

IN CAMERA

ANNUAL RHODES UNIVERSITY LAW FACULTY MAGAZINE

**TRIBUTE TO
NIC SWART**

1954 - 2017

**THE OPPRESSION OF
WOMXN**

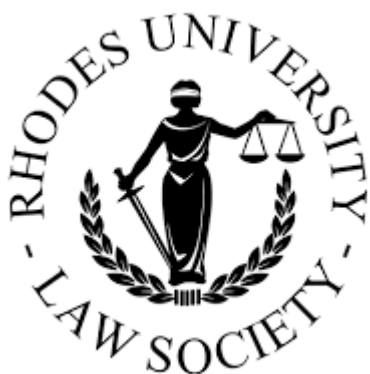
UNDER AFRICAN CUSTOMARY LAW

**THE DEVASTATING EFFECTS OF THE
CAUTIONARY RULE AGAINST
SINGLE CHILD WITNESSES**

**SHOULD THE COMPETITION COMMISSION
CARE ABOUT A COMPANY'S
INABILITY TO PAY A FINE?**

MANIPULATING BBBEE:

**PERPETUATING THE CONCENTRATION OF WEALTH
AND CLASS INEQUALITY**



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EDITORIAL

Sinenhlanhla Nene and Leo Vaccaro

The *In Camera* magazine is edited and compiled by a pair of editors who operate for one year, and only on one edition of this magazine. This is a unique feature of publications of this sort, where the norm is usually that editors can build on their experience and learn from their mistakes. We are not afforded this luxury. The *In Camera* editors are thrown in the deep end, with one chance to make a magazine worth reading.

But there is a silver lining to this. The magazine is then always capable of reinvention. So this year we decided to do things differently.

We have given the magazine a ‘make-over’. We have done away with the old look, thinking that it reminds us too much of dusty old law journals and textbooks (which we are already so tired of having to confront on a daily basis!). We have settled on a more magazine-type look, one which we hope that our readership will appreciate, and be enticed by.

The next step for us was to rethink the kind of content we wanted in the magazine itself. To this effect, we have requested articles that are not about the law *per se*. We have taken steps to encourage students, staff and others to submit content also on political matters, current affairs, and even a personal, heart-felt piece.

More importantly, we thought we would live up to the commitments we made about transformation and inclusion. So we decided to extend the invitation for submitting articles to several other university departments, including the departments of sociology, English, political and international studies, philosophy and history. We are also proud to *debut* the first non-English piece; an article written in isiZulu. Our only hope is that we have set a strong enough tone for years to follow with regard to transformation. However, it is important to note that this remains a Law Faculty magazine even though we have added an element of ‘inclusivity’.

It felt appropriate to encapsulate 2016 as the ‘transformation issue’ when considering the

political climate across the country. But this year we could not think of any one theme that stuck out. This is because this year the Law Faculty and the legal practice at large has dealt with many various issues. Moreover, upon a review of the content of the 2017 edition (and editions past), we did not think that the majority of the content was tailored to any particular theme.



Needless to say we were excited to have explored new ideas and to bring a bit of our individuality to the magazine. We hope that you will enjoy engaging with the 2017 issue!

FACULTY REPORT

2016 – 2017

Professor Rosaan Krüger, with input from staff and students.

INTRODUCTION

The focus of the Faculty as part of the University in the past year was on sustainability. Financial constraints across the higher education sector have caused the institution to reflect critically on what it does and how it allocates its resources to its priorities. This process of reflection coincided with the Faculty's engagement with the Final Report of the Council for Higher Education on the Re-Accreditation of the LLB and the University Transformation Summit. These processes, in which the Faculty actively participated, provided us with much opportunity for reflection on our offerings and our priorities in respect of teaching and learning, research and community engagement. Importantly, it provided us with the opportunity to shape a plan for a sustainable future that will unfold over the next year or so. So, for example, will the Faculty revisit its transformation plan, will it actively seek to diversify its staff complement and improve academic qualifications, it will explore ways to integrate community engagement in teaching, learning and research, reconsider its assessment practices and develop admissions criteria for the LLB 1 students that it will have to admit as from 2019.

While this report then outlines the achievements and events of the Faculty over the last 12 months, from the above it also seems to carry the blueprint for our 2018 activities.

As is customary, I start with student news and activities before reporting on staffing and staff activities.

STUDENTS, STUDENT NEWS AND ACTIVITIES

Graduation and awards

On 21 April 2017, 73 students graduated with LLB degrees from the Faculty.

Three LLM candidates graduated at the ceremony with degrees by thesis:

CHIGOWE, Lloyd Tonderai, LLB (Rhodes) *The principle of distinction and modern armed conflicts: A critical analysis of the protection regime based on distinction between civilians and combatants under international humanitarian law*. Mr Chigowe's supervisor was Prof Laurence Juma.

SUN, Huajun, LLB (Rhodes), with distinction. *Sports and competition law in South Africa: The need to account for the uniqueness of sport when applying the Competition Act 89 of 1998 to the sports industry*. The thesis was supervised by Adv Craig Renaud.

WATERWORTH, Tayla Kim, LLB (Rhodes) *Help or hindrance? A critical analysis of the agreement on sanitary and phytosanitary measures and its effects on developing countries*. Ms Vicky Heideman supervised this research.

The Faculty celebrated graduation with our graduands, their partners and their parents at a lunchtime function held at the Faculty. At this celebration, 32 final year students (44% of our 73 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). Additionally, a number of individual prizes were also awarded at this function:

- **Brian Peckham Memorial Prize:** Best student in Environmental Law: **Darika Santhia**
- **Lexis Nexis Book Prize:** Internal book prize for Moot winner(s) in the Final Year: **Stephanie Stretch**
- **Fasken Martineau Prize:** Best LLB student in Competition Law: **Daniel Kirk-Cohen**
- **Judge Phillip Schock Prize:** Best final year LLB student: **Kendall Kotze**
- **Juta Law Prize:** Best final year LLB student, based on results over penultimate and final year LLB: **Kendall Kotze**
- **Mtshali and Sukha Prize:** Best student in Legal Ethics and Professional Responsibility: **Morgana Newcombe**
- **R G McKerron Memorial Prize:** Best student in Law of Delict: **Orla Murphy**
- **Spoor & Fisher Prize:** Best student in Intellectual Property (Patents & Copyright): **Dino Cesare**
- **Phatshoane Henney Incorporated medals:** Awarded to students who obtain their LLB degrees with distinction: **Kendall Kotze, Lyndsey Strachan, Orla Murphy, Daniel Kirk-Cohen and Nkosazana Dweba**
- **Tommy Date Chong Award:** Awarded to student who makes the greatest contribution to the Law Clinic in their penultimate and final years of study at the University: **Lauren Kennedy**



Faculty opening and awards function

LLB intake 2017

75 students accepted offers into LLB this year, only ten of whom are registered for the four - or three - year LLB-degree. As in years before, the preference of our students is clear: 87% of our law students choose the five-year stream, entering the LLB only after completing a first undergraduate degree.

Postgraduate students and student research

The number of postgraduate students in the Faculty is increasing steadily, with a total of six LLM candidates and five PhD students registered for postgraduate studies for 2017.

STUDENT NEWS AND ACTIVITIES

Legal Activism Society

Ntuthuko Legal Activism celebrated its 10th anniversary this year. The society remains active in raising awareness on a variety of legal issues. In the last year it participated in several awareness-raising events, ranging from Trading Live Week, presenting a life skills course at Assumption Development Centre in Joza, running capacity-building workshops with the children at St Mary's DCC, weekly radio interviews with RMR on various issues, to a workshop with student employees in Grahamstown relating to labour.

Law Society

The Rhodes University Law Society has had a productive year, starting with a successful sign-up event at the beginning of the year. This was followed up with a successful Market Day in March. This key event on the Rhodes Law Faculty Calendar was well attended by representatives from different firms and organisations, and students benefited from interactions with those in the legal profession.

The society also hosted successful meet-and-greet events in April for all its members and for members of its moot club in the weeks following the initial introduction. The moot club was active and met every Saturday. The moot club crowned its events with a show-case mock trial competition on

Rhodes Open Day (in September) in front of an audience of Grade 11 learners.

The Law Society partnered with the Black Lawyers' Association: Rhodes Student Chapter to kick-start the "Her Write to Education" initiative with a Women's Day Luncheon hosted at the New English Literary Museum. Mrs Tasneem Fredericks and Dr Enos Banda engaged with students from Rhodes, Victoria Girls High School, Nombulelo High School, DSG and Kingswood College on matters concerning women's rights. Part of the initiative is collecting sanitary tissues and reading books, throughout the month of September, to be donated to Nobulelo High School.

The society hosted a successful Law Ball on 7 October at the Belmont Valley Golf Club with Mr Pride Jani, Rhodes alumnus and senior associate at DLA Piper, as guest speaker.

The society also arranged the law faculty sweaters for students in the Faculty and department (and a competition for the design thereof), the annual *Final Yearbook* and the *In Camera* magazine editing and printing.

The financial contributions from Bowman Gilfillan, ENSAfrica, Norton Rose Fulbright, PPS and Kingsbourne Dispute Resolution Specialists made the events possible, and the society gratefully acknowledges its sponsors.

Black Lawyers' Association: Student Chapter

In the third year of its existence, the society has consolidated its role and relevance, particularly highlighting aspects of social justice and transformation. The society, led by Ayanda Mbonani and Amogelang Shadi, hosted a number of events furthering its goals. These included an informative dialogue with Judge Lex Mpati, which was facilitated by Adv Matthew Mpahlwa. The society also hosted its Lawyers' Breakfast with the theme Unlocking the Intelligence, Passion and Greatness of Young African Future Legal Practitioners. Several practitioners from different areas of practice addressed and inspired members at this glitzy event.

For Africa Month, the society partnered with the Thabo Mbeki Foundation and the Rhodes International Office to host the Ambassador Extraordinary and plenipotentiary of the Sahrawi-Arab Democratic Republic, Mr Radhi al Bashir Asgayar, for a public lecture and discussion about colonisation in present day Africa, with particular reference to the Western Sahara / Morocco conflict. The discussion moderator was Mr Max Boqwana, CEO of the Thabo Mbeki Foundation. The RU BLA chapter took part in an Intervarsity Moot Court Competition which was hosted by the Nelson Mandela University Chapter. The RU Chapter was represented by Tshwanelo Mabelane, Lonwabo Bhambatha, Mawuko Gyan, Buleh Myeni, Raymond Kadani and Basetsana Moshoeshoe. The team reached the finals and Tshwanelo Mabelane was awarded the Best Mooter of the competition.

In addition to the partnership with the Law Society for Women's Month celebrations, the BLA continued to run its peer-to-peer mentorship programme, and participated in discussion on RMR.

Moot Court and Mock Trial Programme and Competitions

Internal:

The final of the Final Year Moot was held on the evening before Market Day and this added to the lustre of our occasion. The four finalists were Aidan Whitaker, Abigail Butcher, Stefan Euijen and Zinhle Mavuso. Judge Thembekile Malusi of Eastern Cape High Court, Grahamstown was joined on the bench by Advocate Matthew Mpahlwa and Mr Francisco Khoza from Bowman Gilfillan Attorneys. The matter concerned an application about the powers of the executive to withdraw unilaterally from an international treaty. Abigail Butcher won the competition and Aidan Whitaker was the runner-up.

The internal moot competition for Penultimate Year LLB students took place in the second semester. The students were required to argue as to whether the Prescription Act applies to labour disputes. Stuart Bentley, Wesley Howe, Tegan Voges and Christopher White argued in the final round before a panel consisting of Advocates Margaux Beard and Jock McConnachie, from the



Grahamstown Bar, and Mr Luzuko Tshingana, lecturer in the Law Faculty. The tough and well-argued final resulted in Christopher White being announced as winner with Wesley Howe the runner-up.

Penultimate Internal Year Moot Competition

External

ELSA Moot

Rhodes University proudly hosted the European Law Students' Association's (ELSA) International Trade Law Moot Competition for the second year in a row. ELSA is the world's largest independent law students' association, with 50 000 members in 43 European countries.

Teams from Ethiopia, Kenya, South Africa, Tanzania, Rwanda, Liberia, Lesotho, Algeria, Burundi, and Uganda competed against each other over a period of three days. Rhodes Law Faculty was represented by Claire Stubbings, Kimberly Nyajeka, James Mugere and Watson Chirwa in the competition and numerous Rhodes law students acted as volunteers to make the competition a success.

Three Kenyan teams (the Kenyan School of Law, Strathmore University and Kabarak University) and the team from Wits University proceeded to the final round in Geneva.



ELSA Moot



ELSA Moot

NLU Delhi – HSF International Negotiation Competition

Two final year LLB students, Zinhle Mavuso and Charlie Hammick, accompanied by Adv Craig Renaud, participated in the 4th annual NLU Delhi-HSF International Negotiation Competition which was held in Delhi from 8-10 September 2017. 34 teams, of which 22 were international teams (including Nigeria, Singapore, Australia, UK, Japan, and Sri Lanka), competed in the competition. Rhodes Law Faculty was the only South African Law Faculty invited to participate.

In the first preliminary round the Rhodes team came up against the very tough Melbourne University team (who ultimately came second in the competition), and then against the National School of Law, Bangalore, in the second preliminary round. Although the Rhodents did not make it beyond the preliminary rounds the team learned a huge amount about negotiation in a short space of time, had a lot of fun, and made new friends and contacts from around the world.



*Zinhle Mavuso, Charlie Hammick
and Adv C Renaud*

25th African Human Rights Moot Court Competition

The 2017 African Human Rights Moot Court Competition was held at the University of Mauritius in Réduit from 18-23 September 2017. Abigail Butcher and Aidan Whitaker, representing Rhodes, made it to the finals of the competition. Out of the 45 Anglophone, 6 Francophone and 3 Lusophone teams, Rhodes came 3rd overall. Abigail was ranked 4th best speaker out of the 90 English oralists, while her partner Aidan clinched the 10th spot. The Rhodes team was guided and assisted by Professor Enyinna Nwauche and Mr Phumelele Jabavu.



The Rhodes team with Judge Edwin Cameron

The National Child Law Moot Court Competition

Rhodes will be represented at this competition by Ryan Birkner and Mikaella Bodeux, who were chosen after an internal selection process. The competition will be held from the 12 to 14 October 2017, with the finals argued before judges of the North Gauteng Division in the Palace of Justice, Pretoria. The students will be accompanied and coached by Ms Brahmi Padayachi.

LexisNexis Mock Trial Competition

The competition was held at the University of Pretoria from 6 to 8 October 2017. Two Rhodes teams, consisting of Tegan Voges and Wesley Howe, and Christopher White and Joshua Geldenhuys participated in the competition. Both Rhodes teams proceeded to the semi-finals after intense moots, but had to bend the knee to the teams from Pretoria and Stellenbosch, who proceeded to the finals. The team was accompanied by Ms Vicky Heideman.

Kovsie First Year Moot Competition

Mawuko Gyan and Kundai Jimu represented Rhodes University in the Kovsie Moot Court Competition, which was held from 8-10 August in Bloemfontein. The change in the format of the competition brought interesting challenges, with the students receiving a complex set of facts involving different areas of law and limited time to unravel the problem. The Rhodes team performed admirably, demonstrating significant command of the law (given that they saw the topic for the very first time the previous day). Unfortunately, Rhodes did not make the final. The competition was deservedly won by the University of the Free State. The team was accompanied and coached by Ms Nkosazana Dweba.

Student exchange

Three students from Utrecht University, the Netherlands registered for law courses while on exchange to Rhodes. They are Tessa van der Rijst, Tiffany Zandbergen and Ruth Kats. Stuart Bentley, a penultimate year LLB student is currently on exchange to Leicester University in the United Kingdom.

Alumni news

Rhodes Law Faculty alumnus, Mr Sim Tshabalala was appointed the sole CEO of Standard Bank in September 2017, confirming his standing as a business leader in South Africa.

NATIONAL REVIEW OF THE LLB: COUNCIL FOR HIGHER EDUCATION

The Faculty received the final report of the CHE in May and after thorough consideration of the conditions and recommendations from the Council, submitted its improvement plan in October. As alluded to in the opening paragraph of this report, much work needs to be done in the next year. The opportunities for improvement and reflection will be to the benefit of our students and the legal fraternity in years to come.

STAFF, STAFF NEWS AND ACTIVITIES

Staff news

The 2017 academic year started with no changes to the staff complement; however much changed during the course of the year. In July 2017, Mr Siraaj Khan left the employ of Rhodes University, to be followed shortly thereafter by Mr Luzuko Tshingana. Both took up opportunities at other academic institutions in the country. Ms Vicky Heideman will bid the Faculty goodbye at the end of January 2018, as will Prof Enyinna Nwauche. These staff members contributed significantly to the work in the Faculty and we wish them well in the future.

Prof Helena van Coller is on academic leave for the whole of 2017, and Prof Laurence Juma went on academic leave on 1 July 2017 and will end his sabbatical on 30 June 2018. Ms Cecile van Schalkwyk, candidate attorney at the LRC, who holds a LLM in Administrative Law (Stellenbosch) ably filled in for Prof van Coller while on leave. Ms Nkosazana Dweba, Mr Ryan McDonald, Ms Sipesihle Mguga and Mr Michael Tsele – the latter three in practice from the Law Clinic and LRC respectively, assisted the Faculty in meeting its teaching needs. Mr Richard Poole, Ms Anita Wagenaar and Dr Andrew Pinchuck assisted the Faculty with their expertise teaching in the law of taxation, accounting and numeracy skills.

Ms Noma Mashinini and Mr Nkosinathi Mzolo joined the Faculty staff on 1 October 2017, and we look forward to their contributions in the Faculty.

Staff participation in projects and guidance to students:

As in the past, our staff members participated in a number of endeavours on the national and international levels to further the interests of legal education and the profession:

Kruuse, H. Students in Foundations of Law, supervised by Ms Kruuse published an article in the Daily Dispatch on 21 April 2017 discussing a judgment allowing for dagga use: 'Have a toke, just not yet.' Ms Kruuse's Law of Life Partnerships class also made a written submission to the Minister of Home Affairs on the protection of all forms of life partnerships.

Nwauche, E.S. (2017) Chair, Coordinating Committee, African Network of Constitutional Lawyers (ANCL).

Van Coller, E.H. Visiting researcher at the Faculty of Canon Law, KU Leuven Belgium. Research visit as part of a Coimbra Group Universities grant for Young African Researchers. 1 March to 1 June 2017.

Rahim, S. Commercial Law: Teaching and Learning and Third Stream Income

Shuaib Rahim is recording lectures for Rhodes University that are being produced by the Rhodes Business School and Nedbank for the Thuluntulu. The lectures are available free to all commercial law students via the following applications:

<https://play.google.com/store/apps/details?id=za.co.tuluntulu&hl=en>

<https://itunes.apple.com/za/app/tuluntulu/id874882888?mt=8>.

Other contributors to this project include Prof Jen Snowball and Prof Matthew Lester from the Faculty of Commerce.

COMMUNITY ENGAGEMENT

Staff involvement

Community Engagement activities have been primarily focused on public awareness and giving legal advice on the radio and other services to school learners. The Law Clinic has regular slots on Grahamstown Radio where questions and answer sessions on legal issues of interest to the local community have been discussed.

The Law Faculty staff, Ms B Padayachi, Adv S Rahim and Prof R Krüger and students from the Faculty presented a successful workshop for learners from across the Eastern Cape for the National Schools Moot Competition in May.

Jabavu, P., Together with Siphesihle Mguga, an Attorney at the Rhodes Law Clinic presented a talk on urban and rural evictions at Radio Grahamstown as part of the ongoing relationship between the law clinic and the community radio station. This was followed by an article, entitled 'The Constitution and anti-eviction legislation' published on 19 May in the Grocott's Mail. May 2017

Rahim, S. Radio Grahamstown: Land Claims in South Africa. 2 June 2017

Rahim, S. RMR: Interview with Hazel Crampton on *Dagga: A Short History*. 17 September 2017.

Law Clinic

Staffing

In July 2017, Mr Shaun Bergover was appointed as an attorney in the Grahamstown office following the departure of Ms Cooper-Bell and Ms Zuba. Ms Sipe Mguga, Ms Thembakazi Mvemve (both Grahamstown office) and Ms Gugu Vellem (Queenstown office) will shortly be admitted as attorneys, having completed the requirements for admission as attorney.

At the end of 2017 we will bid farewell to Ms Thandeka Heleni on her retirement after 28 uninterrupted years of service to the Law Clinic as receptionist and interpreter.

Students

Besides compulsory attendance by penultimate LLB students at the Law Clinic as part of the Legal Practice course, students have further opportunities to volunteer to work at the Clinic once they have completed this course. A number of students volunteered as student mentors in 1st and 3rd terms, to assist new students at the Clinic with a range of operational and administrative responsibilities as vacation interns during the December / January and June / July vacations.

Advice office project

The Law Clinic is engaged in a number of projects, chief amongst which is the advice office project, involving training and back-up legal services to paralegal advice offices from throughout the Eastern Cape Province.

Four teams, each comprising an attorney, a candidate attorney and an admin staff member continue to service the approximately 38 paralegal advice offices in towns throughout the Eastern Cape Province three times per year in four established circuits: Transkei, North East Cape, Karoo and Southern circuits.

The Clinic was also contracted to offer the SASSETA accredited National Certificate in Paralegal Practice to about six paralegals during the course of 2017 (four times one week modules). In addition the Clinic offered a one week Paralegal Skills course and a one week Children's Law course during 2016.

Community Education

The Law Clinic's community education programme focussed on topical land and housing issues in the first semester of 2016, and wills and succession related issues in the second semester. Within these themes the Clinic offered the same topics each month in workshops at the Assumption Development Centre, Radio Grahamstown talk shows (bi-monthly), and Grocotts articles.

Model International Criminal Court (MICC)

An MICC training course co-hosted by the Law Clinic was offered to nine LLB students and the six candidate attorneys from both branch offices of the Law Clinic during the April vacation, 18-21 April.

RESEARCH

Rhodes University is a research-intensive university and it subscribes to the teacher-scholar model. The Faculty of Law is no different in that respect. We value research in all its guises, from the informal preceding the structuring and drafting of curricula, preparation for lectures to the delivery of papers at conferences and publication of journal articles and books.

Publications by staff, including visiting professors, and postgraduate students over the past year in national and international publications:

Books/Chapters/Monographs

Book:

Nwauche, E.S. (2017) *The Protection of Traditional Cultural Expressions in Africa*. Springer, Berlin. ISBN: 9783319572314.

Chapters:

Kruger, R. (2016) Equality. In: Govindjee, A. (ed.). *Introduction to Human Rights law*. 2nd Ed. Durban: LexisNexis (Pty) Ltd. p.75-84. ISBN: 9780409118346.

Kruuse, H. (forthcoming) Legal ethics and professional responsibility. In: Meintjes-Van der Walt, L (et al) 3rd ed. *Introduction to South African Law Fresh Perspectives*.

Nicolson, D.J. (2016) Teaching Ethics Clinically without Breaking the Bank. In: Qafisheh, M.M. and Rosenbaum, S.A. (eds.). *Experimental Legal Education in a Globalized World*. Newcastle on Tyne: Cambridge Scholars Publishing. p.450-471. ISBN: 9781443889100.

Nwauche, E.S. (2017) Right to Intellectual Property. In Lanchemann, F and Wolfrum, R (eds). *Max Planck Encyclopedia of Comparative Constitutional Law*. Oxford University Press, Oxford, UK. (available at www.oxcon.oup.com).

Nwauche, E.S. (2017) Indirect Application of Economic Social and Cultural Rights in Nigeria. In: Chirwa, D and Chenwi, L (eds). *The Protection of Economic Social and Cultural Rights in Africa*. Oxford University Press, Oxford, UK. p.501-526. ISBN: 9781107173651.

Nwauche, E.S. (forthcoming). National Human Rights Institutions and the Accommodation of Religious Diversity in Africa. Thayer, D and Durnham, C (eds). *Religion Pluralism and Minorities*. Ashgate / Routledge, London, UK.

Nwauche, E.S. (forthcoming). To be neutral and secular: The challenge of religion in South Africa. In: Okeja, U (ed). *Post Secularism in a Modern World*. Routledge, London, UK.

Nwauche, E.S. (forthcoming). The Religious question in South Africa: prince De Lange and Ngcobo. In: Mhango, M (ed). *Essays in Honour of Justice Ngcobo*. Juta, Cape Town.

Nwauche, E.S. and Oyeunmi, A. (forthcoming). The enforcement of intellectual property rights in Africa (WIPO). In: Oyewunmi, A (ed). *Intellectual Property Law in Africa*. World Intellectual Property Organisation, Geneva.

Van Coller, E.H. (2017) Burial Rights: Protecting the Religious and Cultural Heritage of Communities in South Africa. In: M Christian Green *et al.* (eds). *Religious Pluralism, Heritage and Social Development in Africa*. Stellenbosch: SUN Media. P.333-351. ISBN: 978-1928314-27-1.

Journal Research Publications

Campbell, J. (2016) Short-term credit: recent developments and the new limits on the cost of micro-loans. *SA Mercantile Law Vol 28* (3). p.461-479.

Glover, G. (2017) University protests, specific performance, and the public/private-law divide. *South African Law Journal Vol 134*. p.466-480.

Kruuse, H and Mwambene, L. (2017) The thin edge of the wedge: ukuthwala, alienation and consent. *South African Journal of Human Rights*. Vol.33. p.25-45.

Nicolson, N.J. (2016) Our Roots Began in (South) Africa: Modelling Law Clinics To Maximise Social Justice Ends. *International Journal of Clinical Legal Education Vol 23* . p.87-136.

Nwauche, E.S. (2017) Ritual Slaughter in Africa. *Journal of Law and Religion, Vol 32*(3).

Plasket, C. (2016) The Fundamental Principles of Justice and Legal Vacuums: The Regulatory Powers of National Sporting Bodies. *South African Law Journal*. 133 (3). p.569-599.

Van Coller, E.H. (2017) Administrative Law. *2015 Annual Survey of South African Law*. p.41-57.

Van Coller, E.H. (2017) Religious ministers – working for God or working for the Church? A Reflection on *Universal Church of the Kingdom of God v Myeni and Others*. *Oxford Journal of Law and Religion* 6(1). p.187-193.

Book Reviews

Nwauche, E.S. (forthcoming) Oyewunmi, A (ed). Nigerian Law of Intellectual Property. University of Lagos Press. *South African Journal of Intellectual Property*.

Rahim, S. (2017) Crampton H. Wordstock, National Arts Festival 2017. *Dagga: A Short History*.

Other Publications

Juma, L.O. (2016) Regulation of the Private Military and Security Industry in Africa: Background Paper. In: DCAF, D.C.A.F. (ed.). *Report of the Ethiopia Regional Conference on Private Military and Security Companies*. Geneva, Switzerland: Democratic Control of Armed Forces (DCAF).

Research Papers Presented at Academic/Scientific Conferences

Campbell, J. Short-term credit: recent developments and the new limits on the cost of micro-loans. *Law Teachers' Conference*. Swakopmund, Namibia. January 2017.

Jabavu, P. Compensation Without Borders: Towards equitable compensation for migrant miners. *Law Teachers' Conference*. Swakopmund, Namibia. January 2017.

Khamala, C. Dynamic Interpretation of the International Criminal Court's Impact in the Kenya Cases". *18th World Congress of Criminology on the theme "Urbanization, Globalization, Development & Crime: Opportunities & Challenges of the XXI*

Century". O.P. Jindal University Campus in the New Delhi Capital Region, India. 15th-9th December 2016.

Glover, G. University protests, specific performance, and the public/private-law divide. *The Private Law and Social Justice Conference*. Nelson Mandela Metropolitan University, Port Elizabeth. 20-21 August 2016.

Kruuse, H. 'Vuku'zenzele ('Arise Or Act'): Lawyers And Access To Justice In South Africa. *Lawyers and Access to Justice Symposium*. National University of Singapore. 8-9 June 2017.

Kruuse, H. The professional and ethical role of the legal practitioner in contemporary South Africa. *Sociology of the Professions Workshop*. University of Pretoria. 19 September 2017.

Kruuse, H and Genty, P. The State's Role in the Regulation and Provision of Legal Services in South African and the United States: Supporting, Nudging or Interfering? *Regulation of Legal and Judicial Services conference*. Fordham Law School, New York, United States. 8-9 December 2017.

Nwauche, E.S. The Licensing of Traditional Knowledge in Africa. *36th Annual Conference on the International Association for the Advancement of Teaching and Research in Intellectual Property*. Wellington, New Zealand. 23-27 October 2016.

Nwauche, E.S. The exceptionalism of customary law. *Symposium Celebrating Teaching and Research of Prof T Bennett and C Himonga*. University of Cape Town, Cape Town. 13 March 2017.

Van Coller, E.H. Religious Disputes – Recent decisions by the South African courts. Annual LARSN Law and Religion Conference. Centre for Law and Religion, VU Amsterdam. 19 May 2017.

Van Coller, E.H. Public law "rights" and "values" and the intersections between administrative law, public administration and good governance – a South African perspective. *Cambridge Public Law Conference "The Unity of Public Law?"* Faculty of Law, University of Cambridge, United Kingdom. 12-14 September 2016.

Van Coller, E.H. Religious ministers – working for God or working for the Church? *Fourth ICLARS (International Consortium for Law and Religion Studies) Conference "Freedom of/for/from/within*

Religion: Differing Dimensions of a Common Right? St Hugh's College, Oxford, United Kingdom. 8-11 September 2016.

Other involvement

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

Jabavu, P. Updated two chapters 'Remedies' and 'Reduction and Apportionment' in the *The Law of Delict in South Africa* 3rd edition (2017). Loubser MM & Midgley JR (eds). Oxford University Press, Cape Town.

Juma, L. Keynote address to the *Montreux Document Forum Plenary meeting*. Geneva, Switzerland. 27 – 28 April 2017.

Nwauche, E.S. Correspondent for Botswana – Copyright User Rights Survey V11.11. *Program on Information Justice and Intellectual Property*. American University, Washington College of Law, USA.

Nwauche, E.S. Participant. 2nd Meeting of The Working Group to Develop the African Union Model Law on the Protection of Cultural Property and Heritage. Cairo, Egypt. 13-23 December 2016.

Nwauche, E.S. Participant. Fifth Annual Conference on Law and Religion in African. Rabat, Morocco. 13-17 May 2017.

Nwauche, E.S. Participant. 3rd Meeting of The Working Group to Develop the African Union Model Law on the Protection of Cultural Property and Heritage. Lilongwe, Malawi. 24-30 August 2017.

Rahim, S. Presented a seminar for the MBA students entitled: Regulating monopoly, oligopoly and mergers in the South African economy. January 2017

Rahim, S. Delivered guest lecture on the PDEM course in the law of contract for entrepreneurs. 10 March 2017.

Rahim, S. Participant – research for Doctoral Proposal. The International Business Conference. Dar es Salaam. 24 – 27 September 2017.

Van Coller, E.H. Delivered a guest lecture. Administrative Law and good governance in South Africa. Faculty of Law, Hasselt University, Belgium. 16 May 2017.

Van Coller, E.H. Delivered a guest lecture. Regulating Religion: State Governance of Religious Institutions in South Africa. Faculty of Canon Law, KU Leuven, Belgium. 23 May 2017.

FACULTY EVENTS

The Faculty hosted several successful events over the past academic year.

Faculty opening

Our guest speaker was alumnus, Mr Alistair Mokoena, Managing Director of Ogilvie & Mather: Johannesburg. Mr Mokoena handed out prizes and engaged with staff and students after his inspiring address. The Faculty was honoured by the presence of both the Chancellor and the Vice-Chancellor at this event.

Five visiting professors shared their knowledge, expertise and enthusiasm for the law, profession and legal education with the Faculty and its students in the past year, with engagement in lectures and discussions with staff and students. Professor Donald Nicolson contributed to a successful orientation programme for penultimate year LLB students in February 2017. Judge Nambitha Dambuza of the Supreme Court of Appeal delivered a public lecture that elicited much discussion on the Traditional Courts Bill, entitled 'The traditional Courts Bill: the devil is in the detail' on 3 April 2017. Mr Max Boqwana delivered a lecture entitled 'The development of jurisprudence under the Zuma administration: A critical review' to a fully packed Moot Room on 2 March 2017 eliciting much discussion. Adv Wim Trengove SC delivered his public lecture entitled 'Is the Government at War with the Banks: A Discussion of *The Minister Of Finance v Oakbay Investments*' on 18 September 2017, sharing his insights in his customarily accessible way. Judge Clive Plasket debunked the mystery surrounding 'judicial deference' in his public lecture on 10 October 2017 in a lecture entitled 'Judicial Review, Administrative Power and Deference: A View from the Bench'.

The Faculty was also honoured to host Prof Thaddeus Metz, an A-rated philosopher from University of Johannesburg who presented a seminar on 'Ubuntu and legal practice' in October of this year.

Conclusion and prospects

The past year has provided the Faculty with many opportunities for reflection, introspection and planning to respond to our context and its demands. We have listened, thought and hopefully grown. I trust that we will be able to build on the solid foundation of reflection of 2017 as we navigate into the future and its challenges, to remain sustainable, committed to social justice and excellence in legal education.

R Krüger

31 October 2017

RHODES LAW SOCIETY PRESIDENT'S REPORT



By **Kimberley Nyajeka**: Law Society President

2017 has been a very productive year for the Rhodes University Law Society. Our year officially started with a very fruitful Societies Sign-Up, where law students from every year signed up to be members of the Society. Because of this support, our events have been well attended and the Society has received an overwhelming amount of support.

On 15 March, we hosted the annual Rhodes University Law Market Day at the Law Faculty. The event was very successful, with students and the visiting delegates from the various firms and organisations expressing satisfaction with the meaningful experience they had. The major sponsors this year were Bowmans and ENS Africa, whose efforts in ensuring the success of the day are greatly appreciated. We would also like to thank Adv. Craig Renaud for his guidance while we planned the event, and the Faculty staff for supporting us in the process building up to Market Day.

On 7 April, the Society hosted its 'Meet & Greet' at the Rhodes Sports Club to welcome members who signed up to the society. The event was attended by member, non-members as well as Faculty staff and proved a success. We'd like to thank our generous sponsors, Kingsbourne Dispute Resolution Specialists for sponsoring the event and ensuring that we were able to cater sufficiently to our large number of members.

The Moot Club began session after the Meet & Greet. A consistent group of students attend every Saturday, with final-year students volunteering to give short presentations on their personal mooted experiences. We are grateful for the support of the students in ensuring the effectiveness of this initiative. Members of the Moot Club were able to have their final Mock Trial Competition during the Faculty Open Day at the beginning of the second semester for an excited audience of High School students from the schools in Grahamstown. The trial was a resounding success.

For the remainder of the 1st semester, we focused on facilitating our Faculty Sweater design competition, began planning for the annual Law Ball as well as collating the *Final-Year Yearbook*. Likewise, we began consultations with the Law Library and our various sponsors on starting a text-book drive to supplement the library with all the essential text books for Legal Theory 1 to Final Year. This is an on-going project we hope to have executed by the end of the 2017 academic year. Many thanks to our Faculty Library, Ms Sindi Gule for assisting us with facilitating this initiative.

The 2nd semester began with the AGM at Saints Bistro where we elected the committee for 2018. As with our previous events it was well attended; allowing us to reach quorum at the event for the first time in two years. The event was generously sponsored by ENS Africa who gave away merchandise to the students who were running for positions as well as the students in attendance.

On the 16th of September, we collaborated with the Black Lawyers' Association: Rhodes Student Chapter to kick-start the "Her Write to Education" initiative with a Women's Day Luncheon hosted at the New English Literary

Museum. The event was a success with guests Ms Tasneem Fredericks and Dr Enos Banda engaging meaningfully with students from Rhodes, Victoria Girls High School, Nombulelo High School, DSG and Kingswood College on matters concerning women's rights. Part of the initiative is collecting sanitary tissues and reading books, throughout the month of September, to be donated to Nombulelo High School. The initiative has been well supported by students, and we are grateful to the Law Faculty for their support in helping us facilitate the event and to Professor Kruger for giving a presentation and engaging with the students as well.

The Annual Law Ball was held on the 7th of October 2017 at Belmont Golf Course. The guest speaker was Mr Pride Jani, a Rhodes Law Faculty alumnus and Senior Associate at DLA Piper. The event was very well attended by students and Faculty Staff and amounted to a successful celebration of the 2017 academic year. We would like to thank PPS and Kingsbourne for so generously sponsoring the event.

We'd like to extend a special thanks to Mrs Andrea Comley, Ms Fezeka Mwellie and Mr Chad Gill for their constant support and guidance throughout the year. Likewise, we would like to thank Professor Glover for his guidance and consistent contributions to the annual Year Book and *In Camera* (which this year is kindly sponsored by Cliffe Dekker) publications. The Law Society would not be able to run effectively with the continuous and unwavering support we receive from the Rhodes Law Faculty, for which we are always grateful.

Best wishes,
Kimberley Nyajeka



2017 Law Society Committee at the Law Ball

BLACK LAWYERS' ASSOCIATION: STUDENT CHAPTER, RHODES UNIVERSITY

By Ayanda Mbonani: BLA President



2017 has been a year of success and growth for the Black Lawyers' Association. This year is a reflection of the hard work that was sowed into making the society into a reality on campus two years ago. Under the leadership of Ayanda Mbonani and Amogelang Shadi, the society has hosted a series of events which continue to echo the ethos of the Black Lawyers' Association's transformative objective. In addition, to serving the student body at large by distributing legal information through RMR and student forums and running a peer to peer Mentorship programmes for law students, the Black Lawyers Association has hosted a number of key events.

The Black Lawyers' Association began the year by hosting an event titled *In conversation with*

Judge Mpati where the Former President of the Supreme Court of Appeal, Judge Lex Mpati was the key note and it was facilitated by Advocate Mpahlwa. The aim of the dialogue was to provide a platform for students to engage with Judge Mpati and gain insight and his perspective the profession. The Black Lawyers' Association hosted the annual *Lawyers Champagne Breakfast Unlocking the Intelligence, Passion and Greatness of Young African Future Legal Practitioners* which invited different legal practitioners namely advocates, prosecutors and lawyers. The aim of the event was to empower aspiring young practitioners so that they are able to walk into spaces with the confidence to transform them where they need to be reformed.

For Africa Month, the Black Lawyers' Association partnered with the Thabo Mbeki Foundation and the Rhodes International Office to host the Ambassador Extraordinary and plenipotentiary of the Sahrawi Arab Democratic Republic for a public lecture and discussion about colonisation in present day Africa in light of Western Sahara and Morocco conflict. The dialogue was centred on the *Self-determination and Independence of the Sahrawi people*. The speakers were Mr Radhi al Bashir Asgayar, and discussion moderator Max Boqwana, CEO of the Thabo Mbeki Foundation.

The Black Lawyers' Association took part in an *Intervarsity Moot Court Competition* which was hosted by the Nelson Mandela university student branch. The Moot participants were Tshwanelo Mabelane, Lonwabo Bhambatha, Mawuko Gyan, Buleh Myeni, Raymond Kadani and Basetsana Moshoeshoe. The Rhodes University team made it to the finals. Tshwanelo Mabelane was awarded the Best Mooter of the competition.

In commemoration and celebration of Women's Month, Black Lawyers' Association partnered with Law Society to host a women's luncheon titled *Her Right to Education*. The aim of the event was to empower women of the Rhodes students and high school learners to aid their career progression in the profession and beyond. The keynote speakers were Ms Fredericks, the Director of Fredericks Incorporated, social entrepreneur,

transformation activist and advocate for women empowerment, and Dr Enos Banda, the attorney and counsellor of Law for State of New York (USA) and CEO-African Phoenix Investments. The event was a flagship for a textbook/stationery drive and sanitary pads were donated by university students for a High School.

The Black Lawyers' Association runs a peer to peer *Mentorship Programme* throughout the year. The *Mentorship Tea/Meet and Greet* in the beginning of the year served as a platform for all mentors and mentee's to connect with each other and be assigned accordingly. The *Speed Mentoring* event held later in the year was used for mentors and mentees to revive their relationships and regroup as students were about to step into the last term of the year.

Best wishes,
Ayanda Mbonani



BLACK LAWYERS ASSOCIATION
CHAMPAGNE BREAKFAST 2017

BLA Champagne Breakfast



WOMXN'S LUNCHEON:
HER 'WRITE' TO EDUCATION

Womxn's Luncheon: Her 'Write' to Education



THE OPPRESSION OF WOMXN UNDER AFRICAN CUSTOMARY LAW

Sinenhlanhla Nene: Final-year LLB student (Edited by
Nompilo Nene)

Abstract

This opinion piece explores the challenges of discrimination that African women are subjected to under African customary law, as certain practices have been in direct and constant conflict with the Bill of Rights and international human standards. The nature of the conflict between constitutional rights, practices and rules pertaining to customs such as virginity testing and ukuthwala are explored and tested against the Bill of Rights. The article expresses support for practices that are voluntary and coincide with constitutional standards, and furthermore highlights that any practice that does not conform with such constitutional standards, such as ukuthwala, should be declared unconstitutional. The conflict that arises in understanding customary law is suggested to arise from interpreting it from western lenses, and the article suggests that before testing customary law against constitutional standards it should first be contextualized.

Isiqalo

I Ningizimu Afrika inomlando omude wobandlululo kusukela ngesikhathi abantu abamhlophe bethatha umhlaba wethu wobaba mkhulu, okwabanga ukucwasa kwabantu ngenxa yebala, kwabanga ukuhlupheka nokubandlululeka kubantu besifazane. Kaphamb' kwentando yeningi, abantu besifazane ibona abahlukumezeka kakhulu emphakathini. Isikhathi sobandlululo isona esadla indima enkulu kwabanga nomncelo kwabantu. Abantu besifazane ababeshade ngosiko ibona abahlukumezeka kakhulu ngamasiko nenkolelo eyehlisa isithunzi sabo. UBennett uthi icustomary law umthetho osukela kwisikhathi esidala, futhi lomthetho usekhona namanje kwamasiko amaningi

esinawo.¹ Kwicala laVan Breda v Jacobs, yathi inkantolo ukuze usiko libe umthetho fanele ngabe abantu bayalazi lelo siko, kufanele abanengqondo, fanele alandelwe isikhathi eside, nokuthi fanele aziwe kahle ngabantu balaziyo lelosiko.² Amalungelo abantu esifazane asahlukumezwa ngamasiko amaningi ngokuthi lawomasiko awayilandeli umthetho emkhulu yaseNingizimu, iConstitution, ethi abantu besifazane nabesilisa bayalingana njengokusho kwasection 9 weConstitution.³ Noma lukhona ubandlululo, kukhona nokungaqondi kwecustomary law mubheka umthetho waseNingizimu. Kulendatshana, ngizokhuluma ngendlela umthetho wamasiko ubandlulula abantu besifazane, besengibheka indlela amanye amasiko ethu engaqondakali ngomthetho weConstitution.

Ukucwasa kwabesifazane ngaphansi kwecustomary law

Icustomary law nokulandela amasiko into eyenziwa kakhula emakhaya la okusekhona izinduna nezinkosi eziphethe khona. Umthetho waseNingizimu uthi kusection 39(2), icustomary law iyinxenye yemthetho walelizwe futhi fanele ulandelwe; kodwa amasiko abandlulula abantu nangahambiselani nomthetho weConstitution ngeke alandelwe futhi ayavumelekile.⁴ Umthetho omkhulu sawubona usebenza kakhulu kwicala laBhe and Others v Magistrate Khayelitsha,⁵ la inkantolo enkulu yaseNingizimu (Constitutional Court), yathatha isinqhumo sokuthi abantu besifanzane akufanele bebandlululwe ezindabeni ezihlangene namafa. Usiko lalithi abantu besifazane ngeke bethole luthu makushone umuntu, futhi wawungakwazi ukubashiyela ifa. Kulelicala laBhe, uMa wezingane zamantobazane ezimbili waletha isicelo enkantolo ukuthi izingane zakhe zithole ifa lababa wazo owashona.⁶ Omahluleli bathatha isinqhumo sokuthi usiko elingavumeli abantu besifazane bethole ifa liyabandlulula. Lolubandlululo alivumelekile kusection 9(3) yeConstitution lithi abantu akufanele bebandlululwe ngenxa yobulilo babo.⁷ ULanga CJ wabeka ukuthi lobubandlululo ikona okubanga ukuthi abantu besifazane bebukeka bengalingene namadoda, okuyiphutha elikhulu kwicustomary law

¹ SW Mashalaba *Discrimination against Women under Customary Law in South Africa with Reference to Inheritance and Succession* (LLM thesis, University of Fort Hare, 2012) 1-2.

² 1921 AD 330.

³ Constitution of the Republic of South Africa, 1996.

⁴ Constitution of the Republic of South Africa, 1996.

⁵ 2004 (1) SA 580 (CC).

⁶ Para 10.

⁷ Constitution of the Republic of South Africa, 1996.

nakwiConstitution.⁸ Lelicala la*Bhe* lavula indlela yokutshengisa ukuthi amasiko abandlulayo awanandawo eNingizimu. Mesibheka amanye amazwe ala eAfrika, iKenya neMalawi nayo ithatha izinyathelo zokungavumeli amasiko nemthetho ebandlululayo.⁹ Ngiyajabula ukuthi sekukhona ushintsho olukhona ngeConstitution esishintshe indlela icustomary law engasebenza ngayo. Noma kukhona lelushintsho, namaje sisabona abantu besifazane bebandlululwa ngobulili babo ezindaweni zasemakhayelapho kukhona abantu abangafundili. Ngithemba ukuthi umthetho uzokifa nakhona kulezondawo wenze ushintsho olukhulu.

Udweshu le customary law neConstitution

Njengoba sengichazile ukuthi iConstitution izamile ukusiza icustomary law la ebandlulula khona, kodwa khona la abantu bethi iConstitution ayiqondi imithetho yamasiko kahle. Abantu abaninigi bathi ukuhlolwa kwamatshitshi (virginity testing) akukona ukubandlululwa kwabantu besifazane; kodwa indlela yokubavikela kwizifo ezinjengenculaza. Ukuhlolwa kwamantobazane usiko eliqave kakhulu kaZulu, la amantobanzane aholwa kuMkosi woMhlanga. Kodwa lolusiko aluhambisani neConstitution, kakhulukazi usection 14 lo onikezi umuntu ilungelo lukuba nezimfihlo zake yedwa. Ngokubona kwami, lelilungelo kufanele livikelwe, ngakhoke amantombazane akufanele aphoqwe ukuya eMhlangeni. Icalea la*S v Makwanyane*¹⁰ lithi isithunzi somuntu fanele sihlonishwe njengelungelo elibalulekile kwiConstitution.¹¹ Ilungelo elikhulu elithintekayo ilungelo lasection 12(2) elithi umuntu unelungelo lokwenza izinqhumo eziphathelele nomzimba wakhe. Ngokubona kwami, uMhlanga ungathinta lelilungelo uma abantu besifazane bephoqwa ukuhlolwa. Mesibheka amalungelo eConstitution fanele sikhumbule ukuthi unelungelo lokukhetha ukuthi amasiko uzowalandela yini. Uma umuntu efuna ukuhlolwa, akuyona indawo yeConstitution yokuthi iphikisana nalokho. Konke lokhu kuphathelele nokuthi umuntu ezikhethela uthuki ufuna ukwenzani ngempilo yakhe.

⁸ Para 91.

⁹ T Masengu "Customary Law Inheritance: Lessons Learnt from *Ramantele v Mmusi and Others*" (2015) 6 *Democratic Governance and Rights Unit: University of Cape Town* 2 at 10. <https://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2015/07/OxHRH-Working-Paper-Series-Number-6-Masengu1.pdf> (accessed 26 September 2017).

¹⁰ 1995 (6) BCLR 665 (CC).

¹¹ Para 329.

Kukhona amasiko engingavumelani nawo futhi engibona ukuthi awakwazi ukuvikelwa umthetho. Ukuthwala usiko elijwayelwe eEastern Cape naKwa-Zulu Natal. Intobanzane, kwesinye isithathi eneminyaka ewu 12 noma 15, baphoqwa ukushada nabantu besilisa abadala kunabo. Lokhu kwenziwa ngaphandle kwemvumo yentombazane eshadiswayo. Angivumelani kakhulu nalolusiko ngoba alihlukile nokudlwengula umuntu wesifazane. Mawebheka ezikhathini eziningi intobazane isuke ikhala ingafuni ukushada. Bese ishadiswe iphoqwa ukuthi iqale umndeni nomuntu ekade ingazimisele nokushada naye. Mawubheka usection 3 we Criminal Law (Sexual Offences and Related Matters) Act¹² ukudlwengula kuchazwa njengo kulala nomuntu ungatholanga mvumo yakhe umphoqe. Abantu besifazane abaninigi abazithola bethwele bachaza ukuthi babengafuni, ngakhoke abaninigi babo uthola ukuthi badlwengulwa.¹³ Angivumelani nakancane namasiko angavumeli abantu bezikhethela ukuthi bona bafunani. Uma umuntu engafuni ukuthwala, kodwa umuntu wesilisa eqhubeka, akufanele sibheke icustomary law fanele sibeke umthetho obhekene nokwenza icala. Ngithemba ukuthi usection 12 we Children's Act¹⁴ uzoshintshwa izinkantolo zisho ngqo ukuthi ukuthwala kwezingane akukhosemthethweni. Abantu abanye bacabanga ukuthi ukuvala ukuthwala ukuphazamisa amasiko ethu, kodwa angivumelani nalokhu.

Isiphetho

Ukubandlululwa kwabantu besifazane into esisabhekene nayo noma sinayo imithetho engakuvukela. Umbono wami ukuthi abantu besilisa, kakhulukazi laba abahlala emakhaya kufanele befundiswe ngokuphatha kahle kwabantu besifazane. Ngicabanga ukuthi nabantu besifazane abangafundile fanele befundiswe ukuthi banamalungelo, njengoba amasiko amaninigi atshela abantu besifazane nengange ukuthi abanawo amalungelo. Amasiko ethu necustomary law abalulekile kodwa akufanele sivume imithetho engahambelani neConstitution nengasiphathi ngokufana. Kufanele sivikela amasiko aseAfrika, kodwa fanele singavumeli ubandlululo. Ngifisa ukubona umthetho uqhubeka ukuvikela imbokodo.

¹² Act 32 of 2007.

¹³ JC Mubangizi "A South African Perspective on the Clash between Culture and Human Rights, with Particular Reference to Gender-Related Cultural Practices and Traditions" (2012) 13 *Journal of International Women's Studies* 33 at 39-40.

¹⁴ Act 38 of 2005.



SECTION 6 OF THE CIVIL UNION ACT – A FAIR BALANCE BETWEEN SECTION 15 AND SECTION 9 OF THE CONSTITUTION?

Sibusiso Ngwila: LLB 2 Student

Background

When comparing the stance which most countries on the African continent have taken with regard to the rights of individuals who identify as part of the LGBT+ community, South Africa has proven to be revolutionary in the sense that the rights of people who identify as part of the LGBT+ community are constitutionally protected. This is evident in the substance of the Constitution of the Republic of South Africa (hereafter referred to as the Constitution) where it provides in s 9(3) that no person may be discriminated against on the grounds of, *inter alia*, sex, race, gender, sexual orientation, conscience or belief.

The influence of the new constitutional dispensation in terms of the recognition of LGBT+ rights in South African law is perhaps most tangible within the family law framework.¹ The Constitution

in s 15(3) allows for, but does not necessarily compel, the legislature to enact legislation which concerns itself with regulating various types of marital relationships which are entered into and concluded in terms of particular religions, personal or family law.

However, although s 15(3) is one which encourages the recognition of various types of marital arrangements between persons of different religions, beliefs and opinions, it is important to note that the legislature has been particularly slow in producing legislation to this effect, for the most part. The only type of marriage arrangement to be regulated by means of legislation, and which was enacted essentially without delay is the Recognition of Customary Marriages Act,² which was passed in 1998, approximately five years into the apartheid era and two years after the final Constitution became effective.

With this in mind, it is particularly noteworthy to then consider the way in which the Civil Union Act³ came into being, considering the fact that it came about primarily because the legislature risked having the Marriage Act⁴ also apply to same-sex partners (as was held in *Minister of Home Affairs v Fourie*)⁵ if it had not provided appropriate recognition of same-sex marriages/unions after the one-year period which the court had granted. The Civil Union Act was met with some resistance during discussions regarding the introduction of legislation to recognise same-sex marriages by certain religious groups prior to it being enacted in the latter part of 2006, and there were calls for a national referendum regarding same-sex marriages and suggestions in favour of an amendment to the Constitution in order to ensure that the institution of marriage remains accessible only to heterosexual couples.⁶ Regardless of this, however, the Act remains in force to this day.

² Act 120 of 1998.

³ Act 17 of 2006.

⁴ Act 25 of 1961.

⁵ 2006 (1) SA 524 (CC).

⁶ E Bonthuys "Irrational Accommodation: Conscience, Religion and Same-Sex marriages in South Africa" (2008) 125 *SALJ* 473 at 473.

¹ H de Ru *The Recognition of Same-Sex Unions in South Africa* (LLM thesis, University of South Africa, 2009) 4.

Criticism of section 6 of the Civil Union Act

Although the Civil Union Act is in force, and same-sex couples are now afforded statutory protections for their marriages, the Act itself is not without its flaws.⁷ The constitutionality of s 6 of the Act is questionable in the sense that the balance between the constitutional rights of Home Affairs marriage officers and those of same sex couples is not equal. Section 6 of the Civil Union Act reads as follows:

“A marriage officer, other than a marriage officer referred to in section 5, may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex whereupon that marriage officer shall not be compelled to solemnise such civil union.”

This section has been widely criticised on the grounds of its “unconstitutionality” for about as long as the Civil Union Act has been in force.⁸ However, a recent notable criticism of the section which ultimately attracted a response from the former Minister of Home Affairs, Prof Hlengiwe Mkhize, is by *MambaOnline*, which is an online media platform that caters to members of the LGBT+ community. *MambaOnline* on 12 July 2017 reported that Prof Mkhize had rejected a call by COPE MP Diedre Carter to repeal s 6 of the Civil Union Act due to its unconstitutionality.⁹ Consequently, the Minister released a statement in response to the article by *MambaOnline* just 3 days after it was published. In her response, she maintains that a repeal of s 6 of the Civil Union Act is not necessary, but rather, this section of the Act allows the department of Home Affairs to be aware in advance of the objections from marriage officers to solemnise same-sex marriages in order for the department to “plan better”.¹⁰

⁷ JD Lekhuleni *The Constitutionality of the Civil Union Act 17 of 2006* (LLM thesis, University of Pretoria, 2016) 3.

⁸ Bonthuys 2008 SALJ 475.

⁹ L DeBarros “Home Affairs minister rejects call to amend discriminatory Civil Union Act” <http://www.mambaonline.com/2017/07/12/home-affairs-minister-rejects-call-amend-discriminatory-civil-union-act/> (accessed 31 July 2017).

¹⁰ H Mkhize “Response by the Minister of Home Affairs, Prof Hlengiwe Mkhize, to an article published by

“...by allowing the marriage officers, who are representatives of the state, to refuse to solemnise a same-sex couple, the state fails in its obligation to protect, promote and fulfil the rights in the Bill of Rights...”

The (un)constitutionality of section 6 of the Civil Union Act

It has been suggested that the *Minister of Home Affairs v Fourie* judgment could be the reason for s 6 being part of the Civil Union Act.¹¹ Sachs J who wrote the main judgment, maintained that in providing recognition for same-sex marriages, a principle of “reasonable accommodation” ought to be applied in respect of marriage officers who, on the basis of their beliefs, object to solemnising a same-sex marriage.¹² The principle of “reasonable accommodation” would effectively excuse a civil marriage officer from solemnising marriages between same-sex couples.¹³ Therefore, it would be reasonable to assume that s 6 of the Civil Union Act is a reflection of the principle of reasonable accommodation, as expressed by Sachs J in the *Minister of Home Affairs v Fourie* case.

What is particularly interesting is that the South African Law Reform Commission’s *Discussion Paper on Domestic Partnerships*,¹⁴ which was published prior to the *Minister of Home Affairs v Fourie* judgment, includes discussions on suggested regulation structures of same-sex unions. However, it never alludes to the “reasonable accommodation” principle. Hence, what could be deduced from this is that the *Minister of Home*

mambaonline.com on the Civil Union Act and the solemnising of civil union between persons of the same sex by Marriage Officers” <http://www.dha.gov.za/index.php/statements-speeches/1021-response-by-the-minister-of-home-affairs-prof-hlengiwe-mkhize-to-an-article-published-by-mambaonline-com-on-the-civil-union-act-and-the-solemnising-of-civil-union-between-persons-of-the-same-sex-by-marriage-officers-15-july-2017> (accessed 31 July 2017).

¹¹ Bonthuys 2008 SALJ 474.

¹² *Minister of Home Affairs v Fourie* para 89.

¹³ *ibid.*

¹⁴ South African Law Commission Project 118: *Discussion Paper on Domestic Partnerships*.

Affairs v Fourie judgment provided a loophole which allowed the legislature to include this provision in the Civil Union Act.¹⁵

Although it is important to respect the beliefs of others, as mentioned in s 15 of the Constitution, what is particularly concerning is the role that personal opinion and religion seem to play in the provision of a service, namely solemnising a civil union of a same-sex couple, by a secular government which is obliged to serve all South Africans. Marriage officers in the Home Affairs are employees of the government, and allowing such officers to refuse to render services to certain members of the public because of their personal opinions is discriminatory, and in contravention of s 9(1) of the Constitution, which maintains that: “*Everyone is equal before the law and has the right to equal protection and benefit of the law.*”¹⁶

Marriage officers, in their capacities as public officials and representatives of the state, ought to uphold the law in a manner which is objective and does not discriminate against certain members of the public who, in effect, are seeking a service which is provided by the state.¹⁷ Therefore, allowing marriage officers to have a discretion to choose not to render a governmental service to certain members of the population because of their personal beliefs and opinions would arguably translate to the state, which is ostensibly secular in nature, being able to discriminate against members of the LGBT+ community, and it must be kept in mind that the institution of marriage, at least from the perspective of the state, is one which is of a civil nature, and not an institution which is dictated by religious norms.¹⁸

Furthermore, s 7(2) of the Constitution obliges the state to “*protect, promote and fulfil the rights in the Bill of Rights*”, and by allowing the marriage officers, who are representatives of the state, to refuse to provide a governmental service to a same-sex couple which wishes to marry, the state fails in its obligation to protect, promote and fulfil

the rights in the Bill of Rights, more specifically ss 9 and 10, which pertain to equality and dignity respectively.¹⁹

What becomes apparent is that the balancing of constitutional rights between the marriage officers and members of the LGBT+ community is unequal. Although the right of the marriage officers to their beliefs and personal opinion is being taken into account, the rights of the members of the LGBT+ community to access government services are restricted in the sense that they are only able to access particular Home Affairs offices to solemnise their marriage, unlike heterosexual couples, who are able to approach any Home Affairs office. The right to be treated equally without being discriminated against as provided for in s 9 of the Constitution is therefore violated. Therefore, s 6 of the Civil Union Act is unconstitutional.

Conclusion

The refusal of the Minister of Home Affairs to take any action to repeal s 6 of the Civil Union Act, even though she has been alerted to the fact that it is unconstitutional, is a cause for concern. The balancing of s 15 (applicable to marriage officers) and s 9 (applicable to same-sex couples) of the Constitution is unequal and this should be addressed in order to ensure that the rights of all people are considered in a way which is just and fair, and to ensure that, the Republic works towards the achieving the objectives mentioned in the preamble to the Constitution, one of which aims to “*heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights*”.

¹⁵ Bonthuys 2008 SALJ 474.

¹⁶ De Ru *The Recognition of Same-Sex Unions in South Africa* 71.

¹⁷ De Ru *The Recognition of Same-Sex Unions in South Africa* 71.

¹⁸ *Ibid.*

¹⁹ De Ru *The Recognition of Same-Sex Unions in South Africa* 72.



UNPACKING THE DAGGA JUDGMENT: WHAT DOES IT REALLY MEAN FOR YOU?

Compiled by: CA Brandt, BN Bhala, T Mamosebo, J Sikhosana, M Nel, S Khorommbi; N Ndoyana; E Nohaji: Legal Theory 1 students

On 31 March 2017, the Western Cape High Court handed down a judgment concerning the supposed “legalisation” of the private use and cultivation of cannabis. There has been much confusion regarding the effects of the judgment, so (as a group of interested first-year law students) we thought we could help clarify the situation.

Several applicants brought their case to the court advocating for the right of using cannabis. The applicants argued that the prohibition of the private use and cultivation of cannabis was not in accordance with the constitutional principles of equality and freedom of religion. Notably, amongst the applicant was Jeremy Acton, who is a half of the famous “dagga couple”; and Gareth Prince, who previously appeared before the Constitutional Court where he was refused registration of his articles of clerkship because of his Rastafarian-inspired cannabis use. Moreover (with the help of court-appointed parties) the applicants argued that the prohibition breached the constitutional right to privacy. While the court criticised the application for being somewhat overbroad, it found that the application was focused on the legalisation of the private use and cultivation of the plant.

After hearing arguments the court held that the private possession, cultivation and use of marijuana should be legalised. The Western Cape High Court further emphasised that the use of cannabis in the private home should no longer be thought of as a criminal act, as this would unduly deprive individuals of the right to privacy. The court reasoned that private use and cultivation does not actually condone the more serious related activities associated with the drug, such as the supply,

dealing, and distribution of the drug. In other words, the court was satisfied with the argument that there is a disproportional punishment for the insignificance of the harm that arises as a result of the use of the drug in the private home. And lastly, upon reviewing the various experts’ evidence, the Court was of the opinion that the stigmas attached to cannabis are mostly false. There was no real evidence to prove adequately that the ingestion of cannabis results in any mental harm (schizophrenia or a reduced IQ, nor physical harm to the user, nor any strong level of addiction, and that it is not a “gateway drug”.

Does this then mean that there is “nationwide legalisation of marijuana” as has been implied in some media reports? The authors submit that the media reports have been somewhat misleading.

Firstly, in terms of s 172(a) of the Constitution, it is important to remember that the Western Cape High Court’s declaration of invalidity has no force unless it is confirmed by the Constitutional court. Therefore, strictly speaking, cannabis regulations have not been scrapped and will remain in force until the Constitutional Court confirms the declaration of invalidity of a s 4(b) and 5(b) of the Drug and Drug Trafficking Act 140 of 1992 made by the Western Cape High Court.

Secondly, this may take some time. According to Rule 16 of the Constitutional Court rules, a copy of the order must be sent to the Constitutional Court within fifteen days of the giving of the order of Constitutional invalidity. It is within these 15 days that parties have an opportunity to appeal or review the decision. The order made by the High Court was on 31 March. Therefore, on 14 April, if parties do not intend to appeal or review the matter, the Chief Justice will direct how the matter should be dealt with.

What is perplexing about the matter is that the order of the Western Cape High Court not only stayed prosecutions on individual use and growing, but also declared that the judgment would “be deemed to be a defence to a charge “[of] possession, or cultivation of cannabis in a private dwelling”. This effectively means that the court bypassed s 172(2) of the Constitution and allowed its judgment to have “force” in that people can now smoke and grow cannabis in a private dwelling. The authors submit that the court may have overreached here, and people should be wary of continuing use until the Constitutional Court either confirms the order, or indicates otherwise.



THE HATE SPEECH BILL: ANALYSIS AND IMPLICATIONS

Anesu Chiremba: Final-year LLB student

"To become self-aware, people must be allowed to hear a plurality of opinions and then make up their own minds. They must be allowed to say, write and publish whatever they want. Freedom of expression is the most basic, but fundamental, right. Without it, human beings are reduced to automatons."

- Ma Jian

Introduction

After the Department of Justice and Constitutional Development published the recent Prevention and Combating of Hate Crimes and Hate Speech Bill, there have been various criticisms raised about the draft statute. The main contention is that the rigid approach adopted in the Bill will not pass constitutional muster. Prior to publication of the Bill various groups had argued that due to the onslaught of hate crimes in South Africa there is a crucial need for measures to be taken in relation to hate crimes and hate speech. Throughout the country's history, South Africa has faced a barrage of racist, xenophobic and sexual violence attacks. Incidents such as the December 2016 assault, abduction and murder of the lesbian activist Noluvo Swelindawo by eleven men in her community, or two white men assaulting and

forcing a black man, Victor Mlotshwa, into a coffin, are just a few examples. It is apparent that the introduction of this Bill opens up the possibility for the development of South African law the perpetrators of hate crimes and to deter would-be offenders. Acts of hate speech have no place in the country's democratic environment. Despite the legislature's efforts, the idea of criminalising hate speech remains a contentious issue, with many South Africans debating that the statute could result in the complete eradication of a vital freedom in the Bill of Rights - the right to freedom of expression.¹ The civil community finds itself asking the question: could criminalisation of hate speech be the end of all speech? This article will expand on several issues relating to the law relating hate speech. It is pertinent to assess the reason why legislation was drafted and whether its provisions shall drastically impact on freedom of expression. Some recommendations for imposing the Bill will also be made.

Hate speech - the difficulty in defining the Act

South African law has not directly defined the act of hate speech. Instead "hate speech" is a broad concept characterizing a wide range of expressions.² Hate speech remarks not only about racial matters but also about religion, sexual orientation and disability. Ultimately, the Achilles' heel of the statute is the lack of specific definition of the term. The Bill fails to prescribe expressions that would constitute hate speech. Such a shortcoming leads to the unjustified infringement of the right to freedom of expression. A balance must be achieved between criminalising hate speech and ensuring that each individual still enjoys their right to freedom of expression. It is clear that a prohibition of hate speech is necessary. Internationally, there are various covenants that express this prohibition. The International Covenant on Civil and Political Rights

¹ S16 Freedom of Expression

1) Everyone has the right to freedom of expression, which includes —

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

² K Geldenhuys "Hate Speech-a tricky toffee" (2017)

Servamus Community-based Safety and Security Magazine 23.

(ICCPR) has a “hate speech” clause under Article 20 specifying that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”³ Hate speech has been described as a direct invasion of dignity and an infringement of the rights of association of a person, mainly because it goes beyond a mere insult.⁴ Main indicators are that the speech targets a traditionally oppressed group, attributes inferiority to the group, and employs hateful content directed at that specific group.⁵ However, these statements do not provide specific definitions or examples of hate speech itself.

Limitation of Freedom of Expression

Freedom of expression is invaluable in a democratic society. It is instrumental to a functioning democracy “a vital means of fulfilment of human personality”.⁶ In essence it allows individuals to speak out, to criticise and comment on issues freely without censorship. Fostering a public debate of issues allows democracy to thrive. However freedom of expression is not absolute and is subject to the limitations clause.⁷ In s 16(2) of the Constitution it is outlined that (a) propaganda of war, (b) incitement of imminent violence or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm, is excluded from the definition of what is protected in law. The general submission was that legislative measures to ensure these unprotected expressions were punished was not enough and there is a need to create an offence in light of the limitation.⁸

Over-regulation: potential censorship

³ International Covenant on Civil and Political Rights Art 20.

⁴ *Afriforum and another v Malema and Another* 2011 (6) SA 240 (EqC) para 30.

⁵ L Janse van Rensburg *The Violence Of Language: Contemporary Hate Speech And The Suitability Of Legal Measures Regulating Hate Speech In South Africa* (LLM, Rhodes University, 2013) 36.

⁶ *South African Defence Force Union v Minister of Defence* 1999 (4) SA 496 (CC) para 7.

⁷ S 36 of the Constitution.

⁸ M Marais “Does the Constitution call for the criminalisation of hate speech” (2015) 30 *SAPL* 457 at 483.

The Prevention and Combating of Hate Crimes and Hate Speech Bill has attempted to describe hate speech in s 4 as being inclusive of nasty tweets, malicious comments, careless remarks on social media, or satirical political cartoons which could land their creator in court on criminal charges.⁹ The legal meaning has been blurred by these additional thirteen possible offences of hate speech. The Bill fails to consider the Equality Act, which provides for criminal charges once a person has been found to have committed hate speech¹⁰ It is possible that this Bill can be used to outlaw any speech that is considered offensive or confrontational. The Bill covers too many expressions, so much so that calling a capitalists “greedy” or an individual an “irritating old person” could lead to incarceration. Clause 6(3) of the current Bill states that penalties for an individual found guilty of hate speech expressed in s 4 could be “on first conviction, to a fine or to imprisonment for a period not exceeding three years”¹¹ upon recurring offence this may be punished by up to ten years imprisonment.

Suggestions

There have been many opinions as to what has gone wrong in terms of drafting this Bill. Firstly, South Africa already has in place the Promotion of Equality and Prevention of Unfair Discrimination Act and equality courts that regulate the offence.¹² It is apparent from this discussion that the Bill is an attempt to follow international standards, however the slap-dash job does not consider already existing laws. This disregard for previous laws simply causes confusion. There is a need for an amendment that will ensure that the Bill is in line with the Constitution itself, and other laws currently relating to hate speech. It is imperative to ensure that there is no unnecessary infringement of the right to freedom of expression, which is a fundamental right for any democratic nation.

⁹ K Geldenhuys “Hate Speech-a tricky toffee” *Servamus Community-based Safety and Security Magazine* (2017) 25.

¹⁰ S 10(2) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹¹ Clause 6 of the bill.

¹² L Janse van Rensburg *The Violence Of Language: Contemporary Hate Speech And The Suitability Of Legal Measures Regulating Hate Speech In South Africa* at 113.



A CRITICAL ANALYSIS OF THE STATE OF THE NATION ADDRESS

Erika Heaton: Legal Theory 3 student

Introduction

This article undertakes an analysis of the President's State of the Nation address of 9 February 2017.¹ It examines three issues. First, it critically analyses the current instruments that speak to land reform in South Africa; secondly, it determines what the state, in terms of the Final Constitution of South Africa of 1996,² would need to consider as part of the land reform deliberations highlighted in the President's SONA; and lastly it considers the potential challenges thereof. I shall deal with each aspect in my enquiry separately and in the order as set out above.

¹ J Zuma "State of Nation Address" South African Government <https://www.gov.za/state-nation-address> (accessed 8 May 2017). Herein referred to as "SONA."

² Constitution of the Republic of South Africa, 1996.

The question of land in South Africa has long been a contentious topic.³ South Africa's history of apartheid was directly linked to how occupation of, and access to, rights of land were regulated in South Africa.⁴ The vast racial disparity in land ownership during apartheid and the dispossession of black land led to severe inequalities in terms of distribution of land ownership.⁵ Pertinent to redressing the severe inequalities of distribution of land ownership are s 25(4),(6)(7) and (8) of the Constitution, read together with s 36(1) of the Constitution. The state's land-reform goals are guided and underpinned by s 25 of the Constitution.

"The chief criticism to [the Strengthening the Relative Rights of People Working the Land] programme is that essentially farmers would be deprived of 50% of their farms without any compensation."

Critical analysis of the current instruments of land reform

In engaging in a critical analysis of the current instruments of land reform, I shall critically speak to three contemporaneous instruments of land reform mentioned by the President in his SONA. These are the intention of using the Expropriation Act⁶ in pursuit of land reform and redistribution in line with the Constitution (see the Expropriation Bill B4D of 2015);⁷ the declaration of invalidity of the Restitution of Land Rights Amendment Act⁸ by the Constitutional Court; and, lastly, the governmental

³ Zuma "State of Nation Address."

⁴ B De Villiers *Land Reform: Issues and Challenges* 2ed (2003) 45. The process for the struggle of land did not end after the disposition of the San's traditional land but instead continued rapidly with several clashes over land control before and after the first white settlers.

⁵ A Eisenberg "Public purpose and expropriation: some comparative rights insights and the South African Bill of Rights" (1995) 11 *South African Journal on Human Rights* 207 at 207.

⁶ Act 63 of 1975.

⁷ Parliamentary Monitoring Group <https://pmg.org.za/bill/550/> (accessed 8 May 2017). Hereinafter referred to as, "the Bill."

⁸ Act 15 of 2014. Hereinafter referred to as "the Amendment Act."

programme⁹ of “Strengthening The Relative Rights of People Working The Land”.¹⁰

The intention of using the Expropriation Act in pursuit of land reform and redistribution in line with the Constitution

The Expropriation Act provides that the Minister may, subject to several obligations as set out in the relevant sections,¹¹ expropriate any property or take the right to temporarily use any property. The Expropriation Act further sets out the expropriation procedure.¹² Section 12 of the Expropriation Act is imperative to the determination of compensation. Compensation is awarded under three heads: market value, financial loss¹³ and a *solatium*.¹⁴ In the case of *Ash v Department of Land Affairs*¹⁵ Gildenhuys J envisaged a two-step approach to this. However, as a result of the compensation provisions¹⁶ in the Expropriation Act¹⁷ not being aligned with the Constitution,¹⁸ the proposal for an Expropriation Bill was initiated in 2008, with several successors thereafter.

In his address, the President highlighted that he had referred the Bill back to Parliament for reconsideration.¹⁹ According to the memorandum of the Bill, it seeks to align the Expropriation Act with

the Constitution.²⁰ However, the Bill has encountered several criticisms, most importantly that the Bill disregards the “willing-seller-willing-buyer” principle.²¹ The effect is that the Bill allows any expropriating authority to take property by serving a notice on the owner, while leaving it to those divested of ownership and possession to contest it in the courts thereafter.²² It further seeks to limit the jurisdiction and access of the courts through prescribing that courts may adjudicate only on determinations of the compensation due and not the overall *bona fides* of the actual expropriation. It also imposes a 60-day time period in which owners whose land has been expropriated may sue for supplemental compensation. Should owners not follow the prescribed span, they automatically are considered to have accepted the amount offered.²³ However, this is contrary to the current common-law²⁴ position and is precluded by s 25(2)(b), 33(1) and 34 of the Constitution.

Declaration of invalidity of the Restitution of Land Rights Amendment Act:

In the case of *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*,²⁵ a seminal judgment was handed down by Madlanga J, declaring the Amendment Act²⁶ invalid because of the lack of public participation surrounding the formulation of the Amendment Act.²⁷ The Amendment Act envisaged the re-opening of the window for land claims.²⁸ The President’s approval of the Amendment Act²⁹ may be viewed as an active stance by the state to promote progressive land reform and land redistribution.

However, the court found in the matter of *Land Access Movement of South Africa*, that the

⁹ Also known as the “50-50 programme.”

¹⁰ D Steward “50/50 Down on the Farms” FW de Klerk Foundation

<http://www.fwdeklerk.org/index.php/en/latest/news/248-article-50-50-down-on-the-farms> (accessed 9 May 2017).

¹¹ S2(1).

¹² S (6)-(11). Phase one, entails ascertaining whether the relevant property is suitable for the purpose or use as contemplated, or to determine its value. Second phase, entails the service of a notice of expropriation on the owner who is being expropriated.

¹³ Section 12 (1).

¹⁴ Section 12 (2).

¹⁵ 2000 (2) All SA 26 (LCC) paras 34-35. This entails where the consideration of the market value is the starting point and thereafter, an amount may be adjusted according to the relevant circumstances in terms of s 25(3) of the Constitution, in order to determine a just and equitable compensation.

¹⁶ M Evans “The Expropriation Bill holds some hope for landowners” (2017) 17017 *Farmer’s Weekly* 6 at 6. This is because the Expropriation Act pre-dates the Constitution by two decades.

¹⁷ Act 63 of 1975.

¹⁸ J Van Wyk “Compensation for land reform expropriation” (2017)1 *TSAR* 21 at 21 ; A Jeffery “Still Unconstitutional and Unnecessary” (2015) 6 *Without Prejudice* 6 at 6.

¹⁹ Reasons for this are highlighted in the President’s Address, in that he fears that the Bill might not pass constitutional convention because of the lack of public participation during its processing, as is required by S72(1)(a) of the Constitution.

²⁰ Public works “Memorandum of the Objects of the Expropriation Bill, 2015” http://www.publicworks.gov.za/PDFs/documents/WhitePapers/Memorandum_on_Objects_Expropriation_Bill2015_OCSLA.pdf (accessed 10 May 2017).

²¹ Van Wyk 2015 *TSAR* 21.

²² Jeffery 2015 *Without Prejudice* 6.

²³ Jeffery 2015 *Without Prejudice* 6.

²⁴ Jeffery 2015 *Without Prejudice* 6. The common law does not permit the state to even temporarily subjugate property without initially obtaining a court order.

²⁵ 2016 (5) SA 635 (CC).

²⁶ Act 15 of 2014.

²⁷ Paras 67 and 82.

²⁸ Para 2.

²⁹ In the year of 2014.

criticisms³⁰ of the Amendment Act³¹ are that Parliament failed to facilitate adequate public participation before the Amendment Act was passed; the re-opening of the window for lodgement of land claims would prejudice claimants who lodged their claims by 31 December 1998 that still remain unresolved; and, lastly, that as a result of unresolved existing competing claims, new claimants would then be free to claim against land that has already been awarded to existing claimants. Furthermore, should more claims be opened or added under the Amendment Act, this would inflame an already unbearable situation.

Governmental programme: “Strengthening the Relative Rights of People Working the Land”

Lastly, I examine the governmental programme of “Strengthening the Relative Rights of People Working the Land”.³² The 50/50 programme introduces co-determination of farms in South Africa, based on relative proprietorship and the capacity of each contributor in production and management.³³ This system seeks to protect farm workers’ occupancy and prescribes a system of duties and accountabilities with which workers have to comply with in order to retain their proprietorship in the farm; otherwise they could be required to leave the farm.³⁴

The programme prescribes that farmers are required to hand half of their farms to their workers who develop the land. The farm workers’ share is be allotted to them, proportional to their contribution to the development of the land, considering the number of years they have worked on the land.³⁵

The chief criticism to this instrument of land reform is that essentially farmers would be deprived

³⁰ Para 4.

³¹ Which ultimately led to the adjudication of the invalidity of the Restitution of Land Rights Amendment Act.

³² Steward “50/50 Down on the Farms” Hereinafter referred to as “the 50/50 programme.”

³³ At 53-55.

³⁴ GE Nkwinti “Final policy proposals on Strengthening the Relative Rights of People Working the Land” (2004) 2 Policy proposals <http://www.ruraldevelopment.gov.za/publications/land-reform-indaba-2015/file/3397-final-policy-proposals-on-strengthening-the-relative-rights-of-people-working-the-land> (accessed 11 May 2017). In which the Municipal Council must provide the worker with suitable accommodation, within a specific period.

³⁵ Nkwinti “Final Policy proposals.”

of 50% of their farms without any compensation. Therefore, it is not clear how farmers could be arbitrarily deprived of their property without contravening the requirements of s 25 of the Constitution.³⁶

Constitutional limitations and subsequently challenges thereof in terms of the current land reform and land redistribution instruments:

Taking into account the three land-reform instruments mentioned by the President in his SONA, the state should consider the practicability of these land-reform instruments, specifically in regard to the overt constitutional challenge of these land reform instruments. In the sense that the overt challenge is that all three land-reform instruments are at variance with the requirements of s 25 of the Constitution.³⁷

Section 25 of the Constitution defines boundaries for interference, by the state, with property rights.³⁸

The South African constitutional property clause³⁹ relates the principle difference between deprivation⁴⁰ and expropriation⁴¹ of property to the payment of compensation.⁴² This difference is established in s 25(1)⁴³ and 25(2)⁴⁴ of the Constitution. Section 25(1) of the Constitution must be read with s 36(1)⁴⁵ of the Constitution so as to have a greater understanding of s 25(1) of the Constitution, where all deprivations and expropriations must be applied in terms of the law

³⁶ Steward “50/50 Down on the Farms.”

³⁷ Particularly, section 25(1)(2)(3) and (6).

³⁸ H Mostert *The Principles of the Law of Property in South Africa* ed (2010) 119.

³⁹ Section 25 of the Constitution.

⁴⁰ Mostert *Principles of the Law of Property* 119. Deprivation is defined as, the state’s ability to regulate use of private property by restricting owner’s entitlements.

⁴¹ Mostert *Principles of the Law of Property* 120. Expropriation is defined as, the state’s ability to ‘take’ private property without the consent of the owner, for a public purpose or in the public interest, contrasted to payment of compensation.

⁴² H Mostert “The distinction between deprivations and expropriations and the future of the ‘doctrine’ of constructive expropriation in South Africa” (2003) 19 *SAJHR* 567 at 573.

⁴³ Mostert *Principles of the Law of Property* 119. No one may be arbitrarily deprived of property except in circumstances prescribed by the Constitution.

⁴⁴ Mostert *Principles of the Law of Property* 120. This section empowers the state to discontinue independently, subject to constitutionally prescribed circumstances, all the entitlements of specific property right holders for public use or public purposes.

⁴⁵ Also known as the general limitation clause.

of general application; they not be arbitrary; and they must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 25(2) and 25(3)⁴⁶ of the Constitution must be read together. Additionally s 25(2) of the Constitution prescribes expropriations to be for public purpose or in the public interest, subject to a just and equitable payment of compensation in terms of s 25(3) of the Constitution. Some provisions in the property clause⁴⁷ serve a protective purpose,⁴⁸ and others a reform purpose.⁴⁹

In the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,⁵⁰ the court clarified the judicial understanding of the relationship between deprivation and expropriation of property. Furthermore, it declared expropriation as the most severe form of deprivation that requires the payment of compensation,⁵¹ and most importantly developed a flexible test by which to determine whether a sufficient reason exists for an infringement of property rights.⁵²

Furthermore, the state should keep in mind that by virtue of *rei vindicatio* in South African common law, an owner may institute this action to reclaim their property from anyone who is unlawfully in possession thereof.⁵³ Precedents such as; *Chetty v Naidoo*,⁵⁴ *Gien v Gien*⁵⁵ and *Hendricks v Hendricks*⁵⁶ all make reference to Grotius's definition of ownership.⁵⁷ As a result of this it is clear that our courts have highlighted the difference between ownership on the one hand, and either possession or limited real rights, on the other hand.

In conclusion, taking all the above into account, the state should re-consider the practicability of these land - reform instruments and should re-align these land reform instruments with the requirements set out in section 2 and 25 of the Constitution. In doing this the state should embark on a calibrating exercise so as to their present approach to revise land-reform and land redistribution.

⁴⁶ Mostert *Principles of the Law of Property* 120. This section provides how and to what degree owners may be compensated for infringements constituting to expropriation.

⁴⁷ Section 25 of the Constitution.

⁴⁸ Section 25(1)(2) and (3).

⁴⁹ Section 25(5)(6)(7)(8) and (9).

⁵⁰ 2002 (4) SA 768 (CC).

⁵¹ Para 59ff.

⁵² Para 100ff.

⁵³ AJ Van Der Walt and P Dhliwayo "The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis" (2017) 134 *SALJ* 34 at 36. Implying that ownership in South Africa is not absolute.

⁵⁴ 1974 (3) SA 13 (A) para 20.

⁵⁵ 1979 (2) SA 1113 (T) paras 1120C–1122C.

⁵⁶ 2016 (1) SA 511 (SCA) para 7.

⁵⁷ Van der Walt and Dhliwayo 2017 *SALJ* 43. As the most complete property right, allowing the owner to do what they please, subject to what the law permits.



THE BINDING NATURE OF RECOMMENDATIONS BY THE PUBLIC PROTECTOR: *ECONOMIC FREEDOM FIGHTERS v SPEAKER OF NATIONAL ASSEMBLY*

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Introduction

An issue that has plagued the country for some time is the legal status of the remedial action taken by the Public Protector. The aim of this article is to clarify the exact legal nature of these recommendations or remedial actions put forward by the Public Protector. This article gives a brief overview of the predominant issue of corruption in the country, with an explanation as to why the Public Protector's role

“The Public Protector can now act with strengthened power, and review any maladministration with a new impetus as noncompliance is not an option any longer”

is so vital. After this, it will trace the development of the law on the powers of the Public Protector and then explain in detail the current legal position in South Africa. The article will also reflect on the enforcement of decisions made by ombuds in other jurisdictions. Lastly, I will set out my own opinion on the matter and suggest recommendations to ensure the integrity of the office of the Public Protector in the future.

The Public Protector's role in combating corruption

It is common knowledge that corruption and maladministration is one of the biggest challenges faced on a daily basis in South Africa. It is for this precise reason that the architects of the Constitution¹ put various control mechanisms in place.² The control mechanisms at the heart of this issue are the Chapter 9 institutions, specifically the office of the Public Protector. The Public Protector's role is to act as a check on the organs of state as it is an institution that is established outside the traditional three branches of the state, essentially making it a “fourth tier” of government.³ However, the Public Protector has been prevented from effectively enforcing its decisions against the organs of state, resulting in the state being left unchecked or unmonitored.⁴ The Public Protector has been referred to as the watchdog of democracy, yet the watchdog has often been muzzled, which has

¹ The Constitution of the Republic of South Africa, 1996.

² R Venter “The Executive, the Public Protector, and the Legislature: The Lion, the Witch and the Wardrobe?” (2017) 1 TSAR 176 at 176.

³ R Venter “Enforcement of Decisions of Ombudsmen and the South African Public Protector: Muzzling the watchdogs” (2016) 10 *International Journal of Social, Behavioural, Economic, Business and Industrial Engineering* 2042 at 2042.

⁴ Venter 2017 TSAR 176.

resulted in its inability to protect society against governmental abuse of power.⁵ However, recently the legal status of the Public Protector's recommendations and remedial action has been elevated to be legally binding in a landmark Constitutional Court case.⁶ The position of the past will be outlined in the next part of this article below.

Legislative framework

The Chapter 9 institutions were established for the purposes of strengthening constitutional democracy.⁷ These institutions can only achieve their purpose by being independent, impartial, and by performing their functions without fear, favour or prejudice.⁸ It is important to take note that these institutions are only subject to the Constitution and the law.⁹ Furthermore, very importantly the Constitution states that other organs of state have to assist and protect the Chapter 9 institutions by safeguarding their independence, impartiality and dignity, which would (it was hoped) in turn ensure their effectiveness.¹⁰ It became clear, though, that the only manner in which to ensure that the office of the Public Protector is truly effective and independent, is to make sure that the decisions or recommendations made are enforceable.¹¹ The Constitution makes it clear that no organs of state are permitted to interfere with the office of the Public Protector,¹² whilst also confirming that the Public Protector is accountable to the National Assembly and its office thus must furnish the National Assembly with a report on its activities annually.¹³

Section 182 sets out the powers of the Public Protector. It states that the he/she is empowered to investigate alleged or suspected improper conduct, in any sphere of government, to report this conduct

and to take appropriate remedial action.¹⁴ The Public Protector also has powers assigned by the Public Protector Act,¹⁵ which states that the Public Protector can resolve disputes, acts or omissions by mediation, conciliation, negotiation or any other means that may be practical.¹⁶ However, the issue with the legislation is that it does not expressly provide for the direct enforcement of the Public Protector's decisions and recommendations in a clear and unambiguous way.¹⁷ It is this precise *lacuna* or void in the legislation that the Supreme Court of Appeal and the Constitutional Court had to address.¹⁸

Relevant case law

I will first deal with the High Court judgment of *Democratic Alliance v South African Broadcasting Corporation Ltd*,¹⁹ starting with a brief summary of the facts of this case. The Public Protector received many complaints from former employees of the SABC that the appointment of Motsoeneng as the acting Chief Operations Officer of the SABC was irregular, wrongful and amounted to maladministration.²⁰ After the Public Protector investigated the matter, and she compiled a report which confirmed that the appointment of Motsoeneng was irregular, additionally that his salary had been increased from R1.5 million to R2.4 million a year, and that Motsoeneng had committed an array of actions that unduly benefited himself.²¹ The Public Protector directed the SABC's board to take disciplinary proceedings against Motsoeneng, fill the vacant position, and ensure that all monies that were improperly spent be recovered.²² The findings and remedial action of the Public Protector were ignored. The SABC went ahead with the appointment, gave the permanent position of Chief Operations Officer to Motsoeneng, and appointed a law firm to investigate and consider the findings of

⁵ Venter 2016 *International Journal of Social, Behavioural, Economic, Business and Industrial Engineering* 2042.

⁶ *Economic Freedom Fighters v Speaker of National Assembly and others; Democratic Alliance v Speaker of National Assembly and Others* 2016 (5) BCLR 618 (CC).

⁷ Section 181(1) of the Constitution.

⁸ Section 181(2) of the Constitution.

⁹ Section 181(2) of the Constitution.

¹⁰ Section 181(3) of the Constitution.

¹¹ Venter 2017 TSAR 177.

¹² Section 181(4) of the Constitution.

¹³ Section 181(5) of the Constitution.

¹⁴ Section 182(1)(a)-(c) of the Constitution.

¹⁵ Act 23 of 1994.

¹⁶ Section 6(4) of the Public Protector Act.

¹⁷ Venter 2017 TSAR 178.

¹⁸ *Ibid.*

¹⁹ 2015 (1) SA 551 (WCC).

²⁰ Venter 2016 *International Journal of Social, Behavioural, Economic, Business and Industrial Engineering* 2040.

²¹ Venter 2017 TSAR 178.

²² *Ibid.*

the Public Protector.²³ The law firm consequently set aside the Public Protector's report and cleared Motsoeneng of any wrongdoing.²⁴

Scheepers J held that if it had been intended that the findings of the Public Protector should be binding and have a legal status, the Constitution would have explicitly stated this,²⁵ thus creating the problematic situation of non-binding recommendations. However, the High Court held that an organ of state cannot ignore the findings of the Public Protector if doing so would be irrational.²⁶ It concluded that the SABC's ignoring the Public Protector's report was arbitrary and irrational and for this reason ruled against the SABC.²⁷ The High Court compared the Public Protector unfavourably to a court and said if her findings were to be binding, the Public Protector would be usurping the role of the courts.²⁸

On appeal in the Supreme Court of Appeal (now referred to as *SABC v DA*) the court interpreted the word "take" in s 182(1)(c) of the Constitution to mean that the Public Protector is empowered to choose a course of action to take, and not only to give advice.²⁹ The court further stated that the finding of administrative bodies could not be ignored and this should apply equally to the office of the Public Protector.³⁰ It was noted that the High Court incorrectly and inaccurately compared the powers of the Public Protector to the powers of the courts.³¹ The court condemned SABC for conducting a parallel investigation to try to disregard the Public Protector's findings, and even more so that the investigation was carried out by their own attorneys and therefore was not impartial.³² This parallel investigation had no force. It was held that the only way in which to challenge the findings of the Public Protector is to review it.³³ The court stated that the Public Protector will not be able to realise her constitutional purpose if "other

organs of state my second-guess her findings and ignore her recommendations".³⁴ It was held that the Public Protector may decide on a remedy and direct its implementation, and that public bodies do not have the authority simply to ignore her findings.³⁵ It was held that these findings may only be challenged by means of review, and no parallel investigation can override or trump the findings.³⁶

The court concluded by declaring that if the powers of the Public Protector were to be interpreted as only having the force of a meek recommendation, it would not be fitting or effective and it would result in defeating the constitutional purpose of the institution.³⁷ I commend this judgment as it strengthened the powers of the Public Protector to a great extent.

The current legal position

South Africa's current position on the issue at hand is set out in the recent Constitutional Court case of *Economic Freedom Fighters v Speaker of National Assembly*.³⁸ The facts of this case caused a scandal that infuriated the country as the Public Protector found that unlawful non-security upgrades and renovations were carried out at the President's private residence, known as Nkandla, with taxpayers' money.³⁹ The Public Protector's findings were: that the President's actions were not in line with the Constitution as he knowingly appropriated state resources for his own benefit,⁴⁰ that the President should pay back a portion of this irregular expenditure and that the ministers who were involved in the Nkandla project should be reprimanded.⁴¹ No attempt was made to comply with, or carry out, these findings.⁴² The National Assembly appointed an *ad hoc* committee to conduct a parallel investigation, and this committee exonerated the President from liability.⁴³ When the National Assembly and the President refused to

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *DA v SABC* para 51.

²⁶ *DA v SABC* para 74.

²⁷ *DA v SABC* para 83.

²⁸ Venter 2017 *TSAR* 180.

²⁹ *SABC v DA* 2016 (2) SA 522 (SCA) para 42.

³⁰ *SABC v DA* para 45.

³¹ *Ibid.*

³² *SABC v DA* para 47.

³³ *Ibid.*

³⁴ *SABC v DA* para 52.

³⁵ *Ibid.*

³⁶ *SABC v DA* para 53.

³⁷ *Ibid.*

³⁸ 2016 (5) BCLR 618 (CC).

³⁹ *EFF v Speaker of NA* para 5.

⁴⁰ *EFF v Speaker of NA* case para 6-9.

⁴¹ *EFF v Speaker of NA* para 3 and 10.

⁴² *EFF v Speaker of NA* para 11.

⁴³ *EFF v Speaker of NA* para 12.

comply with the remedial action set out by the Public Protector, an application was made directly to the Constitutional Court by the DA and EFF to confirm the legally binding status of the Public Protector's findings.⁴⁴

Mogoeng CJ held that the Public Protector's office would not have been allocated such a substantial budget if its decisions were meant to hold no power and be inconsequential.⁴⁵ The Public Protector would not be able to contribute to the strengthening of democracy if its powers are not binding. This would result in public bodies being able to simply ignore the recommendations made. This would render the Public Protector meaningless.⁴⁶ Consequently, the court held that remedial action taken by the Public Protector is binding, meaning that the President is bound by the findings. He cannot just ignore them, furthermore no parallel investigation is able to relieve him of liability.⁴⁷ Remedial action can only be challenged by judicial review.⁴⁸ In my opinion this judgment is a victory for the war against corruption, and strengthens protection of the people against maladministration and abuse of power. This landmark judgement has the effect of reinforcing respect for the Constitution.⁴⁹ The motion to

*“The watchdog is no longer muzzled,
the tiger is no longer toothless”*

impeach the President was based on this judgment as it was found that the President and the National Assembly failed to defend and uphold the Constitution when they ignored the Public Protector's remedial action.⁵⁰

⁴⁴ *EFF v Speaker of NA* para 13.

⁴⁵ *EFF v Speaker of NA* para 49.

⁴⁶ *EFF v Speaker of NA* para 56 and 67.

⁴⁷ *EFF v Speaker of NA* para 76-81.

⁴⁸ *EFF v Speaker of NA* para 81.

⁴⁹ B Whittle “LSSA applauds landmark judgement on the binding nature of the Public Protector's remedial action” (2016) 20 *De Rebus* 1 at 1.

⁵⁰ J Narshi “President Zuma and the Constitution of the Republic of South Africa: Compliance not optional” (2016) 16 *Without Prejudice* 6 at 6.

Analysis of issues and critique

After discussing the recent shift that has occurred in our law, with the Constitutional Court ruling that the Public Protector's recommendations and remedial action is legally binding, I am of the opinion that legislative intervention is necessary. To properly secure and safeguard the functionality of the Public Protector in the future, the Public Protector Act needs to be amended to give effect to the Constitutional Court judgment. Some academics are in agreement with me on this aspect, and further state that the amendment should further clarify the definition of the term “remedial action” and identify its ambit.⁵¹ This amendment will help vindicate the office of the Public Protector, as it will make it indisputable that its recommendations cannot just be ignored.

The future and strength of the South Africa's constitutional democracy will largely depend on the effectiveness and independence of the Chapter 9 institutions. When I first started doing research on the issue at hand and I read about the office when Lawrence Mushwana was the Public Protector, my first thought was that it is crucial to secure the independence of this office. Mushwana was a former Member of Parliament, which gave the impression that he did not want to adverse findings against the ANC or any high ranking official,⁵² and Mushwana's narrow interpretation of his mandate resulted in bad leadership.⁵³ Barney Mthomboti stated that the ANC actively undermines the Chapter 9 institutions by “packing them with toadies to do its bidding”.⁵⁴ It has been stated that Mushwana's only success was protecting the ANC from the people instead of protecting the people.⁵⁵ My solution to the problem of independence is to ensure that a Public Protector cannot be a person who is closely aligned to the ruling party and who

⁵¹ AS Yakoob “Ambiguity surrounding the powers of the public protector – A threat to the rule of law” (2015) *Ismail Mahomed Law Reform Essay Competition* 3 at 16.

⁵² T Thipanyane “Strengthening Constitutional Democracy: Progress and Challenges of the South African Human Rights Commission and the Public Protector” (2016) 60 *New York Law School Law Review* 125 at 138.

⁵³ Thipanyane 2016 *New York Law School Law Review* 138.

⁵⁴ Thipanyane 2016 *New York Law School Law Review* 140.

⁵⁵ Thipanyane 2016 *New York Law School Law Review* 142.

would not be able to take necessary action against high government officials, as this would defeat impartiality and independence.

Academics agree that independence is crucial in order for the office to be effective. A method to limit undue politicization of the appointment of a Public Protector is to involve society in the appointment process.⁵⁶ Civil society organisations could nominate certain eligible individuals to be considered for appointment as members of the Chapter 9 institutions. However the authority to assess these candidates and make recommendations for certain appointments should be reserved for the National Assembly.⁵⁷ This is not a far-fetched idea as the Constitution specifically allows for the involvement of members of society in the recommendation process pertaining to appointments, as set out in s 193(6) of the Constitution.⁵⁸ Allowing this to take place would be in line with the Constitution which requires the NA to “facilitate public involvement in legislative or other processes”.⁵⁹

During the period of the appointment of Thuli Madonsela the Office of the Public Protector started to fulfil its constitutional purpose of acting as a check on the organs of state. However, Madonsela has been the subject of harassment, intimidation, political pressure and even insults from members and supporters of the ruling party. She has been undermined by the government at every opportunity because she was not an ANC loyalist.⁶⁰ The insults fired at Madonsela constituted the worst form of attacks experienced by a Chapter 9 institution since South Africa became a democracy, and negatively affected her ability to carry out her mandate.⁶¹ My solution to this issue if it arises in the future, is that the criminal sanctions that can be imposed against an individual for insulting or interfering with the functioning of the Public Protector, needs to be carried out.⁶² If an individual is convicted of this crime, he/she would

face a fine not exceeding R40 000, or imprisonment for a period not exceeding 12 months, or both.⁶³ Lastly, to ensure effectiveness legal recourse should be taken against those whom disobey and disregard the Public Protector’s findings.⁶⁴

Conclusion

In the Public Protector’s 2013-2014 Annual Report,⁶⁵ the Public Protector is shown to have been actively protecting the right to administrative action, as, for example, issues of non-payment of pensions and benefits have been remedied.⁶⁶ Due to the legally binding status that the Public Protector’s recommendations and findings now enjoy, the Public Protector’s ability to protect and advance the right to just and administrative action in s 33 of the Constitution has increased tenfold. The national legislation that has been enacted to give effect to a person’s right to just administrative action is the Public Protector Act, in line with s 33(3) of the Constitution. Section 33(3)(a) of the Constitution provides that administrative action needs to be reviewed either by a court or an impartial and independent tribunal. The Public Protector can now act as this “tribunal” with strengthened power and review any maladministration with a new impetus as noncompliance is not an option any longer. The watchdog is no longer muzzled, the tiger is no longer toothless, and the hope is that now the new Public Protector, Busisiwe Mkhwebane, can ensure accountability, transparency, and that democracy is guarded.⁶⁷

⁵⁶ Thipanyane 2016 *New York Law School Law Review* 147.

⁵⁷ Thipanyane 2016 *New York Law School Law Review* 148.

⁵⁸ *Ibid.*

⁵⁹ Section 59(1)(a) of the Constitution.

⁶⁰ Thipanyane 2016 *New York Law School Law Review* 140.

⁶¹ Thipanyane 2016 *New York Law School Law Review* 142.

⁶² Section 9(1) of the Public Protector Act 23 of 1994.

⁶³ Section 11(1)-(4) of the Public Protector Act.

⁶⁴ Thipanyane 2016 *New York Law School Law Review* 149.

⁶⁵ *Public Protector Annual Report* of 2013/14.

⁶⁶ *Public Protector Annual Report* of 2013/14 at 32.

⁶⁷ Venter 2016 *International Journal of Social, Behavioural, Economic, Business and Industrial Engineering* 2045.



THE CAUTIONARY RULE AND ITS APPLICATION TO SINGLE CHILD WITNESSES

Robert Harris: Final-Year LLB Student

Introduction

In criminal proceedings the accused's right to a fair trial enshrined in s 35(3) of the Constitution¹ has been enforced by courts applying a cautionary approach to instances involving single witnesses, notably children in sexual-offences trials. Such caution results in the courts often assessing negatively the reliability of the evidence led by such a single child witnesses. This process has often led the accused being acquitted. This essay considers the issues around this cautionary approach's application, as well as the fairness this approach may have on such sexual offence trials. Whether the approach as it is

¹ Section 35(3) of the Constitution of the Republic of South Africa, 1996.

currently applied needs reform or should be abolished will also be considered.

"There exists no motivation...to accept the notion that children are naturally untruthful witnesses due to their alleged tendency to imagine or fantasise...

the view that children observe less than adults should be abandoned, as research has shown that children do not forget events that fall within their experience"

A brief origin of the cautionary rule applicable to child witness testimony

The exact origin of the cautionary rule is somewhat unknown, however much of its origin may be traced by the writings of John H Wigmore, a law professor at Harvard.² His writing in 1904 alluded to the negativity with regard to sex offences, contributing significantly to the tradition of scepticism in assessing single child-led evidence.³ He had written that with young female childrens' emotional conditions meant that often false charges of sexual offences were contrived, and stated that the courts in hearing such charges must scrutinise them with caution.⁴ There exists no motivation currently for the blunt acceptance of the notion that children are naturally untruthful witnesses due to their alleged tendency to imagine or fantasise. However, this view has been accepted and applied historically in case law.⁵

Main issues of contention around the rule's application

Judicial officers have generally perceived children as being imaginative and suggestible, hence rendering them unreliable witnesses. Hence a cautionary approach to their evidence is called for.⁶

² R Meintjes "A call for a cautionary approach to common sense" (2000) 1 CARSA 41.

³ Meintjes (2000) CARSA 41.

⁴ Meintjes (2000) CARSA 42.

⁵ Meinjes (2000) CARSA 42.

⁶ A Bellengere & R Palmer *The Law of Evidence in South Africa Basic Principles* (2013) 409.

Although research has shown that this is not true, the South African legislature has refused to do away with this cautionary rule.⁷ The court did, however, in the case of *Director of Public Prosecutions v S*⁸ state that this rule should not only apply to children as single witnesses, as any witness who does not understand what it means to tell the truth or has a history of giving inadmissible evidence should be viewed with caution when such witnesses are single witnesses to crimes of a sexual nature.⁹

There is therefore the need to apply a more commonsense approach to when the rule is to be applied. In some instances should the court to rely solely on the evidence given by the single child witness, and in other instances, caution and perhaps corroboration will be called for.¹⁰ Judicial officers should also be properly trained to deal with single child witnesses. Furthermore, these officials should view a child's testimony as being as trustworthy as that of an adult, unless there are features which signal danger and require a cautionary approach.¹¹

As stated above, the basis of this cautionary rule in the assessing of single child witnesses in sexual offences finds weight in the accused's right to a fair trial. As a result, certain provisions have been introduced into the Criminal Procedure Act¹² to deal with instances of single child witnesses in the country and to protect these interests. Section 158¹³ of the Criminal Procedure Act allows single child witnesses to present their evidence by means of closed circuit television or other electronic device at the courts disposal. Further, under s 164¹⁴ of the Act unsworn or unaffirmed evidence may still be admissible by the court, which allows evidence to be given by children as young as two or three.¹⁵ Further, under s 170¹⁶ of the Act, child witnesses may now give evidence through intermediaries if an

application is made that the child will be subjected to undue stress if he/she were to be cross-examined.

Although these statutory provisions have sought to counter the somewhat archaic belief that children's testimony should be viewed as less reliable than adults, the courts, in applying the cautionary rule in cases, have discarded these reformatory prepositions in an effort to protect the accused's right to a fair trial, but have at the same time discarded the best interest of the child. This has resulted in some controversial decisions.

The court in the case of *S v V*¹⁷ found that the judicial officer had failed to admonish the complainant (a four-year-old child) to tell the truth even though the complainant was believed to understand what it meant to tell the truth. As such, on review it was found that the inquiry in terms of s 164 of the Act by the judicial officer was inadequate as the judicial officer had failed properly to admonish the witness. Consequently, the evidence the witness held to be inadequate and the child deemed incompetent.¹⁸ Perhaps the most archaic use of this cautionary rule in recent years was the decision of the Supreme Court of Appeal in the matter of *S v M*,¹⁹ in which the single child witness was a daughter testifying against her father. Although the court stated that the rule was based on an outdated and irrational perception, it maintained that the young girl's testimony was not sufficient to convince the court, and although the girl's evidence may have been true the accused was entitled to the benefit of the doubt.²⁰ These decisions were controversial, and some clarity was needed with regard to the injustice facing single child witnesses in sexual offences.

A commendable decision at the time was that of *The Director of Public Prosecutions v S*,²¹ where the court held that although a rational distinction may be made between the testimony of children and adults, the former does not necessarily require the cautionary approach as common sense

⁷ Bellengere & Palmer *Evidence* 410.

⁸ *Director of Public Prosecutions v S* 2000 (2) SA 711 (T).

⁹ Bellengere & Palmer *Evidence* 410.

¹⁰ Bellengere & Palmer *Evidence* 410.

¹¹ Bellenger & Palmer *Evidence* 411.

¹² Act 51 of 1977.

¹³ Section 158 of the Criminal Procedure Act 51 of 1977.

¹⁴ Section 164 of the Criminal Procedure Act 51 of 1977.

¹⁵ J Prinsloo "In The Best Interest Of The Child: The Protection Of Child Victims And Witnesses In The South African Criminal Justice System" (2008) 9 CAR 49.

¹⁶ Section 170 of the Criminal Procedure Act 51 of 1977.

¹⁷ *S v V* 1998 (2) SACR 651.

¹⁸ Prinsloo 2008 CAR 50.

¹⁹ *S v M* 1999 (2) SACR 548 (SCA).

²⁰ Prinsloo 2008 CARSA 50.

²¹ *The Director of Public Prosecutions v S* 1999 (2) SACR 906.

should dictate when caution should be used.²² This commonsense approach refers to the need for there to be factual basis before such caution should be applied. This factual basis should determine

“In matters of sexual offences, the scales are tipped heavily in favour of the accused’s rights, rather than a child’s fundamental rights”

whether the evidence presented may possibly be untrue.²³ The High Court further stated that to apply the cautionary rule being applied to single testimonies of children was unfairly discriminatory, and that the approach should not be applied automatically simply due to the witness being a child.²⁴

Often this cautionary approach dictates which evidence must be excluded on grounds of unreliability. When this occurs the victim is then subjected to harsh cross-examination regarding the event, often in the presence of the accused.²⁵ As such, the victim is often through this process exposed to a great degree of secondary victimisation as the prosecutor does not necessarily represent the victim but rather has the duty or act to protect of proving beyond a reasonable doubt that the accused is guilty.²⁶ The scales hence in matters of sexual offences are tipped heavily in favour of the accused’s rights, rather than fundamental children’s rights.

As aforementioned, the burden rests on the presiding officer to establish the child witness's level of intelligence, however these officers are rarely knowledgeable in these areas, resulting in these children being heavily prejudiced.²⁷ This ignorance to the prescribed procedure of administering the oath or admonishing the truth in

terms of s 164(1)²⁸ of the Act has led to dismissals on appeal, resulting in the accused being acquitted on small technicalities.²⁹ The accused in most instances will object to these reformatory measures based on the ground that it violates the accused’s right to a fair trial. This however does not seem to be a valid contention in every case of single child witnesses to sexual offences. The problem which will only be eradicated if a change in the blind application of the rule occurs.

Reforming the cautionary rule

The cautionary rule as a whole should not entirely be abolished, as there will be instances which require caution to be applied to evidence submitted. However, the rule itself is in need of reform, as the way it is applied is based on an unacceptable attitude.³⁰ The inability of a young witness to understand the oath should be distinguished from the child’s reliability as a witness.³¹ As such, the cautionary rule should not be a general point of departure when assessing child evidence in sexual-offence matters. Children are required as witnesses to be able to observe: the view that children observe less than adults should be abandoned, as research has shown that children do not forget events which fall within their experience.³² Researchers have studied the children’s ability to remember, have found that generally children do not have a problem retaining and recalling memories. The main factor which may affect their recall, is the delay of time between the event and the trial.³³ The communication aspect of child witnesses is another facet. Although children may at times communicate differently to adults by using more simplistic language, this is by no means to be taken as less truthful or accurate.³⁴ Further, in relation to the requirement of child witnesses to testify truthfully, children as young as three years of age are believed to comprehend this duty, and the judicial system

²² *The Director of Public Prosecutions v S* 1999, para 34.

²³ Meintjes 2000 CARSA 40.

²⁴ Meintjes 2000 CARSA 41.

²⁵ A Ellis “Baby rape: why does the law not protect them?” (2003) 28 JJS 69.

²⁶ Ellis 2003 JJS 69.

²⁷ Ellis 2003 JJS 70.

²⁸ S164(1) of the Criminal Procedure Act 51 of 1977.

²⁹ Ellis 2003 JJS 70.

³⁰ J Le Roux & R Songga “The evidence of young children: Establishing the truth in South African criminal courts” (2004) 17 SACJ 311.

³¹ Le Roux & Songga 2004 SACJ 310.

³² Le Roux & Songga 2004 SACJ 312.

³³ Le Roux & Songga 2004 SACJ 313.

³⁴ Le Roux & Songga 2004 SACJ 313.

should allow children to testify in childlike language without applying caution simply due to a lack of advanced vocabulary.³⁵

Section 28³⁶ of the Constitution envisages

“the cautionary rule should not be blindly applied to all matters involving children as single witnesses in sexual offences...as a result the [child victim] is subjected to intense cross-examination and secondary victimization.”

that children should be afforded the protection from anything which would impair their dignity. Further, in any instance involving a child the best interests of the child must be paramount to any other considerations. It is therefore unreasonable in light of this section to apply the cautionary rule from the outset to all evidence given by child witnesses, as this would directly violate this section. A child may be a lying witness. However, there exists no rational explanation for treating a child witness in sexual offences *ipso facto* as being less reliable and truthful than an adult witness.³⁷ Presiding officers in these matters should hence draw a distinction by applying a commonsense approach to this cautionary rule, on particularly about when to apply it and when not. It should not be an automatic application to all children in sexual offence cases. Further, the valid leading of evidence under the reformatory sections of the Criminal Procedure Act mentioned above should not simply afford an accused an opportunity to object to this on the ground of his/her right to a fair trial, and that this

should be the paramount consideration in determining whether the evidence is admissible.

Conclusion

As a point of departure the cautionary rule should not be blindly applied to all matters involving children as single witnesses in sexual offence trials. A more common sense approach to using it is required. If the court can see from the facts that the evidence may be false or misleading they should apply the rule. The main contention however, in my opinion, is that starting from a cautionary approach results in the child's s 28 Constitutional rights being limited from the offset. Children should not be regarded as being less reliable as witnesses than adults, as both may create fabrications. As a result of applying this rule from the outset, the victim is subjected to intense cross-examination, often resulting in the child being subjected to secondary victimisation, further violating their s 28 rights. It is therefore my view that the continued limiting of a child victims' rights by applying the cautionary rule from the offset in an attempt to uphold the accused's right to a fair trial cannot reasonably be warranted. A less degrading way of balancing these rights is desperately needed. To leave the rule as it currently stands and to apply it blindly to all matters involving sexual offences against single child witnesses may allow the possible acquittal of sexual offenders who are able to claim their right to a fair trial is being infringed. This is an upsetting thing.

³⁵ Le Roux & Songga 2004 SACJ 314.

³⁶ S28 of the Constitution of the Republic of South Africa, 1996.

³⁷ Meintjes CARSA 44.



THE ADMISSION OF EXTRA-CURIAL STATEMENTS UNDER SECTION 3 OF THE LAW OF EVIDENCE AMENDMENT ACT

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Introduction

The current legal status in South Africa regarding the admission of extra-curial statements by a co-accused has been settled by the Constitutional Court in *S v Mhlongo*; *S v Nkosi*¹ where the court, confirming the decision in *S v Litako*,² restored the common-law position prior to the *Ndhlovu*³ judgement, to the effect that extra-curial confessions and admissions by an accused are

inadmissible against a co-accused.⁴ In order to critique this position, it is integral to understand the common law on the admission of extra-curial admissions and how this was altered by the legislature with the Law of Evidence Amendment Act (hereafter referred to as the “LOEAA”),⁵ and to an extent, the Criminal Procedure Act (hereafter referred to as the “CPA”).⁶

I argue in this article that the common law alteration in *S v Ndhlovu* is constitutionally untenable, particularly in light of an accused’s s 35 constitutional rights to a fair trial. The denial of this position in *Litako* and later in *Mhlongo/Nkosi* is also not helpful to the law of evidence in hearsay, as it effectively restored the inflexible position in the common law. Accordingly, it is shown in this article that the court’s should ideally have focused on developing guidelines of application for s 3(1)(c) of the LOEAA in order to strengthen its application in light of both the Constitution and the common law - a position which it will be argued is supported by reference to foreign jurisdictions and their comparative value.

The common law position altered: *S v Ndhlovu*

Under the common law in South Africa, extra-curial statements by an accused (whether they be confessions or admissions) were inadmissible against a co-accused. Otherwise phrased, statements by an accused were considered to be admissible only against their makers. This position stemmed from the early judgements of *R v Turner*,⁷ *R v Barlin*,⁸ *R v Matsitwane*,⁹ *R v Baartman*¹⁰ and then

⁴N Whitear “The Admissibility of Extra-Curial Admissions By a Co-Accused: A Discussion in Light of the *Ndhlovu*, *Litako* and *Mhlongo/Nkosi* cases, and Other International Law” (2017) 134 SALJ 244 at 254.

⁵ Act 45 of 1988.

⁶ Act 51 of 1977.

⁷ 168 ER 1298 ((1832 1 Mood CC 347). In this matter, the accused was convicted on a charge of theft in the lower court on the basis of evidence tendered in a confession by the co-accused, who was an employee of the complainant. The appeal court held unanimously that the confession of an accused was inadmissible against a co-accused and thus the conviction was erroneous.

⁸ 1926 AD 459 at 462, the court noted that this common law principle was one “covering all admissions or statements made by the accused and apart from statute would govern the admissibility of confessions properly so called”.

⁹ 1942 AD 213 at 220, the court noted: “in deciding the case against the one of the accused the court can pay no regard to the contents of the statement made by another”.

¹⁰ 1960 (3) SA 535 (A).

¹ 2015 (2) SACR 323 (CC).

² 2014 (2) SACR 431 (SCA).

³ *S v Ndhlovu* 2002 (2) SACR 325 (SCA).

later in the courts in *S v Molimi*¹¹ and *S v Mhlongo*; *S v Nkosi*.¹² This position was overtly onerous, allowing the courts no discretion to admit evidence in instances where the interests of justice permitted it. In order to remedy this inflexibility,¹³ where hearsay evidence was permitted only if it fell within a closed list of exceptions,¹⁴ the legislature promulgated the LOEAA under the rationale of “facilitate the admission of hearsay evidence in the interests of justice”.¹⁵ Section 3 in particular provides that “subject to the provisions of any other law, hearsay evidence shall not be admitted as

“The Ndlhovu judgement entirely ignored the common law on extra-curial admissions, finding that the evidence tendered by two co-accused’s could be admitted under s 3(1)(c) of the LOEAA”

evidence at criminal or civil proceedings” unless each party against whom the evidence is presented agrees to the admission thereof,¹⁶ the person upon whom the probative value of the evidence depends testifies,¹⁷ or the court is of the opinion that the evidence should be admitted in the interests of justice,¹⁸ after considering the seven listed factors.¹⁹

¹¹ 2006 (2) SACR 8 (SCA). In this matter, Nkabinde J confirmed that “an admission made to a magistrate or a peace officer by one accused is inadmissible against another accused”.

¹² 2015 (2) SACR 323 (CC) para 18.

¹³ DT Zeffert and A Paizes *Essential Evidence* (2010) 135.

¹⁴ South African Law Reform Commission Project 126: *Review of the Law of Evidence (Hearsay and Relevance)* 27.

¹⁵ M Monyakane and S Monye “The Legal Implications of *S v Ndhlovu* and *Litako v S* on the South African law of hearsay evidence: A critical overview” (2016) 3 *South African Journal of Criminal Justice* 308 at 314.

¹⁶ Section 3(1)(a).

¹⁷ Section 3(1)(b).

¹⁸ Section 3(1)(c).

¹⁹ These factors are listed in s 3(1)(c)(i)-(vii) and include the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the probative value of the evidence, the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends, any prejudice to a party which the

One such type of hearsay evidence to be considered under s 3 is extra-curial statements that take the form of admissions. Both the common law, and then later, s 219 of the CPA,²⁰ make it clear that confessions are only admissible against their maker. While the common law holds the same for admissions, the CPA does not explicitly provide the same protection for admissions as it does for confessions. It is within this *lacuna* in the law on hearsay evidence that *S v Ndhlovu*²¹ “dramatically changed” the admission of extra-curial statements.

It is arguable that the *Ndlhovu* judgment entirely ignored the common law on extra-curial admissions, finding that the evidence tendered by two co-accused’s (which was later disavowed) could be admitted under s 3(1)(c) of the LOEAA as per the court’s discretion. Some commentators, such as Watney,²² approved of the decision. Naude went so far as to suggest that a confession by an accused should also be admissible as hearsay against a co-accused.²³ In contrast, others expressed concern that the judgment whittled away at the protection provided by the common law against an accused being convicted on the basis of a co-accused’s extra-curial statements.²⁴

This protection was weakened in so far as the court did not consider how the admission of the hearsay evidence in the facts before it affected the rights of the accused to a fair trial,²⁵ which included the right to challenge evidence.²⁶ Furthermore, in so far as the admission of the evidence compels an accused or co-accused to contest the admissibility of the evidence in a trial within a trial before the prosecution has stated their case, the accused’s right

admission of such evidence might entail and any other factor which should in the opinion of the court be taken into account.

²⁰ S 219 provides: “no confession made by any person shall be admissible as evidence against another person.”

²¹ 2002 (2) SACR 325 (SCA).

²² M Watney “Admissibility of extra-curial admission as hearsay evidence against co-accused” 2008 *TSAR* 834 at 840.

²³ BC Naude “The admissibility of extra-curial statements by a non-testifying accused” (2008) 29 *Obiter* 247 at 250.

²⁴ F Snyckers “The flight from rights: rule aversion in dealing with the criminal process. *Molimi, Zuma, Thint (Holdings) Shaik and Zealand*” (2009) 2 *Constitutional Court Review* 269 at 281.

²⁵ S 35(3) of the Constitution of the Republic of South Africa, 1996 provides for fair trial rights.

²⁶ S 35(3)(i) provides that “every accused person has a right to a fair trial, which includes the right to adduce and challenge evidence”.

to remain silent²⁷ is violated.²⁸ Problematically, the court reasoned that if the interests of justice require the admission of the hearsay evidence, the right of the accused person to challenge the admissibility of the evidence does not include the right to cross examine,²⁹ which goes against the Constitutional Court's position in *S v Zuma*³⁰ and *S v Mhlungu*³¹ in favour of a generous interpretation of rights.³² Accordingly, *Ndhlovu* moved away from the stringent common-law practice through the application of s 3(1)(c).

A swing back to the common law: *S v Litako* and *Mhlongo/Nkosi*

The court in *S v Litako* “expressly and emphatically”³³ rejected the approach in the *Ndhlovu* case.³⁴ The court in this matter defined the issue for determination as whether the administration of justice requires the admission of hearsay evidence.³⁵ The court thus considered both the common law and the LOEAA and reasoned that had the legislature wanted to change the common law, they would have done so explicitly with the inception of the LOEAA. It reasoned that, firstly, the Act never explicitly state that it sought to repeal the common law,³⁶ and secondly, “the fact that the

point was raised for the first time in the *Ndhlovu* case suggested that s 3 of the [LOEAA] was not intended to change the common law on this point”.³⁷ Furthermore, the court drew attention to the fact that s 3 of the Act explicitly states that the court's discretion is applied “subject to the provisions of any other law”³⁸ which, according to the court, meant that the common-law should have been considered alongside the factors in s 3(1)(c) before admission of the evidence. The court cautioned that the common law position on hearsay evidence from English law was not solely based on the hearsay nature of the evidence, but also that an admission made by a co-accused would “nullify the constitutional right to challenge evidence”.³⁹ Accordingly, the court found that the admission of an extra-curial statement by a co-accused would offend the accused's right to a fair trial,⁴⁰ effectively restoring the common-law position in this regard.

The Constitutional Court supported this position in the matter of *S v Mhlongo; S v Nkosi*,⁴¹ advancing a four-stage argument as to why the *Ndhlovu* position could not be supported. Firstly, the court in *Ndhlovu* largely ignored the common-law position prohibiting admissions being used as evidence against co-accused persons, and “instead assumed that the hearsay character of the evidence was a major obstacle to its admission, which could be resolved by the application of s 3 of the [LOEAA]”.⁴² Secondly, the court in *Ndhlovu* failed to take cognizance of s 3(2) of the LOEAA, which notes that the provisions of ss 1 “shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence”. The CC found that the evidence before the court in *Ndhlovu* was inadmissible on the basis of the common law, thus admission through s 3(1)(c) of the Act would be in conflict with s 3(2) of the Act. Thirdly, the court argued that on a teleological interpretation, s 219A of the CPA prohibits the admission of extra-curial statements in the same way it does confessions in s 219. Fourthly,

the common law, or the inference from the Ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention”.

³⁷ Whitear 2017 SALJ 249.

³⁸ *S v Litako* 2014 (2) SACR 431 (SCA) para 52.

³⁹ *S v Litako* 2014 (2) SACR 431 (SCA) para 65; Whitear 2017 SALJ 250.

⁴⁰ Whitear SALJ 2017 251.

⁴¹ 2015 (2) SACR 323 (CC).

⁴² Whitear 2017 SALJ 253.

²⁷ S 35(3)(h) provides that “every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings”.

²⁸ Interestingly, S Lutchman in “*S v Litako* 2014 SACR 431 (SCA): A Clarification on Extra-Curial Statements and Hearsay” (2015) 18(2) *Potchefstroom Electronic Law Journal* 430 argues at 434 that the rebuttable presumption in s 217(1)(b)(ii) of the CPA would not pass constitutional muster based on the same arguments placed before the court in *S v Zuma*, namely that the party themselves would bear the onus to prove the statements were freely and voluntarily made and thus could not exercise their right to remain silent.

²⁹ Lutchmann 2015 PELJ 437.

³⁰ 1995 (2) SA 642 (CC) para 17.

³¹ 1995 (3) SA 391 (CC) para 9.

³² The court in *S v Libazi* 2010 (2) SACR 233 (SCA) para 10-11, while not going so far as to find *Ndhlovu* wrong, held that it had reservations about the wholesale application of the *Ndhlovu* principle because the Constitution requires rights to be construed generously and that the right to challenge evidence is a foundational component of the constitutional right to a fair trial.

³³ Whitear 2017 SALJ 247

³⁴ 2014 (2) SACR 431 (SCA) para 71.

³⁵ para 45.

³⁶ In making this argument, the court referred to the presumption in the case of *Cassidy v Stubbs* (1916 TPD 310 312) where it was held that “[w]e cannot infer that a statute intends to alter the common law. The statute must either explicitly say that it is the intention of the legislature to alter

the CC held that insufficient attention had been paid to the rule that “when interpreting statutory provisions, unnecessary [attacks] on the common law should be avoided”,⁴³ specifically where s 3(2) of the Act clearly indicated that it was not the intention of the Act to alter the common law to allow the admission of extra-curial statements by co-accuseds.⁴⁴

A misguided focus on the common law

The result of the above discussed judgments was a move away from the common-law position and a re-establishment of the same position in response. It is arguable that this was not the right enquiry before the courts, and that a consideration of how the factors in s 3(1)(c) of the LOEAA should be applied by the courts so as to reach a conclusion that best suits the interests of justice was the preferred enquiry. Instead of developing an understanding of the courts’ discretion, the courts sought to develop “blanket rules” to regulate the admission of extra-curial statements by co-accuseds. This effectively resulted in a similar rigidity that the legislature found issue with under the common law, and as such, placed the law on hearsay evidence in an uncompromising position, where admissions which may be in the interests of justice will not come before the court.

Section 3(1)(c), if examined and correctly applied by the courts, strengthens the application of the hearsay rule (that is, does the probative value of the evidence exceed its prejudicial value),⁴⁵ insofar as it adds further enquiries for the court to undertake, thus providing sufficient protection to the interests of justice and the accused’s fair trial rights.⁴⁶ Furthermore, the argument advanced in the Supreme Court of Appeal and Constitutional Court that the “other laws” referred to in S 3(1) refers to the common law is lacking. The precursor to s 3(1) does not mean that “a negative ruling on admissibility in terms of some other law, such as the common law, also rules out the admission of the evidence under s 3” because such an interpretation

would leave s 3 with a “rather limited, if any, scope for application”.⁴⁷

Examining Schwikkard: how then should the discretion be exercised?

Schwikkard’s analysis on the listed factors under s 3(1)(c) are both useful and instructive as to what is a fair and thorough approach to applying s 3 of the Act. With regard to the nature of the proceedings,⁴⁸ she argues that a court is more likely to admit extra-curial statements by co-accused’s in civil proceedings as opposed to criminal proceedings due to the court’s reluctance to use untested evidence against an accused⁴⁹ in criminal proceedings.⁵⁰ With regard to the nature of the evidence,⁵¹ she notes that the reliability of the evidence is the primary concern here in that it is prominent in considering its probative value.⁵² In considering the purpose for which the evidence is tendered,⁵³ in *Metedad v National Employers General Insurance Co Ltd*,⁵⁴ the court noted that this criterion means nothing more than that evidence tendered for a compelling reason⁵⁵ would stand a better chance of admission than evidence tendered for a doubtful or illegitimate purpose.⁵⁶ The probative value⁵⁷ of the evidence⁵⁸ refers to the balancing act the courts must undertake the probative value of the evidence versus the potential prejudice to the party against whom it is admitted.

The court must also consider the reason why the evidence is not given by the person upon whose credibility the probative value depends.⁵⁹ This is because the prejudicial nature of the evidence will in part depend on the necessity of introducing it.⁶⁰

⁴⁷ *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* [2002] JOL 28222 (SCA) para 28.

⁴⁸ s 3(1)(c)(i).

⁴⁹ *Metedad v National Employers General Insurance Co Ltd* 1992 (1) SA 494 (W).

⁵⁰ PJ Schwikkard and SE Van Der Merwe *Principles of Evidence* 4 ed (2016) 296-297.

⁵¹ S 3(1)(c)(ii).

⁵² Schwikkard *Principles of Evidence* 298.

⁵³ S 3(1)(c)(iii).

⁵⁴ 1992 (1) SA 494 (W) 499.

⁵⁵ Zeffert *Essential Evidence* 142.

⁵⁶ Schwikkard *Principles of Evidence* 299.

⁵⁷ According to the court in *S v Ndhlovu* 2002 (2) SACR 325 (SCA) para 45, “probative value” means “value for purposes of truth”. This means not only ‘what will the hearsay evidence prove if admitted, but will it do so reliably?’.

⁵⁸ S 3(1)(c)(iv).

⁵⁹ S 3(1)(c)(v).

⁶⁰ Schwikkard *Principles of Evidence* 299.

⁴³ *Ibid.*

⁴⁴ *S v Mhlongo; S v Nkosi* 2015 (2) SACR 323 (CC) para 31.

⁴⁵ South African Law Reform Commission Project 126: *Review of the Law of Evidence (Hearsay and Relevance)* 34.

⁴⁶ Whitear 2017 SALJ 258.

For example, in *Welz and Another v Hall*⁶¹ the court held that where the evidence could not be given by a revenue official who made a document because he was prohibited by legislation from doing so, the evidence should be admitted in the interests of justice. Other circumstances⁶² that may make it necessary in the interests of justice to admit hearsay evidence include: the death of a declarant; a witness' absence from the country; an inability to trace a witness, or the extreme frail health of a witness.⁶³

Lastly, the court must consider prejudice to opponents⁶⁴ and any other factors⁶⁵ which is deemed necessary. In *S v Ramavhale*⁶⁶ the court noted that it would be unduly prejudicial if an accused found himself forced to testify in order to rebut hearsay evidence in the absence of direct evidence supporting the accused's case.

Conclusion

It is submitted that in order for the courts to apply a fair and thorough approach to the admission of hearsay evidence (in particular, the admission of extra-curial statements by co-accused's) the discretion afforded in s 3(1)(c) should be carefully applied, with reference to all counterbalancing factors and the cautionary rule for admissions. Accordingly, the courts should embark on case-by-case applications of the law, as opposed to generating blanket rules on the admission of certain types of hearsay evidence, as it has been argued the court did in the matters of *Ndhlovu*, *Litako* and *Mhlongo/Nkosi*. This position is both constitutionally tenable and in line with foreign jurisdictions such as the USA and United Kingdom, who use similar rules of which evidence to South Africa. Taking all these factors into account, it is conclusively submitted that focus should be shifted away from the Constitutional Court's decision in *Mhlongo/Nkosi* for its preoccupation with the common law, and towards generating a jurisprudence of application of the factors in s 3(1)(c).

⁶¹ 1996 (4) SA 1073 (C).

⁶² For another list, see Zeffert *Essential Evidence* 143.

⁶³ Schwikkard *Principles of Evidence* 299.

⁶⁴ S 3(1)(c)(vi).

⁶⁵ S 3(1)(c)(vii).

⁶⁶ 1996 (1) SACR 639 (A).



AN INSIGHT INTO THE BBBEE LEGISLATIVE FRAMEWORK

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The legal framework of BBBEE

The Broad-Based Black Economic Empowerment (BBBEE) programme was implemented as a nation building strategy in 2003.¹ The Broad-Based Black Economic Empowerment Act, in conjunction with its Associated charters, the Codes of Good Practice and various Scorecards, give guidelines to companies on how to implement the programme.² The aim of this legislation was to correct the “evils” of the apartheid regime. The BBBEE Act was enacted with the aim of empowering those classified as “blacks” in South Africa.³ It gives the

¹Act 53 of 2003.

²Fauconnier and Mathur-Helm 2008 *South African Journal of Business Management* 1.

³A Fauconnier and B Mathur-Helm “Black economic empowerment in the South African mining industry: a case

economically-excluded majority of South Africa an opportunity to participate in economic development in the country.⁴ The BBBEE framework required specific industries and companies to reform their operational structures in order to include black people.

Shortfalls of the BBBEE framework

a) *The inception of the BBBEE framework*

The work on the BBBEE legal framework was started due to the pressure that the ANC government faced upon attaining independence in 1994. In a quest for political transformation, the biggest problem that faced the government was of effecting socio-economic transformation.⁵ To kick-start this process, President Mandela set up an “advisory” group of the best economic minds South Africa had to offer, known as the Brenthurst Group.⁶ This group was tasked with investigating possible solutions for the socio-economic problems that bedeviled South Africa. However, what they did not realise at the time was that this group was composed of all white men, who represented the white minority interests,⁷ the very interests that were the cause of the problem they were trying to solve. As could be expected, the group proposed solutions that could only fix the problem in so far as the solution did not disadvantage their own interests. Hence, from its very inception the BBBEE programme was faced with the probability that it would fail because it was based on the ideas of people who were not ready to speak to the heart of the problem because it would disadvantage them.

b) *Resistance to the BBBEE programme*

The implementation of BBBEE in companies has been very slow, particularly amongst the “white” companies, primarily because the very nature of this reform requires the preferential treatment of blacks while practicing “fair discrimination” against

study of Exxaro Limited” 2008 *South African Journal of Business Management* 1 at 1.

⁴ T Maidza “BBBEE: An economic controversy” (2012) *The Afropolitan* <http://www.afropolitan.co.za/articles/bbbee-an-economic-controversy-261.html> (accessed on 13 August 2017).

⁵Nel “The second revolution: why is the progress so slow?” (2009) *Management Today* 27 at 28.

⁶ Nel 2009 *Management Today* 28.

⁷ Nel 2009 *Management Today* 28.

whites.⁸ For reasons such as these, whites have shown much resistance in fully implementing the BBBEE framework. For instance, there has been an outcry against Woolworths South Africa's hiring policy that has been called racist, ironically when Woolworths has a role to play in redressing economic imbalances under the BBBEE.⁹ The problem with most companies is that in trying to implement the BBBEE, they only go as far as to use it where there is underrepresentation of blacks within the company structures, and do not do more to open up the space for them in the industries.¹⁰ This effectively slows down the whole process of transformation, and does not promote the purpose of the legislation.

“[The B-BBEE] was the brainchild of white rich men who knew close to nothing about the problem of poverty they were trying to deal with. Their interests mattered more to them than reversing the ills of Apartheid.”

There seems to be an intentional effort to keep the status quo, as whites fear that the inclusion of black people into the economic sector will tilt the scale in black people's favour. However, what people seem to be missing is that the BBBEE is not a mechanism to favour black people, but it is aimed at including all people who were once denied access to economic resources.¹¹

c) *A programme for the politically connected*
The BBBEE programme has selectively benefited black people, empowering and enriching only a few and leaving the rest in poverty. Most of the beneficiaries of this programme have been the politically affluent black people, particularly those

⁸ T Maidza “BBBEE: An economic controversy” (2012) *The Afropolitan* <http://www.afropolitan.co.za/articles/bbbee-an-economic-controversy-261.html> (accessed on 13 August 2017).

⁹ T Maidza “BBBEE: An economic controversy”.

¹⁰ The Economist “The President says it has failed” (2010) <http://www.economist.com/node/15824024> (accessed on 13 August 2017).

¹¹ The Economist “The President says it has failed” (2010) <http://www.economist.com/node/15824024> (accessed on 13 August 2017).

of the ANC government.¹² These privileged few have managed to secure lucrative deals with good BBBEE profiles and have made millions from them, while the rest of the black majority survives on minimum wages and live in poverty. Researchers have highlighted that the politically connected BBBEE partners are preferable because they create strategic access to important things like trading licences, or mining licences.¹³ The point being made here is that the politically connected are not necessarily being selfish with opportunities, but they are just a favourite of investors because of their power. This further establishes the fact that while government remains the dominant provider of opportunities, it is likely that businesses will look at politically connected BBBEE partners.¹⁴ Therefore, in light of that, the BBBEE has failed to fulfil its objective to secure the sustainable rectification of economic inequality.

d) *The BBBEE as a self-enrichment mechanism*
Critics of the BBBEE have noted that the initiative has failed to empower blacks to be able to contribute meaningfully towards the building of the economy. Maidza notes that the BBBEE system has only opened a window through which black people can create riches for themselves, but not sustainable wealth for all.¹⁵ BBBEE businesses have been accused of being less competent in the production of good quality products and services.¹⁶ Most black business owners only focus on enriching themselves and therefore provide their services at high prices that in most cases do not match the quality of products or service. A study has found that the BBBEE investors had trouble fitting into the environment for big companies and more often than not they found that BBBEE investors made more compromises so as to keep afloat in deals.¹⁷ The system is designed to cater for big businesses and black business owners try to maximise as much as

¹² T Maidza “BBBEE: An economic controversy”

¹³ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management* 10.

¹⁴ Fauconnier and Mathur-Helm 2008 *South African Journal of Business Management* 10.

¹⁵ T Maidza “BBBEE: An economic controversy”.

¹⁶ T Maidza “BBBEE: An economic controversy”.

¹⁷ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management* 12.

they can on their opportunities.¹⁸ This is why BBEE has created a system of self-enrichment and has caused inequality to perpetuate.

If blacks only aim at creating wealth then the objectives of the Act are lost. The BBEE programme is aimed to give blacks empowerment opportunities while equipping them with the necessary skills needed for specific industries.¹⁹ This objective was not only to create rich black citizens, but to open up a space through which people learn the skills of the different industries they are operating in, and give them an opportunity to reverse the adverse effects of apartheid. However, black people have only taken the opportunity as an easy way to exploit resources made open to them by the government. Hence, the BBEE programme has failed because of weaknesses in the actual legislative framework, policies should be passed to regulate and guard against the extorting of government money by black businesses.

Highlights of the BBEE framework's achievements

BBEE has created a platform that allows for the inclusion of more people in economic development. There has been a notable increase in the number of women who are involved in the business sector. A study in 2006 showed that women investment groups and community involvement has become more prominent in BBEE.²⁰ The involvement of women has managed to support the fulfilment of the broad-based nature of BEE. This has created a good outcome in those transactions in that the BBEE is being applied to favour more people that were previously disadvantaged. However, most investors have noted that most women groups that participate in these deals lack substantial experience and expertise that is required in each industry, or for the completion of the deals.²¹

Further evidence that the BBEE has not entirely failed is that there are some successful black businesses that have emerged from

implementing the BBEE Act. An example of one such company is SNG, which is an auditing firm. This firm has emerged to one of the best audit firms in South Africa.²² The firm is a result of a merger of two companies. This firm has taken its time in truly learning the skills of the auditing profession and this has allowed the company to grow steadily. Not only have they established a black company of good repute, but now also provide employment opportunities for others. This shows that not all black business are riddled with selfish interests, and that the BBEE structure can also be used for the betterment of the economy.

Recommendations

One major problem that has emanated from the enactment of the BEE Act and all its codes is its actual implementation. Many companies have had a great difficulty finding a balance between implementation of the Act and its codes, and also, implementing the industry charter. Some have battled with interpreting the meaning of the legislation.²³ All this confusion has affected the manner in which companies approach the objective of transformation. Companies have taken it upon themselves to decide how they will comply with the legislation, even if sometimes it is a minimum effort, as in the Woolworths example set above.

The uncertainties and ambiguities can cause companies to lose a lot of money and time attempting to be in full compliance with the requirements.²⁴ Furthermore, the various codes and charters that have to be followed have made it difficult for small businesses to compete with big companies.²⁵ Therefore this could be a useful starting point: that the legislature consolidates the relevant legislation and amend it to the effect that the law is as easily comprehensible, allowing for companies to effectively implement it and achieve the objectives of the Act.

A practical way that would promote the alleviation of the inequality in South Africa would be to allow company employees to be part-owners

¹⁸ M Jack "Current BEE policy a failure" (2017) Herald Live <http://www.heraldlive.co.za/opinion/2017/06/23/current-bee-policy-failure/> (accessed 13 August 2017).

¹⁹ Nel 2009 *Management Today* 28.

²⁰ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management*

²¹ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management* 10.

²² T Maidza "BBEE: An economic controversy".

²³ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management* 12.

²⁴ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management* 12.

²⁵ M Jack "Current BEE policy a failure" (2017) Herald Live <http://www.heraldlive.co.za/opinion/2017/06/23/current-bee-policy-failure/> (accessed on 13 August 2017).

in the companies in which they work. A case study would be Umsinsi Health Care.²⁶ In this case, the company's permanent employees are afforded the opportunity to become co-owners of the business, and as a result have a share in the profits of the company.²⁷ This system is good for creating and distributing wealth among the employees. Furthermore, I would suggest that companies should also consider extending such an opportunity to their staff who earn lower salaries, and not only their permanent staff, because this would be economically uplifting those who need it the most. This would also give all staff motivation to work harder and make the company more productive. This system would also provide the workers with the opportunity to develop their skills adequately so as to make them more productive for the company.²⁸

“New legislation should address class inequality at its roots, and should close the loopholes that currently enable companies to manipulate the BBBEE to work in favour of only a few... rendering the objectives of the Act unachievable”

Another way to better the results of BBBEE is to curb the corruption of the politically affluent. Stopping the influence of political sharks from consuming all the opportunities would allow others to enjoy the benefits of the initiative. For instance, the same strategy was used when Exxaro Limited during their BBBEE transactions. All politically connected people were eliminated as candidates.²⁹ This broadens the empowerment redistribution opportunities. Companies should follow a comprehensive and transparent BEE partner selection. Government officials should busy themselves with monitoring the activities of companies and making sure that the BBBEE legislations are properly compiled with.³⁰ Government officials cannot expect companies to

comply with the BBBEE when they themselves are at the center of the corruption fracas, instead of enforcing the law. For the BBBEE to work, both the government and the companies must work together to enforce it and make sure that its implementation is promoting good governance among companies.

There is also a need for the private sector to be well linked with the public sector for the BBBEE programme to be successful. Companies must be strictly monitored and heavily penalized for not ploughing back into communities. For instance, The Royal Bafokeng Nation (RBN) BBBEE company uses profits from the mining royalties they receive to uplift their community by improving infrastructure, improving education and health services and starting up various empowerment programmes for more than 300 000 people.³¹ The beneficiaries of these programmes stretch beyond the residents of Bafokeng community. This is the kind of empowerment needed in South Africa. Companies need to contribute to the development of the public sectors; this too would be an effective way of alleviation of inequality in South Africa.

Conclusion

The failure of the BBBEE emanates from its very inception. It was the brainchild of white rich men who knew close to nothing about the problem of poverty they were trying to deal with. Their interests mattered more to them than reversing the ills of apartheid. Its failure has been perpetuated by poor implementation strategies that have helped facilitate the benefit of a few blacks. However, even though there is evidence of companies, and previously groups of people, who have made successes out of this programme, it has still left a lot more people in abject poverty.

Therefore, I suggest that the legislature should repeal the current legislation and come up with a new strategy that suits the current socio-economic space that South Africa is currently going through. The new legislation should address the problem at its roots, and also be able to close the loopholes that can be manipulated by people or companies to render the objectives of the Act unachievable and useless.

²⁶ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management* 12.

²⁷ T Maidza “BBBEE: An economic controversy”.

²⁸ T Maidza “BBBEE: An economic controversy”.

²⁹ Fauconnier and Mathur-Helm (2008) *South African Journal of Business Management* 10.

³⁰ “Why is BEE failing?” Fin24 News Online 8 January 2017 <http://www.fin24.com/Economy/why-bee-is-failing-20170108-2> (accessed on 13 August 2017).

³¹ T Maidza “BBBEE: An economic controversy”.



SHOULD THE COMMISSION CONSIDER A COMPANY'S INABILITY TO PAY A FINE WHEN IMPOSING FINES? LESSONS FROM THE UNITED KINGDOM

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Inability to pay: policy background

Competition-law fines play a role in deterring anticompetitive conduct by making it unprofitable. Simply put, it would be illogical if a company could engage in anticompetitive behaviour, knowing full-well that even if they were always to be caught and fined, they would still profit.¹ For this reason, the global

¹ M Brassey *Competition Law* (2002) 326. Most competition authorities are concerned with making the fine payable exceed the gains derived from the anticompetitive conduct, in order to ensure that the fine is not merely reduced to a "licence fee" for carrying on their business.

tendency has been to increase the fines payable.² However, what is to be said for those companies who are unable to pay the fines? This will be the point of discussion in this article. The author's submission is that if a firm can prove that 1) there is a risk of immediate bankruptcy resulting from the payment of the fine, and 2) that such bankruptcy should be regarded as unacceptable given the specific social context, it should warrant a discount on the fine on the basis of an inability to pay. In particular, this paper will draw on "lessons" that can be learnt from the United Kingdom and European Commission cases. The conclusion drawn is ultimately that there should not be a blanket disregard for a firm's inability to pay.³ But discounting a fine on these grounds should not be done lightly, and regard must be had for the circumstances in each case.

The South African Administrative Penalties Guidelines are useful in their own right. And although the steps are complicated,⁴ they are (at the very least) a solid point of departure. But what is to be said about firms who are unable to pay? Should Commission authorities give any attention to the fact that a fine might cause a firm to become financially distressed, even to the point of liquidation?

This question has already been answered where in many jurisdictions, guidelines and

² S Park "Global Forum on Competition: Sanctions in Antitrust Cases - Background Paper by the Secretariat" (2016) *Organisation for Economic Co-operation and Development* [https://one.oecd.org/document/DAF/COMP/GF\(2016\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf) (accessed 1 August 2017).

³ The topic question has not been addressed in the strict sense. The phrase "financially distressed" has been interpreted to include situations including bankruptcy and liquidation, which in itself is mostly what is debated about (as opposed to mere 'financial distress'). See "Commission Decision relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement" Commission of the European Communities (2004) http://ec.europa.eu/competition/antitrust/cases/dec_docs/38069/38069_33_4.pdf (accessed 5 August 2017) 203; and the discussion under the heading in this paper "Two-Fold Test", whereby it is generally accepted that mere financial difficulty is not enough to warrant the discounting of a fine.

⁴ See L Robertson "Global Forum on Competition: Sanctions in Antitrust Cases - Contribution by South Africa" (2016) *Organisation for Economic Co-operation and Development* [https://one.oecd.org/document/DAF/COMP/GF/WD\(2016\)44/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2016)44/en/pdf) (accessed 4 August 2017) 8-9: Here, the Commission remarked that "...the imposition of administrative penalties is not a precise science" and that the determination of fines is still "...on a case-by-case basis".

legislation have been developed to this effect.⁵ This was due to the increasing debate surrounding the topic. The EU Commission had made the firm's inability to pay a consideration in their guidelines on setting fines.⁶ Following in the EU's footsteps, the (SA) Commission incorporated a similar paragraph into its own Guidelines.⁷ By and large, the Commission will only consider a firm's inability to pay in "exceptional circumstances". Moreover, the alleviation does not necessarily involve a discount, but could also entail payment of the fine in instalments.⁸

The Competition Commission's stance on the issue

Deterrence has always been the primary focus of the Commission. In the matter between *The Competition Commission and Federal Mogul Aftermarkets Southern Africa (Pty) Ltd*,⁹ the Tribunal contended that the primary role of fines in South Africa is deterrence, rather than retribution. The praxis of rigorous fining in South Africa reveals that under-fining is likely to create an incentive for firms to engage in anticompetitive conduct.¹⁰ So it follows that the Commission's primary concern when (or rather, if) considering an inability to pay is because it recognises that "the objective of a fine is not to push a firm out of business, but [rather] to ensure that a firm assumes the consequences of its deeds".¹¹ In the *Reinforcing Mesh Solutions* case, the court said that "the purpose of [an administrative penalty] is not to crush the business of the affected firms, but to deter".¹²

⁵ J Aprosiek and S Goga "Administrative Penalties - Impact and Alternatives" (2010) 4 *Journal of Economics and Financial Sciences* 133.

⁶ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No1/2003 Official Journal of the European Communities, 2006/C 210/02 (hereinafter referred to as the "EU Guidelines")

⁷ See paragraph 7 of the SA Guidelines.

⁸ Paragraph 7.3 of the SA Guidelines.

⁹ 08/CR/Mar01; See also *Commission v Federal Mogul* [2003] ZACT 43 (CT).

¹⁰ L Senona "The Dichotomy between the penalty regime in competition law and the firm's ability to pay: South Africa's experience" (2014). <http://www.compcom.co.za/wp-content/Londiwe-Senona-Article-Administrative-penalties-2.pdf> (accessed 2 August 2017) 2.

¹¹ Burger-Smidt "Foreseeability Versus Transparency" *Werksmans Attorneys Legal Brief* 9.

¹² 119 & 120/CAC/May2013 para 62.

Whether there have actually been any changes in the way the Commission determines fines is, however, another question altogether. Notwithstanding the SA Guidelines, there is in fact evidence to suggest that the Commission consistently refuses to consider a firm's ability to pay when determining what it will accept in order to settle cases involving contraventions.¹³ Some commentators submit that this is presumably due to the fact that the Commission is afraid of setting a precedent.¹⁴ There is only one workable example where an inability to pay was considered: In the case of *Anix and Zenex*,¹⁵ the Commission asked for smaller penalties due to the sizes of the firms, and the fact that they are not very profitable.¹⁶ But most commentators on the issue regard this case as an example of an "indirect" consideration of an inability to pay, as the case preceded the SA Guidelines, and the insertion of the ability to pay paragraph.¹⁷

In the case of *New Reclamation Group and the Commission*,¹⁸ the Commission highlighted that NRG's inability to pay the full fine is not something that it should consider; rather the main concern is (as it always has been) to ensure that the fine is sufficient enough to have a significant deterrent effect.¹⁹ The *NRG* case is the closest thing South Africa currently has to a "definite ruling" (or informal precedent) on inability to pay (hereinafter referred to as "ITP") cases.

In conclusion, we are still waiting for a case to turn on the issue more squarely. Would the Commission spare a firm the full wrath of the fine where it is likely that the firm would be forced out of the market? This uncertainty has left a lacuna in

¹³ Park "Background Paper by the Secretariat" 24.

¹⁴ H Flannegan "The heavy hand of the Competition Commission" (2015) *Norton Rose Fullbright* <http://www.nortonrosefulbright.com/news/44650/the-heavy-hand-of-the-competition-commission> (accessed 5 August 2017).

¹⁵ 07/CR/Mar10.

¹⁶ Senona "The Dichotomy" 4.

¹⁷ See Senona "The Dichotomy" 4.

¹⁸ 37/CR/Apr08.

¹⁹ Senona "The Dichotomy" 5: From this case it seems as if the Commission had already considered itself sympathetic in the consent order of paying the fine over three years. Subsequently, New Reclam further insisted that the economic downturn would lead to more severe consequences for its operations, so it pleaded to have the final instalment reduced or otherwise altered. At which point, the Commission refused as it saw this appeal as undermining to the purpose of administrative penalties.

the law, but fortunately decisions from foreign jurisdictions may be able to assist where valuable lessons can be drawn from their competition cases (this will be discussed at a later stage).

Deterrence versus competition: serving a greater good

It is ironic (and contrary to the purpose of the Act) that it should be the case that fines threaten the economic viability of firms.²⁰ In other words, what was intended to promote and enhance fair competition, is now turning out to be the main threat to the competitive atmosphere of the overall economy.²¹ Senona further argues that while the imposition of higher fines is necessary, it should equally be balanced against the backdrop of South Africa's economic and financial context, whereby it cannot be denied (outright) that some firms' may be unable to pay fines imposed upon them.

a) Firm Closure

The most serious negative effect of heavy fining is that the fine is so heavy so as to force the firm to exit the market, by driving the firm into bankruptcy/insolvency - meaning that the firm could completely stop operating as a going concern.²² In these instances, some argue that the overall competitiveness in that market (and potentially the economy as a whole) would be adversely affected as the result of firm closure.²³ This is essentially what was alluded to above, and can be summarised by stating that "the *competitive benefit* provided by the deterrent factor of the fine could be outweighed by the *competitive harm* it causes in the market as a whole".²⁴

Such an argument there is typically hinges on two factors.²⁵ Firstly, the importance of the firm as a competitor. This factors in, *inter alia*, the dominance of the firm and the number of competitors in that market. For instance, if the firm does not exercise much dominance, and there are many competitors, the adverse effect on the market would be minimal. Secondly, whether the firm exit

results in the assets of the firm also "exiting". If it should be the case that there is merely a change of ownership or transfer of the assets, the assets would still remain available for (re)sale in the market (hence, the assets must also be decommissioned, so to speak).

The two-fold test: *Copper Tubing*

The two-fold test developed in *IMI Yorkshire Copper Tube Ltd and Others v Commission*²⁶ is central to the argument in this paper. This test was used as the basis for what a firm should prove to be successful in instances where it claims it should have a discount on the grounds of being unable to pay a fine.²⁷ 1) a risk of an immediate bankruptcy resulting from the payment of the fine; and 2) that such bankruptcy should be regarded as unacceptable given the "specific social context". There are three pertinent issues permeating from this test: 1) proving bankruptcy; 2) what is meant by an "unacceptable social impact"; and 3) the loss of asset value (as it relates to issues 1 and 2).

1) Proving bankruptcy

Proof of bankruptcy goes to the heart of ITP cases.²⁸ The SA Guidelines emphasise this requirement in paragraph 7.2: "the firm must provide the Commission with objective evidence that the [fine] would irretrievably jeopardise the ability of the firm concerned to continue trading and exit."²⁹ Since there is no true ITP case, we could look to the UK for Guidance.

The European Commission has stated³⁰ that it would only be satisfied on the proof of the first inquiry where the firm can demonstrate that it could not meet its contractual obligations (debts, including the payment of the fine) and therefore risks *immediate* bankruptcy.³¹ In other words, the firm

²⁶ COMP/E-1/38.069.

²⁷ The test is often referred to as the "test of the inability to pay".

²⁸ P Kienapfel and G Wils "Inability to Pay - First cases and practical experiences" 3 (2010) *Competition Policy Newsletter* 1 at 5.

²⁹ Also see paragraph 7.2 further for what is meant by 'objective evidence': "information relating to business rescue proceedings or insolvency proceedings." And that 'evidence' in this context could include audited financial statements attesting the veracity of the firm's financial position.

³⁰ "European Communities" (2004) 203.

³¹ "European Communities" (2004) 203: Interestingly, the European Commission refused to accept an interpretation of the test by KME (IMI's main competitor) that an inability to

²⁰ *Ibid.*

²¹ Senona "The Dichotomy" 2.

²² Aproskie and Goga 2010 *Journal of Economics and Financial Sciences* 137.

²³ Aproskie and Goga 2010 *Journal of Economics and Financial Sciences* 138.

²⁴ *Ibid.* [own emphasis added].

²⁵ Aproskie and Goga 2010 *Journal of Economics and Financial Sciences* 139.

must be able to demonstrate that it is under severe threat of insolvency (where the firm's liabilities exceed its assets).³² The EU Commission also has comprehensive "standardised requests" for the information it requires in order to assess ITP cases.³³ The EU Commission has also made it clear however that it is not enough that the firm suffers financial difficulty or losses, no matter how severe.³⁴

a) Causation between the Fine and Bankruptcy

It should follow that the fine itself is responsible for "breaking the back" of the firm. The SA Guidelines make this causal link clear: "the [fine] would irretrievably jeopardise the ability of the concerned firm to continue trading and exit". Assessing this causative link is an age-old case of speculating: what is the firm's financial position *without* the fine, and what would its' position be *with* the fine?³⁵ There are some instances where causation could be lacking.³⁶

2) Social Context

While bankruptcy is the most onerous aspect of the test, it is not necessarily enough to allow for a

pay does not necessarily simultaneously prove bankruptcy, hence that the test is 'too strict'. The European Commission stated that proof of bankruptcy is the only reliable test, it will not accept merely that the firm "does not wish to pay the fine".

³² See further, G Niels "Fine to pay? When firms cannot afford to pay the European Commission's penalties" 2 (2010) *Agenda* 1 at 2: This article advances an empirical framework to utilise in order to demonstrate liquidity constraints, and concludes by suggesting that the EU Commission should consider liquidity and solvency constraints in relation to the size of the fine.

³³ See further, Kienapfel and Wils 2010 *Competition Policy Newsletter* 5: The EU requests to obtain "the company's financial statements (annual reports: balance sheet, income statement, statement of changes in equity, cash-flow statement and notes) in respect of (usually the last five) previous financial years, as well as projections for the current year and the next two years. In addition, the Commission takes into account relations with outside financial partners such as banks, on the basis of copies of contracts concluded with those partners, in order to assess the company's access to finance and, in particular, the scope of any undrawn credit facilities they may have."

³⁴ "European Communities" (2004) 203.

³⁵ Kienapfel and Wils 2010 *Competition Policy Newsletter* 6.

³⁶ *Ibid*: "(i) where the company's financial distress has been deliberately brought about, (ii) where the company is in such serious financial distress that it would go bankrupt even without the fine or (iii) where the fine is very small in comparison with the overall turnover and assets of the company, in which case the fine cannot be considered to have a decisive impact on the company's financial situation."

discount in ITP cases. In the discussion under "Deterrence Versus Competition", attention was drawn to the fact sparing the firm is less important than considering what the implications of such would be on the market, and overall economy. As such, the EU Guidelines state that a firm is not eligible for a fine reduction in ITP cases merely if it can show a legitimate causal link between the fine and the firm's bankruptcy - they must still prove that the firm's bankruptcy would be detrimental in the "particular social context". It has been accepted that damaging social consequences could refer to increased unemployment or the deterioration of the economic sector/industry concerned.³⁷ In *Tokai Carbon v Commission of the European Communities*,³⁸ the Court pointed out:³⁹

"Although the liquidation of an undertaking in its existing legal form may adversely affect the financial interests of the owners, investors or shareholders, it does not mean that the personal, tangible and intangible elements represented by the undertaking would also lose their value."

This means that in order to prove the second leg of the test, one needs to show clear evidence that the effect of the bankruptcy will have an adverse external effect, beyond merely impinging on those in ownership/investorship positions. The European Commission will not be satisfied by the fine impacting on the firm's profitability, rather it must be the public that is affected (the industry, employees, the market, and consumers). Interestingly, in the UK case of *The Commission v French Beef*,⁴⁰ the "economic context" constituted a "stand alone" ground for reduction of 60 per cent

"Emphasis should be placed on the socio-economic implications of firm closure...Competitors in the market are sparse, job-security is threatened, and consumer spending is low"

³⁷ Aproskie and Goga 2010 *Journal of Economics and Financial Sciences* 139.

³⁸ [2005] ECR II-10.

³⁹ *Tokai Carbon and Others v Commission* para 372.

⁴⁰ COMP/38279.

was granted in light of the mad-cow disease affecting the beef sector at the time.⁴¹

The “social context” is not an express requirement in the SA Guidelines.⁴² But the SA Guidelines do refer to the exit of the firm causing “a substantial hardship on a particular firm that may lead to a significant reduction in competition”.

It is however the author’s submission that under the South African context, emphasis should be placed on the socio-economic implications of firm closure. The UK GDP sits comfortably at 2,86 trillion,⁴³ while South Africa is an economic free-fall, going from 416 billion to 294 billion in the past five years.⁴⁴ While GDP is not representative of each individual market’s particular pitfalls or successes, the principle remains the same altogether: times of economic crisis are not business-friendly. Competitors in the market are sparse, job-security is threatened, and consumer spending is low, which in turn leads to the loss of asset value.⁴⁵

Indeed, in the UK case of *Bathroom Fittings*,⁴⁶ the Commission found it appropriate to consider that the firms in those particular industries were experiencing severe difficulties resulting from dysfunctional credit markets at the height of economic crisis.⁴⁷ It would be short-sighted of the Commission to insist that a large, valuable firm should pay the full amount of a fine, where there is evidence to suggest that it is unable to do so - and by doing so it would be forced to close, and leaving in its wake unemployment and depriving the market of a key competitor. This fictitious scenario may not be true for every case, but it certainly does generally represent the overall circumstances South Africa finds itself in socially and economically.

⁴¹ COMP/38279 para 180.

⁴² However, see paragraph 7.3 in the SA Guidelines: Mere bankruptcy “...will not suffice for purposes of obtaining special discounts...”.

⁴³ “Gross Domestic Product (GDP)” *Office for National Statistics* (2017) <https://www.ons.gov.uk/economy/grossdomesticproductgdp> (accessed 4 August 2017).

⁴⁴ “South Africa GDP” *Trading Economics* (2017) <https://www.ons.gov.uk/economy/grossdomesticproductgdp> (accessed 4 August 2017).

⁴⁵ “What Is GDP and Its Impact?” *Statistics South Africa* (2013) <http://www.statssa.gov.za/?p=1143> (accessed 4 August 2017).

⁴⁶ Press release IP/10/790 of 23 June 2010.

⁴⁷ P Kienapfel and G Wils 2010 *Competition Policy Newsletter* 7.

3. Asset value and business operations

Another important observation that comes from the above quotation from the *Tokai* case is that where the assets (or rather the use of them in the commercial sense) do not exit the market, the existence of the concerned firm is arguably irrelevant. If the assets merely undergo a change of ownership, the competitiveness of the market, all things being equal, will not be impacted.⁴⁸ It certainly will not always be the case that the liquidation of a firm results in the loss of value of its assets; and so each ITP case should be assessed on its own merits.⁴⁹

While express reference to asset value is only made in the EU Guidelines,⁵⁰ the SA Guidelines omit this condition. It is the author’s view that the Commission should in fact be more concerned with the survival of production facilities (and capabilities), employment, and the business as a going concern rather than the survival of the particular company/firm itself - that is to say that asset value in the market should be a consideration the Commission deals with. South Africa is in a far worse-off position with regards to employment, industry, facilities and commercial capability than its’ EU counterpart. There should be an elevated level of protection afforded to what little assets are produced by South African firms/undertakings. In other words, the submission is that the Commission should not need proof that absolutely nothing will become of the firm’s business operations if it closes, in order to be satisfied that it is eligible for discounts.

If the EU Commission’s cases should be considered in this regard, one will observe that the EU Commission does not require the *total* loss of asset value.⁵¹ It has been sufficient for the EU Commission that a *significant* asset value loss occurs when claiming inability to pay.⁵² This is understandable: the assets of a bankrupt firm would, while not losing total value, typically be sold-off at

⁴⁸ Aproskie and Goga 2010 *Journal of Economics and Financial Sciences* 139: Effectively, the assets would remain in the market and “...be available for sale by new entrants or rivals”.

⁴⁹ Kienapfel and Wils 2010 *Competition Policy Newsletter* 6.

⁵⁰ Paragraph 35 of the EU Guidelines.

⁵¹ Press release IP/10/790 of 23 June 2010 (*Bathroom Fittings*).

⁵² Kienapfel and Wils 2010 *Competition Policy Newsletter* 6.

discounted prices, dismantled or stand idle.⁵³ So typically neither the full value - nor the loss of all value - of the assets is the case when dealing with firm closure. Expert evidence would be needed by the firm to allege a significant loss of asset value (in support of their claim that they are unable to pay the fine).⁵⁴

“It would be short-sighted of the Competition Commission to insist that a large, valuable firm should pay the full amount of a fine... and by doing so it would be forced to close, leaving in its wake unemployment, and depriving the market of a key competitor”

Conclusion and recommendations

ITP claims are a unique breed of cases where several competing interests clash: the need for deterrence; the interests of the firms (and the relevant stakeholders); the interests of the particular market; the overall social and economic context; and of course, maintaining and promoting healthy competition. The SA Guidelines provide the necessary platform (in the form of policy) that opens up the possibility for firms to begin making out ITP claims when they are found to be in contravention of the Act. This article primarily serves to recommend that, given the absence of our own jurisprudence on the issue, the UK jurisprudence provides a wealth of knowledge that the SA Commission should use for future reference. I strongly advocate for the application of the *Copper Tubing* two-fold test. Furthermore, the argument advanced is that ITP cases should be more concerned with the external social impact of the firm's closure, as opposed to merely the interests of the relevant stakeholders. From this, the Commission should consider the implications of the

assets if firm closure were to occur: if it can be said not to have lost substantial value, the Commission should be less concerned about the firm staying afloat. Where the assets stay available in the market, the impact of the concerned firm's closure will be minimal, and therefore, less regard should be had for an ITP.

The issues surrounding ITP cases are vast, and this paper barely begins to address the topic comprehensively. Issues such as corporate leniency programmes, alternative methods for achieving deterrence (other than fines), and consumer “pass-through” are also pertinent to the discussion, if not invaluable. The academic bustle surrounding this topic should hopefully catch the attention of Commission authorities, and encourage reform in their methods, taking into account the evolving social context and current global economic downturn.

⁵³ *Ibid.*

⁵⁴ In short, the Commission would seek to allege that the assets have (enough) value so as to not exit the market, with the goal of showing that the firm's closure has little/no impact on the market. But much of this is premised on speculation and educated guess-work. See also Kienapfel and Wils 2010 *Competition Policy Newsletter* 6.



THE RIGHT TO TERMINATION OF PREGNANCY IN ZIMBABWE:

A RIGHT IN NAME OR A RIGHT IN SUBSTANCE A COMPARATIVE ANALYSIS

Chido Gezimati: Final Year LLB

Introduction

The recent Constitution of Zimbabwe is premised on the foundations of respect for the fundamental human rights and freedoms, recognition of the equality of all human beings, and gender equality.¹ It is common cause that gender-based discrimination has permeated many African societies, and this discrimination requires urgent action, especially in Zimbabwe.²

The Constitution, to the extent that it purports to protect women, takes its cue from international standards. It is these same standards that (when used to compare) expose the inherent flaws and shortcomings of the Zimbabwean Constitution. This piece is focused on the rights of

women under this present Constitution. The right to health will be the focus of this discussion, particularly the right to terminate pregnancy. The Constitution of Zimbabwe contains several provisions that relate to achieving gender equality in the country. Section 17 is the gender-balance provision, which provides that the state must take positive measures to rectify gender discrimination and imbalances resulting from practices and policies.³ Furthermore, s 76(1) provides that “every citizen and permanent resident of Zimbabwe has the right to have access to basic health-care, including reproductive health-care services.” These provisions were welcomed as the status of women's rights prior to the new constitution was regarded as akin to minors. Reproductive rights were not prioritized, and there was no autonomy in termination of pregnancy.⁴

The right to terminate pregnancies

It has been established that the Zimbabwean Constitution aims to ensure gender equality as well as safeguarding the right of every citizen (equal before the law) to access basic health, which includes reproductive health-care. Reproductive rights are of importance to women as they are central to most issues that affect women.

Looking particularly at the right to terminate pregnancies, unlike in South Africa, this right is available to women only in limited circumstances, which are provided for in terms of the Termination of Pregnancy Act.⁵ These circumstances are as follows:

“a) Where the continuation of the pregnancy so endangers the life of the woman concerned or constitutes a serious threat or permanent impairment of her physical health that the termination of the pregnancy is necessary to ensure her life of physical health, as the case may be; or

b) Where there is a serious risk that the child to be born will suffer from a physical or mental defect of such nature that he will permanently be seriously handicapped; or

c) Where there is a reasonable possibility that the foetus is conceived, as a result of unlawful intercourse.”⁶

¹ S 3 of The Constitution of Zimbabwe, 2013.

² “Women’s Reproductive Rights in Zimbabwe: A Shadow Report” *The Centre for Reproductive Law & Policy* <https://www.reproductiverights.org/sites/default/files/documents/SRZimbabwe97en.pdf> (accessed 14 September 2017).

³ S 17(2) of the Constitution.

⁴ E Dormekpor “Poverty and Gender Inequality in Developing Countries” (2015) 5 *Developing Country Studies* 76 at 77.

⁵ The Termination of Pregnancy Act [Chapter 15:10].

⁶ s 4 of the Termination of Pregnancy Act [Chapter 15:10].

For purposes of this Act, “unlawful intercourse with a person” amounts to rape, incest and mental handicap.

“in a country where the majority can hardly afford basic healthcare services, women are highly unlikely to meet the s 5(4) requirements”

What this means is that termination for any other reason which is not stated in the Act will be unlawful and will attract criminal sanction. This is problematic as it takes away the choice from women and imposes a statutory restriction on situations when termination is permitted. The government took great strides to provide access to basic health as well as permitted the termination of pregnancy, which has however become a problematic issue. An example of this was the recently decided Supreme Court judgment of *Mapingure v Minister of Home Affairs and two others*, where the issues surrounding the practicalities of the Termination of Pregnancy Act were revealed. The appellant, Mildred Mapingure was attacked and raped by robbers at her home. She immediately reported the matter to the police and requested emergency contraception. She was subsequently taken to a hospital and was attended to by a medical practitioner who refused to administer the emergency contraception in the absence of a police officer. Her 72-hour window period lapsed without her receiving the contraception, and she subsequently returned to the hospital and was confirmed to be pregnant. Thereafter, she was informed by the investigating officer to approach the Public Protector with her request for a termination. However this was turned down pending the completion of the trial.

Only five months after the attack on her, was she granted the necessary magisterial certificate to terminate her pregnancy. However, the hospital matron assigned to carry out the procedure declined to do so as it was no longer safe. Eventually, the appellant reached full term and gave birth.

The court a quo in this matter dismissed her claim against the Ministers of Health, Justice and Home Affairs, citing that her misfortune was due to

her ignorance as to the correct procedure to follow, and that it was not the duty of the relevant officials to give guidance to her on the matter. The Supreme Court came to a similar conclusion - that it was the responsibility of the victim to obtain the requisite magisterial certificate allowing for the termination of the pregnancy in terms of s 5(4) of the Act.

From this it is apparent that although Zimbabwe seems to have relatively progressive policies and law on female reproductive rights on paper, including access to the termination of pregnancy in prescribed circumstances, the services as in this case are still unavailable and out of reach for many women in Zimbabwe.⁷

Criticisms and shortcomings

It is apparent that s 5(4) of the Termination of Pregnancy Act presents barriers for women to access their right to terminate pregnancies under the prescribed circumstances. A woman seeking a termination has to obtain written permission at her own cost and, in a country where the majority can hardly afford basic healthcare services, women are highly unlikely to meet the s 5(4) requirements.⁸ The World Health Organisation has issued guidelines with the purpose of ensuring that laws and policies on abortion should primarily protect women's health and human rights.⁹ These guidelines recommend the removal of administrative barriers that make lawful access to abortion services difficult for women. Unfortunately, in Zimbabwe, these barriers and seem insurmountable to ordinary women of little means.

This therefore brings to the fore the question of whether the Constitution of Zimbabwe really provides for sexual reproductive rights of women, or it simply pays lip service to the international standards.

⁷ Legal Grounds: Reproductive and Sexual Rights in Sub-Saharan African Courts (2017) 3 https://www.law.utoronto.ca/utfl_file/count/documents/reproh_ealth/lg-08-mapingure-zimbabwe.pdf (accessed 14 September 2017).

⁸ Law Hub “The Law on abortion in Zimbabwe” The Zimbabwean (2015) <http://www.thezimbabwean.co/2015/09/the-law-on-abortion-in-zimbabwe/> (accessed 14 September 2017).

⁹ The World Health Organisation “Safe abortion: Technical and policy guidance for health systems” (2015) http://apps.who.int/iris/bitstream/10665/173586/1/WHO_RHR_15.04_eng.pdf (accessed 17 September 2017).



HOW RELEVANT ARE THE INTERNATIONAL HUMANITARIAN PRINCIPLES OF NECESSITY AND PROPORTIONALITY TO MODERN WARFARE?

Tessa Mitchell: Final year LLB student

Introduction

International Humanitarian Law (IHL) has developed in accordance with public moral and conscience in order to limit and minimise the effects of armed conflict on persons who are not involved in the hostilities. It has also served to restrict the means and methods of warfare (*ius in bello*). The principles of necessity and proportionality give effect to and are embodied by this objective. They inform states of “rules relating to the use of force and ... how force should be used in international armed conflict”.¹ The principles of IHL are foundational in informing international

¹ J Gardam *Necessity, Proportionality and the Use of Force by States* (2004) xii.

courts treaties, codes and are embedded in the Geneva Convention in the Additional Protocol 1.²

The nature of warfare and weaponry has altered significantly since the embedment of these principles in the Geneva Convention. However, the core purpose and function of the principles remain relevant and applicable to modern day warfare, including developments in cyber-warfare and the shifts in policies to that of “zero-causalities”. In their current form, codified in Protocol I, these principles may be interpreted in a limited manner that gives rise to various shortcomings which make the principles unsuitable to regulated armed conflict. It is submitted that these potential shortcomings must be recognised. The developments in warfare call for a development in the interpretation of the principles to ensure their continued use to states engaged in hostilities.

*“There has been a shift in priorities...
States tend to protect their soldiers over
protecting their civilians”*

The principles – necessity and proportionality

The legality of force used in hostilities depends on the principles of necessity and proportionality.³ They are traditionally regarded as fundamental concepts in IHL.⁴ Comprehensive understanding of these principles requires them to be read in conjunction with the principle of discrimination. The principle of necessity “permits measures which are actually necessary to accomplish a *legitimate military purpose* and are not otherwise prohibited by international humanitarian law”.⁵ In meeting this requirement, states are required to balance human suffering and the effects on civilians, with military gains. The measure is only permitted in terms of

² 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) (hereafter referred to as Protocol 1).

³ D Kretzmer “The Inherent Right to Self-Defense and Proportionality in *Jus Ad Bellum*” (2013) 24 *EJIL* 235 at 239.

⁴ Gardam *Necessity and Proportionality* 2.

⁵ M Sossoli and A Bouvier *How Does Law Protect in War* 2 ed (2006) ICRC Part 1 Chapter 4 at 138.

IHL if the military gains and necessity deem the attack necessary. Consequently, this requires the belligerent state to distinguish between civilian and civil objectives and combatants and military objectives.⁶

Necessity is to be read in conjunction with the principle of proportionality, which requires that “armed conflict should not be conducted in a manner that is disproportionate to the military objective”.⁷ It functions to protect civilians during warfare in that it challenges “the balance between an advantage and the harm suffered by civilians from the attack”.⁸ Key to the application and use of the proportionality principle is the principle of distinction. The belligerent state is required to distinguish between civilian lives and objects and military objects and advantages in order to weigh up and determine if the attack is proportionate and necessary with regard to its military advantage.⁹

These principles serve to “protect civilians and combatants against disproportionate attacks and means and methods of warfare that inflict *superfluous injury* or *unnecessary suffering*”.¹⁰ They do not specifically outlaw forms of weapons, but rather regulate and limit the use of weapons. In *Legality of the Threat or Use of Nuclear Weapons*,¹¹ the court held that the application of these principles and IHL prohibits the use weapons “that cause of harm greater than that unavoidable to achieve legitimate military objectives”. The principles are therefore foundational in regulating the use of force and protection of civilians. They are required to be adaptable and must develop in accordance with the developments of weaponry and the nature of warfare. Further, in light of unprecedented developments in conventional warfare, these

principles are of the utmost importance in functioning to providing certainty and stability in warfare and the protection accorded to civilians and combatants.

Whilst the principles were codified and embedded in Protocol 1, the principles exist and function beyond the manner and form of which they are contained in the Geneva Convention. It is submitted that based on certain interpretations there are circumstances where the form and nature of the principles, as codified in Protocol 1, are not applicable or relevant to a specific and/or conventional form of warfare. However, this does not detract from the principles’ relevance and applicability to a wider scope of warfare, as they continue to function relevant as a pillar and threshold against which such developments should be measured.

Conventional warfare

The applicability and relevance of the principles to regulate conventional warfare has been questioned with due concern for the following areas of change and development in warfare. Firstly, the nature of weaponry has developed far beyond the forms of weaponry imagined at the embedment of the principles. Secondly, the policies in warfare have changed. There has been a shift in states priorities from protecting civilians to protecting their combatants.¹² Various issues have arisen in light of these developments, calling into question the application of principles to modern attacks and hostilities. The following serve as examples of circumstances where these issues have been brought to the fore.

i) The development of weaponry

The relevance and suitability of principles with regard to the modernisation of warfare was addressed in the International Court of Justice (ICJ). In *Nuclear Weapons and Advisory Opinion* the court dealt with whether Nuclear Weapons are subject to IHL. It was put to the court that the weapons had been developed subsequent to the majority of rules in IHL, and therefore were in a

⁶ This requirement is embedded in Article 48 of the Additional Protocol 1. Sossoli and Bouvier *How Does the Law Protect in War* 139.

⁷ J Gardam “Proportionality as a Restraint on the Use of Force” (1999) 9 *AIL* 161 at 166.

⁸ F Hampson and Y Dinstein “Proportionality and Necessity in the Gulf Conflict” (1992) 86 *ASIL* 45 at 46.

⁹ The principle of proportionality is codified in Article 51(5)(b) and 57(2)(a)(iii) and (b) of Protocol 1.

¹⁰ Gardam *Necessity and Proportionality* 8.

¹¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (hereafter *Nuclear Weapons Advisory Opinion*), ICJ Reports 1996, 26.

¹² Gardam 1999 *ASIL* 168.

class of their own. The court rejected this position.¹³ The applicability of IHL, and its principles to nuclear weapons, “despite their being developed after the fundamental structure of the regime was in place and regardless of the fact that the existing principles had never envisioned weapon of mass destruction”, was unanimously approved.¹⁴ In accordance with the court’s advisory opinion, the relevance of the principles continues with regard to other forms of conventional warfare, such as cyber warfare.

In 2007 Estonia experienced an attack in the form of cyber warfare.¹⁵ This occurred in the form of an anonymous attack, and whilst it is believed that the Russian government was involved, there is no evidence to this effect.¹⁶ The cyber-attacks caused serious physical and tangible effects, due to almost a month of “attacks on various government entities – as well as banks and other services – which severely hampered the Estonian economy and government”.¹⁷ In this circumstance, it was not possible to hold a state accountable for the attack. However, due to the consequences of such attacks – that they too should be bound by the principles of necessity and proportionality. Therefore, the principles and Protocol 1 must be interpreted in a manner that modernises the law to “reflect the new technological challenges facing the world today”.¹⁸

¹³ Gardam 1999 *ASIL* 168.

¹⁴ Gardam *Necessity and Proportionality* 73.

¹⁵ T Anderson “Fitting a Virtual Peg into a Round Hole: Why Existing International Law Fails to Govern Reprisals” (2016) 34 *Arizona Journal of International and Comparative Law* 135 at 138

¹⁶ Anderson *Arizona Journal of International and Comparative Law* 138.

¹⁷ J Kelsey “Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare” (2008) 106 *Michigan Law Review* 1427 at 1434.

¹⁸ Anderson *Arizona Journal of International and Comparative Law* 157. It is further submitted that this development and modernisation is best suited in the form of progressive interpretations and practice as an alternative to new conventions and doctrines. The reasoning for this is that due to the exponential advances in technology it is not practical to revise conventions and doctrines with each new development.

ii) NATO - Kosovo

As previously discussed, under the principles of necessity and proportionality, states are required to ensure that civilians and the civilian population are afforded protection. This requires states to prevent or minimise “extensive collateral damage to civilians and civilian objects”.¹⁹ This requirement is embedded in Article 51 of the Additional Protocol, requiring states to ensure that attacks are not indiscriminate and therefore to only utilise weaponry which ensures the meeting of this requirement.²⁰

However, in practice, in modern day warfare states prioritise their combatant’s lives over civilians. NATO forces have adopted a “zero casualties policy”, as seen in the 1999 Kosovo Conflict.²¹ Whilst the involvement of NATO in Kosovo may have been legitimate, it is the means employed which are of concern in *ius in bello*. This implementation policy is clear from the “choice of weapons and the means methods of attack”.²² They reflect the combatants and citizens of the NATO forces disinclination “to bear the considerable human costs that might have followed from the adoption of a legally and morally more acceptable form of intervention”.²³ The campaign and use of high-altitude aerial bombardment ensured greater protection to combatants, but at the potential expense of civilians. In fact it is debated that NATO’s involvement and their effect on civilians exacerbated the humanitarian problem.²⁴

The NATO air bombardment “allegedly violated the fundamental guarantees of IHL”.²⁵ It is

¹⁹ Gardam 1999 *ASIL* 167.

²⁰ Article 51 Additional Protocol 1 of 1977.

²¹ Gardam 1999 *ASIL* 167.

²² R Falk “Kosovo, World Order, and the Future of International Law” (1999) 4 *ASIL* 847 at 851. The weaponry utilised by NATO in Kosovo included “The expansion of the bombing campaign resulted in heavy damage to the water supply and electricity systems; caused severe pollution through the destruction of chemical factories and oil refineries; and broadened the means of attack to include B-52s, cluster bombs, and depleted uranium ordnance, weaponry of questionable lawfulness.”

²³ Falk 1999 *ASIL* 852.

²⁴ Gardam *Necessity and Proportionality* 25.

²⁵ W Sumanadasa “Principle of Proportionality: the Criticized compromising Formula of the International Humanitarian Law” (2010) 10 *ISIL* 21 at 37.

thus necessary in light of these developments and policies to measure them up against the principles of proportionality and necessity in conjunction with their embedded form in the Geneva Convention Additional Protocol 1. The relevance of these to the Kosovo conflict was brought to the fore in light of the fact that “Serbian Royal Academy of Scientists and Artists has a legal team and says it will file charges against NATO for using depleted uranium during the 1999 bombing of Yugoslavia”.²⁶ The weaponry used by NATO contained “cancer-causing depleted uranium,” which has had devastating effects on the civilians in Serbia.²⁷ The principles of proportionality and necessity will be vital in assessing whether the attacks were within the bounds of IHL and whether attacks that have caused disproportionate harm on civilians were unlawful.

This indicates a need for the proportionality equation to be developed to regulate the extent to which a state must assume a “higher risk for [its] combatants in order to protect the [affected] civilian population”.²⁸ Further, it needs to be applied to determine whether certain attacks were potentially unlawful, such as the dropping of a bomb containing cancer-causing depleted uranium into Lake Palic.²⁹ This need for development does not detract from the relevance of the principles in governing warfare and aiming to minimise harm and suffering of the civilian population. Rather, it is submitted that these principles are of increasing importance in addressing potential IHL violations due to the changes in warfare and combat policies. The embedment of the principles in Protocol 1 Article 52(1) and (2) will also be relevant in regulating warfare to ensure that the attacks were necessary to ensure a military advantage, and do not result, in accordance with Article 57 of Protocol 1, in “collateral damage” that is excessive to the advantage. It is in terms of this equation that the

conduct of NATO should be weighed.³⁰ Therefore, necessity and proportionality should (and must) continue to be of value and provide guidelines to what are legitimate attacks in the eyes of IHL.

Conclusion

These principles continue to play a vital role in IHL. Despite developments in warfare not envisioned during the embedment of the principles in the Geneva Convention, the principles function to judge “whether the particular armed actions during a conflict are lawful”.³¹ The zero-casualties policy, the development in warfare in accordance with such policy, the utilisation and developments of cyber technology serve as examples of the current conventional warfare. As was argued in *Nuclear Weapons*, the principles remain relevant and applicable despite developments of warfare and changes in policy envisioned at the stage of codifying the principles in Protocol 1. Therefore, they should and must continue to be applied as foundational principles to provide guidance as to what modern forms of warfare are considered lawful and within the bounds of IHL.

²⁶ M Zivanovic “Serbian Royal Academy to Sue NATO over Bombing” *Balkan Transitional Justice* 12 May 2017 <http://www.balkaninsight.com/en/article/serbian-royal-academy-to-file-charges-against-nato-05-11-2017> (accessed 14 May 2017).

²⁷ *Ibid.*

²⁸ Gardam 1999 *ASIL* 167.

²⁹ Zivanovic *Balkan Transitional Justice* 12 May 2017.

³⁰ A Schachter and F Kalshoven “Implementing Limitations on the Use of Force: the Doctrine of Proportionality and Necessity” (1992) 86 *ASIL* 39 at 43 – 44.

³¹ Schachter and Kalshoven 1994 *ASIL* 39.



NIC SWART

1954-2017

A TRIBUTE

Helen Kruuse: Senior Lecturer

On 10 August this year, Nic Swart passed away while attending a conference in Botswana.

Why should law students care?

Nic Swart was the ethical law student's champion. His other job was being the CEO of the Law Society of South Africa, and the Director of Legal Education and Development (LEAD).

I first came into direct contact with Nic when I received an email out of the blue. It was 3rd April 2013. He wrote to invite me to organise and participate in a summit dealing with the so-called "ethics crisis" in the profession at that time. That first email started a wonderful working relationship where he personified the *noblesse oblige* tradition which he believed needed to be rekindled in a profession challenged by local and global change, not to mention financial pressures. Together, with a team of dedicated academics and lawyers, Nic championed both the Ethics Summit for lawyers in 2014, and an Ethics Workshop for academics in 2015. Most recently, he supported a task team in presenting a legal ethics curriculum to the South African Law Deans' Association in 2016. His last email to me, in May of this year, detailed his recent initiative at the LEAD School for the curriculum to include a MAD social responsibility element

(Making a Difference!) to influence current thinking.

What a profound loss it is to the South African profession.

One of Nic's finest attributes was the way in which he got people together to discuss issues around the profession (sometimes the expression "herding cats" comes to mind!). He was an inclusive person. This meant seeing the Law Society as more than just the sum of its parts: not only did he include lawyers from a variety of practice areas, but he also sought to include academics and importantly, students in all of his plans. It is in this vein then that I sought the views of three different people who interacted with Nic in different capacities over different years.

Rob Midgley, former Dean of the Law Faculty at Rhodes and now Vice Chancellor of Walter Sisulu University remembers him as follows:

"Nic and I worked quite closely on various aspect of legal education and he was most supportive in developing practical skills training throughout the university sector, including Rhodes. He unapologetically championed the Law Society cause for less academic, more practical skills-orientated qualifications for prospective lawyers and was an enthusiastic proponent of a more regulated LLB curriculum. I can recall that numeracy skills were high on his agenda, as was sound language skills. So whenever we introduced any programme, formal or informal, aimed at improving practical skills, he was on board.

There is no doubt that he was passionate about legal education and training. And an energetic man. He sat on a number of Law Faculty Boards, but would probably be remembered more for his work around developing the four-year LLB curriculum and the Practical Legal Training Schools. In this regard, his contribution was enormous. The profession will miss him."

Freddy Mnyongani, senior lecturer at UNISA and member of the SALDA task team on a legal ethics curriculum remembers Nic for his humanity:

“I have known Nic (he would always insist that we call him Nic, not Mr Swart!) for just over a decade now. In all my interactions with him and the many occasions I have seen him interact with other people, there was nothing to suggest that he was in actual fact the man at the helm of the organised profession of attorneys in South Africa. For me, that said a lot about his humility! There is no doubt in my mind that he had a vision for the organised profession in South Africa. He seems to have been aware and alert to the fact that the vision he had could only find meaning if it carried the dreams, aspirations and fears of the people who constituted the same profession that he led. For this, he invested in human relations and worked tirelessly to make sure that the profession was as inclusive as possible. Nic had the natural ability to relate with just about every person across the spectrum of the legal profession. In his interactions, he exuded warmth, kindness, dignity, and was always concerned and caring, in short, Nic had *ubuntu*. There is no doubt in my mind, that the legal fraternity is poorer without him. May his soul rest in peace.”

It seems appropriate that the last word should be from students. In the most recent times, Nic reached out to law students to involve them in the massive changes heralded by the Legal Practice Act 28 of 2014. He saw it as integral that law students be involved in the National Forum – a transitional body – tasked with setting up the new regulatory authority and its reach. Ayanda Mbonani, chair of the Black Lawyers’ Association Student Chapter at Rhodes University, comments as follows:

“Nic Swart was a man with a heart and passion for growing and developing young Lawyers. His heart for young lawyers was clearly displayed in his willingness to find a mechanism to involve students in the National Forum for the Legal Practice Act. It was an honour to work with a person who wanted to see the profession transform and was constantly championing the movement through finding innovative solutions for the betterment of the profession.

We as Black Lawyers’ Association Rhodes Student Chapter are saddened by death

of Nic Swart whom we consider having great contributed to the development of young lawyers. With our brief interaction with Nic Swart we have come to observe a relationship of great respect, humility and passion for the profession. These are the characteristics we as young lawyers wish to carry on and furthermore pass on to the next generation of young lawyers. May his legacy continue to live through our work ethic and the pursuit of justice. We as the Black Lawyers Association Student Chapter salute Nic Swart for his everlasting contribution to the profession.”

Nic was only 63 when he died. In three decades of service to the Law Society and LEAD (and their predecessors) he turned a pilot school for legal practice with only 51 candidate attorneys into a legal education institution which has trained over 26 000 candidate attorneys to date, and continues to train 11 000 practitioners and support staff every year. In a piece celebrating his contribution to the profession in a recent *De Rebus*, Whittle and Jele describe this achievement as only possible because of Nic’s ‘vision, unstinting dedication and hard work’.¹

He leaves his wife Mariette and two grown daughters, Marni and Lyndi, behind. He also leaves the legal profession and a law society who are the stronger and better for his enduring contribution and service. Echoing the words of both Ayanda and Freddy quoted above, it is fitting that this small tribute ends with the Chief Justice’s comments at Nic’s memorial service: “Nic Swart was a man who never made you feel small. A true South African who knew that power means nothing; that we are just human beings. We all belong to this land and this land belongs to all of us, united.”²

¹ B Whittle & N Manyathi-Jele ‘The profession celebrates the immense contribution of Nic Swart as it mourns his passing’ *De Rebus* (2017) September 16.

² Quoted in Whittle & Jele (*ibid*).

**A SPECIAL TRIBUTE ON THE OCCASION
OF THE MEMORIAL SERVICE NIC SWART
AT THE NG KERK LYNWOOD PRETORIA
ON 17 AUGUST 2017.**

Max Boqwana: Legal practitioner, Boqwana Burns

Dear Friends,

Chief Justice, it does happen that a nation from time to time does not only require Leaders but Fathers those who preside over us with love and care. Thank you for being such a Father to our troubled Nation, to the judiciary and the legal profession, but more importantly today to the family of our dearest Colleague: Nic Swart.

I am sorry, Marietta, that you could not break bread with Nic, nor have a last supper with him and have an opportunity to have the last dance with Nic the night before he died. I did, and why me, I do not know.

Maybe it is right therefore that I come and stand here today to say that on the 9th August, I broke bread with Nic and had a last supper with Nic. I went to the News-Cafe restaurant in Gaborone, Botswana where Nic was having a meal and I sat down he pushed his plate towards me and said “please share this (food) with me”. In a true hearty Christian and African way, I smiled and shared the food with him, using no utensils but my bare hands. The meal was crumbed cheese, bread and cauliflower leaves.

Our conversation continued and he said “I am troubled by the uncertainty that the profession is facing and the impact this is having on the staff. I have to face these people all the time and have to give them assurance and it is growing progressively difficult to do so.”

This is a challenge to those that exercise leadership: to ask themselves difficult questions about whether their exercise of power inspires, grow and nurture others, or is merely about self-absorption, an over exaggerated sense of self-importance? We must answer those questions truthfully and honestly.

I have known Nic for almost 25 years and for Nadel, he was a testimony of the truthfulness of why we stood steadfast for non-racialism. If anybody doubted whether we as a nation are able to bridge and destroy racial prejudices and hangovers, Nic was such a person who was totally committed

to this task. So, in Nadel he was at home. Both in thought and in his actions he rejected the artificial differences imposed by apartheid on us, and in fact proved that apartheid was lie.

The National Forum of the legal profession will be forever poorer by his departure, as he was without doubt the key driver of progress, representing all 25 000 attorneys with distinction. For this group of lawyers, he was a pillar of both strength and hope.

He was a true African and a Patriot. We in the SADC Region sought guidance from him to educate the Profession, to which he graciously and freely gave.

In the end as we paid tribute to him in Botswana last week where he took his last breath, we were able to let everyone know and all agreed that:

- Nic was a beautiful human being, a humble servant of our people, an exemplary leader, who was never fazed or dizzied by the heights of success and accolades;

- to us he was not just a star but a galaxy who even in death will continue to shine light on otherwise uncertain future,

- a towering figure and a giant on whose shoulders many of the lawyers in this Country and elsewhere stand;

- like a true soldier he died in the battle with his boots on and today we are returning to this sacred place with his battle uniform and shining medals, to confirm that he fought a good fight and was never was the one who despaired when the weather is bad and nor the one to rejoice endlessly as if there was no tomorrow when the sun shines. We will miss him dearly.

Mrs Swart, children, his families at LEAD, and the LSSA and to the entirety of the Legal Profession in South Africa, we say Nic taught us to seize the moment which he did. Please be comforted in knowing that this pain is shared in equal measure by all of us. And may God place you on the palm of His hand, protect and cover you until you and Nic meet on the other side.

Goodbye dear friend.

May your soul rest in eternal peace.

Asante Sana.



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