



# *In Camera* 2014

20 YEARS OF DEMOCRACY ISSUE





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Special thanks to our sponsor for the support and guidance; the faculty administrative staff for efficiency and logistical support; and Prof Glover for his continued support. The editors would like to thank Thabile Vilakazi for the generous contribution of her skills in capturing the cover photograph for the In Camera magazine as well as Advocate Les Roberts, for taking the majority of our contributors photos.

# EDITORS' NOTE

*Lauren Spring and Loyiso Yako*



**2014 saw South Africans of all heritages celebrate two decades of democracy. Within these twenty years, our country has undergone a monumental transformation from a land that was once divided and ruled by oppression, to one which now basks in the diversity and freedom of her people.**

On 7 May, South Africans made their mark in the country's fifth non-racial democratic elections since 1994. There was an undeniable atmosphere of pride and patriotism as individuals showed off the modest ink marks on their thumbs, sparking trends on social networks and sharing pictures of their "thumb-fies".

However, South Africa is still in the infancy of its democracy. "Inherent" freedom and the bold promises of the Bill of Rights remain meaningless where rights are not proactively realised. Numerous pressing issues remain, long after the enactment of South Africa's supreme Constitution, which require the attention of our government and the legislature in bridging the vast gaps between the country's socio-economic classes. At the 20th celebration of Freedom Day, at the Union Buildings in Pretoria, President Jacob Zuma made promising reports that the government hopes to work together with stakeholders on programmes to aid further economic transformation, including social grants, employment initiatives, mandatory retirement savings and risk benefits for ordinary South Africans. It is vital that the government strives to fulfil its constitutional duties, as the concept of democracy is meaningless where there is little improvement in the material circumstances of the majority.

This year, *In Camera* decided to pay tribute to the 20th anniversary of South Africa's freedom within the pages of the publication itself. We were lucky to have received a diverse range of articles from both students and staff members, addressing topical issues central to the year of 2014. It is always refreshing for one to engage in the thoughts of students and faculty members outside of the classroom, where carte blanche is given in writing articles.

We would like to thank Professor Glover and Sarah Macqueen for their help and guidance in the conception of this year's edition. Despite their demanding schedules, they consistently provided us with advice and professional pointers — all without cracking the whip too hard! Secondly, recognition must be given to the fact that none of this would have been possible if it wasn't for our generous sponsors who were always co-operative and willing to contribute. Last, but certainly not least, we would like to extend a huge thank you to all who lent their creativity to the publication this year as we are aware of the valuable time that each article takes to submit.

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One often forgets how far our country has come in its quest for freedom and equality. We hope that you enjoy reading this edition of *In Camera*, and that you also take it as an opportunity to reflect on your perceptions about South Africa's democracy and what heritage signifies for you.

Sikhululekile. We are free!

Please note: The editors take full responsibility for any errors contained within this publication.



# RHODES LAW SOCIETY:

## REPORT 2014

*Meghan Eurelle*



**It has been nothing short of an eventful year for us all, so to begin I will give a rundown of what The Rhodes Law Society has done this year to add value to the Law Faculty and the student body.**

### **Events**

We kicked off the year by successfully holding the annual CV and interview workshop, as well as hosting the much anticipated annual Market Day in which we accommodated 18 of the top law firms in South Africa.

At the start of the third term we hosted “Dress to Get Fired”, a social function which saw students of all ages mingling and having a good time. Since it is highly probable that many of us will become colleagues in the future, the integration of the younger undergrads with the older LLB students was an aim of Law Society this year. We definitely believe this successful event was a huge step in the right direction of giving students of varying ages the

opportunity to start a networking relationship here at Rhodes.

In the last week of third term, a very successful AGM Spit-braai was sponsored by ENSAfrica; the candidates were all very strong and it was a tight race, however, congratulations are in order for the newly selected committee of 2015. Good luck guys! Towards the end of the third term, the society also collaborated with the Black Management Forum Society to host a public lecture by well renowned Advocate Vusi Pikoli. Khanyisa Mapipa from the Law Soc committee attended the Students for Law and Social Justice Conference in the Western Cape to network and gain ideas for expanding the Rhodes Law Society.

The greatest highlight on our social calendar was the annual Law Ball, graciously sponsored by Norton Rose Fulbright, which was hailed as the most successful Law Ball to date. This year the committee decided on a retro theme—“Saturday Night Fever”. The decor was all bright lights and disco balls, the food was marvellous and the groovy beats kept students, guest and staff alike, dancing until the early morning. We had a photobooth filled with fun props, as well as a singing duet of “Time of Our Life” by two final year students- Fadzayi Pedzisayi and Fundile Sangoni—while a tribute slideshow played filled with photos of the class of 2014. To this top off, the evening was graced by the presence of the Honourable Deputy Judge President of the Supreme Court of Appeal, Justice MS Navsa, as our guest speaker; as well as Judge Clive Plaskett and Advocate Wim Trengove. Having three top South African legal figures, as well as a record number of staff, share the evening, and some strawberry lips, with us was a fantastic way to celebrate the year.

This year, we started the now official “Moot Club”—a club aimed at teaching students of all ages the skills needed to stand up in court. We secured sponsorship of t-shirts for the club before the club even existed, but in August we held a very well supported workshop. Thanks must go to Oscar McGown-Withers, Chayse Kriel, BK Taoana, Adv Renaud and Ms Macqueen for sharing your knowledge and experience at this event.

I truly believe this concept will excel in future under the guidance of the newly-added committee member position. The society once again hosted the University of Venda's equivalent of our own society and we learnt a great deal through exchanging ideas with them. What stood out most from our discussions was how the University of Venda benefited from a law alumni database. As a result, this year Law Soc has started, and hopes to expand, its own Rhodes law alumni database; and we have added the duty of co-ordinating this onto the job description of the legal aid liaison committee member position.

### **Community engagement**

Another aim that I personally held for the Law Society of 2014 was to become more involved with community engagement. I am very proud to say that we have achieved this goal. The committee attended a career fair in Joza township last term to chat to over 1000 school children about studying law and to provide advice and guidance. This year was also the first year in which financial aid was offered to students who could not afford a law hoodie. Through this initiative, and with the help of sponsorship from Norton Rose Fulbright, Law Soc helped over 15 deserving students receive a law hoodie— with one student remarking that he was so grateful that he was never going to take it off, even in summer, and would wear it around his hometown proudly to show off to everybody that he studies law at Rhodes. In October we partnered up with our sister society, Legal Activism, as well as section 27, Galela Amanzi and various other Rhodes societies, to co-host 80 Joza Township children for a constitutional fun day, in which we paraded through the streets of Grahamstown and taught these kids about their legal rights, especially the section 9 right to equality, while having some fun.

### **Time to say goodbye**

My experience on the Law Society committee has undoubtedly been the one of greatest and most rewarding of my varsity career. I am so incredibly grateful for everything this year taught me, and for all those who stuck by my side and had my back continuously. This year has been a great success for the Law Society and my report would not be complete if I did not take this opportunity to personally thank those who made this possible.

Firstly, I would then like to thank the staff of the Law Faculty for always supporting us students and the Law Society through all endeavours. In particular, we would like to thank the one-in-a-million administrative team who we harass non-stop and would be lost without. Mrs Comly, Saronda and Lumka—your help in ensuring the daily activities of the Faculty run smoothly is instrumental and appreciated immensely. To Adv Niesing, we thank you for your advice and guidance and always being available when assistance is needed. To the students who put up with me constantly interrupting their classes with announcements— thank you for all your support of Law Soc over this past year. The ultimate function of Law Soc is to serve and represent the student body, and we would be nothing without you all!

A big thank you must be extended to our generous sponsors, most notably Norton Rose Fulbright and ENSAfrica, who have continuously contributed to numerous events and initiatives. Ms Lynsey Schonfeld and Ms Gillian Turner, we truly appreciate your patience, understanding, consideration and valuable support.

Finally, thank you and congratulations to my amazingly wonderful and special committee of 2014— Chelsey Smith (Legal Aid Liaison), Fadzayi Pedzisayi (Secretary), Khanyisa Mapipa (Public relations), Lauren Spring and Loyiso Yako (InCamera Editors), Tapiwa Nhari (Treasurer) and Robyn Pienaar (Vice-President); with special thanks to Cameron Cordell, Francesca Smith and BK Taoana who contributed invaluable to the Law Soc team. Thank you all for being remarkable individuals and an incredible bunch to work with, for laughing through the trying times, for always having each other's backs, for putting up with my panda pictures and for teaching me the true meaning of leadership and team work. We all know it has not been an easy, albeit rewarding, ride but your constant hard work and dedication is appreciated beyond words, as is your never wavering enthusiasm and constant concern with giving our members everything of the best.

### **To the stayers**

To all students who form a part of the Law Faculty, good luck. If there is one thing I can absolutely guarantee, it is that you will question your seemingly silly

choice of studying law at least once. However, I can absolutely also guarantee that all the stress, sleepless nights, coffee, time and hard work will be worth it!

To the penultimates, thank you for being such a pleasure to share the Saint Peter's campus with. Your time has almost come to move across the foyer, away from the horrible slanted moot room desks, and take your place in the Graham Room as the big kids of the faculty. We wish you luck for next year, lots of it, and am sure you will do the Faculty proud.

In the words of Justice Navsa, please remember to savour your varsity experience, and take the time "to be young, brave, brilliant and stupid".

### **To the leavers**

To the final years, the class of 2014: It has been an honour and a privilege to have shared this journey with you rippers, mare-cats, friends, homies, LLBabes, comrades and peers.

To Grace van Heeswijk, you are amazing and we appreciate all you did for our class over our time in LLB. From Barrat, to Eden Grove, to smelly GLT to the freezing cold Graham Room, chats at tea time and to the always-stuffy computer labs; it has been a long Rhode (pun intended) for us all but it is now our time to leave the moot complex behind and head into the big wide world. Whether your plan is to work, study further, travel or mooch off your parents for a while longer— I hope you do it with Rhodes gees and succeed at whatever you do. So, class of 2014, here is wishing you the best of luck, good health and happiness for the future; and when I hear of your success, I will know that it is well deserved. Oh, and please never forget to "stick it on your forehead".

**Meghan Eurelle**



# FACULTY REPORT: 2013 — 2014

*Dr Rosaan Krüger, with input from staff and students.*



## Introduction

The past year has been a successful year for the Faculty of Law, with endings, new beginnings and exciting events filling the calendar. Notably in terms of leadership changes, Prof Jonathan Campbell's term as Dean of the Faculty came to an end in June 2014 and I took over in July, the first woman in the 109 years of the study of law at Rhodes to take up the position.

I want to thank Prof Campbell on behalf of staff and students for his five and a half year of solid and successful leadership. I look forward to years of fruitful collaboration with staff, students, alumni and other stakeholders. In addition, we say a fond farewell to **Mr Gordon Barker** as he retires at the end of this year, having served the Faculty for 23 years. He will be sorely missed by staff and students alike.

**Prof Laurence Juma** took over his position as Deputy Dean of the Faculty in October this year.

In this short report, I hope to recall our past successes over the 2014 year as well as report in our continuous efforts to improve our teaching and learning, research and community engagement, thus aiming to fulfil our role as a key faculty within Rhodes University.

## Students, student news and activities

### Graduation and awards

On 11 April 2014, 84 students graduated with LLB degrees from the Faculty. A record ten of these students graduated with distinction (Lee Crisp; Maxine Smith; Tamsyn Harrison; Lara Von Wildenrath; Nadine Mather; Jarryd Mardon; AJ Malherbe; Tristan Glover; Peter Bosman and Sarah Macqueen). Two post-graduate students, both supervised by Prof Laurence Juma, graduated at the same ceremony. Thapelo Mohami (LLB, Lesotho) graduated with a LLM-degree for her thesis entitled: "The principle of complementarity: A critical analysis of article 17 of the Rome Statute from an African perspective." Ken Obura (LLM, Pretoria) was admitted to the PhD degree for his thesis entitled "Combating corruption while respecting human rights: A critical study of the non-conviction based assets recovery mechanism in Kenya and South Africa".

The Faculty celebrated graduation with our graduands, their partners and their parents at a lunchtime function held at the Faculty. At this celebration, 30 final year students (35% of our 84 LLB graduates) were awarded Dean's list certificates in recognition of academic achievement (attaining an average of at least 65% for all their final year courses). A number of individual prizes were also awarded at this function:

- ◇ **LexisNexis Book Prize** (Internal book prize for Moot winner in the Final Year): Tamsyn Harrison;
- ◇ **Judge Phillip Schock Prize** (Best final year LLB student): Tamsyn Harrison;

- ◇ **Juta Law Prize** (Best final year LLB student, based on results over penultimate and final year LLB): Lee Crisp
- ◇ **Brian Peckham Memorial Prize** (Best student in Environmental Law): Sarah Macqueen
- ◇ **Fasken Martineau Prize** (Best student in Competition Law): Maxine Smith
- ◇ **Mtshale and Sukha Prize:** (Best student in Legal Ethics and Professional Responsibility): Sarahanna Hassim
- ◇ **Spoor & Fisher Prize** (Best student in Intellectual Property (Patents & Copyright): Murray Taylor
- ◇ **Rob and Trish Midgley Prize** (Overall substantial contribution towards a holistic educational experience for law students at Rhodes): Courtney Cader
- ◇ **Tommy Date-Chong Award** (Greatest contribution to the Law Clinic in their penultimate and final years of student): Murray Taylor.

The candidates who obtained their degrees with distinction (listed above), received **Phatshoane Henney Incorporated medals** in recognition of their accomplishments.

#### LLB-intake 2014

81 students accepted offers into LLB this year, only 12 of whom registered for the four- or three-year LLB, thus indicating that about 85% of our law students continue to choose the 5 (and occasionally 6) year stream, entering the LLB only after completing an undergraduate degree.

#### Law Society

The student societies in the Faculty, namely the Law Society and the Legal Activism Society, successfully hosted a number of social and career-related events in 2014. I highlight only a few of these functions as the Society report appears elsewhere in this publication. Market Day 2014, organised by the Law Society (and supported by Ms Liezel Niesing) took place on 5 March. Adams & Adams, Norton Rose Fulbright, Bowman Gilfillan, ENS and Werksmans sponsored the various events through the day and evening. The day ended with a cocktail function on the beautiful St Peter's

lawns. Many students gave positive feedback regarding their interaction with the firms. Approximately 25 interviews were held, which were spread out over 5, 6 and 7 March.

The Law Ball, sponsored by **Norton Rose Fulbright**, was held on 19 September. Themed "Saturday Night Fever," the night was a success with students and staff partying the night away with guests Adv Wim Tregrove, Judge Clive Plasket, and the guest speaker for the evening, Supreme Court of Appeal Judge Mohamed Navsa. His message was simple but meaningful: contribute to the change in South Africa, and reflect on your roles as lawyers in South Africa today.

#### Legal Activism

This Society continues to go from strength-to-strength and is likely to reach 1800 or more people through its outreach programme this year. Under the leadership of Khanyisa Majokweni, the Society undertook voter education prior to the elections, and general human rights education throughout the year. This education culminated in Constitution Week in September where the society aimed to raise awareness around healthcare rights in particular. The society also distributed 200 copies of the Bill of Rights (in English, isiXhosa and Afrikaans), donated by Juta Publishers, with the aim of engaging with the community around their rights.

The week also included a fun day for children from a local shelter. Prof Jonathan Campbell and Prof Jobst Bodenstein provided facilitators' training to members of the society and involved the students in the Law Clinic's Street Law project. The Society further established working relationships with SECTION 27 and Students for Law and Social Justice during this year. This interaction resulted in a training workshop on healthcare rights conducted by SECTION 27 for students from Rhodes, Forth Hare and Walter Sisulu Universities. The workshop was preceded by a keynote address from Justice Johan Froneman of the Constitutional Court. As a result of the working relationship with Students for Law and Social Justice, Khanyisa Mapipa of Law Society and Nalo Gungubele (a member of the society) attended the annual seminar of the SLSJ, where they had the opportunity to hear speakers such as Justice Yacoob and Prof Karl Klare.

## **Moot Court and Mock Trial Programme and Competitions**

### **Internal**

The **LLB internal** moots took place between 10-13 March for final years, and 11-15 August for penultimate moots. The two final year moot finalists were Armand Swart and Darren Anderson, who battled their labour law topic out before Adv Bevan Boswell, Ms Sue Smailes and Mr Gordan Barker. Armand Swart was announced as the top mootist for the final year group. Melissa Scorer and Diana Machingaidze were chosen as finalists in the penultimate year moot, which dealt with the vicarious liability of banks for the actions of their employees. They appeared before Judge Murray Lowe and Advs Akhona Baninzi and Craig Renaud, with Diana Machingaidze taking the top honour.

The Faculty's internal moot programme was given a boost later this year, when students moved to start up a volunteer "moot club" to be organised and run by the students in promoting moots. The club hosted both Adv Renaud and Adv Torquil Paterson SC in advising students.

This year's competition was rated by many of the Faculty members as the best in recent memory. This is no doubt due to the hard work of the students themselves, but also can be attributed to Ms Anj Haller-Barker's excellent work in preparing the students for the moots during their Legal Skills course.

### **External**

This year saw the 12th instalment of the **European Law Students Association (ELSA) Moot Court Competition on World Trade Organisation Law**. This year was particularly remarkable in that it was the first year in which an African Regional Round was held. Rhodes University entered a team in the African Round and won the regional competition. In the regional round of the competition, Jamie Foreman won best orator for the preliminary rounds, while Oscar McGown-Withers was the best orator in the final of the regional round.

The team consisting of Deanne McKersie, Oscar McGown-Withers, BK Taoana and Jamie Foreman, supported by their coach, Ms Vicky Heideman, travelled to Geneva, Switzerland for the final, for which generous sponsorship was provided by the WTO, as well as the Society of International Economic Law. The standard of the competition was very high and our students certainly learnt a great deal from the experience. Our team was placed 14th out of 20 teams in the preliminary round of the Final, and each of those 20 teams had been at least in the top 3 of their respective regional rounds.

Rhodes University, with numerous other South African universities did not participate in the **23rd African Human Rights Moot Court Competition** which was held in Nairobi, Kenya from 1 to 6 September 2014. The team, consisting of Huajun Sun and Mbalenhle Baduza withdrew from this competition at the eleventh hour in the light of the high risk alert for ebola placed on Kenya by the World Health Organisation at the end of August of this year. While the students did not have an opportunity to argue their matter in the competition, the experience of preparing a complex international human rights law problem and its application on the continent will stand them in good stead in the future.

Two Legal Theory 3 students, Franklin Mbiriri and Moya Vaughan-Williams, accompanied by Ms Brahmi Padayachi, represented Rhodes at the **Child Law Moot Competition** at the University of Pretoria. The team went on to win the competition before Judge Jody Kollapen, Adv Stephen Budlender and Kempton Park Acting Chief Magistrate Daniel Thulare in the Palace of Justice in Pretoria. Moya Vaughan-Williams was chosen as the best oralist in the competition.

From 9 to 13 September 2014 four students— Ben Rule, Diana Machingaidze, Huajun Sun and Fundile Sangoni, accompanied by Ms Jaylynne Hiller, represented Rhodes at the **LexisNexis Mock Trial Competition** at Mandela Metropolitan University where 21 teams clashed in the quest for a winner. Both teams fared well and were placed 5th and 9th overall respectively.



The **10th Kovsie First Year Moot Competition** took place in October 2014, with Rhodes being represented by first year students— Blessings Chinganga, Nosipho Nziweni, Makomborero Majome and Samantha Chi-unzi. The competition had a senior moot section for the first time and the Rhodes participant was Diana Machingaidze, who won this competition and did Rhodes proud. Ms Liezel Niesing coached and accompanied the students to Bloemfontein.

### Student exchange

We currently have the following Legal Theory 3 students on exchange: Anthony Moor, Dylan McCarthy and Uviwe Ntsaluba are at **Utrecht University** in the Netherlands, while Tegan Phillips is at **Leicester University** in the United Kingdom. Two joint honour students, James Carkeek and Kyla Hazell are also at **Utrecht University**.

### Staff, staff news and activities

**Prof Richman Mqeke** retired at the end of 2013 and that farewell left a huge gap. Time waits for no one, and the end of 2014 sees yet another retirement. As mentioned above, **Mr Gordon Barker**, stalwart of the Faculty for more than 20 years, puts down the proverbial chalk at the end of this year after serving the Faculty and the university in many different roles and capacities over 23 years. His institutional knowledge and insight will be sorely missed. Staff and students wish him well in his post-retirement endeavours.

The retirement of Prof Mqeke and the imminent retirement of Mr Barker, allowed for new beginnings for two new staff members. **Prof Enyinna Nwauche** (LLB, LLM) joined the Faculty in July 2014. He currently teaches insolvency law. His research interests are in business and human rights; trade and culture; legal pluralism in Africa; law and religion in Africa; regional integration in Africa; constitutionalism in Africa. He occupied many academic leadership positions, before joining us from the University of Botswana. Prof Nwauche has published extensively in local and international peer reviewed publications; is a member of the editorial board of the Constitutional Court Review; a tutor at the WIPO Worldwide Academy and a member of the Executive Council of the International Association of Constitutional Law (IACL).

**Mr Tladi Marumo** BA, LLB (Rhodes), Postgrad Cert: Prospecting and Mining Law (Wits) joined the Faculty in April 2014 as a lecturer. He was admitted as an attorney in 2012 and was an associate in the mining and construction department of Webber Wentzel. Mr Marumo joined Hogan Lovells (South Africa) in 2013 and was appointed as a senior associate in the mining department. His professional legal experience is in the provision of advice in the mining, construction and engineering industries. Mr Marumo advised on mineral and petroleum Law, mine Health and safety law, construction and engineering law, and occupational health and safety Law. He is currently writing an LLM thesis in the field of constitutional litigation, with specific focus on class actions.

**Prof Jonathan Campbell** hosted a successful meeting of the South African Law Deans' Association at the Rhodes Faculty of Law in May 2014.

**Ms Jaylynne Hillier** and **Prof Jobst Bodenstein** are serving as Co-Secretary and President respectively of the South African University Law Clinic Association (SAULCA).

**Ms Thandeka Heleni**, a receptionist and interpreter at the Clinic since 1989, received an award for her 25 years of service to the Clinic. As the longest serving member in the Clinic, Thandeka has played an important role in the growth of the Clinic.

**Dr Gustav Muller** married Ms **Tiana Muller** (nee Brandt) on 4 January 2014. The couple are expecting a baby boy in February 2015.

### Visiting lecturers and part-time lecturers

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**, **Mr Max Boqwana** and **Professor Digby Koyana**. **Adv Trengove** and **Mr Boqwana** delivered public lectures, while Prof Koyana participated in a public debate (details below).

**Dr Gustav Muller** successfully nominated **Prof Sandra Liebenberg** as Distinguished Visiting Professor in the Faculty of Law for 2014.

She is the third incumbent of the HF Oppenheimer Chair in Human Rights Law and is also Co-Director of the Socio-Economic Rights and Administrative Justice Research Project (SERAJ) at Stellenbosch University. She is widely regarded as a highly competent research and has published widely on the right to equality, the right to dignity, the application of the bill of rights and specifically on socio-economic rights. Her books (as author and co-editor respectively) include *Socio-Economic Rights—Adjudication under a Transformative Constitution and Law and Poverty - Perspectives from South Africa and Beyond*. Prof Liebenberg actively participated in the Faculty during her visit and delivered lectures to the Constitutional Litigation class. Her public lecture was well-received. She also had meetings with the Legal Resources Centre and the Public Service Accountability Monitor during her visit.

The Faculty continues to benefit from the expertise of its part-time specialist lecturers, **Ms Anita Wagenaar (Legal Accounting)**, **Mr Richard Poole (Tax)** and **Dr Andrew Pinchuck (Numeracy)**.

#### **Staff activities— Teaching and learning, research and community engagement**

The LLB curriculum for 2014 underwent one change. The Law of Delict was desemesterised and is offered as a year long course. This change will be piloted in 2014 and 2015 and reviewed thereafter. In January 2014, staff of the Faculty engaged in a thorough stock-take of our curriculum and agreed upon a number of changes to the curriculum that will be introduced over the next two years. So, for example have we agreed to move the year long Law of Delict course to final year, while the two special contracts courses will move from final year to penultimate year. A number of final year electives were reviewed and redesigned. The legal theory curriculum was similarly scrutinised and updated. Students will be apprised of the changes as they are implemented.

This year saw the Faculty continuing with its language tutorials for Legal Theory 1 students. Limited placement in 2014 affected the impact of this intervention, and we hope next year to be able to expand the programme, subject to budgetary constraints.

The content of the tutorials covered include the avoidance of colloquial language, sentence structure and punctuation, the importance of planning before writing, legal writing and language, vocabulary and dictionary exercises and rules of grammar. The students were also put into smaller groups to identify and address common problems. In addition to this support, we again offered our Language Week in September. We were fortunate to have Professor Emeritus Wendy Jacobson as our facilitator. Professor Jacobson delivered lectures to the Legal Theory 1, 2 and 3 classes. In addition, Professor Jacobson was available for one-to-one consultations. A number of students took advantage of this. At the end of Language Week, Professor Jacobson prepared a report which provided some useful insights into the way law students use the written word. It is hoped that these insights will feed into the teaching and evaluation strategies adopted by members of the Faculty.

At the national level, the organised professions and the Council for Higher Education have engaged in a standard-setting exercise for the LLB after a 2013 summit where the majority of South African institutions found the current qualification to be inadequate. Rhodes staff have actively participated in these discussions and other discussions concerning the need for development and enhancement of writing skills and inculcating ethical behaviour among future practitioners.

**Ms Liz Davies** attended a workshop hosted by Stellenbosch University on writing skills for law students in September, while **Ms Helen Kruuse** is part of an ongoing project with the Law Society of South Africa on the introduction of a compulsory ethics module at universities nationally. Ms Kruuse was a key-note speaker at the Law Society of South Africa's Ethics Summit, Durban where presented their paper "The why, what and how of legal ethics education today." Prof Jonathan Campbell, Adv Renaud and Ms Helen Kruuse ably represented the Faculty at a regional Council of Higher Education meeting on LLB standard-setting in early October, where various submissions were made on behalf of the Faculty.

Staff participated in numerous conferences in South Africa and abroad and presented their research to their peers at these events. The following papers were delivered in the past 12 months:

- ◇ **Prof Jobst Bodenstein** presented a paper “Clinical Law Programmes in South Africa: between a Rock and a hard Place” at the South African Law Teachers’ Conference, Wits, January 2014.
- ◇ **Prof Jonathan Campbell** presented a paper “The use of a topical human rights issue to teach justice education, whilst at the same time addressing community needs” at the 7th Global Alliance for Justice Education Worldwide Conference, Jindal Global Law School of the OP Jindal Global University, Delhi, India, December 2013. He also presented a paper “The Role of law faculties and law academics: academic education or qualification for practice” at a plenary session of the South African Law Teachers’ Conference, Wits, January 2014.
- ◇ **Prof Graham Glover** presented a paper “Exemptions, Unjustified enrichment, and remedies in respect of the warranty against eviction in sale” at the 6th Private Law and Social Justice Conference, NMMU, 18-19 August 2014.
- ◇ **Prof Laurence Juma** presented a paper “Engaging in African custom and human rights: A survey of the rules for judicial recognition and application of customary law in Lesotho and South Africa” at the Relying on Culture to Combat HIV/AIDS and the Stigma associated with it seminar, Shadong University Law School, Jinan, China, 14-16 October, 2013. He also presented a paper “Protection of the rights of urban refugees in Kenya: Revisiting Abebe Daddi Tullu & Others v Attorney General” at the IASFM 15, Bogota, Colombia, 15-19 July 2014. He also presented a paper “Beneath the Anti-ICC Rhetoric: Invoking the Support of Domestic Institutions to Promote International Criminal Justice Processes in Africa” at the 13th International Conference of Africanists, The Institute of African Studies of the Russian Academy of Sciences, Moscow, Russia, 27-30 May, 2014.
- ◇ **Ms Helen Kruuse** presented a paper “Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*” at the Annual Family Law Colloquium, UFS, October 2013 in addition to presenting a paper “Life after *Mayelane*: customary marriages and their recognition” at the Annual Miller Du Toit Family Law Conference held at the Clock Tower, V&A Waterfront, Cape Town, April 2014. Internationally, she presented a paper “Travelgate yesterday, waterboarding tomorrow? Government legal advisors and the duty of loyalty in South Africa” at the International Legal Ethics Conference, City University, London, July 2014 and, together with Mrs L Mwambene, presented a paper “Unfulfilled promises? The Implementation of the Recognition of Customary Marriages Act in South Africa” at the XVth International Society of Family Law World Conference, Recife, Brazil, August 2014. At that same conference, she presented another paper, “Conscientious objection to performing same-sex marriage in South Africa”.
- ◇ **Dr Gustav Muller** presented a paper “Neighbour law and the reasonableness principle” at the South African Research Chair in Property Law Alumni Week, Stellenbosch University, 5 August 2014. He also presented a paper “Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa” at the 10th Biennial Modern Studies in Property Law Conference, University of Liverpool, Liverpool, 8-10 April 2014.
- ◇ **Prof Enyinna Nwauche** presented a paper “Appropriating a new customary law in post-Apartheid South Africa” at the 6th Private Law and Social Justice Conference, NMMU, 18-19 August 2014.
- ◇ **Dr Helena van Coller** presented a paper “Dienslewering: Geloofsinstellings, Diensorganisasies end die Staat se openbare Welsynspelig” at the Annual Symposium of the SA Akademie vir Wetenskap en Kuns “Rasionele Benutting van Suid Afrika se Menslike en Natuurlike Hulpbronne, 12-13 September 2013. She also presented a paper “A Comparative View of the Contract of Employment and Employment Rela



International Mercantile Law Conference, University of the Free State, 6-9 November 2013 as well as presenting a paper “Good Governance in the Church: Treating Employees Fairly” at the Second International Conference on Protestant Church Polity: Good Governance in Church and Society Today, Pretoria, 24-26 March 2014. Following on from the themes earlier in the year, she presented a paper “The Role and Duty of Religious Institutions in Civil Society” at the Second Annual African Law and Religion Conference, Stellenbosh “The Quest for the Common Good in Pluralistic Societies”, Stellenbosch, 26-28 May 2014.

- ◇ **Dr Rosaan Krüger** presented a paper “The ebb and flow of the separation of powers in South African Constitutional law – the *Glenister* litigation campaign” at the International Law and Politics Conference, Istanbul, Turkey, April 2014. She also presented a paper “Finding balance between freedom of expression and the prohibition of hate speech: a view from South Africa” at the Glasgow Human Rights Network Conference, Glasgow, Scotland, May 2014.
- ◇ **Mr Tladi Marumo** presented a paper “Delictual class actions: tenable claims?” at the 6th Private Law and Social Justice Conference, NMMU, 18-19 August 2014.

Besides these participating in conference, staff also engaged in a number of other research- and teaching-related activities:

- ◇ **Prof Jobst Bodenstein and Ms Jaylynne Hillier** co-ordinated a quantitative research project on behalf of the South African University Law Clinic Association (SAULCA): annually collecting data of law clinics in South Africa and producing electronic data.
- ◇ **Prof Jonathan Campbell** completed and the Assessors Course with distinction.
- ◇ **Prof Graham Glover** has a book chapter due out in the near future and his book on Sale and Lease will be published around the end of the year.
- ◇ **Prof Laurence Juma** visited Faculty of Law, University of Johannesburg on invitation of the NRF

Chair in International Law to give a talk about the book “Human Rights and Conflict Transformation in Africa” on 27th November 2013. He also presented at the ICRC training session in Pretoria on “Human rights and International Humanitarian Law”, Pretoria, 5th November 2013.

- ◇ **Dr Gustav Muller** proofread, commented on and edited two policy documents for the Gauteng Department of Local Government and Human Settlements entitled “Strategic Framework for Alternative Approaches to Eviction in Gauteng” and the “Framework for Managing Unlawful Occupation of Land and Buildings in Gauteng”. He also presented research on “Free and bound co-ownership”, Property and Housing Series of ENSAfrica, Mitchell’s Plain, 14 May 2014.
- ◇ **Prof Enyinna Nwauche** is a tutor for the WIPO World-wide Academy.

Publications by staff and postgraduate students over the past year in national and international publications:

- ◇ **Prof J Campbell** published an article “The role of law faculties and law academics: Academic education or qualification for practice” *Stellenbosch Law Review* (2014) 25 15-33.
- ◇ **Prof G Glover** published an article “Section 40 of the Consumer Protection Act in comparative perspective” 2013 *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law* 689-697.
- ◇ **Prof L Juma** published a book *Human Rights and Conflict Transformation in Africa*, Langaa RPCIG, (2013). He also published an article with J Tsabora “The South African Defence Review 2012 and private military/security companies (PMSCs): heralding a shift from prohibition to regulation?” (2013) 16 (4) *Potchefstroom Electronic Law Journal* 232-283 .
- ◇ **Ms H Kruuse** and Julia Sloth-Nielsen published an article “A maturing manifesto: the constitutionalisation of children’s rights in South African jurisprudence 2007-2012” *International Journal of Children’s Rights* (2013) 21 1-33.

She also published an article with Mrs Lea Mwambene “Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa” (2013) *Acta Juridica* 292 (co-author). This article is also featured as a chapter in the book Claassens, A and Smythe, D (eds) *Marriage, Land and Custom: Essays on Law and Social Change in South Africa* (2013) Juta: Cape Town. She also published an article “Conscientious objection to performing same-sex marriage in South Africa” (2014) *International Journal of Law, Policy and the Family* 1–27. Finally, she is to publish an article with Julia Sloth-Nielsen “Sailing between Scylla and Charybdis: *Mayelane v Ngwenyama*” *Potchefstroom Electronic Law Journal* (forthcoming).

- ◇ **Dr G Muller** published an article “On considering alternative accommodation and the rights and needs of vulnerable people” 2014 30 *SAJHR* 41-62.
- ◇ **Prof E Nwauche** published an article “The Nigerian Police Force and the enforcement of religious criminal law” (2014) *African Human Rights Law Journal* 203.
- ◇ **Dr EH van Coller** published a chapter in “Church Polity and “Constitutionalism”, L.Koffeman & J. Smit (eds) *Protestant Church Polity in Changing Contexts II*, 147-164, LIT Verlag, Germany. She also published an article “’n Regsvergelykende Blik op die Diensverhouding van ‘n Predikant”, (2013) 54 (3&4) *Dutch Reformed Theological Journal / Nederduits Gereformeerde Teologiese Tydskrif* (NGTT) 1-14. Finally, she published an article “Homoseksuele Predikante: “n Regs- en Morele Dilemma”, 2013 *LitNet Akademies* 10(3).

In line with the University’s commitment to community engagement as the third pillar of the institution, the Faculty has embarked, for the first time, on a Faculty community engagement initiative. Since July 2014, we have made modest gains under the watchful eye of the Community Engagement Office and with the enthusiastic guidance of **Ms Vicky Heideman**.

The Law Faculty participated in Trading Live for Mandela Week by taking a 67 minute slot on RMR to talk about issues of interest to the community. Rosaan Kruger, Helen Kruuse, Anj Haller-Barker and Tladi Marumo came prepared to speak about labour, family, criminal and competition law respectively. Most of the session was dedicated to domestic violence and the criminal law aspects of the Oscar Pistorius trial. The lecturers involved were generally quite surprised at how much they each had to say on these issues, how quickly the time passed, and how much they enjoyed the interaction. The session has inspired the Faculty to look into using radio as a medium for community engagement in the future.

Following from the successful Trading Week event, the Law Faculty has started looking at a long term partnership with the ADC and Radio Grahamstown where staff can discuss issues relevant to the community over the radio, and have a follow-up session at the ADC. We are looking to have a pilot session at ADC on wills and succession in the coming weeks, and hopefully start an on-going partnership from 2015.

Individual staff members continued their community outreach work and Ms Helen Kruuse provided training to FAMSA and department of social welfare on 26 August 2014 on the protection and status of life partnerships in South Africa. Prof Jonathan Campbell is building on this LLM research on consumer credit law, and continues to look at ways in which his research could continue to be engaged in the community.

#### **The Law Clinic – teaching and community engagement**

Three “new” supervising attorneys joined the Clinic in 2013: Jaylynn Hillier (CLE Lecturer/Coordinator), Patrick Pringle and Nomazizi Klaas, who subsequently transferred to the Queenstown office. Tarryn Cooper-Bell, re-joined the Clinic a sojourn to private practice in Johannesburg. The Clinic’s access to Justice Programmes consist of three aspects:

- ◇ providing legal services to indigent and other marginalised groups in the Eastern Cape and especially in the Grahamstown and Queenstown regions;
- ◇ providing training, re-granting (8 offices) and legal and administrative support to some 45

community-based advice offices in the Eastern Cape; and

- ◇ informing communities of their legal and human rights.

Over the past year, 660 new cases were opened in both the Queenstown and Grahamstown offices and a further 600 clients were provided with general advice. The Legal Practice students play a significant role in providing legal advice to the Clinic's indigent clients. The Clinic assisted the community in Joubertina, about 100 km from Humansdorp, in confronting gross abuses perpetrated by a micro-finance company. This resulted in the closure of the micro-financier's offices by the National Credit Regulator and the arrest of two of its staff members. The Clinic is assisting 22 Joubertina residents in actions for damages.

The Clinic's attorneys visited about 40 advice offices throughout the Eastern Cape, assisting in excess of 270 clients in remote communities, and provided training to paralegals on Fundraising and proposal writing workshops in Grahamstown, Queenstown, Graaff-Reinet and Port St John's.

Prof Jobst Bodenstein conducted facilitators training and numerous other workshops were conducted by Clinic Staff on, amongst other things, wills & succession, lease agreements, domestic violence and violence against women for 13 organisations in Grahamstown.

In addition to its work among the community, the Clinic also involved itself with the youth of Grahamstown through the MICC/X Poland Youth Project. Thabang Mokgatle, a Master's student and Kevin Watson from Graem College, accompanied 9 learners from four government schools to an event around the International Criminal Court held on 4 to 10 May, 2014 in Krzyżowa, Poland. The Clinic has since 2012 partnered with the host organisation, Kreisau Initiative, Berlin.

Other partner organisations in this project are from Poland, the Netherlands, Portugal, Vietnam and Uganda. Jobst Bodenstein attended partner organisation meetings in November 2013 and August 2014. The feedback on the performance and conduct of the learners from Grahamstown was very positive.

## **FACULTY EVENTS**

There were an unprecedented number of Faculty

events this year, with top legal minds presenting and debating with members of the Faculty – staff and students – around legal issues in South Africa today. We hope to build on the success of 2014.

### **Faculty opening**

The academic year began with the Faculty Opening in February at which Judge Judith Cloete gave an inspiring address. Judge Judith Cloete graduated from the University of Cape Town with a BA in 1983 and from Rhodes University with an LLB in 1985. She was admitted as an attorney in 1988 and practised continuously until October 2010 when she was appointed as an acting judge of the Cape Town High Court. Throughout her career, Judge Cloete's main area of focus has been the promotion and protection of women's and children's rights.

### **Debate**

The Law Faculty hosted a debate on "Ukuthwala – a Clash of Cultural and Gender Rights".

Ukuthwala involves the abduction of young girls and forcing them into marriage, often with the consent of their parents. Visiting professor in customary law, Prof Digby Koyana, our own, recently retired, Prof Richman Mqoke (member of the SALRC commission on the practice), and Ms Nomboniso Gasa, a freelance gender-rights activist made up the panel for a debate hosted by the Faculty in May 2014. The debate was very well attended and many attendees (including deans from the SALDA meeting) had to find space on the floor of the Moot Room. The debate was then generously funded by the DVC's Office: Academic Affairs.

### **Public lectures**

Our visiting lecturers participated in the activities of the Faculty by making their views known and attracting visitors to the Faculty:

Visiting fellow, Mr Max Boqwana, co-chair of the Law Society of South Africa, delivered a public lecture on 20 May 2014 entitled "The Legal Practice Bill – Beyond the Principles". Many students, aspiring legal practitioners, flocked to the Moot Room to listen to Mr Boqwana as he painted a picture of a transformed and accountable profession going forward.



On 28 July 2014, Prof Sandra Liebenberg, delivered a public lecture, “Forging new tools for vindicating rights of the poor in the crucible of the Eastern Cape”. Prof Liebenberg highlighted the successes of the Eastern Cape High Court judges in shaping innovative remedies to address the plight of the poor.

On 26 August 2014, Judge Igna Stretch gave a thoughtful and challenging address on “Protecting the vulnerable” and invited students to air their views. Her visit to the Faculty was the result of a joint women’s month initiative of the Office of the Chief Justice and the Faculty.

On 19 September, Justice Navsa of the SCA delivered a public lecture entitled “Balanced judicial review – not a cause for concern”. Judge Navsa explained that the separation of powers invariably leads to tension between the branches of government. The initiative for inviting Judge Navsa to deliver the public lecture came from the Law Society.

On 22 September 2014, Visiting Professor Wim Trengove delivered a public lecture, “Should South Africa police the international crimes of others? A discussion of *National Commissioner of the South African Police Service v South African Human Rights Litigation Centre* 2014 (2) SA 42 (SA). Adv Trengove emphasised the essence of South Africa’s international obligations to the protection of human rights.

### **Conclusion and prospects**

A report provides one with opportunity to take stock – to assess productivity, impact and output. This year was full of new opportunities for our students and staff and it is evident that they have made the most of these opportunities. May the future be as exciting and rewarding as we aim to harness the synergy from the interaction between teaching and learning, research and community engagement to the benefit of students and staff.

# ANOTHER IMPORTANT ANNIVERSARY: THE EASTERN CAPE HIGH COURT TURNS 150

*Professor Graham Glover*



**Although this edition of *In Camera* celebrates twenty years of democracy in South Africa, there is another equally significant, milestone that I would like to commemorate – one which has gone by relatively unheralded. 2014 marks the 150th (sesquicentennial) anniversary of the establishment of the High Court in the Eastern Cape, with its seat in Grahamstown.**

It was in 1864, when Parliament was held outside Cape Town for the one and only time – in Grahamstown, and in the current Botany Department building – that a proposal was made for the establishment of a Supreme Court for the Eastern Cape. This was because the Cape Colony, which by this time stretched all the way to the Kei River, was simply too big and cumbersome a territory for justice to be administered from the Supreme Court in Cape Town alone. The court itself commenced operations early in 1865, with a bench of two judges – O'Connor J and Dennysen J. The court itself has been situated since then on the same site

that it occupies today, although it was not until 1913 that the current court building and its elegant façade was constructed following a grant of £120 000 awarded by the then Minister of Justice, JBM Hertzog. It was in terms of the Act of Union that the court in 1910 had become the Eastern Districts Local Division of the Supreme Court of South Africa, with Sir John Kotzé, later a judge of appeal, and (for Rhodes students, the man after whom the res “JK” is named) as its first Judge President. (As an aside, the second JP was Sir Thomas Graham, who served 24 years in the post from 1913 to 1927. It is he after whom the Graham Room in the Faculty is named, and whose portrait, painted by the celebrated artist WG Wiles, the students walk past on their way to their lectures each day.)

In 1957, the court was elevated from its status as a local division of the Supreme Court of the Cape of Good Hope, and Grahamstown became the seat of the Eastern Cape Division of the Supreme Court of South Africa. Although the initial motivation for this came from the local legal and civic fraternity, the chief architect and driver of the process through Parliament was the then Minister of Justice (later State President) CR Swart, who overcame some opposition to ensure that this jurisdictional elevation occurred in terms of the General Law Amendment Act 68 of 1957.

It was partly for the role he played in this process, and the boost it gave to Grahamstown, that Swart received a (now controversial) honorary doctorate from Rhodes University in 1962. The centenary of the establishment of the court in 1864 was commemorated with great pomp and ceremony on 29 July 1964 when the court held a special full bench, presided over by Chief Justice Steyn, the Judges President of all the divisions of the Supreme Court in South Africa, and all the judges of the Eastern Cape Division. To this day only the opening of the Constitutional Court has seen such a collection of legal dignitaries come together to celebrate the establishment of a court in this country.

The festive nature with which the court's centenary was celebrated in 1964 belies the honest fact that the positioning of a seat of a division of the High Court in Grahamstown has been a contentious one since its very first days. Indeed, Grahamstown as a city has faced a constant barrage of attacks on this status. The first – which came from some in the Western Cape and some in Port Elizabeth in the 1860s – could have resulted in the idea of the court's establishment in Grahamstown being stillborn. A further attack came in the first decade of the 20th century, when the Act of Union was being debated, and some questioned whether Grahamstown was a suitable seat for the court in the Eastern Cape. Similar questions were raised in the debates about the court's elevation to the status of a full division in Parliament in 1957. The most concerted offensives have come in the last 20 years, first in terms of some of the recommendations of the Hoexter Commission of Inquiry into the Rationalisation of the Provincial and Local Divisions of the Supreme Court and, in very recent years, in the political manoeuvrings around bringing some of the Hoexter Commission's recommendations to fruition. Ultimately, in terms of s 6 and s 50 of the Superior Courts Act 10 of 2013, Grahamstown's position as the seat of the Eastern Cape High Court is now secure ... for some time at least.

This 2013 legislation has meant that it is now possible, this year, to celebrate the sesquicentennial celebration of the establishment of the court. This commemoration can be perceived in two ways. First, it allows us to look back and to remember the role of the court in making Grahamstown and the Eastern Cape what it is today (for good and bad reasons), but it allows us especially to remember the role the court has played in the last 20 years in promoting access to justice in a modern South Africa, and in the specific and complex circumstances of the Eastern Cape.

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Indeed, it was serendipitous that 2014's Distinguished Visiting Professor to the Law Faculty, Professor Sandra Liebenberg, delivered her public lecture, entitled "Forging new tools for vindicating the rights of the poor in the crucible of the Eastern Cape", on the 28th of July this year – the first working day after the 150th anniversary of the court's establishment. Secondly, the anniversary allows us to look forward to how the Eastern Cape High Court can play an ongoing role in the future in promoting access to justice, and that the Rhodes Law Faculty has a real and valuable potential role to play in this process.

The latest battle to secure Grahamstown as the seat of the High Court was largely won because of the efforts of the legal profession in the town, the civic leaders of the town, as well as the senior officers of Rhodes University, who all understood the importance of working together in a unified way to promote the retention of the seat for the economic sustainability of Grahamstown. The fact that the Law Faculty by these efforts retains the privilege of being "just up the road" from a division of the High Court is one of the things that continues to make Rhodes a special and unique place to study law in our modern society. I encourage the students to cherish this opportunity, and not just to let your only interaction with the High Court be one court visit in Legal Theory One!



# THE ROLE OF LAW FACULTIES AND LAW ACADEMICS: ACADEMIC EDUCATION OR QUALIFICATION FOR PRACTICE? \*

*Professor Jonathan Campbell*



## Background and context

**Should the university law school train lawyers for practice or pursue a broader, academic legal education? This debate about the nature of legal education has been central to the literature on legal education since the nineteenth century, and is not peculiar to South Africa (Cownie *Legal Academics* (2004) 75.** With the advent of democracy in South Africa and in the context of a lengthy history of inequality and racially segregated education, radical change to legal education was deemed necessary (Greenbaum 2010 *JJS* 2). A single four-year undergraduate LLB degree was introduced in 1997 (section 1 of the Qualification of Legal Practitioners Act 78 of 1997), driven by the Department of Justice in the name of transformation with the aim of improved access to the profession, and standardisation of qualification for practice. No research was undertaken into the educational soundness of these changes, even by law academic leaders (see, for example, Woolman, Watson & Smith (1997) 114(1) *SALJ* 30 at 55). The reduced duration of the programme and increased skills emphasis necessitated a limitation on intellectual depth and disciplinary

diversity in the curriculum, and many non-law courses had to be jettisoned.

In the last decade the debate about legal education has been dominated by widespread national criticism of the four year LLB, in particular the alarmingly low success rate of LLB students and the perceived under-preparedness of law graduates for practice. In 2007 only 22% of first-time entering LLB students completed the degree in four years, and five years after entering university only 30% of the total number of first-time entering students had graduated (Scott, Yeld & Hendry “Higher Education Monitor: a case for improving teaching and learning in South African higher education “(2007). It has been widely acknowledged that the degree has not achieved its desired purpose, and a comprehensive national review of the LLB has been initiated.

In considering the educational rationale for future change, it is thus an apposite time to return to the question that is foundational to this paper: what is the purpose of legal education?

## Qualification for practice

The LLB is the qualification required by statute for entry into all branches of the legal profession in South Africa (section 15 of the Attorneys Act 53 of 1977, and section 3 of the Admission of Advocates Act 74 of 1964). One cannot practise law without it, and one can potentially become a senior judge with only an LLB. Some might argue that the LLB is little more than a technical degree involving the learning of an enormous corpus of knowledge; that arguably it might as well be taught at a technikon, being essentially concerned with vocational training; that there is no need for a strong emphasis on case law and legal research, in-depth critical analysis and legal reasoning; that a broad overview of the law will provide enough knowledge to be able to practise law at a basic level; and that the focus need be only on the law, for what direct use will subjects from other disciplines be in the practice of law?

## Academic legal education

Those who favour a more “academic” legal education, on

the other hand, would seek to provide a broad, formative learning experience which produces well-rounded law graduates with knowledge, skills and attributes that go beyond the very basic necessities for the practice of law. Increased academic emphasis would include courses from other disciplines, more intellectually demanding, thinking courses, and tasks demanding higher order study such as research, wide reading, and in-depth critical analysis. One would expect such students to be both academically and personally more mature and employable upon graduation, with a broader world view and deeper intellectual experience.

### Academic education and qualification for practice

It is not difficult to deduce that both functions of legal education are critical and central to its purpose, and are not mutually exclusive. A well-rounded, formative, and academically challenging legal education which maximises the inclusion of subjects from other disciplines, as well as the necessary focus on skills, ethics and social justice values, provides enhanced preparation for practice. Nothing short of this will suffice to produce the quality lawyers that South Africa so desperately needs. Such an education not only serves the vested “academic” interests of the universities, but also serves very well the interests of the various branches of the legal profession, the universities, law students and broader civil society.

The result may well be that fewer graduates will meet the exacting requirements of such an academic programme than is currently the case, and that attendant criteria for admission to legal study will have to be tightened. Yet it is surely more important to have fewer well-equipped law graduates than larger numbers of ill-prepared graduates entering the market every year – to the detriment of the law graduates themselves, the legal profession, civil society served by that profession, and ultimately the administration of justice.

### The two-degree programme

Most South African universities offer a two-degree programme, yet only about 21% of law students pursue it (Law Society of South Africa 2012/2013 “Statistics” 14-15).

Nearly all law students at Rhodes University do so, far more than in any other South African university, which places Rhodes law graduates at a competitive advantage. This programme has the benefit of providing more time to achieve the several objectives of an academic legal education, and is thus generally more representative of a broader, well-rounded academic legal education.

Besides the advantage of acquiring two university degrees, other benefits of the two-degree programme for law students and legal education are:

- ◇ Students are eased into legal studies in their first two or three years of tertiary education, and are therefore academically more mature when they reach the tough later years of LLB study.
- ◇ Students in the two-degree programmes “have a substantially higher completion rate within the minimum period than those doing the LLB as their first degree” (South African Law Deans Association Position paper on legal education (2013) 1).
- ◇ Young students have more time to decide whether or not to pursue the LLB (many students have little or no exposure to the law prior to leaving
- ◇ Students who complete their first degree (with law) and who choose not to pursue the LLB still have the tremendous educational benefit of three years of legal study, which will be useful in most non-legal careers. Students who complete the two-degree programme, but who choose not to pursue a legal career, still have the benefit of an education in other disciplines (which will usually include a non-law major), and might even register for another postgraduate degree.

Although not a total solution to the shortcomings of South African legal education today, the widespread promotion of this currently available two-degree programme nationally will go a long way towards addressing them prior to any structural change to the degree being necessary.

**\*An edited version of this article first appeared in the *Stellenbosch Law Review*: J Campbell ‘The role of law faculties and law academics: Academic education or qualification for practice?’ (2014) 25 *Stellenbosch LR* 15-33.**

# THE CLASS ACTION: COLLECTIVE ENFORCEMENT OF DEMOCRATIC CITIZENSHIP

Mr Tladi Marumo



## Introduction

**A large majority of South Africans remain alien to citizenship of an inclusive nature in their own country.** Inclusive citizenship, which entails the exercise of constitutionally—protected rights, remains a deeply rooted challenge. This dilemma arises from the gap between the rights and responsibilities of citizenship as envisaged in the Constitution, and the lack of capabilities to enable many to assume their new status in a democracy (Ramphela *Laying Ghosts to Rest: Dilemmas of the transformation in South Africa* (2010) 126). As we reflect on the ideals, achievements and failures over twenty years of democracy, we must engage in introspection, whereby we acknowledge that indeed “our democracy will be judged by the quality of life of the least among citizens” (Ramphela *Laying Ghosts to Rest* 137). We must therefore ask ourselves how effective is the law in a constitutional democracy, both both as a means and as an end, to building the collective capability of the poor and vulnerable to access justice? Is the inaccessibility of justice unduly

burdening poor and vulnerable communities who resort to violent protests to articulate their socio-economic frustrations? Such an inquiry entails an examination of legal reform (Carfield “Enhancing Poor People’s Capabilities Through the Rule of Law: Creating an Access to Justice Index” (2005) 83 *Wash ULQ* 339 at 358). I will briefly explore whether and how class actions can enhance access to justice for the protection, promotion and fulfilment of constitutional rights, particularly for poor and vulnerable people.

## The South African socio-economic reality: fertile ground for class actions

South Africa exhibits high levels of poverty and inequality. Chaskalson P, in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) para 8, graphically described the socio-economic conditions in South Africa:

“We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.”

Poverty, in the context of the law as a tool for social transformation, lives in the absence of social factors that enable the poor to exercise legal rights (Mubangizi “Know Your Rights: Exploring the Connections Between Human Rights and Poverty Reduction with Specific Reference to South Africa” (2005) 21 *SAJHR* 33 at 33 and 34). These social factors, that obstruct access to justice, include exclusion of the rural population, ignorance of socio-economic rights, the law and courts in general, and illiteracy (Mubangizi 2005 *SAJHR* 44; See also See Statistics South Africa “Census 2011 Statistical Release - P0301.4” (2012) <http://www.statssa.gov.za/Publications/P030142011.pdf> 33,34, 42, 50 and 51).



Added to these barriers are the high costs of litigation and fear of the judicial process (HJ Erasmus “Cost and Fee Allocation in Civil Procedure Republic of South Africa” (2009) [http://www-personal.umich.edu/~purzel/national\\_reports/South%20Africa.pdf](http://www-personal.umich.edu/~purzel/national_reports/South%20Africa.pdf) 13 and 14 (accessed on 1 July 2013); M Ebadolahi “Notes: Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa” (2008) 83 *New York University Law Review* 1565 at 1567). Litigation is complex, emotionally traumatic and time consuming (Loots “Standing to Enforce Fundamental Rights” (1991) 1 *SAJHR* 49).

Given this reality of lack of access to courts, how then do the majority of poor and vulnerable South Africans express their grievances which may have a basis in law? Often violent protests have become the means of ventilating the collective socio-economic dissatisfaction against the government. The common issues articulated against the government in these protests arise from deprivations of access to adequate housing, electricity, water, social assistance, food, healthcare and education (Dugard and Tissington “Civil Society and Protest in South Africa: A View from 2012” <http://socs.civicus.org/?p=3875> (accessed 1 July 2014)). Protests are in essence a means by which the voiceless poor and vulnerable forcefully seek to be heard by a government that ignores them (Alexander 2010 Review of African Political Economy 37). Consequently, this tension creates the “socio-political divide between ‘citizen and subject’, with people responding by attempting to exert political influence through the development of a collective, community voice” (Alexander 2010 Review of African Political Economy 37).

Voicing discontent outside of the law and against government however serves a limited purpose, as protests rather seldom, if ever, yield results. The poor and vulnerable will remain ignored without means of holding the government legally accountable to its constitutional obligations. I contend that where the demands of poverty-stricken groups have a legal basis that entitle them to approach a court to provide appropriate relief, class actions may provide a more efficient way

to realise rights and hold government accountable.

### **Class actions and access to court**

In summary, a class action is a representative procedure that enables the claims of a number of persons against the same defendant to be determined in one legal action (*Children’s Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 16). This is explicitly provided for in section 38(c) of the Constitution. Class actions, whether for the enforcement of constitutional or other rights, raise constitutional considerations of access to courts, as protected in section 34 of the Constitution. When the poor and vulnerable seek to enforce rights by means of a class action, they are enforcing their constitutionally protected right of access to courts. Class actions will utilise the same collective voice that necessitated group formation. The fundamental objective of the collective efforts, within and outside the legal boundaries, is to effect socio-economic change. I do not propose that class actions will resolve the multidimensional factors that cause service delivery protests, but it may go some way to the fulfilment of the constitutional promise of a better life and access to socio-economic goods.

### **Class actions as the legal institutionalisation of collective community action**

Cameron JA, as he then was, in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) (*Ngxuza 2*) remarked that when government impedes the rightful claims of its citizens, it defies the Constitution which requires response to the needs of poor and vulnerable people. He further emphasised that this is tantamount to the government declaring war on its citizens (para 19). The law can bring about meaningful change by ensuring that these common socio-economic disputes are given a legal basis, are ventilated in the courts, and if successful, enforced against government.

Class actions can therefore be a means of legally institutionalising the already existent collective capacity of the people, to effect real socio-economic change. Cameron JA concluded that there ought to be an affirmative legal technique for bringing a defined group of poor and vulnerable people to court, where there are common issues, in order to make recovery



available to them all (para 4).

This accords with the court *a quo* judgment of Froneman J, as he then was, in *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government, Permanent Secretary, Department of Welfare* 2001 (2) SA 609 (E) 625A-B (*Ngxuza 1*). Froneman J emphasised that when the government has failed to protect the socio-economic rights of a defined class of poor and vulnerable people, courts must act in new and innovative ways to provide far-reaching redress. Cameron JA's affirmative legal technique and Froneman J's innovative way of providing redress for the poor and vulnerable is the class action procedure. Froneman J and Cameron JA explicitly identified that class actions in South Africa were tailor-made for the poor and vulnerable where they have small claims that may be difficult or impossible to pursue individually, and they are in a poor position to seek legal redress, either because of ignorance, or litigation is disproportionately expensive (para 8 to 11). This was later confirmed in the case of *Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA). Jafta J in the recent Constitutional court judgment of *Mukkaddam v Pioneer Foods* 2013 (5) SA 89 (CC) at para 32 added further impetus to the relationship between class actions and section 34. Jafta J stressed that when confronted with class actions, courts must facilitate access to justice rather than hinder it for groups of similarly affected people. The Constitutional Court confirmed that the implications of class actions on the right of access to courts raises constitutional issues of considerable importance for justice (para 26).

Class actions promote access to justice by enabling the poor to avoid expensive costs of individual litigation by sharing litigation services.

Further, through the aggregation of claims by the poor class members, the class is able to gain better leverage as a consolidated unit in settlement negotiations. Class actions also allow for judicial efficiency, whereby limited judicial resources are utilised to provide far-reaching relief and establishing judicial

precedent for persons similarly affected, who would otherwise not have access to courts (C Silver "Class Actions - Representative Proceedings" (2000) *Encyclopedia of Law and Economics* 194 at 202-208). Of importance, class actions are a representational device. These actions have the potential to expand the reach of remedies granted by courts, empowering courts to hear claims advanced by a named party on behalf of people who are not named as parties in the litigation (*Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) para 17).

What progress has the law made to date with regard to class actions for the promotion of access to justice for the poor? There are currently no statutory procedures nor practice directives to facilitate the institution and conducting of class actions. The current South African rules of court similarly do not provide for class actions (*Children's Resources Centre Trust v Pioneer Food (Pty) Ltd* 2013 (2) SA 213 (SCA) paras 14 and 16; N Kirby *World Class Actions* 378). The courts, commendably, in the exercise of their inherent jurisdiction are grappling with the creation of a South African class action model, which in the absence of legislative direction, is bound to take years to settle.

## Conclusion

In a constitutional dispensation that looks to the future, "access to justice" means more than mere physical access to the courts – it incorporates the ability to be effectively heard" (Dugard 2008 *SAJHR* 216). Accordingly, the law as a tool for social justice begs a redefinition and reorientation through procedural legal mechanisms (Vawda 2005 *Obiter* 235). Class actions legally institutionalise the people's collective capability to effect change and transform courts into institutions of democracy. They stimulate social mobilisation, provide a platform for enforcement of rights, intensify debate, frame citizens' grievances in terms of the law and promote legal outcomes (Gloppen 2005 *New Frontiers of Social Policy* 25).

# PROTECTING PEOPLE'S HOMES UNDER THE CONSTITUTION\*

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**On 4 October 2000 it will have been 14 years since the Constitutional Court handed down its landmark judgment in *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC).** The judgment explained some of the key duties imposed on the State by the right of access to adequate housing in section 26 of the Constitution. This judgment, as I will explain, has had an important influence on the transformation of evictions law in South Africa.

However, the recent spate of evictions and demolitions of shelters around informal settlements in the Western Cape – Lwandle, Phillipi East, and Khayelitsha – must make the right to housing ring hollow for those who are left homeless.

What does the *Grootboom* judgment, along with legislation enacted to give concrete effect to the housing rights in section 26, mean in practice for people facing eviction or demolition of their homes? Of particular importance is section 26 (3) of the Constitution, which reads:

**“No one may be evicted from their homes, or have their homes demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”**

This article explores the relevant principles applicable to evictions in our constitutional era, and examines both the progress that has been made as well as some of the key challenges that remain.

## **The historical and social context of housing rights in South Africa**

In the *Grootboom* judgment Justice Yacoob made a critical observation, namely, that the housing rights in section 26 of the Constitution must be understood in their social and historical context. This is particularly important in the South African context given the fact that discriminatory legislation and planning practices resulted in massive forced evictions and relocations. These were instrumental in achieving systemic residential racial segregation and settlement patterns in urban areas. A plethora of legislation systematically deprived the black majority of formal access to land and housing in urban areas, and entrenched socio-economic and spatial inequality. The common law aggravated this situation by favouring existing property rights. Private landowners could protect their property rights by bringing legal processes to evict people from their land, and courts did not balance property rights against the occupiers' personal circumstances and housing needs. In some cases, legislation such as the notorious

Prevention of Illegal Squatting Act of 1951, authorised the demolition of homes without a court order. Although apartheid was formally disbanded in the 1990s, its legacy remains. This is starkly reflected in the distorted spatial lay-out of towns and cities, and the crisis of landlessness and inadequate housing overwhelmingly affecting black communities.

Given this context, it is not surprising that much of the development of section 26 of the Constitution has occurred in the context of people facing evictions from the insecure homes they have sought to establish in urban areas – whether in informal settlements on the urban peripheries or in disadvantaged inner city areas.

### **The eviction of unlawful occupiers: Justice and equity**

The recognition of housing as a fundamental human right in section 26 of the Constitution has meant that Parliament and the courts have had to develop a completely new set of legal rules governing evictions. These rules have to reflect the values and purposes which inform housing as a basic human right. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) is the primary legislation governing the eviction of unlawful occupiers from their homes. It specifically aims to give effect to section 26(3) of the Constitution.

PIE replaces the common law action, the *rei vindicatio*, whereby owners can quickly and easily reclaim their property against an unlawful occupier. Ownership in terms of this common law remedy was a very powerful right which trumped other considerations such as the vulnerable circumstances of an occupier and their interest in protecting the space they call home. In its place PIE establishes an overarching test of “justice and equity” which must guide a court in considering whether an eviction order should be granted, and if so, subject to what conditions. Many of the key safeguards for people facing eviction from their homes have occurred through the interpretation of PIE by the courts. In addition to basic requirements of fair processes such as having proper notice of the eviction proceedings served on the persons concerned, three major principles have been established by the courts in their interpretation of PIE. I discuss these principles before considering other circumstances where people might face evictions from their homes.

### **Alternative accommodation**

The first principle is that, in the absence of exceptional circumstances such as a deliberate invasion of housing or land, people should not be evicted into a situation of homelessness. Temporary alternative accommodation should be provided to those facing homelessness by the relevant public authorities, usually municipalities. This principle has been confirmed in a range of cases under PIE. It can be traced back to the Grootboom judgment which held that emergency shelter must be provided for those “with no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.” The government responded to the Grootboom judgment by adopting an emergency housing programme which forms Chapter 12 of the National Housing Code.

The judgment of the Constitutional Court delivered in *City of Johannesburg v Blue Moonlight* 2012 (2) SA 104 (CC) held that local authorities are obliged to plan and budget proactively for housing emergencies and ensure that they make adequate provision for alternative accommodation for those facing homelessness. This includes considering whether they can provide for emergency housing from their own finances, and if necessary, applying to their relevant provinces for assistance in terms of Chapter 12 of the National Housing Code. In addition, the *Blue Moonlight* judgment established that the duty to provide alternative accommodation applies not only when an organ of state evicts people from their land, but also when a private landowner applies for the eviction of an unlawful occupier. There are still many unresolved questions regarding the nature and standard of the alternative accommodation to be provided, and the processes by which people in temporary accommodation can obtain access to permanent housing. However, certain arrangements for alternative accommodation will not pass constitutional muster. For example, recently the South Gauteng High Court—in the case of *Dladla v City of Johannesburg* [2014] ZAGPJHC 184—ruled that aspects of the City of Johannesburg’s outsourced arrangements to provide temporary alternative accommodation for evicted inner city residents were unconstitutional.

Specifically, the Court found that the gender segregation of married couples and the day-time lock out rules for residents in the Ekuthuleni Shelter violated various constitutional rights, including the right to human dignity, privacy and security of the person.

### **Meaningful engagement**

The second principle is that people facing eviction from their homes should be given a meaningful opportunity to participate in the resolution of the eviction dispute. This can take the form of mediation (where a third party tries to assist the parties to reach an agreement), or the more structured meaningful engagement processes elaborated upon by the Constitutional Court in cases such as *Occupiers of 51 Olivia Road v City of Johannesburg* 2001 (3) SA 208 (CC) and *Residents of Joe Slovo v Thubelisha Homes* 2010 (3) SA 454 (CC). These processes involve in-depth negotiations between municipal officials, private landowners, communities and the organisations supporting them aimed at trying to resolve the eviction dispute in good faith. Like alternative accommodation, meaningful engagement is an important factor that a court will take into account in deciding whether it is just and equitable to grant an eviction order.

### **The role of organs of state**

The third general principle involving eviction cases is that they are no longer regarded as simply private cases. When there is a possibility of people being left homeless relevant organs of state— usually municipalities— must be joined as necessary parties to the legal processes for eviction (see Muller & Liebenberg (2013) 29 *SAJHR* 554). The purposes of joining the relevant municipality to the case is for it to research and present the court with a report dealing with the following aspects: the potential impact of the eviction groups on vulnerable such as the elderly, children, disabled persons and households headed by women; its efforts to facilitate mediation or meaningful engagement between all stakeholders; and the steps it has taken to secure alternative accommodation for those who face homelessness as a result of the eviction. All of these are factors under PIE which must guide the court in deciding whether an eviction would be “just and equitable”, and what safeguards must be put in place to protect

the various vulnerable groups (see Muller (2014) 30 *SAJHR* 41).

### **Evictions for reasons of health and safety**

Apart from evictions in terms of PIE, evictions and demolitions can also occur in terms of legislation or practices aimed at protecting the health and safety of residents or to manage disasters. There have been a number of cases such as *Olivia Road, Pheko v Ekurhuleni Metropolitan Municipality* 2012 (4) BCLR 388 (CC), and *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) where authorities have invoked this kind of legislation or embarked on unilateral action to evict or relocate people from their homes.

The fundamental principle which has been laid down by the Constitutional Court is health and safety reasons cannot serve as a pretext for bypassing the requirements of section 26(3) of the Constitution. The most fundamental requirement is that any eviction of people from their homes or demolition of homes can only occur in terms of a court order and the judicial officer must consider “all the relevant circumstances” before making such an order. Relevant circumstances will, in addition, to health and safety factors, include whether meaningful engagement has occurred, whether the needs of vulnerable groups such as children and people living with disabilities have been adequately catered for, and whether alternative accommodation is available to those facing homelessness. If people are temporarily evacuated from their homes in a real emergency situation they must be allowed to return to their homes as soon as feasibly possible, and the authorities will not be permitted to demolish these homes without a court order.

### **Demolitions of contested “homes”**

The recent spate of evictions in and around Cape Town by the City’s Anti-Land Invasion Unit (ALIU) suggests another way in which the constitutional principles outlined above may potentially be circumvented. Essentially the protections in section 26(3) of the Constitutional and PIE are triggered when a person’s home is threatened by an eviction or demolition. City officials have argued that they are simply preventing the occupation of private land by removing unoccupied and incomplete structures.



In other words, they have not breached constitutional or legislative provisions as no “homes” were destroyed.

This was essentially the argument advanced by the City in the case of *In re Ramahlele v Fischer* 2014 (3) SA 291 (WCC). The case involved an application to court by the owner of land in Philippi East, Mrs Fischer, for an order preventing the unlawful occupation of her property by a number of people erecting informal dwellings on her land. At the same time, members of the community instituted counter legal proceedings against the City. They argued that over 30 of their structures on the land had been demolished unlawfully by the ALIU. This counter-application was based on the *mandament van spolie* which is aimed at restoring possession to people who have been unlawfully deprived of their peaceful and undisturbed possession of property. The remedy is aimed at discouraging people or public authorities from taking the law into their own hands by speedily restoring possession without going into the merits of the underlying rights of the parties.

The High Court held that the demolition of the structures on the land was unlawful, commenting that they were reminiscent of apartheid style evictions. Judge Gamble in the case accordingly ordered the City to rebuild the structures. The City then appealed this judgment to the Supreme Court of Appeal. The Appeal Court held in *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) that the key issue in the case was whether the affected community members were in fact occupying the relevant structures when they were demolished. If they were, then the City would have taken the law into its own hands and acted unlawfully in demolishing the structures. The residents would be entitled to have the structures rebuilt and restored to them. However, if the structures were vacant and unoccupied (as the City alleged) then the City was entitled to remove them. The Appeal Court held that the High Court should have heard evidence on the factual question whether the structures had been occupied or not at the time of their demolition. It referred the case back to the High Court for evidence to be heard on this question.

Although the Fischer case centres on the question of whether the factual requirements for the *mandament van spolie* were met, it nevertheless raises the question what constitutes a “home”.

As noted above, the purpose of section 26(3) and PIE are primarily to protect people’s homes. This is not an issue that the highest court in South Africa, the Constitutional Court, has yet decided. However, it is obviously of great importance to those whose structures are being demolished on the basis of the perception of the ALIU staff that no-one lives in them. The question whether homes have been established must depend on a court properly evaluating the background and circumstances of the people that built the structure, and the reasons for its construction.

The final judgment in the Fischer case promises to offer some guidance on the protection available to people whose structures have been demolished on the basis of the ALIU’s opinion that they were unoccupied. However, it will probably take further legal challenges to demolitions of this nature before the legal rules which apply in this situation are fully clarified. What constitutes a home deserving of constitutional protection is clearly of vital importance to those who continue to struggle for a place in which they can live in peace and security.

### **The crisis of homeless and evictions**

Until the general crisis of homelessness and inadequate housing in urban areas is addressed, evictions will continue to be a source of tension between property rights and the housing rights of formerly disenfranchised people.

The challenge is to develop policies that provide adequate homes through releasing well-located urban land for residential purposes, upgrading existing informal settlements, and establishing a comprehensive public housing programme. While these processes are underway, officials at all levels of government and private land-owners are required to act towards those facing homelessness in a way that promotes ‘good neighbourliness’ and the value of human dignity which lies at the heart of the housing rights in the Constitution.

**\*An edited version of this article first appeared in GroundUp: [http://www.groundup.org.za/article/what-law-has-say-about-evictions\\_2185](http://www.groundup.org.za/article/what-law-has-say-about-evictions_2185)**

# SORT OUT THE KREEPY KRAULY, GET THE WEBER GOING, AND LET'S CHILL IN THE JACUZZI

*Gaelyn Scott, head of the IP department at ENSafrica*



**Stories of trademarks becoming generic—which may have the result that trade mark registrations become vulnerable to cancellation—are rare. Yet there have been a number of examples recently.**

In March 2014 there was a decision of the Court of Justice of the European Union (CJEU) that dealt with a claim that a trade mark registration for Kornspitz should be cancelled because the word had become generic. The trade mark registration covered bakery products, and the contention was that “kornspitz” had become the generic name for a particular type of oblong-shaped bread roll in Austria. The law in question speaks of a trade mark becoming the “common name” for the product, and it also refers to “inactivity” on the part of the trade mark owner. The particular question that the CJEU had to consider was whether the fact that the word had become generic amongst end users was sufficient, when it apparently still functioned as a trade mark—

in other words designated origin—in the trade. The court’s opinion was that it is the perception of the public that matters, not that of the trade. This means that if a trade mark has become generic with the general public then it’s generic, even if those in the industry still see it as a trade mark. The court also felt that, if the trade mark owner does not take steps to inform the public that it is a trade mark, this could amount to inactivity.

Not long ago we wrote a piece on Twitter’s IPO. In it we looked at the issue of whether any of Twitter’s trade marks—which obviously form major assets of the company—are at risk. The article concentrated on the trade mark Tweet, which the company in its documentation itself admitted “could become so commonly used that it becomes synonymous with any short comment posted publicly on the Internet... if this happens, we could lose protection of this trade mark.”

A journalist recently asked our firm to comment on the fact that a South African fast food chain, Chicken Licken, was using trade mark registrations for Soul Food to stop other businesses in the food industry using similar names. This raised a number of issues, including ones relating to the validity of the trade mark registrations. Was Soul Food a distinctive trade mark in South Africa when it was registered back in 2001? If so, has it become generic? The term “soul food” does, of course, have a rather loose meaning of homemade or family food – food from the soul.

There are lots of examples of trademarks that have become generic—cellophane, escalator, kerosene, nylon, linoleum, zip, windsurfer and gramophone to name a few. In some cases it may be a trade mark in one country and a generic word in another—thermos is apparently generic in the USA but not in the UK, yo-yo is apparently generic in the USA but not in Canada, and Aspirin is apparently generic in the USA but still a registered trade mark in a number of countries. There are also certain trademarks that might be regarded as being under threat of becoming generic. The title of this article, “Sort out the

Kreepy Krauly, get the Weber going, and let's chill in the Jacuzzi", is not simply what the average South African male says to his female companion on a Sunday; it's also a good example of three trademarks that are often used generically in South Africa.

### **So how do trademarks become generic? And which trademarks are most at risk?**

Trade marks for ground-breaking products— by which I mean products that have never been seen before— are particularly vulnerable. "Oven chips" is often cited as the classic example of a term that started life as a trade mark (belonging to McCain) but, was soon the generic term for a product that became very popular. If you think this punishes innovators, bear in mind that there's nothing stopping the trade mark owner from creating a generic name for the product. Who knew, for example, that there is a generic name for Rollerblades—inline skates?

Market leaders are also vulnerable. Take Google, for example. It's the absolute market leader in the area of Internet searching, and many people do use the word generically. They may say, for example, " I'll check on Google", when they may simply mean "I'll check online". They may even use it as a verb, saying "I'll Google it", when they simply mean "I'll search it".

Failing to monitor what others are doing with your trade mark is dangerous. If you see others using your trade mark wrongly—the press, dictionaries perhaps— stop them. It's been reported that words like Google and Twitter have made it into certain dictionaries and, although this may not be fatal (many dictionaries will now have a disclaimer to the effect that the mere fact that a word appears in it doesn't mean that it isn't proprietary), it certainly doesn't make life any easier for the brand holder.

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Ask British Airways how difficult things became when Club—the name of its business class—started appearing in dictionaries as the name of a class of airline travel. Obviously if you see competitors using your trade mark for their own products, you need to take steps to enforce your registrations.

If you are really worried about what might be happening to your trade mark, consider taking steps to educate the public. Companies like Xerox and Rolls Royce have placed ads in the media, informing people that their trademarks are just that, and not words which should be used to describe the action of making photocopies, or something that's prestigious or luxurious.

It's also important to make sure you use your own trade mark correctly. Don't use it in the plural form, and don't use it as a verb or noun. Rather, trademarks should be used as adjectives. And if you're worried about it becoming generic, be pedantic. Use the name of the product or product descriptor after the trade mark, and possibly even insert the word 'brand' between the two. Band-Aid bandages. Kleenex brand tissues.

Finally, whatever you do, don't help your trade mark become generic. This was the approach that SAA seemed to adopt some years back in connection with its Voyager loyalty trade mark. A company spokesman once made this extraordinary announcement: "You know a branding campaign has worked when it becomes the generic term for something. Thousands of South Africans refer to loyalty air miles as "Voyager Miles" which is actually SAA's award scheme." Yes, your marketing may indeed have worked, but you may also have lost your trade mark!

# UPLOADING, DOWNLOADING AND STREAMING ON THE INTERNET: WHAT DOES THE LAW SAY?

*Mrs Sarah Driver*



**When democracy dawned in South Africa in 1994, digital technology was in its infancy. In the last twenty years South Africans have witnessed a digital revolution that has transformed our lives in a myriad of ways. The ability to access a vast array of resources on the internet has come to dominate many aspects of our lives and thanks to digital technology, anything in digital format can be quickly copied without any degradation in the quality. Entertainment in digital format is in high demand but how much of what we do when we upload, download or stream movies and series is lawful?**

## **P2P File Sharing**

One of the most popular ways in which movies and series are shared is via peer-to-peer networking (P2P). Downloading P2P software, such as BitTorrent or DC++ is not unlawful because file sharing per se is perfectly legal if the person sharing the file owns the copyright. The problem is that much of what is shared, is shared by peers who are

infringing copyright by making or distributing copies of movies and series without having any legal title to do so.

## **Uploading**

Uploading copyright protected files which can be accessed by other peers on a P2P network infringes the Copyright Act 98 of 1978. Earlier this year, the first prosecution in South Africa for uploading a movie took place. An unlawful copy of the movie 'Four Corners' was uploaded to Pirate Bay by a Cape Town man who was convicted in the Commercial Crimes Court of contravening section 27 of the Copyright Act, for which he received a three year suspended sentence. This section prohibits the distribution of a copyright protected movie/series (<http://afro-ip.blogspot.com/> accessed 25 August 2014).

At Rhodes, the Information Technology Division has received 192 take-down notices thus far in 2014 from owners of copyright, requesting that movies or series made available on P2P networks by students be taken down. This is a massive increase on 96 complaints in 2013 and 6 in 2012. Copyright owners make use of automated internet bots to track the unlawful exchange of files on P2P networks.

As an internet service provider, Rhodes is obliged in terms of the Electronic Communications and Transactions Act 25 of 2002 and the Rhodes Acceptable Use Policy to act on take-down notices. On receipt of the first notice, students are required to meet with an IT official and agree to remove the movie from the P2P network and to refrain from repeating the act of uploading. On receipt of a second notice involving the same student, the matter is referred by IT to the University Prosecutors. Thus far in 2014, 15 students have been successfully prosecuted by Rhodes for a second offence and have received 50 hours each of compulsory community service. A case involving a third offence, the first of its kind at Rhodes, is presently pending the outcome of a disciplinary hearing.

## **Downloading**

Unlike uploading which amounts to a criminal offence in terms of the Copyright Act, downloading a movie



from a P2P network amounts to a civil infringement. The act of reproduction (or copying) is reserved for the owner of copyright and this includes making a reproduction from a reproduction (a copy of a copy) as is often the case on P2P networks.

What many users of P2P networks may not be aware of is that the act of downloading is accompanied by the act of uploading because, when a file is downloaded onto a P2P network, it is simultaneously 'seeding' for other users to download. Until it is expressly removed from the P2P programme, it continues to be available to other users and in this way infringes copyright.

On a lighter note, in May 2014, it was reported that an episode of the fourth season of *Game of Thrones* broke all previous records in that 200 000 people shared a single unauthorised file online and, after one day, 1.5 million people had made a copy of the file (<http://torrentfreak.com>, accessed 25 August 2014). The author of the series of novels *A Song of Ice and Fire* on which *Game of Thrones* is based, George R R Martin is on record as saying 'We are the most pirated show in the world. In a strange way that's a compliment' (<http://the1709blog.blogspot.com>, accessed 25 August 2014).

### Streaming

Streaming has gained in popularity in recent times. YouTube, which is arguably the best-known and most widely used streaming network, is accessed by a billion unique users every month (<http://www.youtube.com/yt/press/statistics.html>, accessed 25 August 2014). A vast array of movies and series is now available via streaming networks, some of which are legal and some not. The liability of the host website is not considered in this note but what of the position of the streamer/user? The South African Copyright Act was conceived prior to the advent of the internet and while some of its provisions can accommodate uploading and downloading as discussed above, it is not possible to locate streaming within it. Reproduction of a movie/series is an act reserved for the copyright owner in civil proceedings. So, does streaming amount to a reproduction?

Unlike P2P file sharing, streaming does not create a copy of the file as it is merely stored temporarily in the RAM (Random Access Memory) buffers of the user's computer or device. No copy of the file remains on the user's computer and the act of streaming is therefore transitory and/or ephemeral. Dealing with the concept of reproduction in movies in *Golden China TV Game Centre v Nintendo Co Ltd* 1997 (1) SA 405 (AD) the court found that "reproduction, in the context of copyright, refers to the copying of the work in question and not to ephemeral versions, renditions or applications of a work" (at 413J).

Since it is unlikely that streaming amounts to a civil infringement of the Copyright Act, does it amount to criminal infringement? Here too, it is difficult to locate streaming within the criminal provisions contained in section 27 of the Copyright Act. The Cape Town man recently convicted of criminal infringement clearly contravened these provisions by distributing (uploading) the work to the extent that the owner of the copyright was prejudicially affected. Streaming by a user does not distribute the work and nor does it fall within the remaining grounds of section 27.

South African copyright law does not concern itself with certain acts that can be performed in relation to copyright works. For example, if someone sneaks into a cinema without paying and watches a copyright protected movie, or reads a book in a book shop without paying for the book, no civil or criminal infringement of copyright has taken place. It is suggested that exactly the same principle applies to streaming via the internet.

It is a truism that legislation lags behind technological development and this is quite apparent from the discussion above in the South African context. Other jurisdictions have introduced legislation specifically targeted at the online environment and an example is the United Kingdom's Digital Economy Act, 2010. It is submitted, however, that as the law presently stands in South Africa, downloading movies amounts to a criminal contravention of the Copyright Act while uploading movies amounts to a civil infringement. The jury is still out on the legality of streaming by users and it is unlikely that those who make use of this form of entertainment face any current legal impediment to doing so.

# UBUNTU AND THE LAW: PROMOTING GOOD FAITH AND FAIRNESS IN CONTRACTS

*Adriaan Hoeben, Sue Hayes and Maria Domingos, directors of the litigation and dispute resolution departments at ENSafrica*



## **Ubuntu and the law: promoting good faith and fairness in contracts**

The Constitutional Court, the highest Court in South Africa, which has now been given wider jurisdiction to hear matters of public importance has, due to an amendment to the Constitution of the Republic of South Africa, recently handed down a judgment which is expected to have a significant impact on the principles of the law of contract in South African law. In fact, the aim to uphold the principles of *ubuntu* and to promote good faith and fairness in contracts is increasingly becoming a trend in judgments handed down by the Constitutional Court.

### **What is good faith in the law of contract?**

The notion of good faith is not a new phenomenon; it has always been part of South African common law. Good faith has been regarded as the doing of simple justice between person-and-person. It involves a respect for the other party's interests in a contract. Because a contract is an agreement between two or more parties, and often involves the principle of reciprocity, parties should not enter into an agreement in bad faith, as doing so would destroy the trust between parties and create commercial chaos.

However, good faith is not a stand-alone requirement in a contract. This much was made clear in judgments handed down by the Supreme Court of Appeal and its predecessor, the Appellate Division. Nonetheless, the Constitutional Court has attempted to develop this notion of good faith and, on a related note, the concept of fairness. The Constitutional Court has attempted to give content and understanding to the notions of good faith and fairness through interpreting and attempting to apply the concept and constitutional value of '*ubuntu*'.

While Ubuntu is not expressly stated as a constitutional value in the Constitution, it was provided for in the Interim Constitution. The Courts have also continually stated over the years that it is a constitutional value and that it assists in giving content to the three express constitutional values of freedom, dignity and equality.

## **Fairness over certainty: *Botha and another v Rich N.O.***

The very recent case of *Botha and another v Rich N.O. and others* 2014 (4) SA 124 (CC) has given a further indication of the Constitutional Court's approach to this issue of good faith and fairness in contracts, but it did not seem to authoritatively express its stance on this point.

This case concerned an interpretation of s 27(1) of the Alienation of Land Act 69 of 1981 ("the Act"), which provides that if a person has paid 50% or more of the purchase price of property which is subject to an instalment sale agreement, that person can demand that the seller transfer the land into his/her name on condition that he/she registers a mortgage bond in favour of the seller over the said land.

In this case, the seller purported to cancel the agreement and to enforce the forfeiture of the purchaser's payments, because the purchaser had defaulted on her payments. One would have expected the court to order the cancellation of the contract, due to the purchaser's default but not forfeiture, which is unlawful, according to s 19 of the Act. Therefore, upon cancellation the purchaser would be entitled to full restitution.

However, the Constitutional Court approached the issue in a different manner. In an attempt to develop the notion of good faith and fairness in contract, the Court subjected the enforcement of the cancellation clause to the fairness of doing so. One can see the Court's attempt to infuse constitutional norms and values into the general principles of the law of contract. In fact, it was stated in the Constitutional Court case of *Everfresh* that Courts need to develop a new contractual order which is informed by constitutional and traditional African values.

The Court here dealt with s 27(1) of the Act, and interpreted that the purchaser is entitled to demand transfer of the land into his/her/its name, provided that the purchaser tenders payment of the arrears amount and, if applicable, any municipal charges and registers a mortgage bond over the property in favour of the seller.

However, the seller had exercised its right to cancel the contract due to the purchaser's default and that the purchaser made no attempt to pay the arrears as contemplated by s 27(1) of the Act. The Court, however, considered whether the enforcement of a cancellation clause is fair under the circumstances, where the seller has exercised their rights in terms of the contract to cancel due to default by the purchaser. The Court held that such enforcement of the cancellation clause would be unfair, and accordingly dismissed the cancellation application. The Respondents were ordered to do all things necessary to effect transfer of the property to the Applicant, provided that payment of all arrear amounts were paid to the Respondents, and a mortgage bond be registered over the property in favour of the Respondents.

It seems that the effect of this judgment is that the exercise of a contractual right may be subject to a standard of fairness.

Consequently, although certainty is a requirement of the law of contract, it may be pushed aside in favour of upholding a standard of fairness in contract. Thus, the enforcement of a cancellation clause may be subject to a fairness enquiry by a Court. Parties must enter into contracts in good faith and act fairly to one another. The Constitutional Court is adamant to develop the law of contract in line with constitutional values and it will continue to do so. While the law is developing as such, this particular point of law will remain in a state of flux.

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# THE YEAR THAT WAS OSCAR: SOME THOUGHTS ON THE PISTORIUS TRIAL

Ms Anj Haller-Barker



**We all know the facts: in the early hours of Valentine's Day 2013, Oscar Pistorius fired several shots into a locked toilet door at his home in Pretoria, killing his girlfriend, Reeva Steenkamp, who was on the other side.** There is so much that one could write about this trial. From the successful application by the media to broadcast the entire proceedings (see *Multichoice (Pty) Ltd & Others v National Prosecuting Authority & Another* 2014 (1) SACR 589 (GP)), and the impact of social media, to the interesting witnesses (one only has to think of the forensic geologist, a defence witness, who disastrously purported to give evidence on everything from sound and light to blood-splatter analysis and forensic pathology), to evidence of police incompetence and tampering, the performance of legal counsel on both sides, and a whole host of other issues. Time and space not being on my side, I will reflect only on the charge and the defence(s) raised.

## The charge of 'premeditated murder'

The State sought a conviction for premeditated murder. The substantive law provides us only with a definition for murder, but the notion of premeditation arises both in relation to bail and to sentencing. The Criminal Procedure Act 51 of 1977 (CPA) categorises planned or premeditated murder as a Schedule 6 offence. Under section 60(11) of the CPA, bail will generally not be granted for a schedule 6 offence unless the accused can show that exceptional circumstances exist in the interests of justice that permit his or her release on bail. The National Director of Public Prosecutions (NDPP) may issue a written notice to the effect that he / she intends to charge the accused with a Schedule 6 offence. Because the NDPP did not do this in the Pistorius matter, it fell to the Magistrate at the bail hearing to determine whether there was a likelihood that Pistorius would be charged with premeditated murder. Magistrate Nair did find that there was such likelihood, but also that exceptional circumstances existed that justified Pistorius's release on bail.

On the issue of sentencing, section 51 (1) of the Criminal Law Amendment Act 105 of 1997, read with Schedule 2 of the Act, prescribes a life sentence for premeditated murder, whereas a first offence for murder without premeditation attracts a minimum sentence of 15 years' imprisonment (in both cases unless substantial and compelling circumstances exist that warrant a lesser sentence). Due to this significant difference in sentence, it was held in *S v Raath* 2009 (2) SACR 46 (C) at 51-53 that where the State intends pursuing a conviction for premeditated murder, that fact should be made clear to the accused from the start, so that he or she may conduct their defence accordingly.

Therefore two issues must be addressed at trial: whether all of the elements for murder were present and, if so, whether the murder was premeditated.

## The defence(s)

Pistorius's defence was that he thought there was an intruder in the toilet, and that he truly but mistakenly believed that he was entitled to defend himself by



shooting through the toilet door – amounting to the defence of putative private defence. In this situation there is no unlawful attack on the accused, and he cannot rely on the defence of private defence. His actions are unlawful. The enquiry therefore turns to whether the accused had the requisite intention to murder. Integral to the enquiry is evidence as to the accused's state of mind (see *S v De Oliveira* 1993 (2) SACR 59 (A)). If the defence succeeds, and it is found that the accused lacked intention, he may either be acquitted, or convicted of the lesser crime of culpable homicide (so long as the requirements for negligence are met).

During the trial the possibility of two other defences surfaced. During cross-examination, Pistorius indicated that he had pulled the trigger by mistake, and did not mean to shoot at the toilet door. This amounts to the defence of automatism, or involuntary conduct—conduct that occurs in a mechanical fashion. However, in re-examination his counsel was quick to steer him back to the defence of putative private defence.

Things then took a sudden turn when Dr Merryl Vorster testified for the defence, to the effect that Pistorius suffers from Generalised Anxiety Disorder (GAD). Dr Vorster was a very late (and in retrospect ill-advised) addition as a witness. She indicated that Pistorius may have lacked capacity at the time of the offence. Remember that the test for criminal capacity asks: (1) whether the accused had the ability to appreciate the difference between right and wrong, and (2) whether he had the ability to act in accordance with that appreciation. Whilst Dr Vorster testified that GAD is not a mental illness, and that Pistorius understood the wrongfulness of his actions at the time he pulled the trigger, she stated it was possible that he could not act in accordance with that understanding. Thus the second leg of the test for criminal capacity was put into question. Defence counsel was adamant that Pistorius did possess the requisite criminal capacity at the time of the act, and that there was no need to investigate this issue.

But it was too late. The State was quick to bring an application for Pistorius's referral for mental observation under s78(2) of the CPA, which reads as follows:

“If it is alleged at criminal proceedings that the

accused is by reason of mental illness or mental defect or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or mental defect, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.”

Our law has a presumption of sanity. Thus, under s 78 of the CPA the burden of proof as to the accused's criminal responsibility rests on the party who raises it. This resulted in an interesting situation. The prosecution, although it brought the application for referral, was not alleging criminal incapacity. On the contrary, it wanted to show that Pistorius had full capacity. The defence also claimed that Pistorius had the requisite capacity, but had painted itself into a tight corner with a witness who was alleging that he may have lacked capacity. Therefore the defence bore the onus in an application that it opposed.

The prosecution wanted the issue clarified so that it did not arise during sentencing or on appeal. This was because section 78(2) refers to mental illness (which, if present at the time of the offence, would negate criminal responsibility), and to mental defect. Diminished responsibility is recognised in criminal law not as defence, but as a factor which may operate in mitigation of sentence where an accused meets the test for criminal capacity, but has some form of mental defect that reduces his responsibility.

Argument turned on an interpretation of s 78(2) and whether its provisions were peremptory or discretionary. The prosecution contended that because Pistorius's capacity had been placed into question, the court had no choice but to order a referral. The defence claimed that there must be substance to an allegation of mental illness or defect, and that the court in any event has a discretion whether to order a referral. Masipa J said that the evidence was properly substantiated by Dr Vorster. She also ruled that the language of s 78(2) is in fact peremptory where the prerequisites are met (as they were here), and granted the order.

As a result Pistorius was referred as an outpatient to Weskoppies psychiatric hospital for a month of intensive psychological testing. The outcome of the referral was two reports, which indicated that Pistorius did not suffer from GAD, or from any mental illness or defect, at the time of the shooting. Thus the possibility of Pistorius relying on GAD either as a defence or in mitigation of sentence was removed.

As I write this, I am conscious of the fact that soon we should have a verdict, and Oscar will know his fate. That verdict will be old news by the time you read this. Regardless of what the verdict may be, I think these legal issues will remain interesting and relevant. I will miss tuning into the trial. Given that DSTV channel 199, which was broadcasting news on the trial 24 hours a day, reportedly became the fourth-most-watched channel on paid television, I won't be the only one!

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## THE LEGAL STATUS OF THE CHILD SOLDIER UNDER INTERNATIONAL LAW: VICTIMS OR VIGILANTES?

*Thabang Mokgatle*



**"We went from children who were afraid of gunshots to now children who were gunshots." (Errol Barnett Ex-Child Soldier) "Shooting became just like drinking a glass of water." (Ishmael Beah, former child soldier, Sierra Leone Civil War (1991-2002))**

According to the Human Rights Watch agency, child soldiers have been active in at least twenty-one ongoing armed conflicts in about every region of the world since the year 2001 (Human Rights Watch, "Facts about Child Soldiers" (2014) [http://www.hrw.org/news/2008/12/03/facts-about-child-](http://www.hrw.org/news/2008/12/03/facts-about-child-soldiers)

soldiers , accessed 17 July 2014).

Although the exact figures of child soldier recruitment and participation in armed conflict are not readily ascertainable, the reality is that even more children in war ridden regions are being recruited and used by both state and non-state actors daily.

The Convention on the Rights of the Child (UN General Assembly (1989) is deemed to have revolutionised the way in which children are treated within societies, as it sets out sui generis rights applicable to children and has won the commitment of various global actors in advancing the goals of the International Human Rights movement (UN Children's Fund (2014). Article 1 of the Convention defines 'child' as a person under the age of 18, unless the domestic law of a State party defines minority age otherwise (UN Children's Fund (2014)

Article 38 of the Convention of the Rights of the Child mandates governments to ensure that children under 15 are not recruited into or forced to participate in war. This right is further elaborated upon under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Optional Protocol), which effectively raises the age for direct participation by children in armed conflict to 18 years of age (UN General Assembly (2000). The Optional Protocol and the African Charter on the Rights and Welfare of the Child respectively, also define 'child' as a human being under 18 years of age (Organisation of African Unity (1990). State parties, where they have accordingly signed and ratified, are bound by the conventions and Charters above cited in ensuring that persons under the age of 18

years are not forcibly recruited or conscripted to directly participate in hostilities (UN General Assembly (2000). This was set out in the case of *The Prosecutor of the Special Court for Sierra Leone v Charles Ghankay Taylor* (Special Court for Sierra Leone 2012), where the Special Task Court for Sierra Leone found former Liberian President Charles Taylor guilty of crimes against humanity and war crimes implicating, inter alia, recruiting children under the age of 15 to participate actively in hostilities in the region of Sierra Leone during its Civil War (Child Soldiers International, “Special Court for Sierra Leone—Appeals Chamber confirms the Conviction of Charles Taylor” (2013). What is not clear and codified, however, is the stance of international law on non-state parties (inter alia, military wings of political groups; rebel forces and mercenary groups etc) who forcibly conscript or recruit children into their structures to be direct participants in hostilities.

In the landmark decision of *The Prosecutor v Thomas Lubanga Dyilo* (International Criminal Court (2012), the International Criminal Court convened for the trial of Thomas Lubanga Dyilo who was the commander in chief of the military wing- the Forces patriotiques pour la libération du Congo (FPLC).

Dyilo was found guilty of war crimes under 8(2)(e)(vii) of the Rome Statute, which specifically includes: enlisting and conscripting children under the age of 15 into the FPLC and using these children to directly participate in an armed conflict of an International character between 2002 and 2003 (UN Children’s Fund (2014) Dyilo was sentenced to 14 years imprisonment as a result of the ICC’s findings.

Considering the above Charters and Conventions, it is not possible for children (as defined above) to possess the required mens rea (mental capacity) to be found guilty for the perpetration of war crimes or crimes against humanity under international criminal law. However, there has historically been a disparity between international and domestic law practice and implementation on this point. As earlier mentioned, various domestic legal systems attach minority at different ages and as a result determine criminal responsibility differently. Domestic legal systems also deal with perpetration of crimes within their jurisdictions differently, and this makes it difficult to say whether there is a blanket approach internationally to

the prosecution of child perpetrators of war crimes.

For example, in 2001 four teenage child soldiers ranging between the ages of 14 to 16 years had been tried, convicted and sentenced to death by the Court of Military Order in the Democratic Republic of Congo (DRC) for their participation in the civil armed conflict. Similarly, in the year 2002, Uganda pressed treason charges against two teenage boys aged 14 and 16 years respectively, who had worked under Joseph Kony’s Lord’s Resistance Army (LRA). All the above mentioned cases were subsequently dropped with the intervention of International Human Rights advocacy groups (Happold (2005).

Earlier this year, Spanish authorities intercepted and detained two teenage girls (aged 14 and 19) on their way to Morocco who were suspected of attempting to join the Islamic State of Iraq and Syria (ISIS) (Al Arabiya News (2014). ISIS is a fundamentalist jihadist organisation, and as part of its agenda to defend the Islamic faith, carries out a combination of guerrilla warfare and terror attacks (The Free Dictionary Online (2014) (BBC News Middle East (2014).

Both girls were identified as citizens of Spain, a country with a national majority age of 18 years (European Commission 2005). It is said that the girls were recruited from a host of foreign combatants to join ISIS’s ranks, through jihadist websites promoting foreign combatant’s participation in the armed conflict in this Middle Eastern region( Al Arabiya News (2014)

As shown from the above, where International law deems children below 18 years incapable of perpetrating crimes, state authorities have tended to interpret criminal responsibility otherwise, according to their national laws.

What is needed is the creation of a better synergy between International law and domestic law on the approach to the criminal capacity and prosecution of child soldiers. The international legal framework in place has set the agenda on how to deal with both the promotion of the rights of children in armed conflict, as well as the protection of children from the effects of directly participating in war.

The problem arises, with the implementation of International law provisions by State parties (Eisentrager



“Exploring the Recruitment and Use of Child Soldiers” 2012 <http://www.e-ir.info/2012/04/19/exploring-the-recruitment-and-use-of-child-soldiers> (Accessed 17 July 2014). State parties need to be better represented in drafting plans of action (implementation strategies) based on the existing legal framework, to effectively deal with the child soldier phenomenon at both the domestic and International levels.

Additionally, non-state parties who are not ordinarily bound by specific Charters and Conventions under international law, but who are expected to abide by international law standards, need to be appealed to. State parties, regional bodies and non-governmental actors alike need to assist in emphasizing the importance of adhering to these standards to non-state participants to war. Failing which, greater sanctions should be considered and even enforced in future.

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## THE APPELLATE BODY OF THE WORLD TRADE ORGANISATION

*Bokang Kokolia Taoana*



This article takes a look at the Appellate Body, the highest judicial body of the World Trade Organisation (WTO). Particularly, it focuses on the Appellate Body's power of *de novo* review. It assesses whether this power should be revised by amending the Dispute Settlement Understanding (DSU), the document forming the cornerstone of the WTO dispute settlement regime.

### **Powers of the Appellate Body: problems with *de novo* review**

In several common law jurisdictions, appeal courts often remit matters to lower courts after having overturned, modified, or reversed the latter's decision on a point of law. This compels the lower courts to re-hear the matter and dispose of the unresolved substantive issues (see for example *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) 86D). Curiously, the Appellate Body has no power to remit a case to the WTO Panel, the forum of first instance. Upon reaching a finding that the Panel erred on a legal issue, the Appellate Body considers that issue anew and makes a ruling (BWV Steward "Polishing the Jewel in the Crown: A Timely Review of the WTO Dispute Settlement Understanding" (2003) 9 *Auckland University Law Review* 25 at 29). One instance in which this occurred involved a dispute between the USA and Venezuela (*United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/R, 1996 at 29). Where the Appellate Body reverses the decision of the Panel, and there are outstanding legal questions, the Appellate Body can elect between requesting a new Panel or can engage



in a *de novo* review of the unresolved issues (Steward 2003 9 *AULR* at 33). The weight of authority suggests a preference for the latter option.

*De novo* review is problematic in several respects. It is argued that an important reason for higher courts remitting matters to lower ones in common—law jurisdictions is the desire to avoid being the court of both first and last instance. The implications of being a court of first and last instance will now be explored in highlighting the drawbacks of the Appellate Body's power of *de novo* review.

The most obvious drawback of *de novo* review is that the Appellate Body considers legal questions without the benefit of the Panel's views. This leads to a risk of deciding a case wrongly, amplified by the Appellate Body's findings being confined to ones of law, not of fact (art 17(6) of the DSU). This means that it cannot reconsider evidence on findings of fact even if it disagrees with the Panel in that regard. In such a situation, there is no further appeal, nor is there any opportunity to correct the wrong decision (Steward 2003 9 *AULR* at 35).

This problem is compounded by the fact that Appellate Body decisions are almost always adopted because of the "reverse consensus" rule, according to which a resolution to dismiss an Appellate Body report must be unanimous (art 17(14) of the DSU). Both parties to the dispute are counted in the votes, and the winning party will invariably exercise their veto to ensure adoption of the report. This means it is possible for a report to be adopted despite containing bad law. Another drawback of *de novo* review is that it makes the dispute settlement system monolithic, with the Appellate Body wielding inordinate judicial power (Cottier "The WTO Dispute Settlement System: New Horizons" (1998) 92 *American Society of International Law Proceedings* 86 at 90). This argument is more compelling when considered with the fact that art 17 (1) of the DSU only allows for 7 members of the Appellate Body, making the organ as a whole more susceptible to outside influence. The monolithic structure renders Panels toothless, reducing their role to being an ancillary one in the dispute settlement process. The monolithic structure poses a further problem: with almost every Panel decision being appealed (Cottier 1998 ASILP at 90), the Appellate Body is

overburdened. The rules as they stand do now allow for the remission of any of its caseload, even where remission would be judicious. This clogging up inhibits speedy dispute resolution.

### Suggested improvements

It is argued that the Appellate Body should be divested of its power of *de novo* review, and invested instead with the power to remit a case to the Panel. This would avoid several of the dangers highlighted above, would make decisions more consistent, and would make the relationship between the Appellate Body and Panels more streamlined. It is further suggested that the number of Appellate Body members should be increased, to allow the Appellate Body better to cope with the caseload. However, the extent to which these suggestions will be taken seriously is unclear. With respect to the improvement of the functioning of the Appellate Body and the Panels, the Doha negotiations have primarily focused on suggestions to create a permanent, as opposed to rotating Panel Body, and to create more flexibility and party control of the dispute settlement process. The suggestion to allow the Appellate Body to remit cases has also been echoed in some of the proposals advanced in the Doha negotiations, the strongest proponent of which is the European Community, a rather powerful bloc (W Weiss "Reform of the Dispute Settlement Understanding" (2004) 1 *Manchester Journal of International Economic Law* 96 at 107).

Also of importance is the financial ramifications of these suggestions being implemented. One cannot ignore cannot ignore the economic reality that the WTO, as does any organisation, operates within an environment of limited financial resources. Decisions of how the Appellate Body should be re-configured must be informed by the financial constraints.

### Conclusion

The DSU is a powerful document which can be criticised from several angles. In order to make the critique more meaningful and focused, the discussion directed its attention to the Appellate Body's powers of *de novo* review.

In light of the drawbacks and dangers of *de novo* review detailed above, it is concluded that the DSU should be amended so as to confer on the Appellate Body the power to remit a matter to the Panel.

# THE “ADVANTAGE TO THE CREDITOR” PRINCIPLE IN INSOLVENCY LAW

Tafadzwa Makoni



**In *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC) at 383 it was held that the main reason for insolvency law in South Africa is to ensure that creditors are secured in the event that their debtor or debtors become insolvent.**

This much is evident when one looks at the Insolvency Act 34 of 1936, hereinafter referred to as the Insolvency Act. Section 3 of the Insolvency Act states that an insolvent debtor, or his agent, may petition the court for the acceptance of the surrender of his or her estate. For the court to accept this application, it must be satisfied that the surrender of the estate will be to the benefit of the creditors. This means that in order to successfully have one's estate sequestrated, one must show the court that it is in the creditor's benefit to have the estate sequestrated (Kanagumire “The Requirement

Of Advantage To Creditors in SA insolvency law” 2013 *Mediterranean Journal of Social Science* 19).

The same requirement, namely that the sequestration of an estate must be to the benefit of the creditors, also exists when there is compulsory sequestration of an estate in terms of s 9 of the Insolvency Act. It is clear from this, that an advantage to the creditor is necessary in order for someone to get their estate sequestrated.

The same does not, however apply to debtors. There is no requirement in South Africa's current insolvency law that requires an advantage to a debtor in order for the debtor's estate to be sequestrated (Kanagumire 2009).

Many have criticised South African insolvency law for failing to balance the interests of both creditors and debtors in insolvency proceedings. In the discussion that is to follow the criticisms levelled against the current laws will be discussed and analysed. Thereafter, a discussion on whether or not there is room for developing a principle that highlights the advantage of the debtor as a focal point in insolvency proceedings in South Africa will be discussed. This will be done with the use of foreign law as a comparative tool that will help shed light on potential solutions for South African insolvency law.

## **Criticisms of the advantage of the creditor principle and its resultant bias against debtors**

Asheela (*The Advantage Requirement in Sequestration Applications: A Call For Relaxation* LLM thesis, UP 2009) argues that the rigid application of the advantage to the creditor principle means that poor debtors rarely succeed in having their estates sequestrated. This is because poor and insolvent debtors rarely have enough assets to benefit all, or even some, of their creditors; subsequently, they cannot satisfy the advantage to the creditor requirement. (Asheela *ibid*). It is submitted that Asheela's observation is correct. If one considers the meaning that the courts

have given to the phrase “advantage to the creditor” it becomes apparent that a poor debtor will be hard pressed to prove that their sequestration will be to the advantage of the creditors.

For example, in *Walker v Syfret* NO 1911 AD 141 at 160, the court held that the advantage to the creditor requirement should be understood to mean that creditors should be given the chance to share the proceeds from the insolvent’s estate in a fair and equitable manner. This is achieved by freezing and then liquidating the insolvent’s assets (see *Walker v Syfret* NO 160). In *Gardee v Dhanmanta Holdings and Others* 1978 1 SA 1066 (N) 1068-1970 the court added that for the court to view an advantage as fair and equitable the insolvent must prove that the sequestration will exceed the likely proceeds from ordinary execution proceedings. This approach is highly problematic to the poor. This is because they can rarely afford to have their assets frozen. Furthermore, they are likely to struggle when it comes to convincing the court that their assets are sufficient to benefit most or even some of their creditors in a just, fair and equitable manner. As Bertelsmann J quite bluntly remarked in *Ex parte Ogunlaja* [2011] JOL 27029 (GNP) para 36:

‘Unless and until the Insolvency Act is amended, the South African insolvency law requires an advantage to creditors before the estate of an individual can be sequestered. Much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the insolvency law seeks to protect the interests of creditors at least to the extent that a minimum advantage must be ensured for the concurrent creditor when the hand of the law is laid on the insolvent estate.’

In addition to making insolvency proceedings inaccessible to the poor, the court’s cautious and rigid approach to the creditors’ advantage requirement, as briefly detailed above, has hampered many others from being able to access insolvency proceedings in term of the Insolvency Act. For a long time this caused undue hardship on South Africa’s ever growing insolvent population.

Perhaps in an attempt to alleviate this problem, the government enacted the National Credit Act 34 of 2005, in order to provide indebted individuals with an alternative means of accessing debt relief structures (Roestoff and Coetzee *Consumer debt relief in South Africa* (2012) 24 *SA merc LJ* 53. The use of administration orders in terms of the Magistrates’ Courts Act 32 of 1944 has also increased. This is no doubt in reaction to the need to find alternative means to provide debtors with a structured means of acquiring debt relief.

Although administration orders and debt relief procedures in the National Credit Act are a welcome development, they do not make up for the lack of a principle stating that the debtor’s benefit should be considered in insolvency proceedings. This inadequacy will be discussed in more detail below.

### **The inadequacies of the National Credit Act and the Magistrates’ Courts Act and possible ways forward for South Africa**

One of the aims of the National Credit Act is to prevent reckless borrowing while also ensuring that debtors discharge their obligations to lenders (Kanagumire *ibid*).

In so doing, the National Credit Act attempts to balance the interest of society with those of the business community. This is something that the Insolvency Act fails to do. The courts, however, still look for an advantage to the creditor when applying the provisions of the National Credit Act and this has somewhat watered down the balance between the interest of the debtor and the interest of the creditor (Kanagumire *ibid*). Administration orders, although useful, have the disadvantage that a debtor can remain under administration for the rest of their life if they do not earn enough money to discharge their debts. This is an unfair burden on the debtor, especially when insolvency proceedings that give finality exist (Kanagumire *ibid*). Consequently, it is necessary, despite the existence of s74 of the Magistrate Court’s Act and the National Credit Act, to develop the debtor’s benefit principle.

The Law Reform Commission has advocated new developments for insolvency law . The 2010 Insolvency Bill introduces a system that will allow a more debtor friendly approach insolvency proceedings.

Be that as it may, a more radical approach is needed to balance the interests of the creditor and the debtor. In this regard, South Africa's insolvency law can benefit by learning from the system in the United States of America, hereinafter referred to as the USA.

This is because the USA has made the debtor's interest an important consideration in insolvency proceedings. For example, a fresh start is given to desperate debtors who have no means of discharging their debt. Options like this are necessary in South Africa as there is a considerable amount of people who live in poverty. Their lives would be destroyed if they were to employ any of the debt relief procedures discussed above.

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In addition to helping the debtor, such a system would encourage creditors to stop giving reckless credit. In so doing it will also further the one of the aims of the National Credit Act.

### **Conclusion**

It is clear that the current Insolvency Act is unjustifiably biased towards creditors. This needs to change. Reforms need to be introduced that will allow the debtor's interest to play a greater role in insolvency proceedings. In order to achieve this reform, South Africa should learn from other jurisdictions and it should develop a more flexible approach to insolvency.



# RELIGION: A POTENTIALLY USEFUL TOOL IN CONSTITUTIONAL JURISPRUDENCE?

*Martin Hare*



In a recent speech by Chief Justice Mogoeng wa Moegoeng (Moegoeng “Law and Religion in Africa: The Quest for the Common Good in Pluralistic Societies” University of Stellenbosch, 2014), he proposed some interesting arguments as to how we as a continent and more specifically as a nation should deal with problems such as “maladministration, crime, corruption and the lackadaisical attitude of many government functionaries in the execution of their duties” and general level of “dishonesty as well as injustices that have permeated all facets of society”(Mogoeng 4).

His solution would be the use of religion to “govern our daily lives, starting with the Constitution of any country”(Mogoeng 4).

While the Chief Justice’s submissions are no doubt well intentioned, they are problematic. The first problem with the promotion of religion in the law-making process is the ease at which religious

tolerance can evolve into religious intolerance. While the Chief Justice’s speech is careful to acknowledge this fact and is at pains to try and convey that this not how he envisions the application of religion in the legal context, there are some worrying aspects of his speech, particularly his views as to how religion can play a part in augmenting the law in relation to people’s personal relationships by establishing a “legal framework that frowns upon adultery, fornication, separation and divorce, subject to appropriate modification”.

Given the problems of gender-based violence in this country, it is probably best that we have a legal framework that promotes personal autonomy in relationships rather than limits it. Apart from the potentially devastating practical effects this could have on society, such a legal regime would also be plainly unconstitutional.

As De Vos correctly states, laws which purport to curtail an individual’s ability to regulate their personal relationships and “intimate affairs” would be inconsistent with the “inherent human dignity of everyone ... a value, which our Constitutional Court has said, runs like a golden thread throughout the Constitution” (De Vos “The law vs. religion: Let’s try that again” <http://constitutionallyspeaking.co.za/category/mogoeng-mogoeng/>, accessed 21 September 2014). Thus, instead of proposing a “vibrant partnership between law and religion”, the Chief Justice has posited a legal framework in which the central tenets of our constitutional dispensation and religious belief would be mutually destructive to one another.

Quite frankly it is difficult to envisage a situation in which law and religion can ever form the type of “vibrant partnership” which the Chief Justice envisages simply because religion is too diverse in variety, interpretation and application to be a viable source of jurisprudence. In a country as diverse as ours how will we ever find a set of religious principles that could be universally applied without unduly inhibiting the rights of others who do not necessarily share those beliefs?

How would this accord with one of the fundamental requirements of the rule of law which “lies at the

heart of our constitutional order”, namely that the law must be capable “predictable outcomes, not outcomes based on the whim of an individual judicial officer” (see *S v Matyityi* 2011 (1) SACR 40 (SCA) para 23).

It is precisely this problem with religion which the Constitutional Court in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) recognised holding that because of the differences “between and within religions ... It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others” (para 92).

However it is not only the Chief Justice’s position that religion should form part of the law-making process that is problematic. It also the idea that the Constitution and laws that have been enacted in furtherance of its vision would somehow be enhanced by the infusion of religious principles.

As the Chief Justice himself notes, the law in place today “generally bears a striking resemblance to Christian principles in many respects” (Mogoeng 13). Apart from a proposal which seeks to place stricter controls on individual’s personal relationships the Chief Justice does not present any other cogent examples of how religion can be used to supplement our constitutional dispensation other than it could be used as a way for our public servants to take their oath of public service more seriously in the hope that such an understanding would “help many to live up to their promises”(Mogoeng 17).

However, the Constitution and the laws enacted in furtherance of it already take an explicit ethical position as to what is expected of public servants. Several pieces of legislation such as the Prevention and Combating of Corrupt Activities Act 12 of 2004, the Public Finance Management Act 29 of 1999, and the Municipal Finance Management Act 56 of 2003 criminalise corruption and financial mismanagement by public servants (See section 26 of the Prevention and Combating of Corrupt Activities Act, section 86 of the Public Finance Management Act, section 9 of Municipal Finance Management Act). They are a reflection of how much emphasis the Constitution places on providing “democratic and accountable government” which seeks to promote social and economic

development.

When an individual becomes a public official there is an agreement that they will undertake to try and help fulfil the Constitutional vision of building a nation founded upon values of “human dignity, the achievement of equality and the advancement of human rights and freedoms.” It was a vision born from a century long fight to have the humanity of every South African properly recognised and accounted for. If that is not enough of a moral imperative for people to act properly then that fight would have been for nothing.

Recently, a 6-year-old boy died after falling into a pit latrine at his school in Limpopo (February “Exposing self-serving politicians” <http://ewn.co.za/2014/04/16/OPINION-Judith-February-Exposing-self-serving-politicians>, accessed 21 September 2014). When questions were put to the MEC for Education in Limpopo as to why pit latrines were still in use at schools, she “lashed out” and said it “it was God’s will (for the boy to die)”. Whatever you believe that is certainly not the will of the Constitution of the Republic of South Africa. The real problem, it seems, is not a lack of religious conscience but rather a lack of political will on the part of those in power who purport to represent constitutional values to put those values into practice.

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# NTUTHUKO LEGAL ACTIVISM: REPORT

*Khanyisa Majokweni*



**The Ntuthuko Legal Activism Society was started by law students who realised the importance of contributing to both the social development of our community (especially as law students with the privilege of studying at Rhodes) as well as the realisation of constitutional goals. As such, the society was able to identify key areas these being HIV & AIDS; labour-related issues; micro-lending; wills & estates; constitutional awareness and rape & domestic violence.**

The constitutional portfolio in the society is the most recently added portfolio; this was because of a noted lack of constitutional awareness in the immediate Grahamstown community. In 2014 we have tried as a society to do so much work under the umbrella of the constitutional portfolio. There have been a variety of events that we as a society

have hosted but there was heavy reliance on the Constitutional Portfolio in light of 20 years of democracy in South Africa and especially the elections that we most recently had.

Among the events that we had, we had the civil education workshop that we hosted at St Augustine Church weeks before the elections. The main focus of the workshop was not to campaign around any political framework (with the fear of contention) but rather to try and enlighten those we could reach on the importance of voting and having their voices heard through the act of voting. This did come with all sorts of difficulty, but the mandate of activism was greater. We got assistance from the Law Clinic particularly the training workshop that was delivered to us by Professor Jobst Bodenstein. What was drawn from this experience for us all was the importance of activism that is not just focused on what we have to say when delivering workshops but also the significance of the experiences and the voices of the people we speak to and encounter. As a society participating in this we heard different stories and ideas on the constitution and democracy in itself.

In the beginning of the current year we had the pleasure of meeting with two representatives of SECTION 27 and were informed of the work they were doing in light of the health crisis in the Eastern Cape. Legal Activism has found this to be an appealing project in terms of the society's activism mandate and also in an attempt to give detail of what the Constitution entails. In light of this the society in hosting the annual constitutional week in September, decided to use health rights as a frame for the week. Health rights to speak an immediate concern of not just the Rhodes population but also the greater Grahamstown community. Our focus and goal is to create awareness, impart knowledge and activism concerning the provision of health services in Grahamstown, with the hope of encouraging the same spirit in the Eastern Cape. We acknowledge that this is a monumental task, but awareness and activism is what we hope for. The idea is to inform people of their rights under section 27, what they are entitled to and how they can exercise this.



We are hoping to show how far the Constitution has come in terms of ensuring that these rights are realized and the progression in the last 20 years. We also further hope that the spirit of activism within our society will have great impact in making sure that people engage with the constitution more and not just as a document but as the basis of our country's legal system. We acknowledge that this will not happen over night but the best thing about being part of Legal Activism has been seeing the keen spirit that our members have for the law and the particular areas of focus that Legal Activism deals with.

In looking at 20 years of democracy, as a country we still have a long way to go in living up to the ideals of democracy and our progressive Constitution. However what's even more encouraging in this respect is that there are organizations much like Legal Activism and many other individuals much like those who are members of the society, who have a passion for the law and who have a passion for a better South Africa. This can be the beacon of hope we have in terms of ensuring the rights and ideals that are enshrined in the Constitution come to life.

**Chairperson**

**Legal Activism 2014**

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## INTERNATIONAL MOOT REPORT:

### ELSA MOOT COURT COMPETITION ON WTO LAW

*Jamie Foreman*



**South Africa has been a member of the World Trade Organisation (WTO) since its establishment on the 1st January 1995.** However, the country is yet to bring a matter before the WTO or its dispute resolution bodies. (To date South Africa has not been a complainant in any disputes, although it has been a respondent in four disputes and a third party in a further six disputes.) This is despite issues arising that appear to be perfectly suited to one of the dispute resolution mechanisms of the WTO (such as the refusal by the European Union to allow the importation of canned pineapples from South Africa due to an "excess" of cadmium in the product). It appears that this is due to a lack of awareness or understanding of these mechanisms within South Africa and the requirement that any action taken or dispute instituted is done so by the state itself as opposed to individuals or bodies.

Whilst a democracy is the cornerstone of our Constitution, it is not enough to look only domestically at what is becoming more and more of an international society. With the increased reliance on growth and exports, it is imperative to take cognisance of international bodies and treaties to which South Africa is a member. One such way of raising awareness of this area is the expansion of the ELSA Moot Court Competition (EMC2) into Africa.



The inaugural African Regional Round took place at Wits University at the end of March 2014, with the top three teams advancing to the Final Oral Round in Geneva, Switzerland.

We first heard about the competition in the elective presentations at the end of last year where Ms Vicky Heideman explained that if we took International Trade Law, and if we were selected to participate in the moot, we could go to Switzerland – an eventuality none of us really thought would ever come to pass as it was too far fetched. However, a number of penultimate year students completed a selection assignment on our understanding of the General Agreement on Trade in Services (GATS) at the beginning of the holidays.

At the beginning of December the Rhodes Team consisting of myself, Oscar McGown-Withers, Deanne McKersie and BK Taoana and supervised by Vicky Heideman began working on written submissions. Once more, we were thrown in at the deep end, and although we were able to ask Vicky for help and advice the four of us still needed to complete 30-page written submission for each of the complainant and respondent arguments. With little background knowledge or understanding, from four different countries and a houseboat, and by using the internet hotspot on our phones we managed to complete and submit the written arguments at the beginning of January.

Now all we had to do was prepare for the oral rounds that would take place in Johannesburg at the end of March. We met almost on a weekly basis, some meetings being more productive than others. We soon found that one of our main problems was going to be pronunciation of certain words (superfluous not superflurrious) and trying to remember that this was a civil court system and therefore not to call the judges, “My lord,” or “My lady”. At this stage we were also all taking International Trade as an elective and whilst it was nice to get a proper understanding of what we were talking about, it also started to raise alarming questions about what we had missed in our written submissions!

Before we knew it, it was the end of March, and the morning after the LLBraai we “suited up” and head to

the airport.

When we got to Johannesburg we settled in, had a three hour buffet breakfast the following morning and then headed to Wits. Not only were we one of seven teams competing in this round, we also happened to be the only ones from South Africa. After getting a tour of the campus, we returned to the hotel to prepare for the first rounds. We learnt a lot from the first two rounds, most importantly, that we did not need to rely on our written submissions – phew.

Our main aim was to get to Switzerland and to get there we needed to be in the top three teams. We progressed to the semi-finals, facing Lesotho, before finding out that we had made it to the final – Switzerland here we come!

We faced an Ethiopian team in the final before being named winners of the African Regional Round at the awards dinner on our last night. This came after two straight days of pleading, four pleadings in total with each lasting at least two hours. We were exhausted. We left Johannesburg not only as the winning team of the first ever African Regional Round but also with two best orator awards; best orator in the preliminary rounds (myself) and best orator in the final (Oscar). Furthermore, we learnt a lot, met some amazing people and left with far more confidence than we had going in. We found that sometimes the most unexpected and simple answer to a question can outshine everything else and that once you get started, the panel of experts acting as judges aren’t so daunting and we weren’t as clueless as we were when we began.

Coming back to Grahamstown was slightly anticlimactic. There were no more buffet breakfasts or shuttles everywhere you needed to go. We also returned to rain. Only myself and Vicky came back immediately with the rest of the team staying on for the Easter vacation. However, we did receive a number of congratulations, were in the newspaper, on LegalBrief and got email after email congratulating us all on our success.

Once classes started up again we had a month to prepare for Switzerland, including getting our visas, but time seemed to speed up and before we knew it we were writing our civil procedure test before getting in the car and driving to the airport once again.

Twenty-four hours and three flights later, one that flew over the “sea” outside Geneva, four of us arrived in Switzerland and went to settle in at the hotel.

After getting lost, finding our way and giving Vicky terrible directions we made it to the WTO and the welcoming evening, where we found out which teams we would be up against. Luckily our first pleadings were at the end of the first day, giving us time to sleep and prepare.

We came up against Georgetown University (eventual semi-finalists) and the National and Kapodistrian University of Athens in our two pleadings before our part in the competition was over, although this did leave more time for sightseeing. We then left our notes behind at the hotel (I may have packed slightly too much in this regard) and went exploring. We managed to go on a tour of the United Nations, go shopping in Gene-

Before we knew it, it was time to come home. I did not want to leave. Geneva was amazing and having the opportunity to take part in a competition such of this and the experiences it gave us cannot be put into words. I learnt so much, made friends with people from all over the world, including those from Grahamstown, and have realised that I can do anything I want to. There is nothing stopping me or any of us.

Finally, I would like to say a huge thank you to Vicky Heideman. We would never have gotten this far without you and you believed in us far more than we believed in ourselves. This is an experience all of us will remember for the rest of our lives and it is all down to you – thank you.

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## “DISCO INFERNO” LAW BALL REPORT

*Fadzayi Pedzisayi*



**As the beaming rays of the sun had run their course and the shift was finally over, she glistened and gleamed, retreating through the remainder of the sky to soon melt peacefully into the horizon as she would temporarily rest until tomorrow’s pleasures...But for the Rhodes Law family the night had just begun.**

It is impossible to overstate the ubiquity of Saturday Night Fever back in 70s. The movie, which launched the career of John Travolta as Brooklyn club kid Tony Manero, came alive as our ears rang with the tunes of the all famous Bee Gees. Dj Dumms set the tone to what would be expected to be nothing short of the most memorable night of 2014 as a Faculty; was beautifully complimented by the black and white draping, accented by droplets of fairy-lights. The candle lit tables - mirrored against the vased disco-ball center pieces and coloured napkins – themselves boogied along to the beat like it was 1978. As the expression goes, “it takes a village”.

As the attendees finally took their seats, the lovely Miss Megan Eurelle, MC for the evening, welcomed all who were present and highlighted our distinguished guests for the night, the Honorable Judge Navsa, Judge Plaskett and Advocate Trengrove. The key note speaker being, Judge Navsa himself, surprised us all with his unique blend of humour.

As the brief keynote address came to a close, there was no doubt in whose honour the auspicious event was really for. For Miss Khanyisa Mapipa announced that the committee had prepared a photo slideshow with all the memories shared between the LLB Class of 2014 from the past couple of years. As the slideshow played, another exciting contribution came from a performance by the Fadzayi and Fundile singing "Flying Without Wings". A standing ovation confirmed that as a class our long five year academic journey was nearing an end and it was the realization that leaving university no matter what age you are is always an emotional time, especially when you are leaving full time education for the unknown world of work or for some unemployment.

Looking around the room, the tone of the night was perfectly reflected in both the attitude of the students and how we all enjoyed being personally served by the young professional DSG waitrons. Cheryl and Naartjie Moss, who between them were responsible for the décor and creating the fabulous three course meal deserve special thanks. Of special note was the dessert, which consisted of a decadent vanilla cupcake topped with dark chocolate frosting.

This was in itself a work of art, and was simply delicious. Even some of the most weight-conscious ladies were observed nibbling on their cupcake. The tempo throughout the evening was the calm before the storm because upon Miss Lauren Spring opening up the dance floor, the air suddenly erupted with clapping and laughter as respected judges from all walks of life and lectures boogied down to beats produced well before many of us present had been conceived of. By the smiles, loss of inhibitions and labels of whom is a student, judge and lecturer, and even Dean were stripped away; it was clear by the end of the night that disco was very much still well and alive. Disco seems to give new life to the perennial human desire to dance, but it was Dr Gustav Muller and his now glowing-pregnant wife, Tiana, who ritually took the dance floor under the glimmering lights of the disco ball and showed us all how disco can be turned into a romantic art form.

The Law Ball 2014, themed "Saturday Night Fever", saw more than 150 people packed into the Rhodes Union Bar. The evening was a great and memorable success and thanks must particularly go to Norton Rose Fulbright for their continuous support of another Rhodes Law Ball. For without their generous contributions, it can almost certainly be said that the Law Ball would not by any measure been as successful and well-attended as it was.

# THE STUDENTS FOR LAW AND SOCIAL JUSTICE (SLSJ)

## CONFERENCE 2014: REPORT

*Khanyisa Mapipa and Nalo  
Gungubele*



### Introduction

Ms Gungubele and Ms Mapipa attended the annual SLSJ conference which was held at the Habonim Campsite near Hermanus. We attended the event as representatives of Rhodes University. SLSJ is a student organisation dedicated to enhancing the ideals of social justice around South Africa by using student based initiatives to assist those who would otherwise not have access to legal advice. SLSJ wishes to form a connection with Rhodes University. The organisation wishes to work in conjunction with Rhodes University's Nthutuko Legal Activism Society, considering the similarity of the work which is done by both organisations. Ms Gungubele and Ms Mapipa attended the conference firstly as a means of making the first contact with the organisation, and secondly as a means of assessing the desirability of the proposed alliance.

### The structure of SLSJ

SLSJ has twelve branches around the country. These branches are made up of various universities and tertiary education institutions. The organisation has a national committee which is made up of four position – Chairperson, Secretary, Treasurer and Communications. The members of the national committee are SLSJ members from the different branches around the country and they are elected at the annual AGM which takes place at the annual SLSJ Conference. In addition, the SLSJ branches have their own committee which is made up of the same positions as those on the national committee. The manner in which the organisation is designed to work is that the branch committee members communicate their needs and concerns to their relevant counterpart on the national branch and a decision is taken by the national committee which will then be filtered through to the branches. The branches are in charge of inspiring student interest and organising social justice workshops in their respective communities.



## **Aims and Purpose of SLSJ**

SLSJ aims to create a network of students who are dedicated to advancing social justice in their communities across the country. The organisation has partnered with a number of law firms, legal activist and civil society NGOs. Through these institutions the organisation aims to involve students in public interest legal work before and after graduation.

The most significant of their partnerships is their partnership with NGOs SECTION 27 and the TAC. SLSJ also aims to educate students around the country about the injustices happening within their own communities as well as engage them in any public interest work – primarily conducting workshops to the layman in the communities and supporting NGOs in fighting for the protection and enhancement of human rights.

## **SLSJ Conference**

### **Technicalities**

The programme lasted three days, from 15 August to 17 August. The programme was structured in such a way that each day would include a main talk by the prestigious speakers with a question session from the floor; a breakaway – the breakaways consisted of various talks held around venues on the campsite and members could choose which talk to attend. After the talks the members would then recollect at the main venue to discuss the topic of their talks with other members in groups into which they were divided. The afternoon sessions consisted of further talks and breakaways.

The theme of the conference was very causal; members were not expected to dress formally or to prepare for any of the talks.

### **Attendees**

It is our understanding that at the annual conference distinguished members of the legal community are invited to speak to the students. They are briefed on the topics which will be discussed and are instructed to speak to the theme. The theme in this year's conference was Globalised (In)justice. The speakers included:

1. Justice Yacoob, former Justice of the Constitutional Court.

2. Judge Dennis Davis, Judge of the High Court of South Africa and Judge President of the Competition Appeal Court.

3. Pregs Govender, Deputy Chair at the South African Human Rights Commission.

4. John Jeffery, Deputy Minister of Justice.

5. Commissioner Ameeria, Commissioner at the South African Human Rights Commission,

6. Adv. Malunga, Deputy Public Protector.

7. Karl Klare, Matthews Distinguished University Professor of labor and employment law and legal theory at Northeastern University of Law in Boston, Massachusetts.

The speakers spoke on a variety of topics including (but not limited to): the Marikana massacre and the impact of the massacre on the woman and children of the deceased miners, the socio-economic change faced by the community due to the loss of the breadwinners; the impact of patent laws in South Africa on the right to health care; GM foods and market concentration; creating a culture of human rights amongst the youth of South Africa; understanding the conflict in Gaza; and International trends in legal education.

## **SLSJ AGM and Election**

### **AGM**

A report was made by the national committee and branch chairs on what they had achieved in the previous year. Finances were discussed and a few concerns were raised about the manner in which finances were being handled at national level.

### **Election**

Members running for the positions had to send through manifestos to the national committee. These manifestos were then distributed via email to all the SLSJ members. At the election, the members were asked to speak to their capabilities in each portfolio. Three of the four positions on the national committee were uncontested, the only contested position was that of National Chairperson.

## Conclusion

The conference in itself was, for the most, inspiring. The speakers were vibrant and their speeches were thought-provoking. The manner in which the event was organised was thorough and well planned. Although many of the talks ran overtime which resulted in late nights and early mornings, all-in-all the content of the conference was beyond spectacular.

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## Recommendation

It is hereby our recommendation that Rhodes University Law Societies (Rhodes University Law Society and Legal Activism) adopt a position within the societies which will liaise with SLSJ. The mandate and aim of SLSJ is very similar to that of the Rhodes University Law Societies and the Law Society and Legal Activism stand to gain much from the organisation and its affiliates. It is our recommendation that a full association at this point would not be prudent. It will benefit both entities to form an informal relationship and continue with their work in association with one another.

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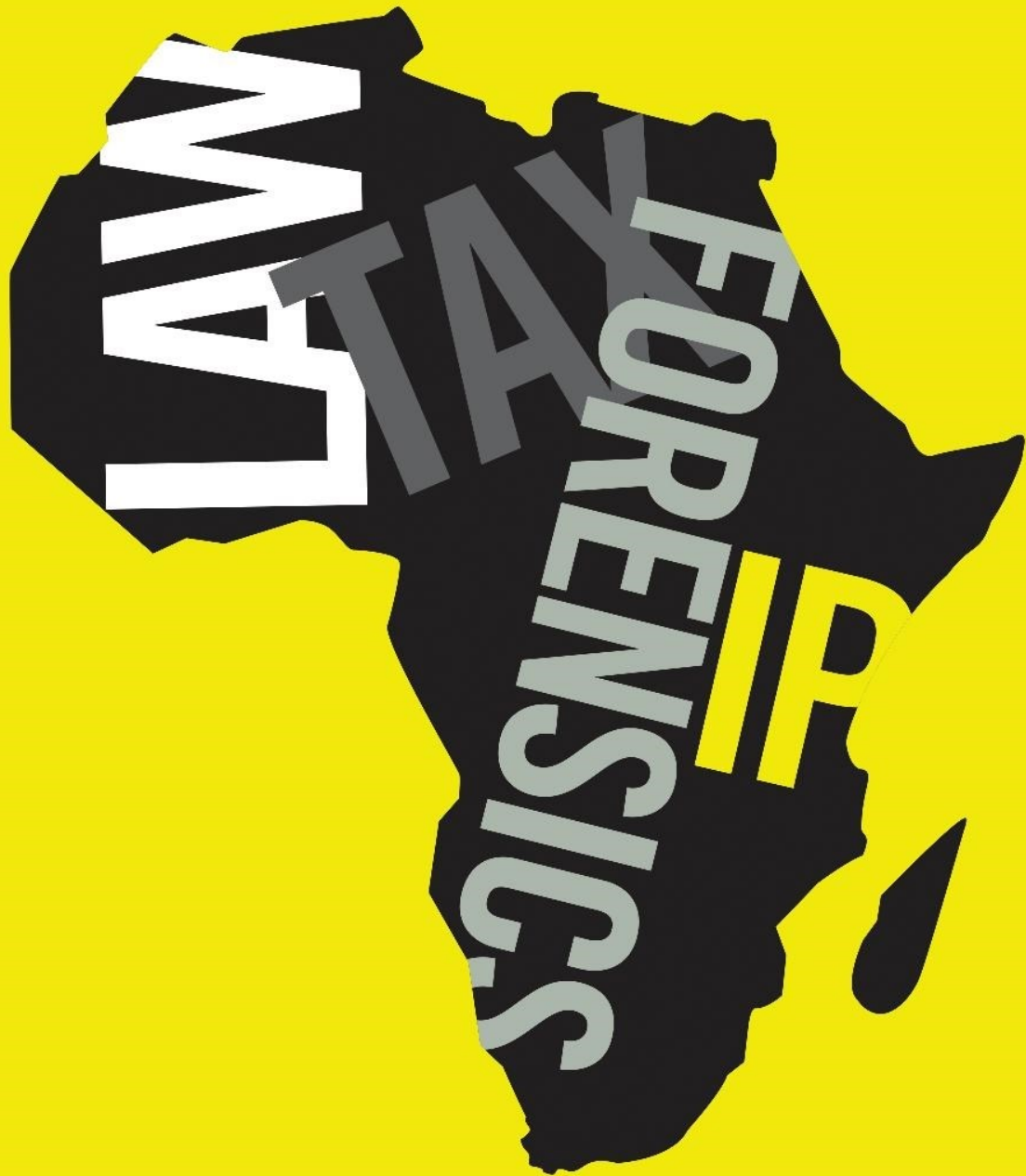


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