 'Uniform Rules of Professional Ethics' <http://www.sabar.co.za/rules-of-ethics.html> (accessed 21 August 2012).
11. Rule 1.3.
12. Rule 1.6.
13. Rule 1.5.
14. Professional Provident Society Insurance Company 'South African Legal Professional Survey - Results' (2013) <https://www.pps.co.za/portal/docs/South%20African%20legal%20professional%20survey%20-%20results.pdf> (accessed 21 August 2013).
15. Bizcommunity.com 'Survey finds declining confidence of SA attorneys in their own profession' (2013) <http://www.bizcommunity.com/Article/196/546/88604.html> (accessed 22 August 2013).
16. *Ibid.*
17. B20 - 2012.
18. S 4.
19. S 5.
20. S 5 (g).
21. S 36.
22. S 36.
23. S 37- 40.
24. S 41.
25. S 42.
26. S 45 (1).
27. S 45 (2).
28. ASCR Table of Contents.
29. Rule 3.
30. Rule 5.
31. Rule 4.
32. Rules 17 - 29.
33. Rule 2.
34. The Law Society of South Australia 'Australian Solicitors Conduct Rules' http://www.lawsocietysa.asn.au/PDF/rules_of_professional_conduct.pdf (accessed 14 August 2013).
35. The Law Society of South Australia 'Australian Solicitors Conduct Rules' 2.
36. The Law Society of South Australia 'Australian Solicitors' Conduct Rules' http://www.lawsocietysa.asn.au/Other/ProfStand_Australian_Solicitor_Conduct_Rules.asp (accessed on 15 August 2013).

The meaning of ‘Handing Over’ of the bride in a customary marriage

a comment on three recent judgments of the Superior Courts

Professor Richman Mqoke



The legal requirements of a valid customary marriage are laid down in s3 of the Recognition of Customary Marriages Act¹ as follows:

1. The spouses must be above the age of 18 years; and
2. both must consent to be married to each other under customary law; and
3. the marriage must be negotiated and entered into or celebrated in accordance with customary law.

In the recent unreported judgment of the Supreme Court of Appeal in *Ngwenyana v Manyelane*² Ndita AJA states:

‘The Act does not specify the requirements for the celebration of a customary marriage. In this way, the legislature purposefully defers to the living customary law. Put differently, this requirement is fulfilled when the customary law celebrations are generally in accordance with the customs applicable in those particular circumstances. But once the three requirements have been fulfilled, a customary marriage, whether monogamous or polygamous, comes into existence.’³

In section 1(1) of the Act a customary marriage is defined as a marriage concluded in accordance with customary law. In the recent judgment of the Constitutional Court in *Mayelane v Ngwenyama*⁴ Zondo J said:

‘whenever it is sought to establish what the customary law position is on a certain issue in the context of

the Recognition Act, it must be established what “the customs and usages traditionally observed among” the relevant group of the indigenous African peoples are which “form part of the culture of” that group of people.⁵

This background is important in considering the decisions of the recent cases to be commented on in this note. The three judgments are *Fanti v Boto*;⁶ *Ndlovu v Mokoena*⁷ and *Motsoatsoa v Roro*.⁸

The Fanti Case

In *Fanti*, the applicant was a widower who applied for a declaratory order that he was entitled to bury his deceased wife and an interdict prohibiting his mother-in-law from burying the deceased. The court had to be satisfied as to whether the requirements for a valid customary marriage were established. The court heard evidence to the effect that R3000 and two bottles of brandy were paid as *imvula mlomo*. The term means ‘mouth opener’ that is - payment made to show that the parties were ready to begin serious discussions on *lobola* - but these discussions never materialised. There was also evidence that *tsiki*⁹ ceremony was observed by the applicant’s group. The court was not satisfied that all the requirements for a valid customary marriage were established. The court referred to the absence of the ‘handing over’ of the bride by her group (family) to the husband’s group (family). The application was therefore dismissed with costs. This meant that the widower was deprived of the right to bury his deceased wife in accordance with his ‘customs and traditions’. The court did not even refer to the requirements laid down in the Recognition Act. The court explained the handing over with reference to the traditional wedding which takes place where there is a bridal party (*uduli*)¹⁰ from the bride’s family.

The Ndlovu Case

The second case which concerned two registered customary marriages which were both registered after the death of the husband. One of the two women discovered, for the first time, when she went to claim the deceased husband’s pension that there was another woman in the deceased’s life. She then applied for an order declaring the first marriage null and void. Although there was conflicting evidence as to whether the deceased had two wives or not, the court was not satisfied about the existence of the first marriage and the emphasis was on the absence of the requirement of handing over as was stated in the *Fanti* case. The decision meant that the other woman who had two children from the deceased was excluded from the deceased’s estate.

The Motsoatsoa Case

In the third case the applicant approached the court for an order on the following terms:

1. declaring that a customary marriage existed between the applicant and the late Tandile Roro; alternatively
2. declaring the third respondent (Department of Home affairs) be directed to register the customary marriage

between the applicant and the deceased in terms of s 4 (7) of the Recognition Act.

The application was brought against the deceased’s parents (first and second respondents) and the Minister of Home Affairs (third respondent). The first and second respondents opposed the application while the Minister indicated that he would abide by the decision of the court.

From the facts it appears the applicant and the deceased were lovers and had stayed together at a house bought by the deceased at Kempton Park. The deceased had introduced the applicant to his parents and had informed them of his intention to marry her. On 10 August 2008 the deceased sent emissaries to the applicant’s parents to negotiate *lobola* and an amount of R 18000 was agreed upon. The deceased made a part payment of R 5000 before he died in 2009. The applicant approached the third respondent to have the customary marriage registered posthumously. She did not succeed hence the application for a declaratory order. The application was dismissed on the ground that the crucial requirement of the handing over of the bride was absent. Again the *Fanti* case was relied on.

In para 19 at 329 the court explained handing over as meaning ‘*go gorosa ngwetsi* (Tswana)/ *ukusiwa ko makoti e mzini e hamba noduli*’ (Xhosa). This translation is not strictly accurate as the verb *ukwendisa* when used in some parts of the Eastern Cape refers to the practice of bringing furniture and other marriage gifts from the bride’s family. The practice does not always coincide with the actual wedding when there is a bridal party that takes place where a girl and the young man had eloped (*begcagcile*) or after the practice of *ukuthwala* (abduction of a girl for the purpose of marriage).

Matlapeng AJ explained the ritual of coaching the newly weds (*ukuyala*) as being part of as the handing over of the bride. The notion of ‘*ukuyala*’ which the learned judge interpreted to mean ‘coaching’ includes counselling both the bride and groom by the elders of the family.

When the parties have eloped there is usually no wedding that takes place but the newlyweds would observe *utsiki* ceremony in order to signify that a customary marriage has been celebrated in accordance with customary law.

All three cases overlooked the judgment of the Native Appeal Court in *Sila v Masuku*¹¹ where the court described a customary marriage as a process which entailed the following three stages:

‘(1) The first stage affecting the attitude of the parties involves visits, and the exchange of social courtesies all designed to establish concord between the groups, culminating in the consent of the groups to the proposed marriage.

(2) Then follows stage two when the extent of *lobolo* is arranged and the cattle and the woman are exchanged. This is the important moment in so far as the legal aspect is concerned and is the contract proper of the ‘marriage.’ It is frequently accompanied by other social and religious ceremonies but as between the groups, that is the contracting parties, this stage completes the transaction.¹²

(3) The third stage involves the bride personally and not the groups as contractors. It is necessary for her to leave the ancestral kraal (homestead) formally, to which end a sacrifice is offered and a feast is held, the ancestors being involved and the gall of the sacrifice being sprinkled over the bride who is adorned with the bladder symbolically...'

In a nutshell the three decisions failed to separate the legal from the religious aspects of a customary marriage. The court in each case failed to indicate the traditional community to which the parties belonged and whether a customary marriage in each case was in terms of customs

and traditions of the communities concerned. This is what was emphasised by Zondo J in the *Mayelane* case supra.

All three judgments did not address s 39(2) of the Constitution in the sense of ensuring the relevant rule of customary law was in harmony with the Constitution.

The courts failed to distinguish the ways in which a customary marriage may be celebrated amongst the Xhosa speaking communities, namely the observance of the rituals of *ukutyisa amasi*¹³ (serving of cow's milk) and *utsiki*¹⁴ (the slaughter of a sheep following the elopement of the newlyweds).

<p>1. Act 120 of 1998, which came into effect on 15 November 2000.</p> <p>2. 2012 (4) SA 527 (SCA).</p> <p>3. Para 23.</p> <p>4. 2013 (4) SA 415 (CC).</p> <p>5. Para 97.</p> <p>6. 2008 (5) SA 405 (C).</p> <p>7. 2009 (5) 400 (GNP).</p> <p>8. [2011] 2 All SA 324 (GSJ).</p> <p>9. <i>Utsika</i> refers to the sheep that is slaughtered after a girl had been brought to the future husband's household. At this ceremony the lady is given a new name by which she will be called at her household. She is also given a new dress code which indicates that she is a married woman.</p> <p>10. This means a bridal party that accompanies a bride to her new home.</p> <p>11. 1937 NAC (N&T) 121.</p>	<p>12. In an unreported judgment of the Witwatersrand High Court in <i>Maluleke v The Minister of Home Affairs</i> [2008] ZAGPHC 129 dealing with s3(1) of the Recognition Act Tshiqi J stated that <i>lobolo</i> negotiations and the payment of <i>lobolo</i> seem to be the fundamental stage in the conclusion of a customary marriage. According to Tshiqi J this negotiation and payment is crucial in signifying an intention to marry and consequentially indicate that the parties plan to advance beyond mere cohabitation. 'Once it is clear that negotiations have taken place the next enquiry, applying the Act, is whether there are any factors that show that the marriage was "entered into" or "celebrated".'</p> <p>13. This is the ceremony which is narrated in <i>Masukus</i> case (supra) and is performed after a traditional African wedding known as <i>uduli</i>. See Van Tromp <i>Xhosa Law of Persons</i> (1947) at 54-58.</p> <p>14. <i>Utsika</i> is fully explained in the <i>Fanti</i> case. Elopement is one of the accepted forms of <i>ukuthwala</i>.</p>
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The DNA Bill

Tayla Waterworth

a leap forward in combatting crime?

Until recently, the only legislation that could be said to deal with DNA samples as criminal evidence was Chapter 3 of the Criminal Procedure Act.¹ However, at the time that the Criminal Procedure Act was passed, DNA profiling had not developed to the extent that it could be used to identify suspects in a criminal matter. Because of this, new legislation is needed to regulate closely the acquisition and storage of DNA evidence and samples in criminal matters.

The Criminal Law (Forensic Procedures) Amendment Bill B09-2013, known colloquially as 'the DNA Bill', aims to reduce drastically the crime levels in South Africa by tackling the problem of recidivism. Recidivism, which refers to the act of repeating an offence,² is believed to be a major component of

South African crime rates. Research has shown that the average house robber has committed over 100 crimes by the time he is arrested, and that one in three robbers has committed murder.³ According to Advocate Jock McConnachie, the majority of criminals convicted in the High Courts have extensive criminal records, and one can often see a progression from minor crimes to more violent offences.⁴ If implemented correctly, the DNA Bill may use traces of DNA at a crime scene to provide an investigative lead where there are no suspects.⁵

Support for the promulgation of the DNA Bill stems from an initiative started by the DNA Project, a non-profit organisation founded by Vanessa Lynch.⁶ This organisation believes that the expanded use of DNA evidence in criminal matters, combined with a comprehensive database of DNA profiles of

convicted criminal offenders, could help to reduce crime levels in South Africa drastically.⁷ Once the Bill is passed, the National DNA database will be used as a comparative tool: DNA evidence found at a crime scene may be compared to the stored profiles, allowing forensic laboratories to determine whether the crime could have been committed by a previous offender.⁸ The DNA Bill will also make it mandatory to collect DNA evidence at crime scenes, as well as from convicted offenders and arrested suspects.

As with most new legislation, concerns regarding civil rights violations and effective implementation plans have arisen. The storage of one's DNA, for example, is worrisome to some, as one would not want one's personal information – such as hereditary susceptibility to diseases – to fall into the wrong hands.

According to Dr Carolyn Hancock, a geneticist involved in the DNA Project, these concerns are unfounded. A DNA profile stored on the database will consist of a short, unique sequence of letters and numbers.⁹ While this sequence can be used to identify the person in question, it does not contain any personal information except the person's gender. The DNA sample itself will be destroyed once the profile has been saved to the database, preventing the personal information present in the sample from being used for nefarious purposes.¹⁰

Unfortunately, the Bill is not without its critics. A report in the *Sunday Argus*¹¹ listed several occurrences where police forces showed a lack of proficiency by misplacing or damaging DNA evidence. Forensic expert David Klatzow is also sceptical, stating that 'we're not even getting the baby basics right...'¹² and indicating that he does not believe South African forensics to be as advanced as it has been claimed.¹³ Parliament has also accepted that Information

Technology support for the Bill is an important concern for the portfolio committee to consider.¹⁴

It does seem, however, that the critics are in the minority. The SAPS Forensic Services Laboratories have stated that it will be prepared to implement the Bill when it is passed, and has submitted an implementation plan to the portfolio committee which is currently considering the Bill.¹⁵ Those resources that may still need development, such as the electronic delivery of reports regarding DNA matches to police officers, will be included in the implementation plan.¹⁶ Dr Hancock refers to the implementation plan also pointing out that 'no one wants to pass legislation that cannot be effectively implemented' and that the technology and skill of our forensic laboratories is 'in line with the best in the world.'¹⁷

Legal practitioner Advocate McConnachie also supports the Bill. He points out that a lack of DNA evidence will not necessarily exculpate a suspect, but having such evidence does add significant weight to a case. He believes that the general public interest is paramount, adding: 'We have come a long way in terms of protecting victims' rights.'¹⁸

With rapid global advances in technology, accurately identifying criminals via their DNA is no longer restricted to the world of CSI; it has become a reality. If the DNA Bill is adopted, it could make a drastic difference to the burgeoning South African crime rates by keeping repeat offenders behind bars. A few swabs of saliva could be enough to prevent thousands of crimes and help those who have been wronged to achieve justice. The Criminal Procedure Act is no longer sufficient on its own; it's time to move into the future.

The Bill is currently under consideration by the Portfolio Committee for Police, and it is hoped that it will be adopted by 6 August 2013.¹⁹

1. Act 51 of 1977.
2. G Gooch and M Williams 'A Dictionary of Law Enforcement' (2007) *Oxford Reference Online* <http://www.oxfordreference.com/view/10.1093/acref/9780192807021.001.0001/acref-9780192807021-e-2591?rkey=XX0Czn&result=1> (accessed 23 July 2013).
3. C Hancock, personal correspondence via email (July 2013); Dr R Zinn, UNISA School of Criminal Justice (June 2009).
4. J McConnachie, personal correspondence (23 July 2013).
5. C Hancock, personal correspondence via email (July 2013).
6. 'Founders Story' *The DNA Project* <http://dnaproject.co.za/about-us/founders> (accessed 23 July 2013).
7. 'What we do' *The DNA Project* <http://dnaproject.co.za/about-us/what-we-do> (accessed 23 July 2013); C Hancock, personal correspondence via email (July 2013).
8. 'DNA Profiling' *The DNA Project* <http://dnaproject.co.za/dna-project/dna-database> (accessed 23 July 2013).
9. C Hancock, personal correspondence via email (July 2013).
10. C Hancock, personal correspondence via email (July 2013).
11. 'SA police "clueless in forensics"' *Sunday Argus* 17 March 2013 http://dnaproject.co.za/new_dna/wp-content/uploads/2009/08/clueless-sa-police.pdf (accessed 24 July 2013).
12. 'SA police "clueless in forensics"' *Sunday Argus* 17 March 2013 http://dnaproject.co.za/new_dna/wp-content/uploads/2009/08/clueless-sa-police.pdf (accessed 24 July 2013).
13. 'Is SA ready for DNA legislation?' eNCA 5 July 2013 <http://www.enca.com/south-africa/ready-dna-legislation> (accessed 24 July 2013).
14. Unknown 'Police Committee concludes hearings on DNA Bill' (13 June 2013) *South African Government Information* <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=37341&tid=110246> (accessed 24 July 2013).
15. 'Is SA ready for DNA legislation?' eNCA 5 July 2013 <http://www.enca.com/south-africa/ready-dna-legislation> (accessed 24 July 2013).
16. C Hancock, personal correspondence via email (July 2013).
17. C Hancock, personal correspondence via email (July 2013).
18. J McConnachie, personal correspondence (23 July 2013).
19. C Hancock, personal correspondence via email (July 2013).

SHARE REPURCHASES AND WAIVING

the Independent Expert's Report

Gary Felthun and Shannon Neill



In terms of Section 48(8)(b) of the Companies Act 71 of 2008, a decision by the board of a company to determine that the company may acquire a number of its own shares is subject to the requirements of section 114 of the Act if, alone or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares. As such, in the event that a company wishes to implement a repurchase of more than 5% of any class of its issued share capital, such repurchase will be subject to section 114 of the Act.

Section 114 of the Act requires the company to retain the services of an independent expert to prepare a report to its board and cause the report to be distributed to all of its securities holders. The report in this regard is required to be fairly detailed and the preparation thereof is both time consuming and expensive (especially in the context of mining companies). As a result, consideration needs to be given to whether this requirement may effectively be waived in law prior to the implementation of such a repurchase.

The general rule in South African law as to whether rights or other entitlements that have accrued by virtue of the statutory imposition of a condition may be waived is that such a waiver is permitted, provided that it is consistent with public policy and the condition in question has not been imposed for the benefit of the public.¹

Therefore, the test as to whether the provisions of Section 114 may be waived is two-fold.

Firstly, it must be considered whether such provisions could also operate for the benefit of the public at large, including, on a strict interpretation, for the benefit of any parties other than the shareholders and directors of the company. The provisions of Section 114 require the distribution of the report contemplated therein to the board and all securities holders of the company in question and as such, it is clear that the Section operates for the benefit of such parties.

However, an argument could also be raised that the provisions of Section 114 may also operate for the benefit of creditors of the company, in the sense that the independent expert's report is likely to set out a situation where an inflated price is being considered, which would ultimately prejudice the interests of creditors. However, section 46(1)(b) of the Act requires the application of appropriate solvency and liquidity tests in the context of a repurchase and therefore it would seem likely that it is these provisions which constitute a protection for creditors, rather than the provisions of Section 114. On the basis of the foregoing, there is therefore a strong argument to be made that the provisions of Section 114 operate only for the benefit of the board of directors of the company (as it does assist them in exercising their fiduciary duties as to whether they should recommend a transaction) and the shareholders (who ultimately benefit from or suffer the commercial consequences of a transaction), being the parties who shall waive the provisions thereof, and not for the creditors or the public at large, and as such, the waiver will not be prevented on this basis.

Secondly, it must be considered whether any public policy considerations

would dictate against the provisions of Section 114 being capable of waiver. The primary objective of the provisions of Section 114 in the context of a repurchase would be to ensure that the company does not overpay in respect of the shares without at least the shareholders and the board of directors being aware thereof. The independent expert's report is therefore a mechanism to give the shareholders and the board of directors comfort as to price. As such, there would be an argument to be made that if shareholders and directors were simply able to waive this requirement, the result would be that it would be possible for a company to do a 'bad deal' without necessarily being aware thereof.

In many instances, the waiver of these provisions may be contrary to public policy, as the shareholders or board of directors of the company in question may not be sufficiently well-versed in understanding what a fair price would be in the circumstances without obtaining an independent expert's report. However, there is an argument that in certain unique circumstances, a waiver of the independent expert's report would not be against public policy, such as in the context of mining companies where the shareholders and directors of the company are all individuals or corporations who have vast experience in mining transactions and an appreciation of what an appropriate price is for a stake in a mining company.

However, in the event it should be decided to waive the provisions of Section 114, it is recommended that the shareholders and boards of directors who undertake such

waivers are fully briefed in respect of the rights which they are waiving as well as their rights in terms of Sections 115 and 164 of the Act (a copy of which would have been included in the independent expert's report). This would strengthen the argument that the interests of the shareholders and board of directors were not prejudiced by such waiver, as they waived the provisions of section 114 in full knowledge of their rights in terms thereof as well as the additional rights that they still retain.

For any company intending to repurchase more than 5% of any class of its issued share capital, it is always recommended that a cautious approach is adopted and an independent expert's report is obtained as it is difficult to suggest with legal certainty that a waiver in this regard will be good in law. However, in very specific circumstances, where there is an overriding need to waive the provisions of Section 114 (for example, as a result of timing and/or costs) and the shareholders and board of the company are able to, in their opinion, demonstrate reasons it would be appropriate to waive the independent expert's report based on what is set out above, they would have an argument that it is possible in law. However, before making the decision to waive the provisions of Section 114, the shareholders and directors must understand the risk in relation thereto, as in the event that a court finds that they were not entitled in law to waive such provisions, there is a very real possibility that a court would find the repurchase to be void.

1. LM du Plessis 'Statute Law and Interpretation' in WA Joubert (Founding ed) *LAWSA* Vol 25(1) 2 ed (2011) at 366.

THE PRECAUTIONARY PRINCIPLE

Sarah Macqueen



The Precautionary Principle refers to the proposition that, when an activity is potentially harmful to human health or the environment, precautionary measures should be taken even if the exact causes and effects of potential harm are not fully scientifically established.¹ Principle 15 of the Rio Declaration contains the most widely relied on conceptualisation of the Precautionary Principle:

'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'²

Although the Principle has been widely accepted as a norm in international environmental law, its development and application have not been certain or uniform.³

The Precautionary Principle is an inherent concept within the framework of sustainable development.⁴ It emerged as an environmental concept in the 1980s in response to the lack of scientific certainty regarding the potential impacts of harmful environmental practices.⁵ The lack of definitive scientific was resulting in a 'paralysis of uncertainty'⁶ and being used as an excuse to continue with potentially harmful environmental practices.⁷ The Precautionary Principle recognises that 'For too long, humankind has acted in the short-term interests of progress and profit rather than the long-term health and welfare of the planet.'⁸

The Rio Declaration marks the high point of the international development of the Precautionary Principle and was, it has been argued, the result of the establishment of the Precautionary Principle as a part of international customary law.⁹ The Rio Declaration was adopted by

representatives from over 175 countries and, while the provisions of the Declaration did not represent a legally binding contract, all parties were required to implement the principles therein.¹⁰

The International Law Association in the New Delhi Declaration recognised the Precautionary Principle as one of the fundamental tenets of Sustainable Development.¹¹ This can be seen as a vitally important development in the implementation of the Precautionary Principle on an international level as sustainable development is regarded as being the fundamental premise upon which international environmental law is based.¹² With the Precautionary Principle being recognised as one of the seminal aspects of sustainable development, its use and application both domestically and internationally should improve.

The basic tenet of the Principle, common to all of its many incarnations, is the idea that it is in our interests (from both a financial and an environmental perspective) to prevent serious environmental degradation rather than attempting to repair damage which has already been done.¹³ Essentially, it is better to err on the side of caution, especially as we are dealing with intrinsically valuable resources which cannot always be replaced or returned to their original state.

In many other jurisdictions, the Precautionary Principle is not explicitly laid down in legislation, resulting in it often being overlooked or not applied.¹⁴ Section 24 of the Constitution of the Republic of South Africa, 1996 contains a justiciable environmental clause which provides the basis for environmental law in the Republic.¹⁵ NEMA gives effect to the rights contained in section 24 and proves to be a welcome exception to the general rule in international jurisprudence, explicitly laying down the Precautionary Principle as a component part of the principle of sustainable development under s2(4)(a).

Section 2(4)(a)(vii) requires 'that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.' The principles set out in s2 of NEMA 'apply throughout the Republic to the actions of all organs of state that may significantly affect then environment.' In this way, the Precautionary Principle must be read into all decisions and actions of state organs which will have an environmental effect. This has made the Precautionary Principle an enforceable principle under national legislation – this will require South African legislators and decision makers to utilise the Precautionary Principle when considering the potential environmental impacts of their decisions.

One of the most explicit indicators that the Precautionary Principle is indeed a vital component of South African environmental law is the recognition of the Principle as important and applicable by the Constitutional Court in the

*Fuel Retailers of Southern Africa*¹⁶ judgment. In the majority judgment, Ngcobo J stated that:

'The precautionary principle required the authorities to insist on adequate precautionary measures to safeguard against the contamination of underground water. This principle is applicable where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development.'¹⁷

The *Fuel Retailers* case looked at the way in which environmental authorities made decisions concerning the granting of permission for the establishment of a filling station in Mpumalanga.¹⁸ The majority judgment was highly critical about the manner in which the environmental authorities had conducted themselves, finding that they had failed to follow the correct procedures under NEMA and had not had adequate regard to the potentially serious environmental impacts a filling station could have.¹⁹ In light of the authority's obligation to follow the Precautionary Principle in their assessment of the situation, the court

found that what was required was a thorough investigation of the possible impacts and detrimental effects of the filling station before granting permission for its construction.²⁰ The Precautionary Principle has therefore been found to be applicable and enforceable by the highest court in the land.

The Precautionary Principle has clearly been shown to be a widely used and relied on principle of international environmental law. The Precautionary Principle is also a vital component of South African environmental law. Its recognition by the Constitutional Court points to the courts being willing to hold parties accountable under the Principle, notwithstanding the definitional problems discussed above. The Constitutional Court applying the principle is hopefully an indication that state departments and relevant role players are becoming more aware of their obligations under this Principle. As South Africa is a country rich in natural resources, it is hoped that the application of the Precautionary Principle in our environmental dealings will help prevent our natural heritage from irreparable damage.

1. Jonathan H. Adler 'More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol' (2000) 35 *Texas International Law Journal* 173 at 194.
2. Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Agenda Item 21, at 10 U.N. Doc. A/CONF.151/5/Rev.1 (1992).
3. Giandomenico Majone 'What Price Safety? The Precautionary Principle and its Policy Implications' (2002) 40 *JCMS* 89 at 94.
4. David A Wirth 'The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa' (1995) 29 *Georgia Law Review* 599 at 634.
5. James E Hickey, Jr. and Vern R Walker 'Refining the Precautionary Principle in International Environmental Law' (1994-1995) 14 *Virginia Environmental Law Journal* 423 at 425.
6. Owen McIntyre and Thomas Mosedale 'The Precautionary Principle as a Norm of Customary International Law' (1997) 9 *Journal of Environmental Law* 221 at 221.
7. James Cameron and Juli Abouchar 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) XVI *Boston College International & Comparative Law Review* 1 at 2.
8. *Ibid.*
9. Kenneth R Foster, Paolo Vecchia and Michael H Repacholi 'Risk Management: Science and the Precautionary Principle' (2000) 288 *Science* 979 at 981.
10. Jeffrey D Kovar 'A Short Guide to the Rio Declaration' (1993) 19 *Colorado Journal of International Environmental Law and Policy* 119 at 119.
11. New Delhi Declaration of Principles of International Law Relating to Sustainable Development, 2 April 2002. UN Doc. A/CONF.199/8, 9 August 2002.
12. Michelle Barnard 'The Role of International Sustainable Development Law Principles in Enabling Effective Renewable Energy Policy – A South African Perspective' (2012) 15 *Potchefstroom Electronic Law Journal* 207 at 211.
13. Poul Harremoës et al *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings* (2002) 4.
14. Backes and Verschuuren 'The Precautionary Principle in International' 44.
15. Iain Curry and Johan de Waal *The Bill of Rights Handbook* 5 ed (2009) 522.
16. *Fuel Retailers of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) para 81.
17. Para 98.
18. Para 1.
19. Para 105.
20. Para 99.

GIVING IT HORNS

A legal vantage point of the rhino-poaching pandemic

Michelle du Toit



The law is a prominent tool for change. This is particularly evident in our country and thus social issues demand attention from the law. Such an issue is that of the rhino poaching pandemic that is devastating our country's environment. The African black rhino, *Diceros bicornis*, is internationally recognised as critically endangered and illegal poaching has caused the population to plummet greatly.¹ Although our legislation does impose penalties, restrictions and methods to control hunting, the poaching of rhino has increased exponentially over the last five years.² Perhaps the enforcement of the law currently in place is ineffective or perhaps something needs to be implemented in order to prevent poaching and illegal trade, rather than just penalising and prosecuting when, and if, they are caught. To address this it is worth looking at other African countries such as Kenya, Democratic Republic of Congo, Botswana and Tanzania, to see not only what their law says but also how it is enforced and how effective it is.

The Constitution of the Republic of South Africa requires that national and provincial governments have the concurrent function of legislative jurisdiction in terms of the conservation and management of wildlife. The legislation currently in place is the National Environmental Management: Biodiversity Act (NEMBA).³ NEMBA imposes restrictions on hunting by means of species, areas and methods. Furthermore it places bans on

activities such as the hunting, selling and transferring of threatened or protected animals without a permit. Currently the penalty for breaches of the law regarding black rhino is:

'1. A fine, not exceeding the amount prescribed in the Adjustment of Fines Act⁴, or not exceeding 3x the commercial value of the specimen in question, whichever is the greater amount, or

2. imprisonment not exceeding 5 years, or

3. both such fine and imprisonment.'⁵

Although there are plans in place to increase the rhino population, there is no legislation specifically aimed at preventing poaching and given that 488 rhino have been poached this year alone, the threat of these penalties may be to no avail.⁶ The Threatened or Protected Species Regulations (ToPS), under NEMBA, requires a permit to be issued for a person wishing to hunt, kill, remove parts, import or export and sell black rhino or any parts of it. Another applicable aspect of the law is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁷ under which all commercial trading of rhino products are banned. Despite these legislative efforts, policies and regulations, the poaching numbers continue to increase.⁸

Other countries have managed somewhat to combat the poaching pandemic by the implementation of laws, regulations and security measures to limit poaching and trafficking. Botswana has strict hunting regulations and the hunting of protected game, such as the rhino, is prohibited unless for public safety and other exceptions.⁹ If an offence contravenes the protection of rhino, the applicable penalties are high; US\$12,750 and up to 15 years' imprisonment. Similarly all offences involving rhino are consequential to strict and severe penalties such as P100000 in fines as well as imprisonment for up to 10 years.¹⁰

The Democratic Republic of the Congo also has strict hunting regulations and furthermore has criminalised offences related to poaching such as hunting at night or shooting an animal from an aircraft or vehicle.¹¹ These regulations are monitored strictly and effectively through law enforcement.¹² Legislation¹³ provides that a government agency may be created for wildlife enforcement. This consists of eco-guards, directors and regional chiefs who act as police officers.¹⁴ As long as the enforcement of these regulations remains effective, poaching of protected animals in the DRC can be prevented to a certain extent.

Kenya has established an institution responsible for law enforcement concerning wildlife - the Kenya Wildlife Service (KWS).¹⁵ The KWS has full prosecutorial powers and has

within it a security division to investigate wildlife crimes specifically.¹⁶ Like the DRC, Kenya has strict hunting regulations that are enforced by the KWS. These regulations and institutions are controlled by the Wildlife Conservation and Management Act (WCMA).¹⁷ The security division has spheres covering protection, development, investigation and intelligence. Each division has a role to combat poaching, survey and monitor, investigate and prosecute.¹⁸ Powers awarded to these officers as well as other law enforcement officers include those of inspection, detention, arrest and search and seizure.¹⁹ The act also imposes strict penalties on those who contravene the law, and where concerning rhino, an offender can be imprisoned for up to 10 years and/or a fine up to \$460 when a trophy such as a rhino horn is involved.²⁰

The wildlife of Tanzania, like South Africa, is central to its tourism industry.²¹ As this sector contributes up to 17% of Tanzania's gross domestic product, it is crucial that the wildlife be protected.²² This protection is governed by the Wild Conservation Act,²³ the National Parks Act²⁴ and the Forest Resources Management and Conservation Act.²⁵ These Acts impose regulations and penalties with regard to poaching offences.

Like South Africa, Tanzania has a large number of National Parks.²⁶ This makes for an easy comparison between responses to poaching.

By looking at the way in which other African countries are combating the war against poaching, it is evident that South Africa is not leading the troops. Why is South Africa so susceptible to poaching? A total of 142 alleged poachers have been arrested since the beginning of the year yet the number of incidents continues to grow.²⁷ Perhaps South Africa needs to take the lead and combine the effective mechanisms that our African neighbours have in place in

order for us to compete in this battle.

A page can be taken from all the countries by making the penalties higher as the Department of Environmental Affairs is seeking to do. It is seeking the amendment of the penalty clause to read;

- '1. A fine, not exceeding R10 million;
2. Imprisonment, not exceeding 10 years, or
3. Both such fine and imprisonment.'²⁸

Again, this is merely imposing stricter penalties, not putting into effect enforcement or prevention methods.

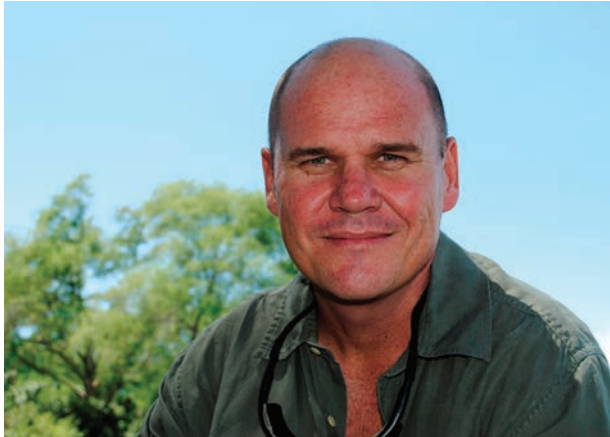
South Africa could look at the establishment of a special unit for wildlife protection such as in Kenya. Perhaps stricter hunting regulations are needed, as in the DRC. South Africa, like Tanzania, relies on our wildlife, it is part of our country's heritage and therefore it seems logical to implement anything possible that could preserve this. Our rhino numbers are dwindling and action needs to be taken to prevent poaching. The world is looking to South Africa to take the lead and in a country where the law has been able to resolve many problems surely it can also be used to implement change in protecting the rhino.

The comparative law establishes that South Africa will be supported in its ventures against poaching. There is already a basis of effective methods of prevention or regulation in place throughout Africa and this should be used in combination with our resources and international interest to prevent the irreversible consequences of rhino poaching. NEMBA's plans to increase the rhino population and implement stricter penalties will be to no avail if poaching statistics continue to rise. The problem is calling out to the law and whilst it is in our hands something should be done before the poachers manage a 'coup on the face of our ten rand note'.

1. Schedule 49 of 2013.
2. Media statement, 18 July 2013, Department of Environmental affairs.
3. Act 10 of 2004.
4. Act 101 of 1991.
5. National Environmental Management: Biodiversity Act 10 of 2004.
6. Media statement, 18 July 2013, Department of Environmental affairs.
7. National Environmental Management: Biodiversity Act 10 of 2004.
8. Media statement, 18 July 2013, Department of Environmental affairs.
9. Wildlife Conservation and National Parks Act 2 of 1992.
10. Wildlife Conservation and National Parks Act 2 of 1992.
11. Law No. 82-002, art. 28.
12. D Figueroa (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 25.
13. The Hunting Law of 1982.
14. D Figueroa (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 25.
15. Wildlife (Conservation and Management) Act of 1976.
16. H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 30.
17. Act of 1976.
18. H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 34.
19. H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 34.
20. Wildlife (Conservation and Management) Act of 1976 sch 56.
21. H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 50.
22. H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 50.
23. Wildlife Conservation Act 5 of 2009.
24. VII Laws of Tanzania: Principal Legislation, Cap.282.
25. Act 10 of 1996.
26. H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 52.
27. Media statement, 18 July 2013, Department of Environmental affairs.
28. National Environmental Management: Biodiversity Act 10 of 2004.

IS ENOUGH BEING DONE TO STOP RHINOCEROS AND ELEPHANT POACHING AND ARE THE MEASURES IN PLACE EFFECTIVE?

Rory Young



Unfortunately for the rhinoceros and the elephant, the fight to save them from eventual extinction could not really be described as a war as such, despite the popularity of doing so. In reality it is a hodgepodge of police action, customs seizures, educational campaigns and governmental policies, by a multitude of both public and private organizations in many different countries.

The laws and penalties in place to combat poaching itself and the smuggling and selling of rhino horn and ivory all vary according to country. Just as importantly, the will and ability to enforce these laws also differs tremendously.

The endangered species supply chain is broken down into three main parts. These are the poaching itself, the trafficking and the selling to market.

The approach to stopping the actual poaching itself differs greatly. In Kenya for example, under newly proposed laws the new penalty for poaching an elephant is a fine of up to 1million Kenyan shillings or US\$11 000. In Zimbabwe a poacher could be shot if he doesn't surrender immediately upon contact being made with him. He will then face up to 7 years in prison (typically 5). Zimbabwe does however, want to increase the penalty to eleven years imprisonment.

Ivory is currently selling at around \$3 000 per kilo on the black market whilst rhino horn sells for up to \$100 000 per kilo on the black market. Fines therefore are hardly a deterrent with such great rewards on offer. The Kenya Wildlife Service Rangers are often demoralized to discover that they have apprehended the same poachers again within a few days of previously apprehending them because they have been released after paying a fine of a few hundred dollars or less.

The vast majority of poaching teams access areas across borders. It is well known that most of the poachers entering the Kruger National Park do so from Mozambique. Similarly, Zambian poachers cross into Chobe in Botswana and to the many different wildlife areas along the Zambezi basin in Zimbabwe. This cross-border issue creates an immediate problem for intelligence teams as to gather intelligence and run teams of informers inevitably means doing so across an international boundary. Therefore, they are obliged to either do so secretly, effectively spying and operating illegally in their neighbour's territory, or are obliged to attempt to gain their co-operation. Many countries place good relations with their neighbours higher on their list of priorities than the prevention of poaching. In addition, once a poacher crosses an international boundary there is no way of continuing the chase and the poaching groups are effectively in the clear once they cross into home territory.

Next there are the traffickers. These are of the same ilk as drugs, weapons or blood diamond smugglers. However, there are far fewer controls in place and less will in place to end the illegal trade in endangered species. Therefore they are much more easily able to collude with the authorities in the countries they are shipping to. Like any illicit product, it is relatively easy to get rhino horn or elephant tusk out of the country. Controls and checks are usually at ports of entry not exit and as a result the methods, systems and infrastructure are not in place to stop exports.

The big problem again is the lack of will to get tough with the countries where the ivory is being exported to. The customs departments are just not motivated to arrest and charge traffickers.

Lastly we need to look at the consumers of these products. The biggest consumer by far China and the economic boom there has given rise to the current crisis. Kenya believes this is the key to the whole problem and focuses on encouraging the continuation of the Conference on the International Trade in Endangered Species (CITES) ban on the trade in ivory and rhino horn rather than on going after the poachers. This is because Kenya believes that limiting the supply will cause demand to dramatically reduce or dry up altogether and thus the market will collapse and there will be no incentive to poach.

The argument against this approach is that the demand will always be there and that the supply of legal ivory should be carefully controlled and funds generated should be funnelled into wildlife management. Unfortunately, the demand has sky-rocketed in spite of the ban.

According to the Elephant Database, Zimbabwe, which in favour of limited legal trade, has 'definite' population of up to 47 366 elephants. Kenya on the other hand has a 'definite' population of 26 427 elephants. Whilst opening up the trade will probably not affect the poaching in Zimbabwe, it almost certainly will affect the Kenyan population because it is entirely dependent on limiting the trade.

Whether supporting this is right or wrong, it will be impossible for the Kenya group to convince the others to change this until Kenya itself shows that they are really doing what needs to be done to fight the poaching itself.

So who is right? Is it Zimbabwe with its harsh penalties and shoot-to-kill policy, or Kenya with its focus on banning the trade and reducing demand?

Many believe that it should be a combination of both. Get tough on the poacher and traffickers and also makes ivory untouchable, taboo, illegal or dangerous. However, that can only happen if the governments of those buying it get serious. One thing is absolutely certain, there needs to be international pressure and action against the traffickers and the nations that allow them to ply their trade.

It is possible to win this war. We've been here before. I

mentioned that Zimbabwe has 47 000 elephants. Well, in 1900 there were less than 500 left! Furthermore, the white rhino was reintroduced into Zimbabwe from South Africa after being wiped out completely and the black rhino was reintroduced into South Africa from Zimbabwe after being wiped out. Recently there has also been wonderful success in the battle to end the practice of eating shark fin soup in China. The actress Bai Ling and other celebrities championed the cause and the younger generations in China responded. There has been a dramatic decline in the shark fin trade. We need to learn from this. The demand for these products can be decreased if the will to fight it is there.

A combination of international co-operation, political will, tough penalties and aggressive enforcement are all needed desperately to save these species. Without them these animals face a very uncertain future.

Editors' Note: In a development to the Zimbabwean shoot to kill policy, a ranger has been sentenced to death after shooting an unarmed poacher. More can be read about this at the following link:

<http://www.newzimbabwe.com/news-12499Game+ranger+to+hang+over+murder/news.aspx>

TOWARD A LEARNING ENVIRONMENT FOR THE 21ST CENTURY

Vicky Heideman



The world has changed since the 19th Century. Naturally. It has been over 100 years and a lot has happened since then. But has the learning environment changed as much as it should have? Perhaps not. We now have the technology to use PowerPoint, to post our lecture slides online, and even podcast our lectures, but is all of this progressive enough? Our current system of giving lectures itself originated in times like the 19th Century and before, where access to

information was harder to come by. The job of the lecturer was to impart this precious information to the students in his class, and the task of the student was furiously to scribble as much of it down as he could. But the world has changed since then. Why would you scribble down notes frantically when you could just buy the text book? Or download the

slides? Or when you could just Google it? Or use the lovely PRIMO CrossSearch or HeinOnline from the comfort of your room in res/digs to find one of the many journal articles that has been written about the subject you wish to find out about? Are we as lecturers not redundant, and clinging onto our jobs as they have always been rather than accepting a reality where our purpose in lecturing is simply to produce a reading list?

But let us consider the current situation: we still give lectures, almost all of us using digital slides, and very few of us podcasting our lectures. Some students still furiously write down information (some on laptops) while others are happy enough to simply 'learn the slides'. My impression is that the perception among law students currently is that an ability to memorise cases and insert them at appropriate moments is the skill that will get you the first class pass – not critical thinking and problem solving as we might propound in our course outlines. The 'problem' about which you need to 'think critically' is, after all, based on a case which is somewhere on the reading list which the Honourable Justice has already solved for you, is it not? So the trick in doing well in LLB is to read everything on the reading list and remember what the judge said was the right answer. Unless there were two judges

who said differently. Then you read the journal article on the reading list and you agree with the academic who chose one over the other, especially if that academic happens to be your lecturer.

So what is the point of coming to lectures? Maybe the lecturer will give you exam hints, and tell you what on the reading list you may leave out. Maybe the lecturer will give you a lovely case summary so you don't have to go and find and photocopy/print the case after all. But in the meantime, what have you learned? Or let me qualify this: what have you learned that will remain with you beyond the day of the exam?

I like to think that in lectures and through assignments and tests/exams we as lecturers are immersing our students in the language of the law, and that some basic facts and cases will always remain imbedded in their consciousness. I would also like to think that the skills of critical thinking and problem solving will be enhanced with every assessment task, and with the exposure to the lines of legal reasoning contained in the carefully selected cases and readings required for each course. But this might not always be the case.

John Biggs, a leading academic who has written quite a bit about teaching and learning, identified two main approaches to learning: the deep and the surface approaches.¹ As the name implies, the deep approach is where a student fully engages with the course material with a view to constructing a clear and lasting understanding of the knowledge on offer in the course. This student reads the material in advance, thinks about it, and comes to lectures with a well-prepared question in mind, the answer to which could be the key-stone in the arch of knowledge that she is constructing. On the other hand, the surface approach is where a student simply skims the surface of the knowledge on offer with a view to just passing the course, perhaps for a greater purpose of

finding employment after her degree. Since Biggs, other writers have included a third category between the surface and deep approaches, namely the strategic approach. As the name suggests, this approach to learning is epitomised by the adage 'work smart, not hard'. The student who adopts this approach is on the warpath toward the highest possible outcome (read marks) for the least amount of effort. This is the student who might be willing to engage deeply with the substance of the course, but only if it is coming up in exams, and only as deeply as is necessary to convince the marker that she has done the work required for a good mark.

I have a hunch that the surface approach to learning would generally be insufficient for a student to pass undergrad well enough to make it into LLB. However, I think there are very few students who feel that they have the time in LLB to attempt a deep approach to learning. Thus, my impression is that the vast majority of LLB student adopt a strategic approach to learning, and that this approach can prevent that student from gaining the knowledge and skills we might like them to gain by the time they graduate.

What can we do, then, to try to move away from the idea that the process of learning the law is simply that of receiving knowledge in a 19th Century fashion, toward a situation where more students feel compelled to take a deep approach to learning rather than a strategic one? I don't believe the answer lies in the technology of slides and podcasts. Somehow we as lecturers need to think of more creative ways to use the old fashioned format of the lecture to compel students to engage: be it through inspiration, promotion of discussion and allowing of dissenting viewpoints, or through more compulsory written tasks. And perhaps an awareness by students of these different approaches to learning will in itself inspire them to take a deeper approach to the study of law.

1. A full explanation of these approaches can be found in J Biggs 'What the Student Does: teaching for enhanced learning' (1999) 18 (1) *Higher Education Research & Development* 57.

The Unwritten Rules of Passing at University

Rutendo Matsikiwa

LAs first years YOU DO NOT HAVE AN OPINION! The famous words constantly thrown at you as you start your university career, particularly as a law student. Three years down the line all of your essay questions start with 'critically analyze' or 'criticize the above.' Without realizing it, three years on you're assumed to be capable of forming an opinion which, of course, must be backed up by a credible source.

In an article in the Mail & Guardian by a student entitled 'How could I have failed Varsity?'¹ a student from one of the country's top universities writes about the unknown rules we're expected to follow in order to succeed at university. Such success is expected despite the pressure of academics, and peer - related activities such as drinking, partying and missing lectures. These pressures are not made easy by the 'sink or swim attitude' some lecturers adopt. This particular student learnt the hard way that high school methods of study, are generally insufficient and the 80s distinction cruise in high school sinks very fast if you don't adapt.

Such high school methods include surface learning where one is satisfied with the notion that '50 % is a pass and 51 % means you've been neglecting your friends'. The driving force for this type of learner is to obtain a qualification which will allow him or her to get a basic entry-level job. What is key in this instance is the ability to absorb more information than humanly possible and hope to remember it all in a two- hour exam. - a process more commonly known as 'cramming'.

As law students the one thing you learn to perfect is your cramming ability. Everybody has a different way of doing it, whether it's pacing up and down waving your hands around like a deranged person or hunched up in a corner chewing your nails reciting all the acronyms intended to come to your rescue. As the disclaimer on Wiki How To Do Anything states, 'While cramming probably won't get you an "A," it can definitely save you from an "F"'.² In the end we can all testify to not remembering half of what we've learnt through cramming. How then does that benefit us as students stepping out into the world intending to practice what we have learnt?

A shocking but realistic discovery made not too long after getting into university is that high-quality private schooling does not guarantee success at university. Many students can testify to matriculating with distinctions but going on to pass the first semester at university with thirds or being put on academic probation. What is it that makes university so much harder? Is it in fact harder or do we need to figure out

those unknown rules and adopt a more mature approach to learning? One of the most important rules we need to know is how to handle the freedom which comes with being at university and being able to resist procrastination and peer pressure.

I once overheard a girl saying that 'finishing your degree in three years is like going to the club and leaving at 10pm'. Her friends agreed with her and confirmed that it is acceptable to finish your degree a year after the required time. Unfortunate situations do arise which lead to that: but in the absence of this, effort should be put into completing one's degree in the specified time frame.

The sad reality is that many people do not finish their degrees, either at all, or at the same time as the peers they started out with. This never really hits home until some friends don't come back at the end of first year. When the class keeps getting smaller each year, and in third year when some don't have the same zeal about graduation as you do, these words ring true. The only thing which sets apart those who graduate from those who do not is the discipline and understanding of the principle of doing what needs to be done to succeed. This is another unknown rule which on face value seems to be obvious. It is unknown in the sense that there is no one way to do what needs to be done which will guarantee everyone success. For example, people study differently and engage in class differently, therefore one cannot adopt the learning techniques of their friends or the person sitting next to them. Each person needs to study in a way that is best for them and promises the best results.

Success at university is guaranteed through moving away from surface learning and actually engaging with one's work. Techniques such as reading before the lecture are paramount. Doing extra reading makes a student noticeable and produces distinctions. It is true that acquiring a degree is not easy, but with hard work and diligence it is not impossible. Time should, of course, be given to having a social life, but that should not be to the hindrance of one's degree.

Law as a subject of study was created by people who came up with opinions that could be criticized. Such criticism stems from having a point of view with some authority to back it up. It is up to us to build on the opinions laid down by those who came before us. In doing so, we will be able to preserve knowledge and re-invent it to best suit the changing times. Without students who are willing to learn the unspoken rules of the university and who will put in the time and effort to engage with their work, this will be impossible.

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1. Nomusa Mthethwa <http://mg.co.za/article/2013-01-11-how-could-i-have-failed-varsity> .
 2. <http://www.wikihow.com/Cram-for-a-Test>.

CONFUSION IN THE CLASSROOM ENVIRONMENT

Prof Graham Glover
[with the unwitting assistance of others – no names mentioned!]



There is a famous idiom that goes ‘there is many a slip betwixt the cup and the lip’. In the academic context, experience suggests that this should be reformulated to say ‘there is many a slip betwixt mouth and ear’. All students will know well how hard it can be to concentrate on what a lecturer is saying on a hot February day in the Graham Room when the builders next door are making a racket with drills and angle-grinders. The conceptual misunderstandings that result can occasionally be quite bizarre, and usually expose themselves when we academics discover these pearls of ‘wisdom’ in the exam scripts at the end of each semester. I thought it might be entertaining to share just a small selection of these howlers with you – collected over many years – in this year’s *In Camera*. They might look crazy, but I can assure you they are all transcribed as students stated them in their scripts.

How important is legal theory, exactly?

John Austin, author of *The Province of Jurisprudence Determined*, was the most influential writer in the English speaking world in the 19th and 20th centuries.

The outbreak of the First World War can be attributed to the impossibility of the performance of the contract in *Peters Flamman & Co v Kokstad Municipality*.

The legal philosophers known as ‘American realists’ were terribly radical and the American government, fearing a revolution, tried to contain them.

The notion of rights (most famously described in the work of the theorist Wesley Newcombe Hohfeld) has generated a myriad of debates, plus many a bar debate and brawl.

Some basic misconceptions

Action proceedings are always fairer than application proceedings. If a plaintiff [sic] proceeds by way of application proceedings, it means that the defendant [sic] is given no chance whatsoever to plead his case, and is left in the dark.

The element of legality is foundational to the consummation of a binding contract in SA law.

During the Middle Ages Roman law was preserved for future generations by the work of the Glossators and Conveyancers.

The Local Authorities Act is irrelevant to this problem, as legislation cannot overrule the common law.

After the introduction of the supreme Constitution, the CC and the SCA acquired certain rights. These included making and breaking law.

The law on this issue is to do with latent defects in the law of sale. This is a form of constitutional law.

In South African law, damages for breach of contract are typically dealt with by the delict courts, rather than in the contract courts.

A person's right to freedom of expression is limited by another's right to defamation.

The National Credit Act aims to assist creditors who are in debt.

Innuendos and personifications

A tenancy at will lasts as long as the lessor and the lessee pleasure each other.

A fit and proper person is someone who is able to acknowledge the amorous responsibility that comes with the practice of law.

It appears that this contract was virtuous – ie it was done for free.

The judiciary is a sect in government.

In *S v Labuschagne*, a fire engine was sued for going through a red traffic light.

The applicants were both very poor women who owed certain debts, and their houses were at the risk of being executed.

Some unusual definitions and explanations

Murder is the intention to harm another person to the point of death and beyond.

When a person enters into a suretyship contract, they sign up for collateral damage.

In *Ebrahim's* case it was decided that words should not be stretched to mean something else when in fact they mean another thing. (Interpret that!)

An example of a contractual assumption is where two parties get married on the assumption that the woman is fertile. If it is discovered that she is not, the contract of marriage is null and void.

A condition is a provision where performance is qualified by reference to a certain future event; certain in the sense that we do not know if it will happen.

Civil disobedience would, for example, be an act like disobeying a law which compels you to join the army, but because of your state of consciousness you cannot join.

Q: After reading the set of facts, explain what sort of creditor X would be upon insolvency.

A: X is however not a secured creditor though the situation may seem as such, though this is partially true. X is not a preferent creditor either. X is not entirely an ordinary creditor either. (That was the whole answer!)

The last word: I can't remember ... and I'll admit it fully in writing!

However, in a recent decision of the SCA, *Janse van Rensburg v Grieve Trust*, one of the more traditional SCA judges, who firmly believes in following Roman-Dutch law (I can't remember his name for the life of me at the moment and I don't want to be a clot and name the wrong name but I think it's probably Van Heerden or Van den Heever ... probably wrong anyway and it's a totally different name – I'll definitely remember after the exam is over and curse my leaky memory – if I see you in the Faculty I'll tell you so you know I did actually know and I've just forgotten momentarily.)

CHINA'S LEGAL ENVIRONMENT: A CREATURE *SUI GENERIS*

Haruperi Mumbengegwi

Being in the People's Republic of China is not just a cultural shock, but for the law student/lawyer, one can describe it as a legal shock. It is a legal environment that is a world away from the South African legal system. The Chinese legal system is still in its infancy compared to most legal systems. This is due to a number of factors- the most obvious being that the legal system only fully came into existence in 1978. This article outlines the nuances of two things that heavily affect the legal environment, the judiciary and social relationships, known as *guanxi*. Lastly, a brief case-study of how the local environment has affected international investment will be given.

After the creation of the People's Republic of China in 1949, legal concepts and laws were borrowed from the Soviet Union in order to establish a socialist dispensation. However, the Cultural Revolution of 1966-1976 caused instability in the legal system. During this period, laws that had been enacted and institutions which had been created were invalidated. No further laws were enacted for over 10 years. Legal infrastructure, including law schools, research institutes, and courts were disbanded. Only after the death of Mao Zedong in 1978 was there some revival of the Chinese legal fraternity. Mainland China uses the civil- law system, whereas Hong Kong uses the common- law system.

The Judiciary

Within the Chinese legal system, the judiciary operates in a different fashion. In China, the judiciary is tightly bound to the state and this has vast implications for the independence of the judiciary. The Ministry of Justice and its organs have the authority to determine the size of the profession, admission, educational requirements, modes of organization, official fee schedules, and disciplinary proceedings amongst other things. The ostensible control of the Communist Party can also be seen in practices that require law firms to form Communist Party cells and senior lawyers to provide junior colleagues with ideological, as well as practical training, although this is becoming less stringent. This kind of control was apparent in 1999 when the lawyers' bureau of the Beijing Municipal Government, which oversees annual renewal of lawyers' licenses, instructed attorneys not to represent persons detained during the crack-down on the *Falungong*

movement (a religious group that was unpopular with the Communist Party).

Guanxi: To litigate is to use one's connections

The above statement refers to the use of social relationships known as '*guanxi*'. *Guanxi* can be described as the sense of social connections and relationships that are based implicitly (rather than explicitly) on mutual interest and benefit. This notion of *guanxi* is not limited to the legal fraternity. *Guanxi* is arguably functional to the Chinese worldview dating back to Confucianism; a philosophy that has shaped Chinese morality and subsequently its legal development. For practical reasons, one would choose to go to a lawyer who is known to have *guanxi*. Lawyers without *guanxi* will most likely face difficulty in setting up even the first interview without the support of the investigators of their case. *Guanxi* can be seen to be distinct from bribery as it does not involve a once off payment for a favour, it involves social visits and the building of a relationship.

The law in China is imbedded with cultural norms and social allegiances. These social and cultural factors have become topical, as they have disadvantaged foreign investors. This has led to criticism of *guanxi* and its impact on the rule of law. As China's legal system does not conform to the hegemonic western standards of the rule of law, it is generally agreed by legal scholars, domestic and foreign, that China's laws and legal system are not effective. Operating under the rule of law paradigm is argued to be way of leveling the playing field, which is used by international investors to harmonize legal systems. One of the first things one learns in law school in South Africa is the importance of legal certainty, whereas in China, it is the absence thereof.

Chinese views on Litigation: Wahaha and Danone

The importance placed on relationships has led to an aversion to legal recourse. Whilst a lawsuit is viewed as effective in gaining leverage and bringing the other party back to the negotiating table, this does not often apply in China. Chinese legal tradition strives for harmony over confrontation. This means that once you institute legal proceedings, it is an indication to the other party that negotiation and out of court discussion is no longer an option. There have been a number of high- profile cases where foreign parties have instituted legal proceedings against Chinese companies to their own detriment. The

locus classicus in showing the effect of foreign investors misunderstanding and underestimating Chinese legal culture is the *Wahaha-Danone* dispute.

Danone, the global dairy giant, entered an international joint venture with Wahaha, the Chinese dairy giant. Initially, Wahaha owned 49%, Danone 25.5%, and another Hong Kong based company owned 25.5%. Needless to say, Danone soon bought the additional 25.5% to gain a 51% holding which shocked Wahaha and was considered by the Chinese to be a 'takeover by stealth'. Wahaha was making unauthorised use of the joint venture's trademarks and setting up satellite companies, amongst other violations of the joint venture agreement. Danone swiftly instituted legal action, and this was sold to the Chinese public as an international company bullying a local gem. Moreover, the founder of Wahaha was viewed as a national hero. In other jurisdictions, public opinion is irrelevant to the legal process. This is not the case in China. Danone filed over 10 arbitrations and court actions in six jurisdictions to no effect. Wahaha filed for arbitration in China in 2007, where it was held by the

Hangzhou Arbitration Commission that China's Trademark Office had never approved the original transfer of the Wahaha trademark and that an exclusive license agreement for the trademark (meant to replace the original trademark transfer) had never been registered. Thus, ownership of the Wahaha trademark had never been transferred to the Joint Venture. This led to Danone pulling out of the Joint Venture. Both domestic and international scholars did not deem the decision to be legally sound. However, valuable lessons can be learnt from Danone's experience.¹

They say when in Rome do as the Romans do. This is certainly true when working in the Chinese legal environment. It forces one to debunk all understanding of how the law *should* work. Whether it is a state controlled judiciary, or the building of social connections, the Chinese legal system is certainly a creature *sui generis*. Given the growing interaction between China and Africa, most young lawyers are going to experience these nuances at some point in the future. My only advice to you is keep calm, and start building your *guanxi* network!

1. [Editors Note]: For more information refer to P Zhang and C Van Deusen 'French Danone And Chinese Wahaha: Yet Another Example Of An Unsuccessful International Joint Venture' (2010) 4 International Business: Research, Teaching and Practice 82.

THE ROAD AHEAD FOR FOREIGN GRADUATES

An account of one former Rhodent's Journey

Doreen Gapare



A considerable number of Rhodes Final Year law students are foreign nationals. As such, on their return to their various countries they will have to face conversion exams and attempt to establish themselves in a jurisdiction that now appears 'foreign' given the 4-5 years they have spent studying in South Africa. This article is based on the experience of Ms Doreen Gapare, a former Rhodes student who is currently Partner at Scanlen and Holderness Zimbabwe. The article is an account of her journey from Rhodes graduate to where she is currently. It is my hope that it will enlighten and inspire many foreign students as we approach 2014.

Doreen is a Rhodes University Graduate who joined Scanlen and Holderness Zimbabwe in 2008 after spending 2 years in the Attorney General's Office as a Public Prosecutor. Scanlen and Holderness is one Zimbabwe's oldest law firms and is widely regarded as one of the premier law firms in Zimbabwe, employing nineteen specialised lawyers (including ten partners). Doreen has particular interest in corporate and commercial law, natural resources and energy law and development, conveyancing and criminal litigation. She is currently working in the firm's litigation department and heads the licensing department and the firm's marketing committee. She is also a member of the Board of Examiners (Ethics) for the Council for Legal Education in Zimbabwe. - Lisa Ndhlovu

When I graduated from Rhodes University I came back home as I had tried my best and failed to get articles in South Africa. I had done some research on the private firms I was

interested in and sent my applications to firms in Harare – being a Rhodes graduate I was only interested in the largest firms that could afford to give me the skills for private practise. I applied to Scanlen and Holderness and many others, but at that time they indicated they were scaling down, or that I needed to be registered as a legal practitioner. To be registered one needed to have written and passed the conversion exams – so getting a position as a ‘professional assistant or associate’ was quite difficult at first. I decided to apply for a position the Attorney General’s office and was appointed prosecutor for the State in the Criminal Division of the AG’s Office in April 2005. The main reason I joined the civil service was because they did not require that you be a registered legal practitioner to be employed as state counsel. It was an opportunity to gain valuable work experience while studying for conversions.

The conversion exams are administered by the Council for Legal Education through the Judicial Services Commission. The process is as follows;

1. You contact the council through the Judicial Services Commission at their offices at the High Court of Zimbabwe or visit their website www.jsc.org.zw for information and enquiries.
 - 1.1 Typically, if you are from a South African University, you will receive exemptions for Civil Procedure, Criminal Procedure, Common Law 1 and Common Law 2.
 - 1.2 You will register for; Statute Law, Law of Evidence, Bookkeeping and Accounts for Legal Practitioners and Professional Ethics.
2. Once you graduate and are in possession of your degree certificate and transcript, you write to the Council, attaching your certificates and requesting that you be exempted and registered for the courses as indicated by the council. They will respond with indications as to your exemptions.
3. Exams are written twice a year, in May / June and October/ November. The Council will inform you, upon

request, when you should register and the cost per subject. Typically the registration closes a month before the first day of the exams.

4. The council will provide you with the syllabi for each subject, references and past exam papers on registration. You are required to be resourceful and it is best to find and make use of different libraries and research facilities on Zimbabwean Law, especially case law. The Legal Resources Foundation and the AG’s office have extensive libraries. Law firms such as ours offer internships and you could make use of libraries at

such firms during your internship.

5. If you struggle in Accounting for Legal Practitioners (as I did) or in any other subject it is best to find a tutor.

I joined S&H before I was registered and only registered after I had joined them. I cannot say I have faced any challenges because I have a South African degree – the Rhodes University degree is internationally recognised so it is ‘useful’ wherever you are. Zimbabwean law has its origins in Roman- Dutch law so there are no major differences between it and South African law. Furthermore, some of our statutes are exact replicas of the South African statutes – our laws are very similar and you will find that in practice you will make reference to many South African authors and case authorities in your arguments because they apply here as well.

I have learnt that it is not where you study that gives you an added advantage. You will find that your degree equips you with the qualification and skills you need, but private practice is more than a degree or where you attained it. You can be successful in any environment regardless of where you studied.

The information contained herein is a summary of my experience many years ago. There may be some changes that are not specifically stated here and it is best to carry out your own research and approach the Judicial Services Commission and the Law Society of Zimbabwe; who are always willing to assist. Visit their website on www.lsz.org.zw

MOOT COMPETITION 2013

Lara von Wildenrath



The International Criminal Court came into existence through the signing of the Rome Statute by 6 signatories on 1 June 2002. There are currently 139 signatory countries and 122 that have ratified the Statute. This is indicative of the global commitment to combat crimes against humanity and punish those most responsible for these crimes. It is fitting that the International Criminal Court has its home in The Hague, a veritable centre for peace and justice which is home not only to the International Criminal Tribunal for the former Yugoslavia but also to the Peace Palace, the seat of the International Court of Justice.

What is perhaps more poignant is that the ICC is only a train ride away from Anne Frank's house, Anne Frank being one of the most famous victims of the Holocaust. The trial of the Nazis at Nuremberg sought to punish those most responsible for the atrocities committed during World War II and was a response to the world agreeing that such crimes should never happen again. Unfortunately, many more ad hoc tribunals have had to be created throughout the world in the following decades, including the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. The propensity of these tribunals led to the necessity of creating the International Criminal Court which has jurisdiction over countries that have signed the Rome Statute. Jurisdiction can also be extended to any crimes that are committed against nationals of the signatories of the Rome Statute, whatever the territory upon which the crime took place. One of the most controversial aspects of the jurisdiction of the ICC is that the UN Security Council may refer a situation to the Court even if the country in question has no link whatsoever to the jurisdiction of the court.

The International Criminal Law Network is an organisation that aims to promote the goals of the Rome Statute by creating the only English-language international trial court competition that is recognised by the International Criminal Court. Law students from all over the world are invited to participate in the competition which fosters a greater understanding of international criminal law and allows students to practice their skills as future lawyers in this field. The 6th Edition of the competition was held in 2013 and 36 universities participated. Each team consisted of 3 speakers and 2 researchers, as well as a coach.

The Rhodes University team, consisting of Sarah

Macqueen, Nada Kakaza, Nikki Moubray, Nicola Sulter and Lara von Wildenrath, seized the opportunity to participate in such a prestigious event. The competition posed a number of challenges: firstly, there needed to be extensive fundraising to make the trip to the Hague possible and secondly we had to produce three 10 000 word memorials setting out each case. This all had to be done while balancing our university course work and other activities. It was completely worth it as we set off on the journey to The Hague during the week of the 19th – 29th April for the experience of a life time.

Each team had to participate in three preliminary oral rounds. Each case was presented on behalf of one of the interested parties that would normally appear in a real court case at the ICC, namely the prosecution, defence and counsel for the victims. One of the primary aims of the International Criminal Court is to provide closure for the victims of crimes against humanity or war crimes. In this way, unlike any other criminal tribunal in the world, the ICC provides for the victims to have their own counsel so that their voices can be heard and so that they can participate in a more meaningful way than merely giving witness testimony.

Interspersed between the oral rounds, held at the Hague Campus of Leiden University, were visits to different tribunals in the area. On the first Monday of the competition, we had the opportunity to visit the International Criminal Court. We were given an honest and enlightening account of the difficulties faced in attempting to engage with the victims of these atrocities from a representative of the Victims' Unit. The talk highlighted the mammoth task of gathering victims' testimony in remote places all over the world and how difficult it is to provide an often foreign idea of justice to people who have had their homes and lives destroyed. We then had an opportunity to look in on the trial of Jean-Pierre Bemba from the situation in the Central African Republic. We then had to quickly make our back to Leiden University for the oral round that afternoon, where Rhodes represented the victims' counsel.

The next day, we visited the International Criminal Tribunal for the former Yugoslavia, which was an incredibly moving experience. The Tribunal was formed as a response to atrocities committed in the early 90's in the former Yugoslavia that involved widespread ethnic cleansing and genocide. The proceedings are reaching their end and currently those most responsible for the crimes in that region are being tried; we were lucky enough to see the trial of Karadzic who had been charged with the crime of genocide among others. He was in the unique position of defending himself and consequently we witnessed his own cross-examination of one of the witnesses. The International Criminal Tribunal of the former Yugoslavia is of great importance for international criminal law due to the mature stage of the proceedings - the jurisprudence has covered many of the issues now facing the International Criminal Court which in turn informs the decisions in that court, creating further certainty in international criminal law.

The Rhodes University team represented the prosecution

and defence in two subsequent oral rounds and although the trip to the Special Tribunal for Lebanon was cancelled, we were able to visit the Peace Palace which is a grand, stately building built by Andrew Carnegie to further global peace.

Throughout the rest of the week, the International Criminal Law Network organised a number of social events where students and professors of international law could meet and relax after a lot of hard work. At the end of the week, the final of the competition was held in the actual court room of the International Criminal Court with ICC judges presiding. Leiden University were the winners.

The competition itself revolved around a fictitious case which emphasised three issues that often face the International Criminal Court. The facts of the case involved a rebel group that had kidnapped civilians to make them 'bush wives', namely prisoners that are forced to perform a marital role for the soldiers of the rebel group. The national country of the rebel group was not a signatory of the Rome Statute but aspects of the crime in question were committed in a neighbouring country who was a signatory. The case culminated in the leader of the rebel group absolving himself of liability at a Truth and Reconciliation Commission which subsequently granted him amnesty for his actions.

The first issue that the teams were faced with was whether the International Criminal Court had jurisdiction to hear the case as the national country was not a signatory to the statute and that international treaties are not normally binding on third parties. The second issue went to the core of the purpose of the International Criminal Court. The court is entrusted with the task of trying those most responsible for the worst global atrocities, while observing the principle of complementarity which recognises the right of countries to conduct their own fair and impartial national proceedings to try their own criminals. Therefore, the second issue was whether the case was admissible before the court given that the rebel leader had been granted amnesty by a national Truth and Reconciliation Commission. The last issue concerned the necessity of observing legality in international criminal law which stipulates that a person cannot be tried for a crime that was not considered a crime at the time it was committed. Therefore, the question was whether forcing someone to be a 'bush wife' was a crime within the ambit of the Rome Statute and whether it was distinct from sexual slavery, which is explicitly listed as a crime in the Statute. These issues were incredibly difficult to resolve and needless to say led to much debate inside and outside of the court room.

The moot competition was certainly a life-changing experience for everyone involved. We had the opportunity to be exposed to the heart of a justice system that is relentlessly fighting for global peace while simultaneously providing closure for individuals that are the victims of the worst crimes in the world. The importance of the International Criminal Court is both awe-inspiring and humbling for young lawyers who will be key to shaping the future of international criminal law.

Paperwork – less paper, more work

Nokuzola Ndlovu



“Paperwork wouldn’t be so bad if it weren’t for all the paper. And the work.”

Darynda Jones

More than any other discipline, law is known for the copious amounts of reading, writing and drafting involved. We have thousands of bookshelves and libraries worth of legal papers! The world is rapidly moving towards using technology to transform the way we perform tasks and our discipline is no different. Law reports, legislation and academic journals are all increasingly becoming easily accessible online – the printing of these will soon become redundant and the library shelves will begin to gather dust.

The Internet is a marketplace. It enables producers of online legal products to market sell their product online. The benefit of this is two-fold: electronic copies of content are cheaper to produce and methods of production not involving paper are more environmentally friendly. The Internet also has a lot of potential for making legal knowledge accessible to lay people and encouraging participation by the public in the law-making process. According to a report released by the South African Network Society:

- 34% of adults in South Africa now use the Internet;
- Internet use has increased from 15% to 34% since 2008;
- Over 50% of adults in South Africa will be Internet users by 2014.¹

Most recently, the world has seen increased availability of downloadable applications that enhance the use of computers or mobile phones. Some are aimed at increasing productivity, perform practical functions and still others are just for fun. Below is my compilation of applications that can be used for work and play, as well as to help you to reduce your negative impact on your environment by saving paper.

Note-taking

Recommended: Evernote (www.evernote.com), Catch (www.catch.com), and One Note (Microsoft Office).

What I use them for: Taking class notes; making audio recordings; saving my ideas, to do lists; keeping meeting minutes; saving web pages.

Features:

Synching. most applications give you the option of creating a “Local Notebook” or a “Synchronized Notebook”. Local notebooks are stored on your computer like all the other documents you save to them. Synchronized notebooks are stored on the application server as well as your computer.

The benefit of creating a synchronized notebook is that when you create an account, you can access the notes from any device – as long as it can access the website of the application. This means that even if your computer is stolen or crashes, or should you lose it somewhere, you still have access to all your documents through the website.

Web-clippings. You never have to worry about trying to find pen and paper so you can quickly jot down the important information you found on a webpage or that important email. These applications can clip an entire page of a website for you to read later. It is quick and easy and can be done with one click of a button. Web-clippings can also still be accessed from your device when you are offline.

Everything in one place. This becomes important when you are working on a particular matter or project. You can create as many notebooks as you would like to and organise into different sections and mark them as you would a file. In effect, these note-taking applications create the file system for you, a system that you can edit, delete and access when you need to.

Drawback. Most application-makers offer a premium version and free version of the application. In most free versions, there is a limit placed on the amount of data that can be stored on one account and limited access to certain features. These would not seriously affect personal use but would affect someone using the application for say, business purposes

File storage:

Recommended: Dropbox (www.dropbox.com) and Google Drive (drive.google.com)

What I use them for: Storing important documents; creating and saving financial spreadsheets; photographs; sharing documents.

Features:

User-friendly. Both Dropbox and Google Drive are relatively easy to use - even for someone with basic knowledge of computers and Internet use. Dropbox provides instructions on how one can upload their documents from their computer to their server as well as guidelines on how it works.

Recovery from a crash. File storage apps are a great way to store what is most important to you, what you cannot afford to lose in the event of your computer crashing or being stolen. Every document you upload on to the server and save can be accessed and resaved onto another device.

Sharing is caring. A favourite feature of mine is that these apps facilitate collaboration. If you are working on a group project, you can give permission to your group members to view, download and/or edit a specific document by sharing a link with them through their email address.

Drawback. The storage capacity of these apps is quickly used up, particularly if one is mostly saving large files such as audio recordings and photographs. If you are looking to back your entire hard drive, opt for other crash recovery programs.

Humans have used paper for over 2000 years and no doubt, paper will be a part of our lives for many more years to come. But the landscape is changing as technology becomes a bigger part of everyday life. Take advantage of this and not only will you save time and money by being more organised but your friends and colleagues will think you are cool.

PAINTING THE TOWN... AND ALL THAT JAZZ!

Lee Crisp



As the sun set on the 14th September, the Rhodes law community primed and pressed as they got ready for a night that promised plenty of shimmying and shaking, and perhaps a Charleston thrown in the mix as well. It had been a night many had been looking forward to and the 'Roaring Twenties'- themed 2013 Rhodes Law Ball did not in any way disappoint.

Walking into the venue was almost akin to what it must have been like stepping in the doors of any underground jazz club in that age. The attendees of the Law Ball stepped into a room illuminated only by tiny lights standing in stark contrast to the dark, carefully draped fabric suspended from the sky. The Rhodes Law Society Committee succeeded in creating an authentic 1920s-esque environment through not only the décor and table settings, which were coloured by feathers, roses and a little bit of sparkle, but also by the smooth jazz vocals provided by songstress for the evening, Kay Mosiane. The stage had been set for an evening filled with glitz, glam and lifelong memories.

The attendees took their seats as the MC for the evening, Mmaphuti Morolong, welcomed all who were present and made a toast to the year that was. At this point, the three signed students of Norton Rose Fulbright, Maxine Smith, Mlungisi Khambule and I, took the stage to say a few words about the firm in appreciation its generous sponsorship of the evening. Without the support of Norton Rose Fulbright, it can almost certainly be said that the Law Ball would not by

any measure been as successful and well-attended as it was.

All in attendance were treated to some words of wisdom by the key-note speaker for the evening, the Honourable Mr Justice Johan Froneman. In his own brand of humour, his Lordship spoke on how students of the law have a duty to use the knowledge obtained at a fine tertiary institution such as Rhodes University not only to the betterment of oneself, but rather to building a better South Africa. There can be no doubt that many of the things said were taken to heart by those in the room who are standing at the door of their post-Rhodes lives, waiting to open up and see what lies in store for them. And when in the working world, this responsibility to the Nation should not be forgotten.

Once all the speeches were over for the evening, the dance floor was opened and this was where the real magic happened. After having partaken in the social lubricant which flowed in many a 1920s speakeasy, inhibitions were left at the door and in the dimly light room, and no-one was shy to show off their moves. Being so used to experiencing Law Faculty staff members in a more formal context, the letting loose and integration among staff and students alike made the night a special one. One member of staff even took it upon himself to take over the DJ decks in order to show the 'youngsters' what a real song and dance looked like, and so Dr Gustav Müller and his fiancé Tiana took to the floor to show everyone a thing or two when came to close-hold dancing.

The evening came to an end with a truly spectacular, awe-inspiring moment. The attendees descended to the Great Field, just outside the Union Club, where lanterns had been laid out ready to be lit up and let go into the dark night sky. The light of a single lantern was not in any way significant, but as more and more floated off high above the Field, the night sky was illuminated by these symbols of the hopes and wishes of those who had nurtured them before letting them go. This was said to be a reminder that so much more can be achieved as a group than can be achieved by one's individual efforts, something that should not be forgotten as many end their Rhodes journey at the end of this year. And in remembering the night that was and the challenges which lie ahead, one should remember the timeless words of F. Scott Fitzgerald in *The Great Gatsby* that 'So we beat on, boats against the current, borne back ceaselessly into the past'.

The Rhodes Law Society, the Faculty of Law and Norton Rose Fulbright are all thanked for their respective contributions in making the evening a 'Roaring' success.