In Camera

2022

The Rhodes Law Society
Annual Law Magazine

RHODES UNIVERSITY - LAW SOCIETY -

The AfCFTA Agreement

AGENCY BY ESTOPPEL as distinct from APPARENT AUTHORITY

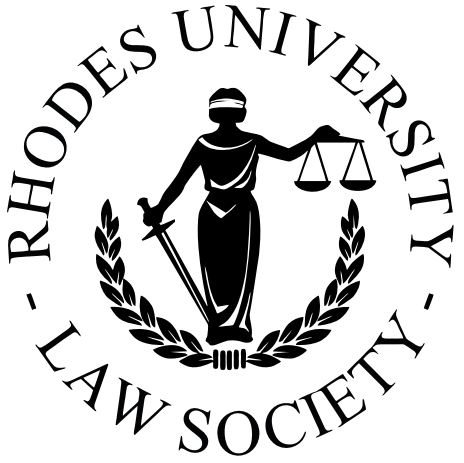
Regulatory or Exclusionary
migrants' right to work in South Africa

Preventative lawyering & therapeutic jurisprudence

Cannabis social clubs
The law in South Africa

African and western perspectives on human rights: *a comparison*

Is a horse by any name still a horse?
An analysis of competing similar trade marks in South Africa



In Camera

2022

The Rhodes Law Society Annual Law Magazine

Compiled by Thanyelani Ndlovu and Paulina Quartey
Edited by Professor Graham Glover
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letter from the editors

By Thanyelani Ndlovu
and
Paulina Quartey

In Camera editors 2022

It was a huge honour to be elected as *In Camera* editors for the Rhodes Law Society in 2022. Being avid readers and fledgling writers,, we found this to be a great opportunity to contribute to the creation of one of the Law Societies trailblazing initiatives. The *In Camera* magazine is a student-headed publication consisting of essays from students and the faculty. Essentially, it is a student-led magazine produced for students by students.

We were really excited to put the magazine into motion this year especially since it has been on hiatus for the past two years due to the effects of the Covid-19 pandemic. We started bouncing off ideas back in November 2021 and started drafting plans to make it a reality. This year the magazine will be available in digital format and as a hard copy. Recent times have shown that change is sometimes very much needed and we have embraced it fully. The format of the magazine remains the same, but we are excited to share a fresh new look with you all. We hope it will adequately capture the eventful, exciting, taxing and hopefully rewarding year 2022 has been.

Our thanks go out to the previous I*n Camera* editors, Tafadzwa and Aimee, who gave us valuable advice on how to embark on the enormous task. The support of the Law Society 2022 committee members, and most notably the guidance of Professor Glover in ensuring that the magazine meets the standards previous editions have set, is also acknowledged.

We hope the magazine will provide a fresh insight into the minds of young legal thinkers, that it will provide fond nostalgic memories to the final years someday when we are old and grey, and that it will continue to carry the legacy our forebears have left.

With that said, happy reading and enjoy!

THE YEAR IN CAMERA

MARKET DAY








PENULTIMATE AND FINAL YEAR MOOT

INTERNAL MOOT

MEET AND GREET

BOWMANS SHOWCASE

ANNUAL GENERAL MEETING

LAURENCE JUMA DEBATE IN LAW










LAW SOCIETY BALL

LAW SOCIETY BALL

Law Faculty report

By Professor Laurence Juma

Dean
Faculty of Law
28 September 2022

The past year has been one of readjustment. The measures that had been put in place to contain the COVID-19 pandemic were eased and the faculty welcomed students back to face-to-face lectures at the beginning of the year. In the first semester of 2022, all lectures in the penultimate and final year classes were face to face. There were challenges with the Legal Theory classes because of the room capacity restrictions. However, those restrictions were removed towards the end of the first semester and face-to-face lectures resumed in the second semester. Both staff and students faced some challenges in readjusting to the pre-COVID-19 situation. Mental health and other challenges made it difficult for some of our students to cope with the academic demands. The law faculty community must however be commended for the efforts they have made thus far to ensure that all our programmes both academic and extracurricular are back on track. For example, we had very successful internal moots both for the penultimate and final year students. The excitement of oral arguments were evident. Our student societies were vibrant with activities through out the year. The Law Market Day and the LLBraai were equally exciting and very successful. On the staff side, things were equally exciting. There were research breakthroughs, attendance of local and international conferences and achievements of higher qualifications. There are developments within the university of which the faculty has been a part. The recently concluded discussions around the university IDP and the CHE quality review have all been very taxing. Staff and students of the faculty contributed significantly to these discussions.

If there is one thing that the COVID 19 experience has taught us is the need to be flexible and embrace change. It has also revealed the existential reality that life is impermanent and always in flux. Thus, as a faculty, we must commit to improving all what we do and in supporting the three pillars of our university (community engagement, research and teaching and learning), while at the same time ensuring that our students are given the best possible

opportunity to succeed. We must embrace social justice as our responsibility and commit to making transformation an integral part of our work, in the classes we teach, in the advocacy work we undertake (both at the faculty and in the Law Clinic), in the scholarship we produce, in the decisions we make, and in our everyday interactions within the faculty and in the university at large. Our transformation agenda will not be meaningful if it does not take on board issues of mental health, respect for integrity of all people, and, most importantly, dedicating ourselves more consciously to the mission of creating a more just world. These commitments should be followed by concrete and affirmative steps, as is already evident in the IDP process.

We should move into 2023 with a measure of optimism.

GRADUATION AND AWARDS

On 6 April 2022, 66 students graduated with LLB-degrees from the Faculty.

Two LLM-candidates graduated at the ceremony with degree by thesis:

- **MALAHLEKA, Mthuthukisi**, LLB (UNISA) LLM (UP), in Law, in the Faculty of Law. Degree by thesis. Thesis: The regulation of privacy on cloud computing services in terms of the Protection of Personal Information Act 4 of 2013. Supervisor: Ms TN Mashinini.
- **NDYULO, Lisa Neliswa Latima**, BA, LLB (Rhodes), in Law, **with distinction**, in the Faculty of Law. Degree by thesis. Thesis: Protecting the right to identity against catfishing. Supervisor: Ms TN Mashinini.

20 final year students (30% of our 66 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). The following individual prizes were awarded to the final year LLB class of 2021:

- **Brian Peckham Memorial Prize:** Best student in Environmental Law: **Francis Makkink**
- **ENS Africa Prize:** Best student in Labour Law: **Francis Makkink**
- **Lexis Nexis Book Prize:** Internal book prize for Moot winner(s) in the Final Year: **Siphesihle January and Lineo Kekana**
- **Juta Law Prize:** Best final year LLB student, based on results over penultimate and final year LLB: **Francis Makkink**
- **Mbusowemvelo Mtshali Ethics Law Prize:** Best student in Legal Ethics and Professional Responsibility: **Hugh Harnett**
- **R G McKerron Memorial Prize:** Best student in Law of Delict: **Hugh Harnett**
- **Spoor & Fisher Prize:** Best student in Intellectual Property (Patents & Copyright): **Francis Makkink**
- **Phatshoane Henney Incorporated medals:** Awarded to students who obtain their LLB degrees with distinction: **Francis Makkink, Hugh Harnett and Christopher Tobaiwa**
- **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: **Thabisani Khumalo**

October 2022 Graduation

One LLM student graduated in October 2022. **TSELE, Michael**, LLB (Rhodes). Degree by thesis. Thesis: "On Legal Expressivism, Incorporeal Injuries and the Equal protection Clause: An Analysis through the lens of the Civil Union Act". Supervisor: Prof H Kruuse.

LLB intake 2022

47 students accepted offers into first-year LLB and 49 students accepted offers into LLB penultimate year this year, joining 20 students in the four-year LLB stream in the penultimate year. As in years before, the preference of our students is clear: 71% of our law students choose the five-year stream, entering the LLB only after completing a first undergraduate degree.

Postgraduate students

The number of postgraduate students in the Faculty is increasing steadily, with a total of sixteen LLM candidates and three PhD students registered for postgraduate studies for 2022.

STUDENT NEWS AND ACTIVITIES

Well done to our 2021 Top Students Francis Makkink, Hugh Harnett and Christopher Tobaiwa. See *Without Prejudice* https://www.withoutprejudice.co.za/free/article/7548/view

Two of our LLM students participated in the Southern African Law Teachers Association Conference, held at Fort Hare University in July 2022: M Malahleka "Poked by the COVID-19 pandemic on cloud computing services: What went wrong with POPIA?", and L Ndyulo "Addressing catfishing: A comparative analysis of South African and US legal interventions against online impersonation".

MOOT COURT AND MOCK TRIAL PROGRAMME AND COMPETITIONS

Internal: Final year

In March 2022 the LLB final-year class participated in the annual Moot Competition. The final round was held on 31 March at the Faculty of Education's Big Lecture Theatre Complex where Sthandwa Khuzwayo and Thobani Ndebele were announced as the joint winners of the competition. All students had to prepare heads of argument and argue whether a cost order amounts to an order for maintenance *pendente lite* which could be deducted from a pension fund. Cameron Hardy, Nathan Heggie, Thobani Ndebele and Sthandwa Khuzwayo progressed from the preliminary rounds to the final. They presented compelling and thought-provoking arguments which thoroughly impressed the judges. Sthandwa and Thobani's oral presentation ultimately swayed the bench. The competition was adjudicated by Judge Avinash Govindjee from the Makhanda High Court with the assistance of Messrs Leo Vaccaro from De Jager Lorden Attorneys and Shaun Bergover from the Rhodes University Law Clinic.

Despite minor venue allocation challenges and unpredictable weather conditions, the entire event went smoothly and culminated in a cocktail function and award ceremony which was enjoyed by all. We are grateful for all students and staff (both academic and admin) who worked tirelessly to ensure that the preliminary and final rounds were a success.

Penultimate Year

The facts and the moot problem were made available to students on 11 July 2022. They chose partners and, based on a random allocation of sides, they prepared heads of arguments which were submitted on 29 July 2022. The markers, Mr Craig Renaud and Ms Yolanda Ndamase, did an excellent job. They ensured that the heads were marked promptly. They also provided detailed comments to students which left students with no complaints regarding the marks awarded. The four judges, Mrs Sarah Driver, Ms Nicolene Nxumalo, Mr Shuaib Rahim and Mr Hugh Harnett, sat through the preliminary rounds between 1 and 5 August 2022. They always showed up for the rounds on time and submitted the mark and feedback sheets in time for the marks to be compiled. Prof. Kruuse and Prof. Van Coller, despite being in the background, were always present to offer guidance as and when the coordinator needed it. The marks for the heads and oral argument were compiled and the top four students were chosen to take part in the moot final that took place in the Moot Room on the evening of 17th August 2022. Vuya Nako and Tapiwa Madzima represented the applicant while Blessings Chinganga and Franciscus Crouse represented the respondent. The parties grappled with the issue of how far media coverage should go in as far as court proceedings are concerned. Both parties advanced interesting arguments in a hearing adjudicated upon by three judges. Judge Thandi Norman presided over the hearing, along with Magistrate Jaylynne Hillier and Advocate Nicola Molony. Judgement was delivered in favour of the respondent. This was followed by the announcement of the top mootist at a cocktail function that was well attended by both staff and students. Judge Norman announced Blessings Chinganga as the top mootist. She, however, alluded to the excellent performance by the other three mootists. In a separate email sent to the

moot coordinator Prof. Lubaale, Judge Norman wrote: "Thank you very much for inviting me to assist with the moot and for your hospitality. I enjoyed engaging with the brilliant lawyers that you are grooming. They have a bright future ahead of them!"

STAFF NEWS

The Faculty welcomed back **Ms Yolani Ndamase** and **Prof Charlene Lubaale** who had been on official leave. **Prof Lubaale** was on maternity leave while **Ms Ndamase** was on a Fulbright research visit to the USA. The faculty also welcomed one new lecturer, **Ms Nicholene Nxumalo,** who joined us from the Nelson Mandela University Faculty of Law**.**

At the same time, **Prof H Kruuse** proceeded on academic leave for a year as from July 2022.

RESEARCH

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

Books, chapters and monographs

Book

Lubaale, EC: Dyani-Mhango Ntombizozuko, *National Accountability for International Crimes in Africa* (2022 Springer Switzerland), ISBN-13: 978-3030880439.

Book chapter

Mathiba G: 'The Constitutionality of the COVID-19 Moratorium on Evic-tions in South Africa' in Boggen-poel Z et al.(eds) *Property and Pan-demics: Property Law Responses to COVID-19*: Juta (2021) 208-228.

Lubaale, EC, Dyani-Mhango, Ntombizozuko: "Introduction: Relevance of Debates on National Accountability for International Crimes in Africa" 1-28.

Lubaale, EC, Carkeek, James: "African Restorative Justice Approaches as Complementarity: The Case of Libya" 207-245.

Lubbaale, EC: "Now Available but Still Not Accessible to the ICC: Bashir and Africa's Politics" 247-285.

Lubaale EC, Dyani-Mhango, Ntombizozuko: "Conclusion: Where to, Now?" 639-646.

Van Coller EH, Idowu Akinloye**:** 'Religion, Law and COVID-19 in South Africa' was published by Routledge in 2022 in: Fortune Sibanda, Tenson Muyambo and Ezra Chitando (eds) *Religion and the COVID-19 Pandemic in Southern Africa*.

Van Coller, EH: 2022, "Chapter 10 - Religious Freedom in South Africa" in Md. Jahid Hossain Bhuiyan and Ann Black ed., *Religious Freedom in Secular States: A 21st Century Perspective* (2022), 217 – 233.

Van Coller, EH: 'Administrative Law' in *Yearbook of South African Law* (2022) 72-100. Juta, South Africa. ISBN: 978 1 48513 911 9.

Van Coller, EH: 'Medical Treatment and Religious Objections in South Africa: The Best Interest of the Child' in M. Christian Green and Faith Kabata (eds) *Law, Religion and the Family in Africa* (2022) 171 – 185.

Journal research publications

Mathiba G: "Corruption in Land Administration and Governance: A Hurdle to Transi-tional Justice in the Post- Apartheid South Africa?" (2021) 42(3) *Obiter* 561-579.

Research papers presented at academic/scientific conferences

Campbell J: "The role of preventative lawyering and therapeutic jurisprudence in law clinic practice and teaching" A paper presented at a Legal Ethics / Ethics in Law Conference (Stellenbosch University, November 2021).

Campbell J: "The role of preventative lawyering and therapeutic jurisprudence in the practice and teaching of alternative dispute resolution" A paper presented at the Alternative Dispute Resolution Colloquium (North West University, November 2021).

Juma L: "Constitutional change and rule of law in Kenya: Whither thither?" A paper presented at the International Conference on "Leadership and Power in Africa in the Past and the Present: Studies in Russia, Tanzania and Beyond", Dar es Salaam, Tanzania, on 1-4 March 2022.

Kruuse, H: 'Attended the International Legal Ethics Conference hosted at UCLA, Los Angeles from 13-15 August 2022. She presented a co-authored paper with her erstwhile colleague, Dr Justin Ramages titled: "Lawyering in a transformative legal system: Ethical judgment in South African Broad-Based Black Economic Empowerment (BBBEE) transactions."

Kruuse H: "Litigating customary marriage disputes: The need to move away from an adversarial approach" A paper presented at the Acta Juridica Symposium honouring Prof Chuma Himonga's work in customary law, 20-21 September 2021, UCT (presented online). The paper has been submitted and will be published in the 2023 Acta Juridica

Kruuse H: "Recognising form through function within the context of integrating the bride requirement in customary marriages" A paper presented at the Centre for Legal Integration in Africa's inaugural symposium: The future of legal orders in Africa, UWC (co-presented with Prof Lea Mwambene) in October 2021.

Lubaale, EC: "Insights from international criminal law on enhancing accountability for gender-based crimes amidst the limits of the double criminality principle" a paper presented at the South African Law Teachers Conference on 12 July 2022.

Lefenya, K & **Mathiba, G:** "Enhancing Accountability for Environmental Damage in South Africa, Zimbabwe, Mozambique and Swaziland: Towards Environmental Justice" at the Environmental Law Association (EIA) Annual Conference, 15-18 September 2021.

Mathiba, G: "The Potential of Asset Recovery in Deterring Corruption & Other Transnational Crimes: South African Perspective with insights from *Bobroff v NDPP* [2021]" at the 4th International Conference on the Right to Development: "Right to Development and Illicit Financial Flows from Africa" 1-2 November 2021, Centre for Human Rights, UFS.

Mathiba, G: "Critical Assessment of the Whistleblower Protection in the AU Convention on Preventing and Combating Corruption: South Africa in Context" at the 5th Annual Conference of the Law and Development Network: "Beyond the Crisis: Challenges and Opportunities for Law and Development" 24-26 November 2021, NMU

Mashinini, N: "The role of consent in the processing of personal data on social media" a paper presented at the Southern African Law Teachers Conference on 14 July 2022 at the University of Fort Hare.

Mashinini, N, "The gap between self-regulation and content regulation: A case of image rights violations on social media". A paper presented at the International Human Rights Conference on Human Trafficking, Social Media and AI Regulation and Climate Justice on 28 July in Cairo, Egypt.

Other involvement

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

Kruuse H: Participated as a discussant in two inter-jurisdictional panels, the first titled: "Iterations of Mandatory Pro Bono: Definitions, Causes, Implementations, and Impacts" (chaired by Prof Whalen-Bridge, National University of Singapore) and "Studies of Law Students Values in Emerging and Transitional Economies" (chaired by Prof Richard Wu, University of Hong Kong). Helen was also elected for another term as one of the Directors of the Board of the International Association of Legal Ethics.

Kruuse H: Attended the Legal Ethics / Ethics in Law Conference (Stellenbosch University, November 2021) and acted as an organiser and chair for the panel on "Ethics and Legal Education."

Glover, G: Attended the annual Private Law and Social Justice Conference, hosted by Nelson Mandela University, 29-30 August 2022. He also gave his professorial Inaugural lecture on 7 September 2022: Title - "'Please Call Me' Agent. The Taxonomy of Agency Law in South Africa."

Rahim, S: Participated in the PUAT Project: Erasmus + and European Commission Project in Athens (August 2022) with the Universities of Athens and Crete with South African partner Universities of Rhodes University, UKZN and

Venda. At the virtual conference hosted by Fredericks University in Crete "Innovative practices in teaching and learning for building a sustainable and just society", he presented a paper on "How the SDGs speak to the Four Pillars of Sustainability: Moving from responsive to proactive and sustainable practices in internal trade law."

Prof H Kruuse received the 2022 Faculty of Law Research Award. The award was announced at the Faculty Graduation Function on 6 April 2022 The Faculty awards an annual prize for the "Faculty of Law Researcher of the Year" to encourage staff in their research endeavours and to give formal recognition to those members of staff who have contributed in the research area of academic excellence. During the challenging last 2 years of the Covid-19 pandemic, academic staff had to adjust to the changed circumstances, online teaching challenges, and limited time for research. Despite all of this, she still managed to excel on the research front through her research outputs and conference participation.

Prof Kruuse has written several articles and book chapters, with a specific focus on Legal Ethics and Professional Responsibility, lawyers and access to justice. Professor Kruuse has also presented a number of conference papers, often by invitation, ranging from issues of ethics, legal education, and customary marriage disputes. She is also the Review Editor for the *South African Law Journal*.

Prof Kruuse, H: Acted as a Panellist for a panel discussion at the Law and Society Association Con-ference Race, Reckoning and Remedy (virtual/Lisbon) 13-16 July 2022: "Professional Para-doxes: Access to Justice and Bar Associations" (Chaired by Prof Helena Whalen-Bridge, University of Singapore).

The faculty had a very successful postgraduate supervision roundtable in August 2022. Some of the recommendations that emerged from the roundtable include the need for the Faculty to consider hosting postgraduate seminar with presentations from postgraduate students (similar to the LLB research essay presentations), and the call for the faculty to resume postgraduate collaborations with NMU/Fort Hare.

COMMUNITY ENGAGEMENT

Law Clinic[1]

Following the lifting of lockdown restrictions this year, the Law Clinic has been able to escalate the delivery of legal services to the indigent community of Makhanda and surrounding areas. The demand for free legal services never ceases, and the Law Clinic continues to fulfil an important need in the local community. Law Clinic staff and students still conduct consultations within the premises by remote as a continued precautionary measure.

Staffing

Law Clinic attorneys ("legal practitioners") in 2022 are Mr Shaun Bergover, Prof Jonathan Campbell, Ms Sizi Yuze, Mr Ndumiso Khumalo and Ms Siya Makunga (who replaced Mr Ryan McDonald at the end of 2021). Very importantly, there has been adequate supervisory capacity of law students.

Candidate attorneys (and law student mentors) in 2022 are Ms Siphokazi Mlindazwe (LLB, UCT), Mr Mhleli Khomo (LLB, Rhodes) and Ms Aphiwe Nonyukela (LLB, Rhodes).

Clinical legal education

The Legal Practice course reverted to being based upon the live client experience this year, which significantly enhanced student experience and learning once more. With hindsight, we now know that the absence of this in-person experience resulted in a much-reduced learning opportunity for students in the Legal Practice course during 2020 and 2021, when the course was taught largely via simulations.

During the second semester we re-introduced our student volunteer programmes. Five student mentors (who completed the course in the first semester) and ten Legal Theory 2 reception volunteers provided an invaluable service at the Clinic, and in the process gained some practical exposure.

During the last year, a total of 14 students worked as vac interns as part of the Clinic's vac internship programme. All of these students had been denied the opportunity of working at the Law Clinic during 2020 and 2021, so they appreciated the opportunity. They were:

- December 2021-January 2022 vacation: Thulani Mangxa, Mhleli Khomo, Devedine Armstrong, Caitlin Stoltz, Mpokiseng Morengoa and Aphiwe Nonyukela.
- June-July 2022 vacation: Mr Chuma-Nande Gora, Ms Sacree Kabeya, Mr Washington Mutaringe, Mr Laone Setshedi and Ms Xolelwa Mkula.
- August 2022 short vacation: Fezekile Dhlamini, Cherryl Joubert, Samkelisiwe Makhanye and Siseko Benya.

Community education

During 2022 we continued to write monthly articles for *Grocott's Mail*, this year mostly relating to the consumer credit law, with Prof Glover providing invaluable assistance as editor. Nine articles have been published to date with a further three articles still to follow this year.

In addition, the Clinic conducts regular radio broadcasts on five radio stations, namely (area of listenership indicated in brackets):

- Radio Grahamstown (Makhanda and surrounding area)
- Rhodes Music Radio (Makhanda and surrounding area)
- Kingfisher FM (Gqeberha, Kariega, Despatch, Jeffreys Bay, Cape St Francis, Oyster Bay, St Francis Bay, Colchester, Addo, Hankey, Patensie, Kirkwood, Paterson, and Sundays

1 The report was prepared by Prof Jonathan Campbell, the Director of the Rhodes Law Clinic.

River)
- Ndlambe FM (Alexandria, Bathurst, Boknes/ Cannon Rocks, Bushmans River, Kenton-on-Sea, Port Alfred, Seafield).
- Lukhanji FM: Komani (Queenstown, Ezibeleni, Whittlesea, Tarkastad, and Sterkstroom).

Advice Office Programme

The first round of advice office visits in February 2022 were conducted virtually as in 2020 and 2021. Over a four-week period in June-July 2022, Law Clinic staff conducted physical, in-person visits to about 35 paralegal advice offices in four different circuits, namely: Karoo; Southern; North-East Cape; and former Transkei. A team comprising an attorney, a candidate attorney and a support staff member conducts each visit. These visits will be repeated in October-November 2022.

Law Clinic attorneys are in the process of finalising a paralegal manual on domestic and gender-based violence, together with Ms Masimbulele Buso, Rhodes University's Manager: Anti-Harassment and Discrimination, in preparation for a one-week paralegal course on the subject to be offered in Makhanda in November 2022.

FACULTY EVENTS

The faculty hosted several events in the past year.

LLB Orientation

This year the LLB orientation was face to face. As usual, the penultimate year students were introduced to a whole range of new courses by the individual lecturers. The students enjoyed the stimulating lecture by Prof Glover on study methods, research and problem solving. Students were also guided on faculty rules.

Faculty opening

The guest speaker for this years faculty opening was Mr Mbuso Mtshali, an alumnus of the Rhodes University Law Faculty and the Head of Corporate Governance and Company Secretariate of Sanlam. He spoke to the students about leadership and how Rhodes education University prepared him for leadership. His experiences during student days at Rhodes shaped his sense of community, and particularly his desire to give back to the Rhodes community. It is from Rhodes that he became aware of the essential charitable role that lawyers play in this regard. Mr Mshali encouraged LLB students to be useful leaders in society. In his view, leadership had nothing to do with age and that one could take up leadership at any age. During the event he also presented awards and prizes to students who had performed well in their studies in the previous year.

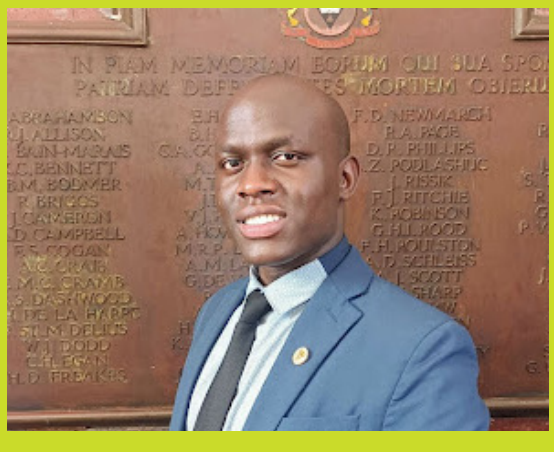
Visiting lecturers

In July the faculty hosted Professor Oluyemisi Bamgbose, who is professor of law and recently appointed DVC: Research at the University of Ibadan. Prof Bamgbose was visiting Rhodes as part of the ARUA partnership programme. Her talk was on alternative dispute resolution at the international level.

CONCLUSION AND PROSPECTS

The faculty is looking forward to a more vibrant future given that the COVID-19 restrictions are behind us. It has taken a lot of readjustment and we have overcome many challenges. All we can hope for is progress. We should be able to build on the lessons of COVID-19 and perform even better in the areas of teaching and learning, research and community engagement.

I wish all students and staff a very prosperous 2023.



2022

Law Society report

By Thembelani Ncube

Chairperson, 2022
Rhodes Law Society

The 2022 academic year has been a tumultuous and challenging one, especially in relation to the Rhodes University Law Society (the Law Society) and its activities. Transitioning from the COVID-19 pandemic where almost everything was virtual and online, in-person events and activities were difficult. The Law Society has not been as engaged in the last two years as it usually is due to the pandemic. Therefore, there was a higher burden on the 2022 committee to bring back the spirit and the vibrancy of the Law Society. In this regard, the 2022 committee deserves a special thanks for their hard work and a special mention in this report: Thato Mackade (Vice Chairperson), Tebogo Tladi (Secretary), Megan Goliath (Treasurer), Tiisetso Nhlapo (Public Relations Officer), Thanyelani Ndlovu and Paulina Quartey (*In Camera* editors), Donne' van der Westhuizen (Social Awareness Officer) and Jason Shephard (Moot Club Chairperson).

Finally, with the challenges that the committee faced, where we could not easily consult the previous committees on what is usually done in preparation for certain events, I would like to give a very special appreciation and thanks to Mrs F Mwellie who was hands-on and very engaged in assisting the society this year. We could not have done it without her guidance, assistance and advice.

SUBSCRIPTIONS

This year's societies subscription, Extravaganza and Societies sign-ups evening, which are SRC-organised events where students are encourage to sign up for the Law Society, were successful ones. It was challenging in that many students had lost interest in society activities because of the lack of engagement caused by the COVID-19 pandemic. However, even so, approximately 320 students signed up for Law Soc, which is a great success.

EVENTS

Law Market Day

The Law Society, in collaboration with the Rhodes University Career Centre and Law Faculty, hosted an annual Market Day on 18 March 2022. The Market Day is an excellent opportunity for law firms to market themselves and to form relationships with Rhodes University law students. It is also an excellent opportunity for law students to network with the law firms, to secure interviews for bursaries, vacation programmes and articles, and to also ask any questions regarding the niche in which they would like to specialise. There were some law firms that showed an interest in Market Day but could not come in person to the event, so online presentations were conducted by those law firms, which also proved successful. One of the key roles the Law Society committee members play is to ensure that they build solid connections with contacts from various firms, businesses and institutions in order to convince them to come to our Market Day each year and to consider our students for employment. This year, the committee did just that, and we had a good number of prospective employers come to Grahamstown to present themselves and the opportunities they can offer to our students. I am grateful to every firm that came and interacted with the students. In particular, I would like to extend my appreciation to Baker McKenzie, Bowmans and Webber Wentzel, who sponsored the event and contributed towards making the event a success

The Market Day took place on the St Peter's lawns at the Law Faculty. Market Day student assistants helped with the setting up of each firm's individual stand. Everyone who attended Market Day was required to observe Covid-19 regulations and protocols (i.e. sanitising, wearing a face mask and social distancing), and to follow the guidelines provided for the event. All in all, the event was a successful one and special thanks goes to Adv C Renaud, who assisted and guided the Committee throughout the planning and preparation work.

Law Society Meet and Greet

This event was held in the second term on 22 April 2022 at the Steve Biko Dining Hall. The first purpose of this "Meet and Greet" was for all the new members of the Society to be formally introduced to the rest of the Law Society members and the 2022 Committee. The second purpose of the event, and as the tradition goes, is for law students to come together in a social setting and get to build connections with students they would not otherwise have met in order to foster an environment which is conducive to building good friendships. Lastly, it was intended to be a start of fostering a kindred and collegiate spirit amongst students at Rhodes University. We provided food, refreshments, entertainment and a platform for discussion to students.

Annual General Meeting

The Law Society hosted its Annual General Meeting on the evening of Thursday 1 September 2022 at The Victoria Hotel. At this meeting we reflected on the events we had held in the first semester, outlined the events to follow, and held votes for constitutional amendments. Thereafter, the candidates who had applied to be in the 2023 committee were interviewed by the 2022 committee, with a few additional questions from the floor – grazzle style. The committee of 2023 was announced the following week.

Moot Club

Moot Club has been very busy this semester. Moot Club successfully participated in this year's Kate O'Regan moot, facilitated by the University of Cape Town's Moot Society. This was an accomplishment for Rhodes University and its law students as the teams appeared before heavyweight Justices and legal titans such as Justice Kate O'Regan herself, Deputy Chief Justice Dikgang Moseneke, Justice Kollapen, and Professor Pierre de Vos, amongst others. The participants in this competition can hold their heads up high in that they performed with enthusiasm and professionalism.

The Moot Club also ran the annual Internal Moot Court Competition, sponsored by Webber Wentzel. The Moot was open to all law students,

from first-year Legal Theory to final-year LLB, and was set to allow students the opportunity to research an area of law foreign to them. Moreover, it gave students the ability to practise their trial advocacy skills and court drafting. It was an exciting and successful moot, with various judges from the Law Faculty and Webber Wentzel assisting in adjudication.

LJ Debate in Law

The RU Law Society, Ntuthuko Legal Activism, and the RU Black Lawyers Association collaborated to present the 2022 first edition of the Laurence Juma Debate in Law. This was an unprecedented joint event of the three law societies that we hope will be a legacy for many years to come. The competition is essentially in honour of the current Dean of Law, Prof. Juma, and more significantly because round tables are close to the heart of Prof. Juma. We saw no better person after whom to name the competition.

This competition took place on 28 September 2022, and gave law students an opportunity to sit on a round table with experienced legal minds in the legal fraternity to debate a contemporary topical issue in law. There were four adjudicators, and six students made up the panel (three students FOR and three students AGAINST). Adjudicators: Prof L Juma, Adv Asanda Koliti, Adv Sarah Sephton, and Mr Siyabonga Malaza. Panellists: Arguments FOR - Paulina Quartey, Charmaine Ncube and Bongani Mpande. Arguments AGAINST - Munashe Rafomoyo, Washington Mutaringe and Sive Sontsele.

The winning team was the team arguing FOR the motion.

Best orator: Charmaine Ncube
2nd best orator: Bongani Mpande
Best research: Paulina Quartey
Team player: Sive Sontsele
Best presentation: Sive Sontsele

This year's first edition featured Immigration Law and Constitutional Law, examining a set of facts which resembled the Constitutional Court's decision in *Rafoneke and Others v Minister of Justice and Correctional Services and Others* [2022] ZACC 29 (2 August 2022).

Law Ball

The Annual Law Ball is an event specially curated to celebrate our LLB final-year students. It functions as a celebration of the year and a passing of administration from the old committee to the new. This is the most expensive event that we run and some of the costs included are: venue hire, decorations, sound, catering and the hosting of a prominent guest speaker, this year's guest speaker being Judge Avinash Govindjee. This year's Law Ball took place on 1 October 2022 at Belmont Golf Course under the theme: "The Phantom of the Opera". The Law Ball was attended by members of staff and students alike and special guests. Our final-year students were honoured with gifts from the society. This was also a splendid opportunity for students to let their hair down before examinations.

The Law Society works hand-in-hand with the law faculty to ensure that the year is successful and without your commitment to the Society we would not be able to do that. I would also like to say thank you, with special mention to Professor Glover – for his assistance and guidance with the compiling and editing of *In Camera* magazine. To the Dean of Law, Prof. Juma, and the Deputy Dean of Law, Prof. Van Coller, thank you for your effortless assistance throughout the year in ensuring that our work is a success. Thank you also to Advocate Renaud, the Law Society's mentor, for always providing such level-headed counsel in times of crisis – we are lucky to have such an experienced practitioner's guidance. A special mention also goes to Ms Mwellie, who has gone above and beyond to assist the Law Society's initiatives, and Mrs Comley, who was always willing to help, on top of the workload that she has on her desk. To the members of staff, not only at the Law Faculty, but at Rhodes University at large, we say thank you for being part of making 2022 a successful year for the Law Society.

2022

Black Lawyers Association report

By Mila Ralarala

Deputy Secretary
Black Lawyers Association

The Black Lawyers Association student chapter exists to empower upcoming legal professionals. It stands by its motto "Transformation and Justice for All". The common misconception that it is a society only for back people is not at all true. The name has a history stretching back to the 1970s. Our main objective is to foster an environment of dynamic future lawyers from all walks of life who are cognizant and well aware of what is going on in the legal field, locally and internationally.

EVENTS HELD IN 2022

Annual colloquium

The Rhodes University BLA takes delight in hosting a colloquium every year. This event is regarded as the most crucial event for the society, where law students and legal practitioners come together to discuss various issues pertaining to the Law profession. This year's guest was Ms Rorisang Mzozoyana, a Rhodes University graduate, who gave a presentation on "Navigating the social, financial and mental challenges of being a legal practitioner". Her presentation outlined her experiences working in the law field, recounted a few stories of her former colleagues, and gave some statistics to back her presentation up. She also outlined some of the changes that have taken place in the legal profession as a result of the shift to technology and how the students can ensure that their law degrees are useful in this day and age. It was an interactive session where students got to ask her questions. The student panellists comprised Samkelisiwe Makhanye and Tafadzwa Mavindidze. Some guests from the law faculty included the Dean, Prof. L Juma; Dr Mashini, who was the advisor of the BLA; and Miss Mguga, who was the programme director.

Career Webinar

This was part of our yearly alternative careers fair called "Breaking the Mould" where we highlight young legal professionals who have taken alternative career paths. The focus of this year's event was to provide employment opportunities abroad for law students. We were joined by Mr Mutugi Mutegi, an advocate and certified company secretary from Bowmans based in Kenya. The event also had a special installment for foreign students who wanted to know about readjusting back home after completing their studies in South Africa.

Meet and Greet

We started semester two off with Meet and Greet on 22 July 2022 at the Student Union. This was an opportunity for the members and executive members to socialise over food, drinks, music and games.

Other events

The planned Women's Day event and Community Engagement event were hindered by some logistical challenges. We hope that these events can happen in 2023. The BLA took pride in being part of the organising of the first ever LJ Debate in Law, in honour of the current Dean of the Law Faculty, Prof. Juma.

Law students were given the opportunity to debate on a legal issue. This year's topic was on Immigration and Constitutional. Six students were part of the debate and the judging panel consisted of Prof. Juma himself and practitioners from town.

AGM & 2023 Committee elections

The AGM was held on 29 September 2022. This is where the executive committee for 2023 was elected. The candidates were interviewed by the 2022 committee on 27 September 2022 via Zoom.

The executive would like to extend a word of gratitude to all the students who signed up and supported our events. We would also like to thank the other two law societies in the University, the Law Society and Ntuthuko Legal Activism for their continued support. We look forward to more and more collaborations in the future. To our advisor, Dr Mashinini, we thank you for your wise counsel throughout the year.

To the Law Faculty, rea leboha.

2022

Ntuthuko Legal Activism report

By Penelope Qhawe Ntamo

Secretary
Ntuthuko Legal Activism

We all know that the pandemic affected normal university life as some may know it. As the world has returned to "normal", our society aimed to continue to develop our community's understanding and interaction with the law - which harks back to our society's name Ntuthuko which means 'progress' or 'development' in isiZulu.

SUBSCRIPTIONS

We are proud to announce that this year's subscription drive to encourage students to sign up was very successful, and approximately 135 students signed up. This was achieved with the aid of the Orientation Week Sports and Societies Extravaganza which was organised by the SRC and which was held on 18 February 2022.

EVENTS

The Meet and Greet

This particular event's main aim was to introduce the society and its executive committee to the attendees/new members and to provide greater detail of the society's plans for the year. The event took place at Gino's Italian Restaurant and we had Mr Shaun Bergover, who is an attorney, holder of an LLM degree in Environmental Law and a lecturer in the Law Faculty, as a guest speaker.

Human Rights Day Workshop

This was an interactive workshop seeking to educate and inform learners about the significance of human rights in the South African context. The session was held with Grade 7 learners from Oatland's Preparatory School, which is a public primary school in Makhanda. The Law Faculty conveyed their support of this workshop by giving the society free Constitutions which were distributed at the school.

The Law Faculty Opening

We were privileged to have been invited to assist at the Law Faculty Opening event which took place on 11 March which also doubled up as a prize-giving ceremony.

The Social

This was an interactive panel discussion aiming at informing and educating law students on prospective career paths they could follow after obtaining the Bachelor of Laws degree. The panelists consisted of Ms Cecile van Schalkwyk, Ms Akhona George, Adv Cameron Cordell and Ms Sacrée Kabeya.

COMMUNITY ENGAGEMENT

In the first semester a limited number of events could be hosted due to funding issues. However, there have been some projects which have been initiated and we developed contacts to enhance our engagement with the Makhanda community. The Community Engagement division of this society has been able to work with the Community Engagement Centre of Rhodes University. Having created this relationship with the centre meant that in future we will be able to be in touch with the many other community engagement centres which are in Makhanda, allowing us to interact more successfully with the community at large.

Advocate Rahim of the Law Faculty initiated a program called Street Law. This programme was warmly welcomed by the society. This is because we believe this will be a good opportunity for us to work with the community while giving the students an opportunity to deal with the law in practice. We are yet to see the project blossom; however, we have high expectations.

The society also planned to have a session with local schools in commemoration of Freedom Day. Plans were made in collaboration with the Community Engagement Centre were, however, postponed.

A project that has been successful thus far has been visits to a primary school found in Makhanda. This was a project where our committee members went to the school and had a "law lesson" with the learners. The content was simplified to cater for the understanding of the learners.

In essence, it has been quite a challenging year, and a very busy one at that, but which has turned out to be very successful.

2022

Moot Club report

By Jason Shephard

Chairperson
Moot Club

It has been a very busy, but very successful 2022 for the Law Society Moot Club. Moot Club has been actively involved in various moot court competitions throughout the year, both externally and internationally. The Club also hosted the 2nd edition of its Internal Moot Court Competition, sponsored by Webber Wentzel, which was a great success!

KATE O'REGAN INTERVARSITY MOOT

Moot Club participated in this year's Kate O'Regan Intervarsity Moot Court Competition, facilitated by the University of Cape Town's (UCT) Moot Society. This year's challenging topic surrounded the Russia-Ukraine war, and South Africa's abstention from voting to condemn Russia's attack against Ukraine at the United Nations General Assembly sitting in March 2022. The issue was therefore whether South Africa's resolution to abstain from voting in favour of the resolution was unconstitutional, irrational and unlawful.

In this competition, two teams from Rhodes made it to the semifinals of the competition. The participants were: Sithandwa Khuzwayo, Thanyelani Ndlovu, Sovash Chetty and Esethu Seholoba. This is an accomplishment for Rhodes University and its law students as the teams appeared before heavyweight Justices and legal titans such as Justice Kate O'Regan herself, Deputy Chief Justice Dikgang Moseneke, Justice Kollapen, and Professor Pierre de Vos, amongst others. The participants of this competition can hold their heads up high in that they performed with enthusiasm and in accordance with the highest standards of professionalism expected by Rhodes University.

INTERNAL MOOT COURT COMPETITION

sponsored by Webber Wentzel

The Moot Club also held the second edition of its annual Internal Moot Court Competition, sponsored by Webber Wentzel. This Moot Court Competition was open to all Law students, from students in Legal Theory 1, to final-year LLB students. It is therefore a great way to compete against friends and class mates, whilst learning the skills of trial advocacy.

This year's topic involved the removal of a director in terms of section 71 of the Companies Act, and whether shareholders of a company are required to provide reasons for removing a director. This particular topic required students to interpret and engage with the Companies Act, the audi principle, and the legislature's intention to determine whether shareholders are indeed required to furnish reasons for removal. At present, it needs mentioning that this question of law remains uncertain, and we await a decision from the Supreme Court of Appeal to clarify this area of our law.

The moot itself took place virtually on 24 September 2022, with six teams competing, and seven judges from across the country taking part. Ultimately, only one team could be crowned the winners of this year's internal moot, and the team that came out victorious were Team 8, comprising Sovash Chetty and Vuya Nako. A big congratulations to them for this achievement!

A special thanks goes to the Law Faculty staff and Webber Wentzel staff for availing themselves for this amazing experience for our participants. A warm thanks also goes to Webber Wentzel for their continued support and sponsorship, both for this particular moot court competition, and throughout the year. We could not have had such a successful year without them.

KOVSIE FIRST-YEAR MOOT COURT COMPETITION

The Moot Club is also involved in this year's 18th Annual Kovsie Moot Court Competition, facilitated by the University of the Free State (UFS). Moot Club will be working alongside Mr Bergover to assist in training two teams from Rhodes University to compete in the oral rounds held at the Supreme Court of Appeal in Bloemfontein in December. The topic this year concerns customary law and law of succession in the context of determining whether a "spouse" from a customary marriage may inherit in terms of the Intestate Succession Act despite a separate civil marriage having been concluded. This is an exciting topic for first-year students as it introduces them to customary law, family law, the law of succession and constitutional law. I am confident this year's moot will expose first-year students to the experiences and excitement of mooting. The oral rounds are set to take place on 6 December 2022 at the Supreme Court of Appeal.

We wish the two teams competing the very best of luck, and trust they will wave the Rhodes flag successfully.

JOHN H JACKSON INTERNATIONAL TRADE LAW MOOT

Finally, Moot Club has been actively involved in assisting Adv Shuaib Rahim from the Law Faculty with training the team representing Rhodes University at the 21st edition of the John H Jackson Moot Court Competition. The topic for the 2022 competition involves the manufacturing and distribution of Covid-19 vaccines in terms of the TRIPS agreement, and whether the destruction of shipments breaches Article 4 of the WTO Dispute Settlement Understanding, read with the Article XXIII of the General Agreement on Trade and Tariffs 1994.

The African rounds are set to take place in Nairobi, Kenya in 2023, and if Rhodes makes it to the top 4 in Africa, they will progress to the finals held Geneva, Switzerland in June 2023!

This year's team consists of Tapiwa Madzima (captain), Blessings Chinganya, Casparus Franciscus Crouse and Amanda Magodo. We wish our students the very best as they compete in the oral rounds in Nairobi, and have full confidence the team will progress to Geneva to take the title in June 2023.

CLOSING REMARKS

This year we have appointed the New Moot Club Chairperson for 2023, and introduced a new position within the Law Society, the Vice Moot Club Chairperson. We wish the incoming Chairperson, Thanyelani Ndlovu and her Vice-Chairperson, Nyiko Shitlhavani a successful and fruitful tenure as they continue to raise Moot Club to new heights in 2023.

Thank you once more to the Law Faculty, and in particular Professor Helena Van Coller, for assisting in coordinating this year's Faculty moot programme. Moot Club would not have been as functional without her continued assistance and guidance. Thank you!

Again, a massive thank you goes to Webber Wentzel, and in particular Siyurie Moodly for all the support she has given Moot Club this year. We hope to continue this successful relationship for 2023 and beyond.

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A comparison of the African and western perspectives on human rights: A critical analysis of Cobbah's "African Values and the Human Rights Debate: An African perspective."

Portia Davies: Final-year LLB

Introduction

My objective is to provide its reader with a critique of J A M Cobbah's article "African values and the human rights debate: an African perspective". In doing so, the article aims to expand upon Cobbah's argument that the Westerner's world view in terms of human rights is not superior to the African's world view in this regard. It will discuss the relevant points that Cobbah makes to prove this argument and, furthermore, will lend support to this argument by referring to three different articles on the subject. Ultimately, this legal opinion will argue that Cobbah is correct in suggesting that African and non-African scholars alike should approach human rights along a cross-cultural path. This legal opinion will then turn to consider what is known as the "dynamic paradigm". In doing so, it will suggest that although it is necessary to approach human rights along a cross-cultural path, this must be done in such a way to ensure that the human rights infringements characteristic of the African's world view and/or culture is discouraged. This will be expanded upon below.

The Westerner's world view is not superior to the African's world view

The flaws in the Westerner's world view

To begin with, it is of crucial importance to highlight that Cobbah attempts to prove that the Westerner's world view is not superior to the African's world view by highlighting the flaws in the Westerner's world view. In doing so, he relies, firstly, on Kent's suggestion that the Westerner's world view is that concern for the less fortunate in society falls under the heading of charity and, thus, has nothing to do with rights.[1] Kent continues by emphasising how this distinction ensures the individual is insulated from group responsibility for the needy.[2]

Viljoen, in support of this argument, states that the Western-dominated discourse privileges the individual.[3] He continues by proposing that the Western human rights instruments postulate an autonomous individual who is prepared to dissociate from others.[4] Additionally, Cobbah, in this regard, states that the Westerner's world view denies the existence of the disadvantaged rights to economic sustenance and society's obligation to satisfy this right.[5]

1 J A M Cobbah "African Values and Human Rights Debate: An African Perspective" (1987) *Human Rights Quarterly* 309 at 311.
2 Cobbah (1987) *HUM RTS Q* 311.
3 F Viljoen "Africa's Contribution towards the development of International Human Rights and Humanitarian Law" 2001 *African Human Rights Law Journal* 18 at 20.
4 Viljoen 2001 *AHRLJ* 20.
5 Cobbah (1987) *HUM RTS Q* 311.

Cobbah, in support of this contention, highlights how the evolution of liberalism has undermined the vitality of certain groups of people.[6] He does this by asking his reader two fundamental questions. Firstly, how, in terms of the Westerner's world view, do we deal with situations in which some people are disadvantaged?[7] Secondly, how do we deal with situations in which some cannot compete because of physical and/or mental disabilities?[8] There is simply no answer to these questions in the Westerner's world view – as per Cobbah's argument.[9]

Rather, as Cobbah suggests, the answer to these questions is found in the African world view.[10] It is necessary, in his opinion, to recognise the inescapably collective nature of our society.[11] He further reinforces this suggestion, at a later stage in his article, by describing how the history of liberalism is filled with examples of groups of individuals who have been systematically excluded from the full benefit of their individual rights.[12] In providing an example, he points out that Westerners have failed to provide the equality and prosperity for women and African Americans that many hoped for.[13]

The effectiveness of an African's world view

Cobbah's article then turns to consider the effectiveness of the African's worldview in terms of human rights. He highlights that an African's worldview is concerned with the survival of the community rather than survival of the fittest.[14] Furthermore, he highlights that the African world view is not grounded in self-interest but rather in social learning and collective survival.[15]

Moreover, Cobbah suggests that, in terms of an African's world view, care for the disadvantaged is ensured through sharing.[16] Furthermore, he points out that reciprocity of generosity is expected in an African's world view.[17] He proves this point by providing the example of the busy mother who can always rely on the entire community for support.[18] To add to this, Cobbah highlights that an African's world view guarantees social security and, at least, minimum economic rights.[19]

Kent, in support of Cobbah's argument, indicates that the African sense of community obligation, which goes beyond charity, is what is needed to foster economic rights beyond the demands of human rights activists and human rights textbooks.[20] To add to this, Viljoen supports this contention by highlighting that the communal aspect of the African's worldview is emphasised in the rights guaranteed to people and in the recognition of the family as a natural unit and basis of society.[21]

This is further reinforced in the preamble of the African Charter, which stipulates that the enjoyment of rights and freedoms also implies the performance of duties.[22] Cobbah's perspective, which is supported by Kent and Viljoen, therefore implies that the African's world view is not inferior and should not be considered inferior to that of the Westerner's

6 Cobbah 1987 *HUM RTS Q* 315.
7 Cobbah 1987 *HUM RTS Q* 314.
8 Cobbah 1987 *HUM RTS Q* 314.
9 Cobbah 1987 *HUM RTS Q* 314.
10 Cobbah 1987 *HUM RTS Q* 314.
11 Cobbah 1987 *HUM RTS Q* 314.
12 Cobbah 1987 *HUM RTS Q* 328.
13 Cobbah 1987 *HUM RTS Q* 311.
14 Cobbah 1987 *HUM RTS Q* 320.
15 Cobbah 1987 *HUM RTS Q* 322.
16 Cobbah 1987 *HUM RTS Q*
17 Cobbah 1987 *HUM RTS Q* 322.
18 Cobbah 1987 *HUM RTS Q* 322.
19 Cobbah 1987 *HUM RTS Q* 322.
20 Cobbah 198 *HUM RTS Q* 323.
21 Viljoen 2001 *AHRLJ* 20.
22 African (Banjul) Charter of Human and People's Rights of 1986.

world view because of the benefits that come with an African's world view and the flaws that come with a Westerner's world view.

Cobbah's suggestions

Cobbah, firstly, suggests that we must look to culture to re-establish the fact that our rights as individuals and as a society should relate to our dignity as human beings[23]. To achieve this aim, Cobbah indicates that Western and non-Western scholars should seek to overcome their Western chauvinism to help them admit other world views into the international discourse.[24] This is because the African's worldview, in his opinion, can serve to improve the quality of human rights discussion at an international level.[25]

Furthermore, he argues that to correct injustices within different cultural systems, it is not necessary to turn all people into Westerners.[26] He argues, instead, that the Westerner's world view is by no means the only rational way of living human life and that the African's view of society may indeed be a helpful input into a reassessment of the duties that a moral society owes to the individual, and vice versa.[27]

This viewpoint is reinforced in Ibhawoh's article, where he quotes Mary Robinson, who said "more thought and effort must be given to enriching the human rights discourse by explicit reference to non-Western religions and cultural traditions".[28] Ibhawoh further argues that the content of human rights has to bear in mind the "African cultural fingerprint", which emphasises group, duties, social cohesion and communal solidarity, as opposed to rigid individualism.[29] These suggestions are of significant importance, and this legal opinion does not disagree with his argument that human rights should be approached along a cross-cultural path. However, this legal opinion will now turn to consider that the most suitable approach to human rights is what Ibhawoh describes as the "dynamic paradigm".

The dynamic paradigm

Ibhawoh's dynamic paradigm takes cognisance of the fact that there is tension and conflict between the Westerner's world view and the African's world view.[30] The underlying cause of this tension is that, in the Westerner's opinion, the African world view allows for certain infringements of fundamental human rights. This difference in opinion provides great difficulty in attempting to approach human rights along a strictly cross-cultural path.

To expand upon this point, the Westerner's world view considers gender equality a fundamental human right, and that this right is infringed upon in many African cultures. To be specific, the traditional status of women in many African cultures is deemed inconsistent with this right.[31] Moreover, Westerners view children's rights as another fundamental human right. The fact that there are many early or forced child marriages and child labour in African societies infringes upon this right.[32]

The dynamic paradigm suggests that all customary practices which dehumanise or are injurious to the physical and mental well-being of persons should be prohibited.[33] Ibhawoh proposes that this objective can be achieved by adopting a holistic and sensitive approach that seeks to understand the social basis of the cultural traditions and how

23 Cobbah 1987 *HUM RTS Q* 310.
24 Cobbah 1987 *HUM RTS Q* 327.
25 Cobbah 1987 *HUM RTS Q* 328.
26 Cobbah 1987 *HUM RTS Q* 328.
27 Cobbah 1987 *HUM RTS Q* 328.
28 B Ibhowah "Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State" (2000) *Human Rights Quarterly* 838 at 838.
29 Ibhowah 2000 *HUM RTS Q* 843.
30 Ibhowah 2000 *HUM RTS Q* 843.
31 Ibhowah 2000 *HUM RTS Q* 844.
32 Ibhowah 2000 *HUM RTS Q* 844.
33 Ibhowah 2000 *HUM RTS Q* 850.

cultural attitudes may be changed and adapted to complement human rights in a way that does not compromise the cultural integrity of peoples.[34]

Furthermore, Ibhawoh indicates that the best way to achieve this goal is through community involvement in advocacy, information, education, legislation, and policy formulation.[35] In support of this contention, Ibhawoh provides the example of female genital mutilation/female circumcision and how this approach was utilised in Kenya.[36] As a result, alternative circumcision rites were introduced. These rites reduced the number of girls who had to undergo circumcision from 95% to 70%.[37] With this in mind, this legal opinion argues that the dynamic paradigm is perhaps the most effectual paradigm in terms of which human rights should be approached.

Conclusion

To conclude, this legal opinion has considered Cobbah's notion that the Westerner's world view is not superior to the African's world view is correct. It has highlighted that this is because of the inherent flaws of the Westerner's world view and the benefits that approaching human rights along a cross-cultural path offer. In doing so, however, this legal opinion has also considered the reality of the situation in today's day and age and the inevitable tension and conflict a cross-cultural approach to human rights creates. As a result, this legal opinion has commented on Ibhawoh's dynamic paradigm and suggests that this is the most suitable way to ensure that cultural traditions and attitudes, that infringe upon certain human rights, may be changed and adapted in a way that does not compromise the cultural integrity of peoples. This approach ensures that neither's world views are excluded from the conversation concerning human rights.

34 Ibhowah 2000 *HUM RTS Q* 856.
35 Ibhowah 2000 *HUM RTS Q* 859.
36 Ibhowah 2000 *HUM RTS Q* 858.
37 Ibhowah 2000 *HUM RTS Q* 858.

The AfCFTA Agreement: The Pursuit of Agenda 2063 in the context of the WTO

Junaid Nyker: Final-year LLB

The Agreement Establishing the African Continental Free Trade Area[1] (the Agreement) has been ratified by 43 African states. Foundationally, the Agreement seeks to establish the African Continental Free Trade Area (AfCFTA) to liberalise and expand intra-Africa trade. Substantively, AfCFTA symbolises a Pan-African commitment to political, social and economic solidarity in pursuit of the AU's Agenda 2063.[2]

Agenda 2063 is the AU's mission (1) to achieve a prosperous Africa through inclusive and sustainable growth; (2) to integrate the continent politically; (3) to establish good governance, democracy, respect for human rights, justice and rule of law; (4) to create a peaceful and secure Africa; (5) with a strong cultural identity, common heritage and ethics; (6) which proliferates the potential of its women and youth and cares for its children; (7) and which is a strong, united and influential global player.[3]

The WTO is a proponent of trade liberalisation as a catalyst for socioeconomic justice and supports an Africa with reduced barriers to trade. However, all 43 of these State Parties as members of the WTO, are bound by its agreements, and are subject to discipline in terms of the WTO Dispute Settlement Understanding (the DSU).[4]

AfCFTA's success in pursuit of Agenda 2063 therefore depends on the Agreement's ability to comply with international trade law in terms of the WTO's core agreements. The core agreements include the DSU, the General Agreement on Tariffs and Trade (the GATT)[5] and the Anti-dumping Agreement.[6] AfCFTAs ability to comply with these agreements is further inhibited by Africa's various structural and institutional challenges.

This report will highlight the structural challenges which threaten the success of AfCFTA, as established by the Agreement, in its ability to comply with each of the WTO core agreements. Through navigating these structural and compliance challenges, it will answer the

1 The Agreement establishing the African Continental Free Trade Area signed 21 March 2018 at Kigali Ext/Assembly/AU/2(X) (the Agreement).
2 C Ajibo "African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects" (2019) 53(5) *Journal of World Trade* 871.
3 AU "Agenda 2063. The Africa We Want" (2015) UN http://www.un.org/en/africa/osaa/pdf/au/agenda2063.pdf
4 Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401.
5 General Agreement on Tariffs and Trade 1947 (GATT), 55 U.N.T.S. 194.
6 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

pertinent question: Can the African Continental Free Trade Area successfully enable Agenda 2063?

Structural Challenges

Inequality Amongst Parties

At the centre of the debate over free trade is the potential threat imposed on least developed economies to their infant and subsistence industries.[7] State Parties to AfCFTA, despite having common goals, are not equals. South Africa, Egypt and Nigeria account for 50% of all African economic output and are positioned to exploit lower costs of trade, potentially offsetting domestic production in poor recipient economies.[8]

Such a scenario threatens massive job losses in the recipient countries, particularly in the agricultural and manufacturing sectors which have historically relied on protectionism.[9] This could further threaten the institutional stability of AfCFTA and encourage non-compliance by those recipient states, rendering the AfCFTA Agreement ineffective and conceptually illegitimate.

Institutional Capacity, Political Will & Corruption

State Parties are poorly equipped with the institutional capacity to conduct trans-continental trade.[10] African financial institutions, with the exception of South Africa, generally lack the capital and expertise to liaise, manage and secure the transfer of funds at a continental level. Most Africans work in SMEs or informal sectors, with manufacturing accounting for only 10% of the African GDP.[11] Without capable financial institutions, AfCFTA will remain ineffective.

At the level of governance, African legislatures and executive branches are often slow to domesticate treaties and lack the expertise to be able to oversee their implementation or compliance. The implications of an FTA require all parties to be able to establish and maintain legislative compliance in order to materialize benefits and avoid costly disputes. Most State Parties are yet to implement legislative compliance and enforcement strategies.[12]

Finally, African tax authorities lack monitoring mechanisms, investigative capacity and accounting proficiency. These mechanisms are crucial to enable the transfer of payments between states.

Infrastructure

Transcontinental trade requires enabling infrastructure. Foundational to this requirement is a robust and efficient logistics infrastructure. Africa lacks ports, roads, railways and borders capacitated to effect high levels of intra-African trade.[13] Colonialism, by design, created infrastructure which connected Africa to Europe - African economic independence requires Africans to build infrastructure which connects Africans and their economic outputs to other Africans. Beyond logistical infrastructure, AfCFTA requires Africa to upgrade its IT, telecommunication and electricity infrastructure to enable commercial communication and business efficacy.[14]

Can AfCFTA Overcome Structural Challenges?

AfCFTA seeks to address the inequality which exists amongst Party States through the various "technical assistance" clauses throughout the Agreement, its Protocols and Annexes. The AfCFTA Agreement, by design, recognises its

7 C Ajibo "Liberalising Regional Trade Regimes Through AfCFTA: Challenges and Opportunities" (2020) 64(3) *Journal of African Law* 308.

8 C Ajibo "Liberalising Regional Trade" 308-9.

9 P Nwafuru 'Why the AfCFTA implementation is at a snails pace and the expectation in 2022' (2022) *Nairametrics* https://nairametrics.com/2022/01/08/why-the-afcfta-implementation-is-at-a-snails-pace-and-the-expectation-in-2022/.

10 C Ajibo "Liberalising Regional Trade" 308-9.

11 C Ajibo "African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects".

12 P Nwafuru 'Why the AfCFTA implementation is at a snails pace'.

13 C Ajibo "African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects" 894.

14 C Ajibo "African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects" 894.

context and makes available technical and capacity building assistance to State Parties through the office of the Secretariat.[15]

The Secretariat intends to secure resources and coordinate the transfer of skills between countries to ensure improved and capacitated monitoring systems. Further the Secretariat commits to facilitate training and capacity building programmes, to assist with legislative domestication of the Agreement with the establishment of national investigative and support institutions.

These commitments have the potential to reduce inequality amongst States Parties, particularly at the level of infrastructure and institutional capacity. However, the extent of the task remains massive. The obligations placed on State Parties to cooperate through the Secretariat, without further elaboration is vague and may prove difficult to enforce. Finally, it is unclear how the Secretariat will be able to raise the amounts required and the fiscal implication this may have on Party States.

The AfCFTA Agreement within International Trade Law

Core Tenets of AfCFTA

AfCFTA fits within the framework of Agenda 2063 through its core tenets. AfCFTA seeks to create a single market with free movement, to contribute to the movement of capital and facilitate development, expand intra-Africa trade, boost industrial development, enhance competitiveness, resolve cleavages arising from overlapping regional memberships and to lay the foundation for the establishment of a Continental Customs Union.[16]

Appropriateness of a Free Trade Agreement (FTA)

The broad scope and ambition of the AfCFTA Agreement means it is necessary for AfCFTA State Parties to notify the WTO via Article XXIV. Despite the general prohibitions against preferential treatment, Article XXIV of the GATT empowers WTO members to enter into preferential trade agreements through an RTA or FTA if such an agreement promotes the goal of trade liberalisation subject and subject to meeting certain requisites.[17]

Article XXIV accepts the formation of FTAs if such an agreement substantially reduces tariffs between and among members with a view to facilitate trade and that tariffs are eliminated substantially on all trade between parties. The AfCFTA Agreement as adopted is well aligned with these requirements as it does not impose higher tariffs on third parties and seeks to eliminate 90% of tariffs between State Parties.

The AfCFTA Agreement v GATT

The 'Most Favoured Nation' (MFN) Principle

The MFN principle is the foundational principal of the GATT and defines the ethos of international trade law in terms of the WTO. MFN is enforced through Article I and seeks equality amongst WTO members. MFN confers an entitlement to each member to receive the benefit of the same measure enjoyed by the "most favoured nation" with regards to any trade measure implemented by another member of the WTO.[18]

The requirements to enforce the MFN principle and to claim equal benefit are outlined in *Canada - Autos (*1999) and require determining whether the measure claimed confers a benefit in the form of a trade advantage over other members. The advantage must be immediate and unconditional. Lastly, the measure must be placed on the like product of the product which the claimant seeks to apply the same measure.[19]

If the MFN principle were applied strictly, any trade advantages extended by Egypt to South

15 C Ajibo "African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects" 894.
16 Article 3 the Agreement.
17 Article XXIV of GATT.
18 Article I of GATT.
19 Article I of GATT.

Africa as State Parties to AfCFTA would have to be extended by Egypt to all other members of the WTO. This would defeat the purpose and objectives of AfCFTA – to create a continental market. The establishment of AfCFTA inherently violates MFN yet is *prima facie* precluded from its application on the basis that it seeks to massively liberalise trade amongst developing and least developed countries. AfCFTA benefits from Article XXIV of GATT.

The exception created by Article XXIV of GATT which allows for the creation of AfCFTA, upon closer analysis, is also one of its greatest threats. AfCFTA enforces the MFN internally through Article 14.[20] In essence, benefits extended by one State Party to another must immediately and unconditionally be extended to all State Parties. However, AfCFTA's compliance with the spirit of GATT also sees the Agreement creating similar exceptions for its developing and least developed countries.

Article 4.5 of the Agreement further allows for the continuation of already established RTAs and their implementation. This ensures the continued validity of already established WTO compliant RTA's such as SACU and the East African Economic Community.[21] However, differently to the international trade environment under GATT, which is dominated by trade amongst wealthy countries, all State Parties to AfCFTA are poor countries, with volatile national security and compromised balance of payments.

This means that any State Party can claim in terms of the exceptions made for developing and least developed State Parties. The threat is that the AfCFTA Agreement relies on an MFN clause that will be difficult to enforce, and subject to tremendous uncertainty.[22] Uncertainty disincentivises the types of economic activity and sustainability which AfCFTA seeks to attain and diminishes AfCFTA's goal of substantial and broad trade liberalization. Further classification and regulation of when State Parties may avoid the enforcement of MFN may be necessary. Without this, AfCFTA may never fulfil its potential to contribute towards the AU's Agenda 2063.

The 'National Treatment'(NT) Principle

The second core provision of GATT is the NT Principle established in terms of Article III.[23] Broadly, NT obliges members to treat the imported products of other members identically to domestic products in three instances. The first, outlined in the first sentence of Art III:2, prohibits the imposition of internal taxes or charges on an imported product in excess of those imposed on the like domestic product. The second, outlined in the second sentence of Art III:2, prohibits members from imposing dissimilar internal taxes and charges on directly competitive and similar products with the object of affording protection to the directly competitive or similar domestic product. Finally, Art III:4 also prohibits members from imposing laws, regulations, requirements affecting the internal sale, purchase, transport and distribution on imported products which are less favourable than those imposed on the equivalent domestic product.

Article 5 of the Protocol of Trade in Goods of the AfCFTA Agreement specifically imposes the obligations in Art III on State Parties to the Agreement, and provides that WTO jurisprudence must provide guidance to the interpretation and application of the NT principle.[24] In terms of its provisions, AfCFTA embraces and is entirely compliant with the two most important principles of the GATT.

Notwithstanding this, the lack of institutional capacity and the broad scope of the AfCFTA exceptions present similar problems to the

20 Article 14 the Agreement.
21 C Ajibo "Liberalising Regional Trade Regimes Through AfCFTA" 304.
22 C Ajibo "Liberalising Regional Trade Regimes Through AfCFTA" 304.
23 C Ajibo "Liberalising Regional Trade Regimes Through AfCFTA" 304.
24 Article 5 of the The Protocol on Trade in Goods of the AfCFTA Agreement and its Annexes.

attainment and enforcement of the NT principle amongst State Parties as the enforcement of the MFN principle.

Dispute Resolution: Africa's Own Mechanism – The Irrelevance of the DSU

The AfCFTA Agreement establishes a specialised Dispute Settlement Mechanism (DSM) to adjudicate disputes arising between State Parties in terms of the AfCFTA Agreement. [25] Like the WTO's DSU, the Agreement requires parties first to notify each other of a trade dispute and to attempt resolution through conciliation and mediation.[26] If the parties fail to reach an agreement, the complainant party can refer the dispute to an ad hoc, specialised and democratically elected panel. Panel decisions can finally be referred to the Appellate Body.[27] This procedure and institutional structure coheres with the WTO's goal of encouraging cooperation and consensus in the settlement of disputes.

These procedures are particularly useful in an African context. African states generally do not have the fiscal security to fund international legal challenges which they may lose and be left without remedy. Cooperation encourages a cost effective and efficient system.[28] Given the institutional challenges facing African states there has been much criticism made against the establishment of this mechanism. Critics argue that AfCFTA disputes would be better resolved by the WTO's already established and respected body. Further, critics contend that an independent DSM may create compliance challenges for State Parties towards their obligations within the WTO. This criticism is misplaced.

An internal AfCFTA DSM is preferable for a number of reasons. The WTO's DSU provides the WTO with jurisdiction over all disputes arising between members in terms of WTO Agreements.[29] It does not preclude or discourage dispute resolution in terms of RTA's from being resolved internally. Article 3(2) of the WTO's DSU requires its Appellate Body to not extend or narrow rights in terms of the WTO Agreements.[30] A responsible interpretation of this provision will discourage the WTO DSM from considering AfCFTA disputes which may narrow or extend rights of the disputing parties beyond the rights evidenced in WTO Agreements.

Other Regional Trade Agreements recognised by the WTO, such as NAFTA and MERCOSU,R have well-established DSMs consistent with the principles of the WTO and international trade law, it would be inappropriate for parties of those agreements to refer disputes arising to the WTO DSM.[31] This principle was reflected in the case of *US – Standards for Reformulated and Conventional Gasoline*.[32]

Indeed, the objectives of AfCFTA require State Parties to address and resolve the institutional and infrastructural challenges which prevent an effective resolution of disputes internally. However, if AfCFTA is to be a sustainable mechanism through which to attain Agenda 2063, it must establish independence of its institutions. AfCFTA recognises that it seeks to address a context unique within international trade– African industries, morals, expectations are best known by Africans. Africans are best suited to make value judgments using institutional knowledge of the AfCFTA provision, African industries and to deal with African evidence.

25 Article 20 the AfCFTA Agreement.
26 Article 6 the Protocol on Rules and Procedures on the Settlement of Disputes of the AfCFTA Agreement and its Annexes (the Protocol on Disputes).
27 Article 6 of the Protocol on Disputes.
28 Article 6 of the Protocol on Disputes.
29 Article 6 of the Protocol on Disputes.
30 Article 3.2 DSU.
31 YT Tegegn "Examining the Overlapping Jurisdictions between the WTO and AfCFTA Dispute Settlement Mechanisms: Whose Jurisdiction is it Anyway?" (2018) 8(2) *Bahir Dar University Journal of Law* 287-8.
32 *US – Standards for Reformulated and Conventional Gasoline* WT/DS2/10/Add.7 (26 August 1997).

The AfCFTA Agreement v WTO's 'Anti-Dumping Agreement'

The success of the AfCFTA depends on its ability to prevent, deter, locate and adjudicate acts of dumping.[33] Articles 7-9 of the GATT and Articles 2-3 of the Anti-dumping Agreement prohibit and provide remedies against malicious international price discrimination which threatens to injure the industry of the like product in the importing country. The remedies available to members against dumping include price undertakings to normalise price in the domestic market and diminish threats to domestic industry.[34] To exercise these remedies, the injured member is required to conduct an investigation which establishes that there is dumping, that the domestic industry of the like product is suffering or under threat of injury, and that there is a causal link between dumping and the injury.[35]

The AfCFTA Agreement and its protocols make available to State Parties all remedies found within WTO Agreements for dumping which occurs between State Parties. Further, Article 20 requires State Parties to cooperate in investigations and the implementation of remedies. The provisions of AfCFTA are therefore compliant with the obligations already imposed on State Parties as members of the WTO.

Despite this compliance, Africa's structural challenges require focused resolutions which go beyond WTO precedent. Smaller African markets are more volatile and at greater risk of dumping than most WTO members due to their having less industry diversification and a lower income base.[36] Bigger economies such as South Africa and Ethiopia could destroy the wheat industries of volatile economies such as Libya if Libya is institutionally or politically incapacitated to investigate the act of price discrimination. A lack of monitoring and compliance capacity creates the risk of non-African products entering African markets and benefiting from AfCFTA due to porous trade borders and false labelling.

Article 19 of the AfCFTA Agreement seeks to accommodate these challenges in two ways. The first is to require the establishment of an enforceable Rules of Origin Agreement (RoO).[37] When concluded, these RoO need to ensure that products from Africa will be identifiable and traceable in terms of a uniform system.[38] The continued delay in concluding the Agreement on RoO risks reducing public and business confidence in the AfCFTA Agreement as a whole. If the Rules are established, the second objective is to ensure that the technical assistance and capacity-building mechanisms through the office of the Secretariat are utilised and are effective. In this instance, such support will have to address both the compliance and enforcement of AfCFTA RoO and the institutional capacity to investigate and monitor dumping.

Can the African Continental Free Trade Area successfully enable Agenda 2063?

The AfCFTA Agreement is compliant with the framework which currently governs international trade law. Its provisions are capable of establishing a Free Trade Area which can be universally recognised; they reflect objectives which already bind the majority of states. This reality is important if it is to successfully enable Agenda 2063 as it avoids compromising the trade relations and obligations which already exist amongst African

33 P Nwafuru "The AfCFTA Rules of Origin will create opportunities for private sector through value addition" (2021) *Nairametrics* https://nairametrics.com/2021/07/24/the-afcfta-rules-of-origin-will-create-opportunities-for-private-sector-through-value-addition/ (18th May 2022).

34 Article 8 of the Anti-dumping Agreement.

35 Article 4-6 of the Anti-dumping Agreement.

36 P Nwafuru 'Why the AfCFTA implementation is at a snails pace and the expectation in 2022' (2022) *Nairametrics* https://nairametrics.com/2022/01/08/why-the-afcfta-implementation-is-at-a-snails-pace-and-the-expectation-in-2022/ (18th May 2022).

37 Article 19 of the AfCFTA.

38 P Nwafuru 'Why the AfCFTA implementation is at a snail's pace (2022) *Nairametrics* https://nairametrics.com/2022/01/08/why-the-afcfta-implementation-is-at-a-snails-pace-and-the-expectation-in-2022/ (accessed 18th May 2022).

states, and between African states and the rest of the world.

AfCFTA's prospects of successfully enabling Agenda 2063 through the creation of a single African market is further strengthened by its recognition that it cannot merely regulate trade law, but must address and resolve the institutional and structural challenges which inhibit African trade. Despite progress being slow, AfCFTA is capable of pursuing a single African market which unites the continent, improves standards of living and strengthens the economies of African states as reflected in the AU's Agenda 2063. Whether it will indeed achieve this ambition remains a question of time, commitment and political will.

Preventative lawyering and therapeutic jurisprudence: Practical application in legal practice and justice education

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Introduction

Is it possible to practise law in such a way that clients are pro-actively counselled on how to conduct their affairs to optimise their arrangements, and to avoid consequences that are contrary to their interests? In doing so, can law be practiced in a humane and caring manner, with attention being given to both legal and psychological concerns that are inherent in the issue presented? Indeed, should the law actively promote the general wellbeing of those governed by it?

It is both instructive and refreshing for legal practitioners to sometimes take a step back from a focus on the letter of the law, and to reflect more thoughtfully on the manner in which they undertake their work. Law teachers too should be cognizant of the fact that it is *people* that their students will in future serve, and not the law itself, which must have implications for the way in which they teach.

This essay will introduce the interrelated ideas of preventative lawyering and therapeutic jurisprudence, which are little known in South Africa, and which provide an insightful conceptual basis for responding to questions such as those posed above. There are noteworthy similarities with related concepts that have been developed in South Africa, such as the foundational values of our Constitution,[1] *ubuntu,* and the ethics (or jurisprudence) of care. My purpose is not to discuss these better-known South African concepts, but rather to further enrich South African scholarship in this broad field with an introduction of these concepts, which emanate in large part from North American scholarship.

Case study: Nellie's story

Nellie is an elderly widow, a retired domestic worker, a state pensioner, and the mother of three adult children, two of whom are employed and settled in their own homes. The youngest, Andile (28), is unemployed and lives at home, is dependent on Nellie, and spends whatever money he has on alcohol and sometimes drugs. He has a four-year old daughter, Siya, who he clearly adores, but has neglected. Nellie looks after Siya as if she were her own child, since the child's mother left town some time ago and her whereabouts are unknown.

Andile sometimes drinks in the house with old school friends whom he calls "the gang". He occasionally becomes abusive towards Nellie when intoxicated, and once threatened her physically when she asked his friends to leave after midnight. She is wary of these men because

1 Human dignity, equality, and human rights and freedoms (Section 1a of the Constitution of the Republic of South Africa, 1996).

she has seen that some of them carry knives, and on one occasion they broke some furniture and a window. By contrast, Andile is often protective of his mother, showing in his own way that he cares for her, and will sometimes do as she asks.

Nellie is the owner of the house and its contents, and she has about R100 000.00 saved from her late husband's pension payout. She has no debt and few other possessions. She has for many years suffered from very aggressive tuberculosis, and does not know how much longer she has to live.

Besides her own safety, Nellie's primary concern is for Siya's wellbeing, as she feels that she is effectively Siya's only parent-figure. She loves Andile despite his bad habits and the company he keeps, and believes that he can be a good father if only he could secure a job and live more responsibly. Nellie is desperate, she does not know what to do. She seeks legal advice, although she has never been to a lawyer's office before.

Nellie's personal and family circumstances and problems are not uncommon, and encapsulate some of the lived experiences of many people in the current South African context. How should a lawyer respond to Nellie's story: what advice should be given, and what steps taken?

How could Nellie be assisted?

Possible legal interventions

There are a range of possible legal interventions that could flow from this scenario that most lawyers would consider. They usually necessitate litigation, and could go some way towards addressing Nellie's concerns to varying degrees. Nellie could bring an application for a protection order against Andile to enhance her personal safety;[2] she could lay a criminal charge flowing from the threatened assault; she could institute eviction proceedings against Andile;[3] she could approach the Children's Court to attempt to obtain an order for care (custody) of Siya;[4] she could cut Andile out of her Will and leave everything to Siya, in an effort to protect Siya's interests.

Social versus legal challenges

Clearly, however, this family's complex problems are as much social in nature as they are legal. There appear to be no easy answers, and the effectiveness of legal interventions will be limited. Any useful outcome must have regard to the social challenges evident, for example: Nellie's life expectancy; Siya's tender age; Andile's lack of means, bad habits and company. There are no direct legal solutions to these social challenges and so, when advising Nellie, it is crucial to consider both legal and non-legal issues and potential solutions. In many lawyer-client relationships, the lawyer is therefore inevitably drawn into becoming a psychological and even therapeutic agent, as well as a legal expert, because the parties' practical contexts and lived experiences demand this, and simply cannot be ignored.

Towards possible solutions

There are positive elements evident in relations between Nellie and Andile, and these can be built upon as part of an effort at finding solutions. Chief amongst these is that they care for each other and for Siya, which it is easy to overlook in the case of Andile. Nellie might well want these positive elements to be preserved and protected for the sake of everyone in the family, not least Siya.

Mediation

A preferred approach might be to advise on a mediation process, where both social and legal issues could be canvassed, and practical solutions explored. If the parties are able to express their concerns in a mutually respectful environment, it is likely that communication will be improved, and Andile may be more likely to act on his mother's serious concerns – for example, to try

2 An application in terms of the Domestic Violence Act 116 of 1998.
3 An application in terms of the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.
4 An application in terms of s 53 of the Children's Act 38 of 2005.

to find a job, to limit his drinking at home, to take more responsibility for Siya, and more. In the process, the relationships between mother and son, and between Andile and Siya, are likely to improve. Thus, mediation can have therapeutic value, even though this is not its primary intended goal.[5] Alternatively, if Andile refuses to attend mediation (which is voluntary), Nellie could institute proceedings in the Children's Court, which will require him to be present, and then an effective mediation or negotiation process under the auspices of that court could ensue.[6]

Counselling services

It might also be appropriate to encourage Andile to seek professional help in relation to his possible dependence on alcohol (and drugs) and any other relevant issues, and family therapy may become necessary. In this way legal, mediation and counselling services, undertaken by open-minded and mutually respectful professionals, could combine to assist this family significantly.

If Andile proves to be uncooperative or obstructive, then Nellie can still resort to the courts to force Andile's hand, ultimately in order to protect the interests of Siya, although potentially at the expense of family relations.

Preparing for death

Nellie is not well, and her life expectancy is uncertain. Many ageing people do not seriously consider the financial ramifications of their deaths, and do not plan for it, often resulting in much unnecessary confusion and contestation after death. Many people do not know that they have the power to order their affairs after death through a will, and Nellie might well be one of them.

Although this was not her reason for approaching lawyers, Nellie should be advised on various options to protect Siya's interests through a will, for example: to establish a testamentary trust for the benefit of Siya or all her grandchildren; to disinherit Andile entirely if she has little doubt that he will squander an inheritance; to appoint someone reliable and trustworthy as trustee of the trust and executor of the estate in order to ensure no abuse, and that her estate devolves correctly upon her rightful heirs.

All options should be carefully discussed with Nellie to ensure that they are properly understood, ultimately in order to enable her to make well-informed decisions for her will. Furthermore, Nellie should be advised that her wishes can be changed at any time in future by the execution of another will, especially if there are major changes in her life.

What this can mean for the lawyer

If Nellie's lawyer is able to respond to her legal and non-legal problems in these ways, then the lawyer can derive great personal satisfaction from knowing that she has helped to build something constructive in the family from a previously desperate situation; that she has done more than simply try to patch up problems without addressing their underlying causes. For some more caring and socially inclined lawyers this more holistic approach to lawyering is nothing new, while others will purposefully avoid becoming involved in any non-legal considerations presented by their clients.

Is there any guiding theory or conceptual basis that underpins this approach to lawyering, which can be instructive to lawyers and law students alike? The established concepts of preventative lawyering and therapeutic jurisprudence each provide different perspectives on this overarching approach to legal practice.

An introduction to preventative lawyering[7]

Preventative lawyering emphasises the role of

5 The viability of independent mediation will be influenced by the cost of this intervention. If a free or affordable mediation service cannot be found, the cost of a private mediator may be prohibitive for Nellie.

6 This will be possible in terms of either a pre-hearing conference (in terms of s 69 of the Children's Act 38 of 2005) or a family group conference (in terms of s 70 of the Children's Act).

7 The terms "preventative" and "preventive" law and lawyering are used interchangeably in the literature.

the lawyer as counsellor, planner and facilitator.[8] It seeks to help clients to achieve their goals by optimising arrangements (eg through estate planning) and minimising risks (eg through avoiding expensive litigation).[9] It fosters a constructive and pro-active approach to lawyering as seen, for example, in the estate planning advice that could be given to Nellie, and the attempts at resolving her issues with Andile in an amicable manner, through mediation.

Much lawyering is seen to take place "in the shadow of litigation".[10] Preventative lawyering assumes that the prevention of legal disputes is less costly than litigating in court. To this extent it is comparable with preventative health care, which presupposes that keeping people healthy allows for a better allocation of resources than treating people who become sick.[11]

Preventative lawyers focus on "legal soft spots" that they should be alert to: either "trouble spots" to be avoided (eg warning a client of the exorbitant cost of small credit), or "opportunity spots" to be taken advantage of (eg advising a client to save money to purchase a luxury item, rather than to borrow money and become over-indebted).[12] Expressed much more simply, the purpose of preventative lawyering is to prevent clients such as this from making bad or potentially disastrous decisions, and to propose a more constructive, positive course of action.

Preventative legal education

How are clients to know about the need to seek timeous legal advice before making important decisions? Some clients are fortunate to be better schooled in legal, financial, business and general life skills than others. They are more likely to know, for example, that a sale of immovable property is not valid unless it is in writing and signed by both parties. For those that are less fortunate, this knowledge can only be obtained via public, preventative law programmes that seek to educate and raise awareness about legal rights in specific, targeted areas of law, eg via websites of law offices; publication in newspapers; radio or television talk shows, workshops, information posters and pamphlets, and more.[13]

Further, if preventative lawyering practice and method are to be more widely applied in practice, then preventative law ideals and techniques should also be taught to law students, legal practitioners and paralegals through a range of education and continuing education programmes. Alternative dispute resolution methods and client counselling skills, for example, should arguably be compulsory modules in the LLB degree, and should be applied in students' law clinic practice, where experiential learning becomes possible. In addition, with the introduction of court annexed mediation in the magistrates' courts in South Africa,[14] mediation training should become a compulsory component of the vocational training programme for legal practitioners.

Therapeutic jurisprudence

From the discussion above it can be seen that preventative law approaches often have a positive and sometimes therapeutic outcome for the individuals or communities concerned, and thus relate closely to what has become known as therapeutic jurisprudence.[15] Therapeutic

8 B Winick "The Expanding Scope of Preventive Law" (2002) 3(2) *Florida Coastal Law Journal* 189 at 189.
9 E Dauer "Preventive Law Before and After Therapeutic Jurisprudence: a Foreword to the Special Theme Issue" (1999) 5 *Psychology, Public Policy and Law* 800 at 800.
10 Winick 2002 *Florida Coastal Law Journal* 197.
11 D Stolle, D Wexler, B Winick & E Dauer "Integrating Preventive Law and Therapeutic Jurisprudence: a Law and Psychology Based Approach to Lawyering" (1997) 34 *California Western Law Review* 15 at 16.
12 D Wexler "From Theory to Practice and back again in Therapeutic Jurisprudence: now comes the hard part" 2011 *Arizona Legal Studies Discussion Paper no. 10-12* 33 34 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580129 (accessed 11-02-2021).
13 The Rhodes University Law Clinic, for example, pursues preventative law objectives through its community education programmes.
14 See Chapter 2 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa GN R 740 in GG 33487 of 23-08-2010, as amended by GN R 183 in *GG* 37448 of 18-03-2014.
15 See, for example, E Fourie "Constitutional Values, Therapeutic Jurisprudence and Legal Education in South Africa: Shaping our Legal Order" (2016) 19 *PER* 1 http://dx.doi.org/10.17159/1727-3781/2016/v19i0a732 (accessed 12-02-2021).

jurisprudence acknowledges the impact of the law on the psychological, emotional and social life of those affected by it, and encourages an ethic of care. Its mission is to improve the general wellbeing of both the client and the lawyer:

> "Therapeutic jurisprudence is an inter-disciplinary approach to law that builds on the basic insight that law is a social force that has inevitable (if unintended) consequences for the mental health and psychological functioning of those it affects."[16]

These consequences (both positive and negative) should be studied with the tools of the behavioural sciences – such as psychiatry, psychology, criminology, and social work. Legal practice should be reformed to minimise anti-therapeutic consequences and to promote therapeutic consequences. Therapeutic jurisprudence explores how the rich insights gained from these fields can add value to the practice of the law, whilst not promoting therapeutic goals over other goals.

Its primary focus is on the roles and behaviours of the legal actors (clients, lawyers, judicial officers etc) as distinct from the law itself. Lawyers wishing to practice therapeutically should be sensitive and open to their clients' psychological responses; they should understand that in their relationships with clients they can inevitably become psychological or even therapeutic agents.[17]

Links with preventative law

Proponents of therapeutic jurisprudence argue that the lawyer's intervention should have an impact far wider than only minimising clients' potential legal risks and enhancing their legal opportunities. Preventative law might focus primarily on the financial and economic implications of an over-indebted consumer ending up in a debt trap ("legal soft spots"), for example. Therapeutic jurisprudence, however, extends the focus to "psychological soft spots"[18] such as stress and anxiety from being over-indebted, the resultant self-esteem of the consumer, the impact on his relationship with his spouse or other family members, possible clinical depression, and more. Such pro-active intervention can only become possible through a more intentional focus on building the interpersonal relationship between lawyer and client.

Illustrations from Nellie's story

Nellie's story is instructive in further demonstrating these concepts. Nellie is prompted to seek legal advice because of her personal safety and Andile's neglect of Siya. These are trouble spots identified by Nellie. In response, the preventative lawyer is able to identify opportunity spots such as the proposed mediation process; the avoidance of divisive litigation; resultant improved communication and inter-personal relationships; and so on. Further trouble spots, this time identified by the lawyer, might follow Nellie's death: further neglect of Siya, and contestation over Nellie's estate among family members. The opportunity that this presents to prevent neglect and future conflict is the execution of a will which addresses these issues. These are all examples of preventative lawyering measures.

The lawyer who sees herself as having an additional role as therapeutic agent, however, would spend further time on psychological soft spots identified – for example (suggested advice is given in brackets):

- Siya's emotional and psychological wellbeing resulting from abandonment by her mother and the neglect of her father (suitable counselling could be advised);
- Andile's dependence on alcohol (and possibly drugs) and bad company (again, suitable counselling or even rehabilitative treatment could be advised);
- Nellie's chronic illness (regular medical check-ups could be advised).

16 Stolle, Wexler, Winick & Dauer 1997 *California Western Law Review* 17.
17 Stolle, Wexler, Winick & Dauer 1997 *California Western Law Review* 40.
18 Wexler "From Theory to Practice and back again in Therapeutic Jurisprudence: now comes the hard part"

Conclusion

What is frequently overlooked or under-emphasised in the practice and teaching of law is that there are people behind every case, who bring into the lawyer-client relationship their own peculiar history, personality, hopes, fears, economic realities, home and work contexts, and much more; and that these personal factors often impact significantly on the issues, both legal and non-legal, that are presented by the client.

There are many lawyers and law students who embrace the values espoused in this article, and who have somewhat different or alternative notions of how to practise law; who tend to question the traditional expectation that all cases must be litigated and fought by hard-nosed lawyers, with a winner-takes-all outcome; who would like to use the law more proactively to benefit individuals and communities, to minimise risks, and to help clients to make better decisions on matters in which the law touches their lives; who care for the general wellbeing of their clients, and not only for their success in winning their cases; and who prefer to place the person of the client at the centre of the legal controversy, ultimately in order to pursue their clients' best interests.

There is a need to promote and legitimise the alternative concepts discussed in this article such that they become more widely recognised and practiced. In this way, young lawyers who subscribe to these values will be encouraged and supported in the development of a sense of personal and professional verification, and in pursuing careers and ways of practice that for them have greater meaning and purpose.

Regulatory or exclusionary? Three constitutional cases that deal with the right to work of migrants in South Africa

Paulina Quartey: Final-year LLB

Introduction

There is not much case law on the right to work of immigrants. The few cases that have reached the Courts have had similar outcomes. Three cases will be discussed in this article.

Larbi Odam v Member of the Executive Council for Education

One of the leading cases on the right to work was the seminal Constitutional Court judgment in *Larbi Odam v Member of the Executive Council for Education*[1] (hereafter *Larbi-Odam*). The matter concerned the discriminatory nature of the Regulations regarding the Terms and Conditions of Employment of Educators[2] issued by the MEC (North West province) restricting permanent employment in state schools to South African citizens only. The appellants were qualified teachers temporarily employed in the North West province from African countries including Zimbabwe, Botswana, Namibia, and Uganda. Some the appellants were permanent residents who had lived in South Africa for a period ranging between 10 years or more. Most of them were married and had children with South African citizens. The Minister had terminated the positions held by the appellants on the basis of s 8(6) of the Educators' Employment Act,[3] which provided that temporary contracts of educators could be terminated upon reasonable notice, and proceeded to advertise those positions.

The Court applied the *Harksen v Lane*[4] test for unfairly discriminatory legislation which requires a determination first as to whether there was a differentiation between groups/categories of people, and whether such differentiation had a rational connection to a legitimate governmental purpose. If this was the case the second question is whether the differentiation amounts to unfair discrimination, depending on if it was based on a listed ground in s9 of the Constitution or an analogous ground that had the potential to seriously impair the dignity of a person.[5] If a differentiation is found to be based on a listed ground, it is presumed to be unfair. If the differentiation is on any other ground, unfairness will be dependent on the impact of the differentiation on the complainant. Finally, if the discrimination is found to be unfair, a limitation analysis in terms of s36(1) of the Constitution must ensue to determine if the

1 1998 (1) SA 745 (CC) para 4.
2 GN R1743 of 13 November 1995.
3 Act 76 of 1998.
4 1998 (1) SA 300 (CC).
5 1998 (1) SA 300 (CC) para 54.

provision is justified. [6]

The Court in *Larbi-Odam* found that such an exclusion was a differentiation that was unfairly discriminatory because it differentiated between non-citizens and citizens to the detriment of the latter.[7] Citizenship is a ground which was not easily changed since it is conferred by virtue of birth.[8] Discrimination on this ground had the potential to seriously impair the dignity of non-citizens because, as a minority, foreigners had little political muscle and were a vulnerable group, susceptible to attacks based on their nationality.[9] Their ability to secure potential employment and to have contractual security was impacted by this provision.[10] Permanent residents had been granted such status after determination by the Immigrants Selection Board, after a period of stay in the Republic and having made a conscious commitment to South Africa.[11] It was held that it was arbitrary for the government to allow permanent residents permanent stay in the country but to restrict their work opportunities. The provisions were therefore held not to bear a rational link to a legitimate governmental purpose. It was, finally, unfair discrimination that could not be justified under the limitation clause of the Constitution because, considering the nature of their status, permanent residents enjoyed the same rights to compete for employment as citizens, and the government, in conferring that status, had made a commitment fromwhich it could not depart.[12] On the basis of this enquiry, the discrimination suffered by permanent residents was unfair.

Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority

The applicants in this matter were refugees who had applied to register with the Private Security Industry Regulatory Authority (hereafter the Regulatory Authority) in order to provide security services.[13] In terms of the Private Security Industry Regulation Act (hereafter the Private Security Act)[14] registration was only allowed on the basis of citizenship or permanent residence.[15] The applicants sought a declaration of constitutional invalidity on the basis that s 23(1) discriminated against them due to their refugee status; or, alternatively an administrative review of the decision of the Regulatory Authority. Our focus for the purposes of this article will be limited to the constitutional challenge.

Again, the Court applied the *Harksen*[16] test. Firstly, a determination was made as to whether s 23(1) differentiated between groups of people. This was found to be true, as the provision differentiated between citizens and permanent residents on one hand, and all other foreigners on the other hand.[17] In establishing a rational connection between the provisions of s 23(1) and a legitimate governmental purpose, the Court looked at the preamble to the Private Security Industry Regulation Act. Trustworthiness was cited as paramount in the approval of an application to register with the Regulatory Authority; such trustworthiness should be objectively verifiable.[18] Trustworthiness was crucial, according to the Court because of the nature of the employment;security personnel carry arms and wear uniforms, and they hold a

6 Ibid.
7 1998 (1) SA 745 (CC) para 19.
8 Ibid.
9 1998 (1) SA 745 (CC) para 23.
10 Ibid.
11 1998 (1) SA 745 (CC) para 24.
12 1998 (1) SA 745 (CC) para 25.
13 *Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).
14 Act 56 of 2001.
15 S 23(1).
16 1998 (1) SA 300 (CC).
17 2007 (4) SA 395 (CC) para 35.
18 2007 (4) SA 395 (CC) para 37.

position of authority in society.[19] If proper care was not taken in the registration of security service providers, the consequences could be life-threatening; this made it important to regulate them.[20] For these reasons, the Court accepted that there was a legitimate governmental purpose behind the differentiation.[21]

In the enquiry as to whether there was indeed unfair discrimination, the Court considered the impact of the provisions on the refugees and whether the differentiation was on a listed ground and found that a differentiation based on refugee status was an analogous ground because it was not listed in s 9(3).[22] Reference was made to s 27(f) of the Refugees Act,[23] which states that a refugee is entitled to seek employment, but this was limited by s 23(1)(a) of the Private Security Act[24] to the extent that they may not work in the private security industry. The Court was of the view that this did not prevent them from seeking employment in other industries. In addition to this, the applicants could rely on the provision of s 23(6), which allows the minister to allow registration on good cause or the exemption in s 1(2) of the Private Security Act.[25] In the alternative, the applicant may apply for permanent residency when they were able to meet the requirement of 5 years' residence after gaining asylum seeker status, and approval by the Standing Committee for Refugee Affairs.[26]

The Court further considered the right to freedom of trade, occupation, and profession in s 22 of the Constitution.[27] Citing *Affordable Medicines Trust v Minister of Health*,[28] where it was found that there were constitutional limitations to the regulation of the practice of a profession under s 22. legislation that regulates the practise of a profession will pass constitutional muster if it is rationally related to the achievement of a legitimate government purpose, and if it does not infringe any of the rights in the Bill of Rights.[29] The Constitution was interpreted as requiring that the power to regulate the practice of a profession be viewed objectively. Such regulation should be rationally related to a legitimate government purpose, and a Court could not interfere simply because it disagreed with it or considered the legislation to be inappropriate.[30] Furthermore, to rely on a right in the Bill of Rights, one must have an existing right which had been infringed unjustifiably.[31] The Court was of the view that the applicant could not claim Constitutional protection for a right that was not applicable to them, especially when it served a legitimate governmental purpose. The Court also cited previous and precedents of *Larbi-Odam*,[32] *Khosa v Minister of Social Development and Others*[33] and *Watchenuka v Minister of Home Affairs*[34], as well as the Canadian case of *Law Society of British Columbia v Andrews*[35], in which the Courts had differentiated between permanent resident holders/citizens and temporary resident foreigners. Finally, the Court looked to South Africa's obligations in terms of the United Nations Convention relating to the Status of Refugees,[36] which required refugees

19 2007 (4) SA 395 (CC) Para 40.
20 2007 (4) SA 395 (CC) Para 41.
21 Para 42.
22 Para 43.
23 Act 130 of 1998.
24 Act 56 of 2001.
25 Act 56 of 2001.
26 2007 (4) SA 395 (CC) para 50.
27 The Constitution of the Republic of South Africa, 1996.
28 2006 (3) SA 247 (CC) para 72.
29 Ibid.
30 Ibid.
31 2007 (4) SA 395 (CC) paras 53 -54.
32 1998 (1) SA 745 (CC) para 24.
33 *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC).
34 *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (4) SA 326 (SCA).
35 (1989) 1 S.C.R. 143.
36 Convention relating to the Status of Refugees (189 U.N.T.S. 150 entered into force April 22, 1954). United Nations. 1951.

to be accorded favourable conditions as was given to other foreigners in a country to access employment. But the Court distinguished the applicability of this requirement on the basis that refugees were considered to be in a different position to permanent residents in South African law.[37] On this basis, the Court concluded that the discrimination in this instance was fair.

Rafoneke v Minister of Justice and Correctional Services and others

In the more recent case of *Rafoneke v Minister of Justice and Correctional Services*,[38] an application was brought by a Lesotho national with a Lesotho Exemption Permit in South Africa and a refugee, both of whom had studied for an LLB degree, had successfully completed articles, and had passed the attorneys admissions exam.[39] The applicants sought to have s24(2)(b), and (3), read with s115 of the Legal Practice Act[40] (hereafter the LPA), declared unconstitutional.[41] The challenge was brought against 24(2)(b) which allegedly violated their right to equality because it differentiated between South African citizens and permanent residents on one hand, and temporary permit holders on the other hand.[42] They further submitted that there was no rational relationship between the differentiation and a legitimate governmental purpose, ans that even if there was a link between the differentiation and a legitimate governmental purpose, it nevertheless amounted to discrimination on the grounds of social origin or nationality, and that the discrimination was unfair and therefore could not survive constitutional muster.[43] Another argument was that s 115 of the LPA discriminated against them because qualified foreign legal practitioners from certain countries could be admitted and enrolled to practice in South Africa without being citizens or permanent residents, whereas temporary residents who had studied and trained in South Africa, could not.[44]

The Constitutional Court applied the *Harksen* test and held that there was indeed a differentiation between permanent residents and citizens and temporary resident foreigners, but this differentiation had a rational connection to a legitimate governmental purpose, which was to protect work opportunities for South African citizens and permanent residents.[45] The Court accepted that the provisions of s 24(2)(b) did discriminate on an analogous ground, but that this discrimination was not unfair because temporary resident foreigners could still work in other industries. Other factors which contributed to its decision included the fact that temporary residents could not bypass the provisions of the Immigration Act and other employment laws which required permits for specific periods and reasons to allow foreigners access to employment that were normally restricted to citizens and permanent residents.[46] The Court also found that South Africa's obligation arising from International Instruments such as the Agreement on Tariffs and trade (GATT) mandated it to accepted foreign professionals from certain designated countries.

The Court also considered the provisions of s 22 of the Constitution which, according to its interpretation, gave citizens alone the right to choose their professions. Reference was made to a report from 2011 which showed that out of 3300 LLB graduates, only 2200 contracts for articles were obtained. This therefore indicated the rationality of the LPAs provisions, read with the preamble of the Immigration Act and

37 2007 (4) SA 395 (CC) para 67.
38 2022 (1) SA 610 (FB) para 6.
39 2022 (1) SA 610 (FB) para 1.
40 Act 98 of 2014.
41 Ibid.
42 Ibid.
43 2022 (1) SA 610 (FB) para 23.
44 2022 (1) SA 610 (FB) para 24.
45 2022 (1) SA 610 (FB) paras 30-33.
46 2022 (1) SA 610 (FB) para 26.

the Employment Services Act, all of which sought to promote employment first for its citizens and permanent residents in an economic climate where employment was scarce.[47] In effect, since there was a rational connection, the discrimination was fair and there was no need to conduct the remainder of the limitations analysis in the *Harksen* test. The Court did make a separate finding which now allows temporary resident foreigners to be admitted as non-practising legal practitioners, and this will further provide more employment opportunities for this category of people. Allowing this. in the Court's opinion. did not contravene the provisions of the LPA.

Regulatory or Exclusionary?

It is quite clear from the cases above and a host of other cases dealing with the rights of immigrants that there is a clear divide between citizens and permanent residents, on one hand, and temporarily resident foreigners on the other hand in South African law. When it comes to the right of immigrants to work, the cases above show an almost identical trend in the Courts' thinking which is mainly based on three key elements: protection of local employment opportunities; mistrust of foreigners; and a reluctance of the Courts to go against populist, irrational ideals prevalent in South African society in relation to foreign nationals. This is surprising as the definition of work in the Immigration Act on a plain reading refers to conducting work associated with running a business or activities consistent with employment, with or without remuneration. No limitations were placed on this right because it is an inherently fundamental right that allows a person to put in effort to achieve a suitable quality of life. As the Court indicated to in *Minister of Home Affairs v Watchenuka*,[48] the right to work implicates the right to dignity, which is inherent in every living person: it knows no nationality or citizenship. Everyone should be given the opportunity to earn an income to provide for themselves.

The court in *Union of Refugee Women v Director* cited trustworthiness as the major determinant of a successful application for registration.[49] The only plausible conclusion from this, despite the Court's feeble attempt at providing a reason, is that foreigners are not to be trusted. This narrow approach to the right to work is extremely worrying, especially where some of the applicants in the *Union* case were refugees who had settled in South Africa after fleeing persecution. The chances of "fleeing" as the Court puts it, are slim to none as the most valuable thing to a refugee is stability and acceptance. The Courts' failure to consider current statistics on temporary residents is disturbing in both the *Rafoneke* and *Union* cases. More often than not, the public perceives South Africa's migrant population to be larger than it actually is,[50] and the Court perpetrated this view by failing to request current information on the subject.

The Court in *Rafoneke* also made mention of the possibility of foreign legal practitioners absconding with trust fund money.[51] Cases such as *S v Macheka*,[52] *S v Vorster*,[53] *Attorneys Fidelity Fund Board of Control v Mettle Property Finance*[54] and *Hewetson v Law Society of the Free State*[55] are a few examples of a host of instances where fidelity fund thefts have occurred by the current demographic of legal practitioners. It is submitted that the courts have been repeatedly wrong in painting temporary resident foreigners in such

47 2022 (1) SA 610 (FB) para 30 -
48 2004 (4) SA 326 (SCA) para 25 – 31.
49 *Union of refugee women v Director* para 37 – 40.
50 K Moyo "South Africa Reckons with Its Status as a Top immigration destination, Apartheid History, and Economic Challenges" https://reliefweb.int/report/south-africa/south-africa-reckons-its-status-top-immigration-destination-apartheid-history (accessed 30 August 2021).
51 2022 (1) SA 610 (FB) para 40.
52 2020 (1) SACR 189 (FB).
53 2007 (2) SACR 283 (E).
54 2012 (3) SA 611 (SCA).
55 2020 (5) SA 86 (SCA).

a manner. Dishonesty is not a trait based on nationality or origin. This is especially significant in light of the judgement in *Larbi Odam*, where the Court stressed the need for the protection of minorities since when they have little political sway to make demands from the government.[56]

The decision in *Rafoneke* is not surprising. The Constitutional Court since the judgment in *Larbi-Odam* has been increasingly restrictive of its interpretation of the right to work of temporary residents in South Africa. It would seem that the Courts are restricting access to work on a piecemeal basis. The question then becomes how far this will go. Will every profession be limited based on a set of criteria that are distinctly unbecoming of South Africa's transformative constitutional agenda? The Courts in both cases above suggested tthat employment was available in other industries, forgetting the restrictions applicable by virtue of being a foreigner and fits own judgment. Furthermore, the Court's reasoning in allowing foreign admitted legal practitioners to work in South Africa, where they have no training or little knowledge of local law, holds little weight. This is because, when compared to students who have studied and passed the local admissions exam, the better suited choice should be to support temporary residents because of the knowledge and expertise they have gained during the term of their studies.

The Court's approach in the cases discussed is in line with a governmental move to tighten immigration into South Africa. Since 2020, the government has moved the Department of Home Affairs, from the Governance and Administrative Cluster to the Justice, Crime Prevention, and Security Cluster.[57] This means that the department responsible for issuing permits and visa to immigrants has now been placed alongside the departments for State Security, Police, Defence, and others tasked with regulating criminal and security issues. This suggests that immigration is clearly a security concern for the government. This is contrary to the visionary ideals in the preamble to the Immigration Act. In fact, the current state of affairs is indicative of how the divisive laws of apartheid have influenced law-making in a Constitutional South Africa. The reality is that immigration regime in South Africa is not as inclusive as it purports to be in relation to the right to work.

Conclusion

In conclusion, this article has examined the regime providing for the right to work of temporary resident immigrants in South Africa before and after 1994. Current case law on the topic has been discussed to demonstrate the approach the Courts have adopted in interpreting this right. It has been found that South Africa has an exclusionary approach to the right to work. A distinction is drawn on the basis of permanent residency and citizenship. Our Courts have indicated that the Constitutional rights of temporary resident immigrants are developed only as a subordinate to citizenship and permanent residency. Further, this suggests that the Courts are not as independent as we would like them to be, since they are influenced by populist ideals prevalent in society.

56 Para 19-20.

57 Government of South Africa "Justice Crime Prevention and Security Cluster" https://www.gov.za/about-government/justice-crime-prevention-and-security-cluster (accessed 1 September 2022).

The law in South Africa in relation to cannabis social clubs

Thanyelani Ndlovu: Penultimate-year LLB

Introduction

Cannabis, also known as marijuana, weed, or dagga, has been a controversial topic among people all around the world. While some advocate for its religious, spiritual, and medicinal beliefs, others view it as a harmful plant. The focal point of this article is to discuss the uncertainties that arose about cannabis after the landmark judgment was handed down in September 2018 by the Constitutional Court in *Minister of Justice and Constitutional Development v Prince* ('the *Prince* case').[1] The Constitutional Court legalised the private consumption of cannabis. However, its judgment is arguably vague in so far as it did not address the commercial use of cannabis, one example of which is cannabis social clubs.

The Constitutional Court's judgment

The first point of departure is to unpack the *Prince* case. Prince made an application to the High Court to declare certain provisions of the Drugs and Drug Trafficking Act ('Drugs Act') and Medicines and Related Substances Control Act ('Medicines Act') unconstitutional in so far as they infringed upon the right to equality and privacy according to section 14 of the Constitution.[2] The High Court held that sections 4(b) and 5(b) of the Drugs Act read with Part III of Schedule 2 of the Drugs Act and sections 22A(9)(a)(i) and 22A(10) of the Medicines Act read with Schedule 7 of the Medicines Act were unconstitutional because they infringed upon the use, possession and cultivation of cannabis by an adult in a private dwelling.[3] The application made to the Constitutional Court was based on section 167(5) of the Constitution read with Rule 16 of the Rules of the Constitutional Court, which state that the Constitutional Court must confirm any order of constitutional invalidity made by the Supreme Court of Appeal, the High Court, or a court of similar status.[4] The Constitutional Court confirmed the constitutional invalidity of these sections, except 22A(10) of the Medicines Act. It is worth noting that the very section that the Constitutional Court did not declare invalid is of great importance to emerging business models centered around cannabis. Parliament, was given 24 months to amend the Drugs Act and the Medicines Act to allow for the use, possession and cultivation of cannabis for personal use in a private dwelling.

Therefore, the essence of the Constitutional Court decision is that the use of cannabis should

1 2018 (6) SA 393 (CC).
2 The Constitution of the Republic of South Africa, 1996.
3 2017 (4) SA 299 (WCC).
4 Rule 16 of the Constitutional Court, *Government Gazette*, 31 October 2003.

be highly regulated. Although cannabis has been legalised in South Africa only as far as the private use and consumption of cannabis for personal purposes is concerned, acts of producing, storing, processing, and selling cannabis are still illegal. Additionally, one can only have a limited amount of cannabis in one's possession. The maximum quantified by law was left to Parliament to determine. It seems fitting to discuss the position on cannabis in South Africa, because the Constitutional Court judgment has raised a lot of questions among cannabis social club owners.

The Haze Club: Grow Club Models

What are cannabis social clubs, you might ask? The best way to describe this is by taking a look at the story of Neil Liddell. Neil Liddell is the director of The Haze Club ("THC"). This club forms part of the "grow club model", which allows members of the club to buy their own seeds and have them grown and harvested by THC.[5] The rationale behind the formation of this club is that members retain ownership of the plant, and THC provides the facilities and equipment to help grow this plant.[6] This initiative was started to provide people living in urban metropolises, flats, and small and informal houses with the necessary facilities to grow this plant.[7] Mr Liddell was arrested and charged with the possession of a trafficable quantity of cannabis.[8] Subsequent to this, Mr Liddell made an application to the High Court.

Mr Liddell argued that denying access to grow clubs amounts to direct and indirect discrimination against people who do not have the time or land to grow their own cannabis. Mr Liddell's affidavits stated that the model allows South Africans to reap the benefits of the ruling regardless of their living conditions.[9] Essentially, whether one lives in the city, in a flat, or in a house with no land, or if one has no time or patience to cultivate cannabis, businesses such as the Haze Club provides people with an opportunity to acquire their own cannabis. Mr Liddell further argumed that the Club does not operate contrary to the judgment because THC subleases spaces to its members; therefore, each lot constitutes a member's private space. Hence, THC was not violating any legal provisions because the member's private space is limited to two plants, which yield about 30g of dried cannabis.[10]

The Constitutional Court in *Prince* did not confirm the order made by the High Court relating to the purchase of cannabis (section 22A (10) of the Medicines Act) and Mr Liddell therefore argued that[11] the prohibition of grow clubs infringes on the right to freedom of trade, occupation, and profession as per section 22 of the Constitution.[12] The rationale behind this argument was that the grow club model provides many people, such as farmers, with employment opportunities. Similarly, in light of the occupation argument, one can ask the question why are gardeners caring for the gardens of those who cultivate cannabis in their homes are entitled to do so without there being any legal impediments?

Cannabis for Private Purposes Bill B19-2020

To give effect to the *Prince* judgment, Cabinet recently approved the Cannabis for Private Purposes Bill B19-2020 ('the Bill'). It seems that the Bill does not provide clarification for the commercial use of cannabis, which might be attributable to the fact that the Constitutional Court chose to not deal with that question. The only thing mentioned in the Bill is that adults

5 The Haze Club "How it works" https://thehazeclub.co.za/ (accessed 09 October 2022).
6 L Daniel "SA's first dagga growing club heads to the High Court after nearly two years after police raid" https://www.businessinsider.co.za/first-cannabis-club-in-south-africa-at-the-high-court-2022-6 (accessed 09 October 2022).
7 Ibid.
8 Ibid.
9 S Smit "Haze Club case: 'Cannabis grow clubs allow people to access their rights'" https://mg.co.za/business/2021-02-02-haze-club-case-cannabis-grow-clubs-allow-people-to-access-their-rights/ (accessed 7 July 2022).
10 Ibid.
11 Ibid.
12 The Constitution of the Republic of South Africa, 1996.

may, without the exchange of remuneration provide to, or obtain from another adult, for personal use 30 seeds/seedlings for cannabis plant cultivation material, one flowering cannabis plant, and 100 grams dried cannabis equivalent.[13] This specific provision shows that the Bill does not envisage formulating regulatory measures for the commercial use of cannabis. This move by both the legislature and the judiciary seems not to consider how big a business opportunity cannabis social clubs are.

Becasue of the uncertainty that grow club owners are facing, more challenges seem to arise. The Bill has been tabled in Parliament and still needs to undergo a public participation process before it is passed into law. However, the 24-month suspension given by the Constitutional Court in the Prince case has lapsed before the legislature remedied the invalidated provisions. Moreover, there is nothing that indicates that Parliament asked for an extension, which means that the reading-in order by the Constitutional Court will take effect, which is likely to create more confusion to this already uncertain situation.

Way forward

It is commendable that South Africa is the first African country legally to permit the private use of cannabis.[14] However, we do need to take cognisance of the challenges that the Constitutional Court judgment has posed on cannabis social clubs. The viewpoint that this article adopts is that grow clubs should be permitted to continue conducting their business as usual because the fee paid to these grow clubs is not for the cannabis itself; it is simply rent for the land to grow this plant. These models are different from a cannabis dispensary where the sole purpose of such an enterprise is to make a profit from selling cannabis for recreational or medical use. In such an instance, cannabis dispensaries are essentially making a profit from directly selling cannabis, while in the case of grow clubs, they are merely making a profit from renting/leasing out their land to members of the club. Their profit is in no way derived from selling cannabis because the plant is bought by the members and they retain full ownership of the plant. Grow clubs are merely providing the facilities necessary to grow cannabis. Placing various restrictions on grow clubs in South Africa might potentially take away many investment opportunities from abroad. Many markets in Canada and the United States would like to invest in Africa. However, due to various legal constraints, the opportunity for South Africa's economy evaporates.[15]

Conclusion

In conclusion, the judgment handed down by the Constitutional Court in the *Prince* case will go down in history because of the progressive approach taken by the Constitutional Court. However, despite being a landmark judgment, it still leaves many South Africans perplexed and confused, specifically cannabis social club owners. It is also concerning that neither the legislature nor the judiciary are doing anything to provide clarity about the commercial use of cannabis in the context of cannabis social clubs. As Mr Liddell argued, this type of business enterprise does not defy the judgment; it merely seeks to allow everyone to reap the benefits of the judgment. At the end of the day, recognising such businesses as legitimate will contribute to South Africa's economy, by providing employment opportunities and taxable income.

13 Cannabis for Private Purposes Bill B19 of 2020.

14 EC Lubaale and SD Mavundla "Decriminalisation of cannabis for personal use in South Africa" (2019) 19 *African Human Rights Law Journal* 819-842.

15 Norton Rose Fulbright "South African legislative overview" https://www.nortonrosefulbright.com/en-za/knowledge/publications/f57eb1e2/south-african-legislative-overview (accessed 7 July 2022).

Agency by estoppel as distinct from apparent authority: *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC)

Thembelani Ncube: Final-year LLB

Introduction

It cannot be gainsaid that certainty is a fundamental facet of every legal system.[1] It forms part and parcel of the constitutional value, the rule of law.[2]

In this article, I examine critically the decision by the majority in *Makate v Vodacom*[3] (*Makate*) on apparent authority (or ostensible authority)[4] and estoppel in the law of agency. In this ground-breaking judgment, the court changed the law as it has been understood since the early 20th century.[5] The court introduced a new approach to our law of agency, holding that estoppel and apparent authority are different legal concepts.[6] Against the face of well-established precedent, the court overturned decades of settled law in its judgment.

The minority, by contrast, was very critical of the majority's approach and gave a thorough examination of the law as it had traditionally existed. The minority's view was that the traditional approach, as received from English law into South African law, should continue to apply. This traditional approach is that apparent authority and estoppel are one and the same thing and that 'apparent authority is merely one more instance of estoppel'.[7]

Inasmuch as the majority has brought about much needed clarity and certainty in this area of the law of agency, it has equally created a lot of confusion and uncertainty in practice. In the legal academic literature, some commentators prefer the traditional approach, accepted by the minority judgment;[8] while other commentators advocate for the new approach, endorsed by the majority

1 Per Van der Westhuizen J in *Mighty Solutions v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) para 38; F Ali *The Importance of Legal Certainty in the South African Common Law of Contract in Promoting the Constitutional Vision* (LLM thesis, UNISA, 2021) 50; S Wrbka "Comments on Legal Certainty from the Perspective of European, Austrian and Japanese Private Law" in M Fenwick and S Wrbka (eds) *Legal Certainty in Legal Certainty in a Contemporary Context* (2016) 10.

2 Certainty is part and parcel of the rule of law. See section 1(c) of The Constitution of the Republic of South Africa, 1996.

3 2016 (4) SA 121 (CC).

4 The concepts 'apparent authority' and 'ostensible authority' are often used interchangeably. In this paper, I consistently use the former concept (apparent authority).

5 See *Van Blommenstein v Holliday* (1904) 21 SC 11 at 17; *In re Reynolds Vehicle and Harness Factory Ltd* (1906) 23 SC 703 at 712. See also PA Delport *et al Henochsberg on the Companies Act 71 of 2008* (2021) at 99.

6 2016 (4) SA 121 (CC) para 75.

7 2016 (4) SA 121 (CC) para 110.

8 See CJ Pretorius "Authority by Representation – a Rule Lacking a Theory: A Reappraisal of *Makate v Vodacom* 2016 (4) SA 121 (CC)" 2021 *Acta Juridica* 297; RD Sharrock "Authority by Representation – a New Form of Authority?" (2016) 19 *PELJ* 1; FHI Cassim and MF Cassim "The Authority of Company Representatives and the *Turquand* Rule Revisited" (2017) 134 *SALJ* 639; FHI Cassim *et al Contemporary Company Law* 3 ed (2021) 243; Delport *et al Henochsberg on the Companies Act* (2021) at 99.

judgment.[9] There have also been occasions where judges have avoided this conundrum altogether.[10] Be that as it may, there is a need for clarity in what manner one ought to approach this in practice. Thus, in this article, I investigate whether apparent authority and estoppel are one and the same thing, or not – and from there, try and explain the majority judgment.

The facts of *Makate*

The facts were, briefly, as follows. Mr Nkosana Makate (applicant) came up with a brilliant idea where a cellphone user without airtime could send another a 'please call me' request. This idea was written down, introduced to Vodacom - through Mr Philip Geissler (the then Vodacom director of product development and management). An agreement was reached that the idea would be put to trial and, if successful, Mr Makate would receive a share of the revenue generated. The trial was a success, Mr Makate was praised, and Vodacom introduced the new "Please Call Me" product, but no compensation came Mr Makate's way. Instead, Mr Knott-Craig (the then Vodacom CEO) and Mr Geissler created a false narrative where the former was falsely and dishonestly credited. After leaving the employ of Vodacom, Mr Makate instituted action proceedings in the High Court to enforce his agreement with Vodacom.

The applicant was unsuccessful in the High Court.[11] Leave to appeal was declined by the High Court and by the Supreme Court of Appeal. However, the Constitutional Court granted leave to appeal. When the matter came before the Constitutional Court, it had to be determined, firstly, whether the apparent authority relied upon by the applicant was established.[12] Secondly, whether the applicant's claim had prescribed, which necessitated a proper interpretation of section 10(1) of the Prescription Act read with sections 11(d), 12(1), and 12(3) of the Prescription Act.[13] This article is concerned with the former issue. The majority and the minority came to the same conclusion in the case - that Mr Makate should succeed - albeit on different approaches in so far as the law was concerned.

The traditional approach

Before *Makate* the traditional approach, preferred by the minority, was that agency by estoppel and apparent authority were the same thing.[14] Wallis AJ, writing for the minority, held that on both principle and authority apparent authority is merely one more instance of estoppel.[15] This has been the case, prior to *Makate*, since time immemorial. Our law was adopted from English law, which understands apparent authority as falling under the broader rubric of estoppel and is treated as an instance of estoppel by representation.[16]

The requirements for proving agency by estoppel before *Makate* where that, there must be:

(a) a representation made in words or by conduct, including silence or inaction;
(b) the representation must have been made by the principal to the person who raises estoppel (the representee);
(c) the principal must reasonably have expected that her conduct may mislead the representee;

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9 See LL Ramokanate "Distinguishing apparent authority from agency by estoppel: A commentary on the decision of *Makate v Vodacom* [2016] ZACC 13" (2016) 24 *Lesotho Law Journal* 177; G Glover "Agency in South Africa: Mapping its defining characteristics" 2021 *Acta Juridica* 243; WJC Swart and M Lombard "Company Rules" (2017) 80 *THRHR* 657.

10 See *AfrAsia Special Opportunities Fund (Pty) Ltd v Royal Anthem Investments 130 (Pty) Ltd* [2016] 4 All SA 16 (WCC) paras 33-34; *Stols v Garlicke and Bousfield (PKF (Durban) Inc* [2020] 4 All SA 850 (KZP) paras 228-232; *Auto Showroom CC v Patel* [2020] ZAGPJHC 129 paras 20-21 and 27.

11 *Makate v Vodacom (Pty) Ltd* [2014] ZAGPJHC 135.

12 2016 (4) SA 121 (CC) para 31.

13 Ibid para 32; Act 68 of 1969.

14 See *NBS Bank v Cape Produce* 2002 (1) SA 396 (SCA); *Glofinco v ABSA Bank* 2002 (6) SA 470 (SCA); *South African Broadcasting Corporation v COOP* 2006 (2) SA 217 (SCA).

15 2016 (4) SA 121 (CC) para 110.

16 Ibid para 128.

and
(d) the representee must reasonably have acted on the representation to his own prejudice.[17]

The new approach

The majority's approach, however, was the opposite - namely that apparent authority and estoppel are not the same thing.[18] The court held that the "presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf".[19] The court changed the law as it has been understood since the early 20th century.[20] As such, when the time came to separate the "pears from the apples", the court that:

> "The approach that collapses apparent authority and estoppel into the same thing, as illustrated here, is not underpinned by principle, let alone an established one as suggested…There is no doubt that our law has recognised estoppel, and the circumstances under which it applies, for a century. But that does not mean estoppel is apparent authority."[21]

The conflation of estoppel with apparent authority has been described as a '*contradictio in terminis*' (the direct translation which means 'a contradiction in terms').[22] Ramokanate persuasively, and correctly, argues that the *Makate* judgment "brought about much needed clarity to what was for most time a grossly misunderstood part of the law of agency".[23]

Prior to *Makate*, there were a prominent number of judges and commentators who advocated for and alluded to the new approach endorsed by the majority - and similar examples can be found in England.[24] In 1942, Hathorn JP in *Insurance Trust and Investment v Mudaliar*[25] noted the confused state under which the English law of agency was under and how it was finding its way into South African law.[26] Professor Kerr has always been one of the predominant advocators for a separation between apparent authority and estoppel.[27] He was very critical of the *Law of South Africa* edition at the time, which seemed to have conflated apparent authority with estoppel.[28] Kerr has always been adamant that there must be a distinction drawn between estoppel and apparent authority. He argued that apparent authority exists as a separate concept from estoppel.[29] In 1964, Diplock LJ in *Freeman & Lockyer v Buckhurst Park Properties*[30] (an English judgment) also alluded to the same confused state of English law.[31]

Anglo-American texts also appear to treat the two concepts - apparent authority and estoppel - as separate.[32] The American *Restatement Third: Agency* distinguishes what may be called "true"

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17 2016 (4) SA 121 (CC) para 49. See also *NBS Bank v Cape Produce* 2002 (1) SA 396 (SCA) para 26; *Glofinco v ABSA Bank* 2002 (6) SA 470 (SCA) para 12.
18 2016 (4) SA 121 (CC) para 44.
19 2016 (4) SA 121 (CC) para 47.
20 See *Van Blommenstein v Holliday* (1904) 21 SC 11 at 17; *In re Reynolds Vehicle and Harness Factory Ltd* (1906) 23 SC 703 at 712.
21 *Makate* 2016 (4) SA 121 (CC) para 80.
22 Swart and Lombard 2017 *THRHR* 670.
23 Ramokanate 2016 *LLJ* 179.
24 See *Insurance Trust and Investment v Mudaliar* 1943 NPD 45 at 61; AJ Kerr *The Law of Agency* 4 ed (2006) 28, and quoted therein DM Walker in *The Oxford Companion to Law*. For English examples, see Diplock LJ's remarks in *Freeman & Lockyer v Buckhurst Park Properties* [1964] 1 All ER 630 (CA) at 643; and Slade J's remarks in *Rama Corporation Ltd v Proved Tin & General Investments Ltd* [1952] 1 All ER 554 at 555; P Watts and F Reynolds *Bowstead & Reynolds on Agency* 21 ed (2018) also treats the two concepts as separate, see paras 1-011, 2-101, 3-004 and 8-010.
25 1943 NPD 45.
26 1943 NPD 45 at 61.
27 Kerr *op cit* 26-30.
28 Ibid.
29 Kerr *op cit* 28.
30 [1964] 1 All ER 630 (CA).
31 [1964] 1 All ER 630 (CA) at 643.
32 Watts and Reynolds *Bowstead & Reynolds on Agency*; The American Law Institute's 3 ed (2006) *Restatement of the Law: Agency*. See also the footnote discussion in Glover 2021 *Acta Juridica* 262 (n 85).

estoppel cases from cases of apparent authority.[33] The English text *Bowstead & Reynolds on Agency* makes a distinction on the basis that estoppel requirements apply in weak form – or watered-down approach – to agency situations.[34] Such situations are to be distinguished from other agency-related situations where the general principles of estoppel apply.[35]

Considering that this is a nuanced approach in our law and is still in the trajectory of development, some judges and commentators have endorsed the approach in *Makate*.[36] Likewise, on the opposite side, some judges and commentators have disagreed with *Makate*,[37] while, on that score, some judges have put up Lady *Justitia*'s blindfold on *Makate*.[38] However, this has dire consequences for the development of our agency law in this area, and, it is submitted, is a direct challenge to the *stare decisis* doctrine.[39] As Professor Glover eloquently argues, "the Constitutional Court is unlikely to overturn its own finding any time soon", thus, "the doctrine of precedent requires its acceptance for current purposes".[40]

That being the legal position and the *Makate* judgment binding upon every court in the land, there is a need for clarity on how this can be approached in practice. That is to determine how an applicant pleads their case on apparent authority and how estoppel is pleaded. This was, after all, one of the pressing issues in the court *a quo* and in the Constitutional Court in *Makate*.[41] However, that is a matter requiring a separate piece of work for a proper and detailed discussion. The breadth and reach of this article is not wide enough to cover it here.

Conclusion

In conclusion, the *Makate* judgment does not come as a surprise. Our law, as adopted from English law, has always been under a state of confusion – a conflation of estoppel and apparent authority. On multiple occasions, judges and commentators would point to this confusion. It is respectfully submitted that the majority in *Makate* took a bold – but correct – decision to overturn the law as it was since the early 20th century. Our law is now ventilated, estoppel and apparent authority are not the same, they exist separately, distinctively, and independently – but, as illustrated by *Makate*, they apply in similar factual scenarios.

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33 The text is not available to me but is emphatically discussed in *Bowstead & Reynolds on Agency* 112 and 381, 382.

34 *Bowstead & Reynolds on Agency op cit* 6.

35 Ibid.

36 See *Mngomezulu v Vodacom (Pty) Ltd* [2017] ZALCCT 27 paras 16-19; *605 Consulting Solutions (Pty) Ltd v National Health Laboratory Service* [2019] ZAGPJHC 248 paras 18-20; *Genadeshoop CC v Brown NO* [2020] ZAWCHC 173 paras 19-22; *Van der merwe v Tlaping Ranch (Pty) Ltd* [2019] ZANWHC 57 paras 7 and 12-13; *Costa NO v Arvum Exports (Pty) Ltd* [2016] ZAWCHC 95 paras 31-35; *Brightstone Trading 3 CC v Economic Freedom Fighters* [2021] 9 BLLR 913 (LC) paras 39-42; *Charter v Butler's Port Alfred Properties (Pty) Ltd* [2016] ZAECGHC 151 para 34-36 and 47-48; *Bothma v Chalmer Beef (Pty) Ltd* [2018] ZAFSHC 209 paras 25-31; Glover 2021 *Acta Juridica* 243; Ramokanate 2016 *Lesotho Law Journal* 179.

37 See *Gore NO v Ward* [2022] ZAWCHC 3 para 29; *Radio Surveillance Security Services (Pty) Ltd v Telkom SA Ltd* [2018] ZAGPPHC 296 para 53-57; Pretorius 2021 Acta Juridica 297; Sharrock 2016 PELJ; Cassim and Cassim 2017 *SALJ* 639; Cassim *et al Company Law* 243; Delport *et al Henochsberg on the Companies Act* at 99.

38 See *AfrAsia Special Opportunities Fund v Royal Anthem Investments 130* [2016] 4 All SA 16 (WCC) paras 33-34; *Stols v Garlicke and Bousfield* [2020] 4 All SA 850 (KZP) paras 228-232; *Auto Showroom CC v Patel* [2020] ZAGPJHC 129 paras 20-21 and 27.

39 See P Delport and I Esser "Corporate Law" (2016) 2016 *Annual Survey of South African Law* 244 at 274.

40 Glover 2021 *Acta Juridica* 262.

41 *Makate v Vodacom (Pty) Ltd* [2014] ZAGPJHC 135. See also *Makate* 2016 (4) SA 121 (CC) paras 14-28 for a full discussion of the High Court proceedings and decision.

Is a horse by any name still a horse? – An analysis of competing similar trade marks in South Africa in light of *Stable Brands (Pty) Ltd v LA Group (Pty) Ltd* [2019] zagpphc 567.

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Introduction

"What is in a name? A rose by any name remains a rose. Oft' quoted oft' used, albeit in a dismissive tone."[1] It cannot be gainsaid that trade marks do not form part of the core identity of any brand. Without it, much of the brands identity would be left wanting, based solely on the dependence of its style or quality, rather than its distinguishing characteristic that allows consumers to differentiate the product apart from anothers. This is because trade marks are a badge of origin.[2] A collective of a distinguishing mark, a distinguishing badge and an origin, all wrapped up into one distinguishable mark.[3]

In fact, it has been said that the distinguishability of a trade mark lies in the telling of a story. That story of a trade mark proprietor's goods or services either being one of good fortune, or of a hapless one.[4] The identity or mark of any brand is therefore key to much of its success in consumer markets in modern times. In this case note, I will be discussing the case of *Stable Brands (Pty) Ltd v LA Group (Pty) Ltd* [5] involving two prominent brands with confusingly similar trade markings, that being a depiction of a polo player on a polo pony with a raised mallet,[6]the word "Polo", and/or a combination of the two.[7]

The facts of the case

In trade mark law, the fundamental function of a trade mark is to distinguish one person's the goods or services from that of another's.[7] It is against this backdrop that the Gauteng High Court in Pretoria recently had to consider distinguishability relating to two of the most widely known clothing and fashion brands in the modern era – Polo by Ralph Lauren, and Polo licensed by the US Polo Association.

It is widely recognised that the fashion industry in general is highly competitive. Retail clothing and accessories stores are even more competitive in local malls and shopping centres in South Africa, offering a wide variety of both local and international shops and brands such as Cotton On, Factorie, ZARA, Edgars, Foschini and Truworths. The Applicant, Stable Brands (Pty) Ltd ("the Applicant"), and the First Respondent ("the Respondent"), LA Group (Pty) Ltd, are

1 *Stable Brands (Pty) Ltd v LA Group (Pty) Ltd* [2019] ZAGPPHC 567 para 1.
2 *Pepkor Retail (Pty) Limited v Truworths Ltd* [2016] ZASCA 146 para 10.
3 [2016] ZASCA 146 para 10.
4 [2019] ZAGPPHC 567 para 3.
5 [2019] ZAGPPHC 567.
6 *LA Group (Pty) Ltd v Stable Brands (Pty) Ltd* [2022] ZASCA 20 para 54. 7 [2019] ZAGPPHC 567 para 13.
7 [2016] ZASCA 146 para 10.

no different. Both of these parties are highly competitive retailers in the clothing and fashion industry in South Africa. In this matter, the Respondent launched an urgent application at the Gauteng High Court, Pretoria for interdictory relief against the Applicant, and its registered licensor US Polo Association, for infringing 46 of its registered "POLO" word, and POLO PONY & PLAYER device trade marks.[8]

In retaliation, the Applicant counter-applied for, *inter alia,* the expungement of all of the Respondent's registered trade marks from the Register of Trade Marks ("the register") in terms of s 24, read with ss 10(2)(*a*), 10(2)(*b*) and 10(2)(*c*), and ss 10(13), 27(1)(*a*) and 27(1)(*b*) of the Trade Marks Act ("the Act").[9] The Applicant alleged, *inter alia,* that the Respondent had not used it for a period of 5 years prior to the launch of the application for expungement, and was therefore liable for expungement.[10] The Applicant further lodged an application with the Tribunal of the Registrar of Trade Marks for expungement of the trade marks of the Respondent.[12] Hearing was set down for adjudication in the High Court on both the infringement and expungement proceedings, but the application lodged at the Tribunal of the Registrar of Trade Marks was transferred to the High Court in terms of s 59 of the Act. As a consequence, it was agreed by the parties that all three applications were to be consolidated and heard together.[11] However, at the hearing, counsel for the Respondent sought adjournment to reconsider their application for infringement. Upon reconsideration, the Respondent decided to withdraw the application for infringement and tendered costs. This was unopposed and made an order of court by agreement between the parties.[14]

The matter for expungement launched by the Applicant was therefore the only matter at issue that the court had to deliberate on. To this end, the Applicant sought to amend its notice of counter-application to include trade marks initially omitted from its papers. This application for amendment was granted, along with the joinder of the Registrar of Trade Marks as the Second Respondent in the matter.

The matter was therefore set down for hearing, and the matter proceeded on the single issue determining whether the trade marks held by the Respondent were liable to be expunged in terms of s 24, read with ss 10(2)(*a*), 10(2)(*b*) and 10(2)(*c*), and ss 10(13), 27(1)(*a*) and 27(1)(*b*) of the Act.

Summary of Arguments

The Applicant

The Applicant, Stable Brands (Pty) Ltd, is a fashion and retail brand. It is the registered licensee of US Polo Association in South Africa.

In this matter, although it was the Respondent that launched proceedings in the Pretoria High Court, it was ultimately the Applicant that was successful in its application. With the Respondent initiating infringement proceedings against it, the Applicant launched counter-application proceedings for the expungement of the Polo trade mark from the Register.

The main arguments advanced by the Applicant all fall within the applicable statue regulating trade marks in South Africa. The Applicant therefore relied in particular on s 24, read with ss 10(2)(*a*), 10(2)(*b*) and 10(2)(*c*), and ss 10(13), 27(1)(*a*) and 27(1)(*b*) of the Act in claiming cancellation of the trade mark. To this end, the Applicant sought two remedies in its counter-application. Firstly, for the cancellation of 46 of the Respondent's various trade marks from the Trade Marks Register, and alternatively directing the Trade Mark Register to endorse disclaimers of the Respondent's trade mark.[12]

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8 [2022] ZASCA 20 para 3.
9 Act 194 of 1993.
10 [2019] ZAGPPHC 587 para 6 and 7.
11 [2019] ZAGPPHC 587 para 7 and 8.
12 [2019] ZAGPPHC 567 para 12.

Moreover, the Applicant in its arguments alleged that the various trade marks, those being the word "POLO" and/or a polo player on a polo pony with a raised mallet included a diverse range of classes, namely: 6, 9, 14, 16, 18, 20, 24, 25, 26, 27, 28, 35, 41, 42 and 43.[13] These classes therefore included a wide range of goods and services such as clothing, sporting apparatus, keyrings, spectacles, leather goods, electronic goods, jewellery, and entertainment services that the Applicant contended should all be cancelled on various grounds, namely: (i) that the marks – lacked distinguishability (ss 10(2)(*a*), are descriptive and non-distinctive (ss 10(2)(*b*), and have become customary in a *bona fide* and established practice of the industry (ss 10(20(*c*);[14] (ii) have not been used for five years or longer (ss 27(2)(*b*); (iii) were registered without a *bona fide* intention to use coupled with non-use (ss 27(1)(*a*); and (iv) would likely cause confusion or deception in regard to the manner in which the registrations have been used.[15] All of these arguments will be explored in the *ratio* of the Court.

The Respondent

Initially, it was the Respondent that initiated the current dispute regarding trade mark infringement. In May 2018, the Respondent launched urgent application proceedings at the Pretoria High Court seeking interdictory relief to restrain the Applicant, as well as its licensor – the US Polo Association – from infringing its licensed trade mark. The Respondent therefore placed reliance on the infringement of its trade mark – that being the word POLO, POLO PONY & PLAYER device trade marks – in terms of s 34 of the Act.[16] However, on the day of the hearing, the Respondent sought a standing down to reconsider its legal position. At the recommencement of the proceedings, the Respondent decidedly withdrew its application for infringement against the Applicant.[17] This was unopposed and the draft order was made an order of Court.[18]

However, this notwithstanding, the Applicant requested the matter proceed with the issue of cancelling of the Respondent's trade marks. This was opposed by the Respondent on the basis that upon its withdrawing, the Applicant's counter-application was dependant on the withdrawn main application, and could no longer be entertained. Furthermore, the Respondent submitted that the Applicant lacked the requisite *locus standi* in light of the withdrawn main application.[19] Van Der Westhuizen J in an *ex tempore* judgment dismissed the Respondent's Application on the basis that the counter application was a separate, distinct and substantive application.[20] Therefore, the issue of cancellation of the Respondent's trade marks persisted despite the Respondent withdrawing its infringement allegations against the Applicant.

In the light of this, and in response to the Applications submissions in terms of s 27(1)(a) and 27(1)(b) of the Act, the Respondent advanced numerous arguments, including referencing various invoices, photographs and catalogues in support of its assertion that it had a *bona fide* use of the trade mark.[21] Furthermore, the Respondent advanced that a correlation existed between the Respondent's specific trade mark and the photographs, catalogue or invoice presented to prove *bona fide* use. The Respondent further, in light of the allegation of non-use in terms of class 42, advanced the argument that it intended to establish restaurants at flagship stores around the county. It did this by demonstrating design plans for future use.[22]

13 [2019] ZAGPPHC 567 paras 24, 25, 35 and 54.
14 [2022] ZASCA 20 para 5.
15 [2019] ZAGPPHC 567 para 23, 56; [2022] ZASCA 20 para 5.
16 [2022] ZASCA 20 para 87.
17 [2019] ZAGPPHC 567 para 9.
18 [2019] ZAGPPHC 567 para 9.
19 [2019] ZAGPPHC 567 para 9.
20 [2019] ZAGPPHC 567 para 9.
21 [2019] ZAGPPHC 567 para 45.
22 [2019] ZAGPPHC 567 para 52.

Finally, in relation to the allegation by the Applicant that the Respondents trade marks are liable for expungement in terms of s 24, read with s 10(13) on the basis of its agreement with Ralph Lauren to trade alongside each other, the Respondent relied in particular on s 31 of the Act. The Respondent advanced the technical argument that the trade mark included additions or alternations that did not substantively affect its identity by referring to the Ralph Lauren mark.[23]

The *Ratio* of the Court, and its reasons therein

In this matter, the Court, per Van Der Westhuizen J, had to determine a number of submissions brought by the Applicant for cancelling the Respondents 46 trade marks. Arguments were advanced in terms of s 24, read with ss 10(2)(*a*), 10(2)(*b*) and 10(2)(*c*), and ss 10(13), 27(1)(*a*) and 27(1)(*b*) of the Act, and related to a number of different classes of goods and services offered, and trade marked by, the Respondent.

In indicative outcome of the Court in coming to its findings against the Respondent, the Court stated in *obiter* that where a trade mark proprietor has used its registered trade mark in a manner that renders it liable for expungement, it only has itself to blame for such expungement.[24] With this context and backdrop in mind, I will set out briefly each argument advanced by the Applicant that the Court was discerned with in coming to its findings in cancelling all 46 of the Respondents trade marks from the Trade Mark Register.

Cancellation based on a lack of distinguishability in terms of s 10(2)(*a*), read with s 24 of the Act: In its submission, the Applicant alleged that the word "polo" was not distinguishable because the word was used to broadly describe specific pieces of clothing, rather than a distinguishable brand.[25] This is illustrated by the fact that polo shirts are commonly referred to goods in the fashion industry. Moreover, because of this commonality, the trade mark "polo" did not distinguish its brand from the relevant articles of goods found in fashion stores across the world. Accordingly,the trade mark was liable to be expunged in terms of s 10(2)(*a*), read with s 24 of the Act.[26]

Cancellation based on a lack of distinctiveness in terms of s 24, read with s 10(2)(*b*): The Court in this regard dealt with the interpretation and meaning of the word "polo" in ordinary English, and in terms of the dictionary definition. The Court derived that the word "polo" was incapable of performing a trade mark function, especially when regard is had to the origin, true use of the word, and true purpose of the trade mark. In this regard, the Court held that at face value, the word "polo"was first and foremost a word of description, rather than a word of distinctiveness. The

Court went on to say that the word "polo" is therefore a generic term used to describe clothing in the fashion industry, and cannot exclusivity differentiate one traders goods or services with another. The Court consequently held that the trade mark was liable to be expunged in terms of s 24, read with s 10(2)(*b*) of the Act for non-distinctiveness.[27]

Cancellation based on the claim that the trade mark had been registered without a *bona fide* intention to use, coupled with non-use in terms of ss 27(1)(*a*) and (*b*), read with s 24: In relation to the provisions of s 27(1)(*a*) and (*b*) of the Act, the Applicant sought reliance on the Act relating to specific trade marks identified.[31] The Applicant sough to cancel the trade marks held by the Respondent on the basis of a lack of a genuine intention to use the trade mark where a trade mark is registered, together with non-use of the registered trade mark for a period of five years.[28]

In relation to the issue of a *bona fide* non-use of

23 [2019] ZAGPPHC 567 para 67.
24 [2019] ZAGPPHC 567 para 66.
25 [2019] ZAGPPHC 567 para 66.
26 [2019] ZAGPPHC 567 para 26-30.
27 [2019] ZAGPPHC 567 para 31-34. [31] [2019] ZAGPPHC 567 para 41.
28 [2019] ZAGPPHC 567 para 41-42.

the trade mark in terms of s 27(1)(*a*), the Court in this particular issue had little difficulty in determining that the trade marks issued, being 2003/02685, were not currently being used, or intended to be used, by the Respondent. As a consequence, the Court held that the Respondent, being a business that focusses mostly on clothing, footwear, bags, wallets etc., did not have any intention of using its trade marks for typewriters, scientific apparatus, instruments, software, and health care services, amongst others. Accordingly, the Court held that the Respondent had no clear intention to use any of the aforementioned trade marks on such goods.[29] Moreover, the Court held that Respondent's approach in showing a *bona fide* intention to use was "sparse, ambiguous or lacked conviction".[30] This argument advanced by the Respondent was therefore dismissed, and certain classes were expunged from the register.[31]

In relation to the argument advanced cancelling the trade marks on the basis of nonuse for five years or longer in terms of s 27(1)(*b*): In this regard, the Court was tasked with considering the Respondents undated photographs and catalogues outside of the critical period, being 2 April 2013 - 2 April 2018.[32] In coming to its reasoning, the Court held that it was trite law that the trade mark proprietor bore the onus in proving use, as stated in s 27(3) of the Act.[33] To this end, the Court came to the determination that there existed no causal connection between the evidentiary invoices and photographs taken outside the critical period. Therefore, no correlation could be drawn between the invoice and photographs.[34] As a consequence, the Court cancelled the trade marks in terms of s 27(1)(*b*) on the basis of the Respondent failing to discharge the onus of proof.[35]

And finally, the issue of cancellation based on the registration of a trade mark which would likely cause confusion or deception arising from a manner in which the registration had been used: s 10(13) of the Act is the provision with which the Applicant placed reliance in alleging that the trade mark registered would likely deceive or confuse consumers. The Applicant in advancing argument on this ground sought to rely on the admitted fact by the Respondent that its registered trade mark, and the registered trade mark used by Ralph Lauren LP, were entitled to be sold alongside each other in the South African market.[36] The Court, in examining this argument, noted that the test in establishing whether a trade mark confused, or was likely to deceive, was dependant on that of an ordinary person, with average intelligence and proper eyesight.[37] In response to this argument, the Respondent alleged that, in terms of s 31 of the Act, reliance may be placed on the use of the associated mark.[38] Unfortunately for the Respondent, the Court held that this argument could not be sustained, especially in the light of the fact that the Court has the discretionary power to accept such evidence.[39] Accordingly, the defence raised by the Respondent fell short, and the trade marks were cancelled in terms of s 24, read with s 10(13).[40]

An evaluation of the matter in light of the SCA decision

In one fell swoop, the Pretoria High Court declared all of the Respondents trade marks cancelled. It was both a drastic, and broad brush judgment that had far reaching implications for one of the most well-known fashion brands in South Africa. The question that left many who

29 [2019] ZAGPPHC 567 para 57.
30 [2019] ZAGPPHC 567 para 50.
31 [2019] ZAGPPHC 567 para 54-57.
32 [2019] ZAGPPHC 567 para 42.
33 [2019] ZAGPPHC 567 para 43.
34 [2019] ZAGPPHC 567 para 47.
35 [2019] ZAGPPHC 567 para 54.
36 [2019] ZAGPPHC 567 para 61.
37 [2019] ZAGPPHC 567 para 54, citing *Roodezandt Kooperatiwe Wynmakery Ltd v Robertson Winery (Pty) Ltd* 2014 BIP 294 SCA.
38 [2019] ZAGPPHC 567 para 67.
39 [2019] ZAGPPHC 567 para 67, citing *Pleasure Foods (Pty) Ltd v TMI Foods CC t/a Mega Burger* 2000 (4) SA 181 (T) at para 190F-H.
40 [2019] ZAGPPHC 567 para 6 of the order. [45] [2022] ZASCA 20 para 207.

read the judgment begging: was this decision correct? The Respondent did not think so, and decided to appeal the matter to the Supreme Court of Appeal ("SCA"). This, in part, was upheld on the basis that the SCA felt that the Respondent did not, and could not, prove that all 46 of the Appellants trade marks – its very lifeblood – were liable to be expunged.[45]

I am of the opinion to agree with the majority decision penned by Schippers JA. The Judgement written by Van Der Westhuizen J is far too broad, and would have a harrowing effect on trade mark litigation going forward. In this regard, I will briefly discuss the findings by the SCA in overturning some of the peculiar decisions of the court *a quo*.

The SCA starts out by looking at all of the arguments advanced by the Applicant (the Respondent in the SCA) in the court *a quo*. It, firstly, discusses whether the trade marks were, in fact, liable to be expunged in terms of s 10(2)(*a*). The Court trotted through immense figures and financial numbers to determine whether the Appellant had, by some margin, established distinctiveness through use in the South African market.[41] The answer? A resounding yes. Of course Polo, a brand with over 600 stores across South Africa, with a net profit of R1.2 billion over a three-year period, would be able to show distinctiveness through use.[42] Accordingly, the SCA held that the Court *a quo* erred in considering the insurmountable evidence presented, and ordered that the trade marks were not liable to be removed in terms of s 10(2) of the Act.[43]

Furthermore, the SCA held that the High Court erred in finding that the word "polo", as contemplated in the dictionary, would render it non-distinctive. It may be determined that the word "polo", although appearing as descriptive of items of clothing, is quite clearly distinctive as a "trade source of goods", and therefore had acquired disincentives through extensive use, despite it being descriptive.[44] Rightfully, these arguments were rejected by the Court.[45] In relation to the attack by the Respondent in terms of s 10(2)(*b*) and (*c*) of the Act, the SCA, in a swift decision, held that the Appellant's trade mark was distinguishable when regard is had to the range of classes of goods it sells. Accordingly, this argument also failed, and the decision by the court *a quo* was correctly set aside.[46]

In relation to the removal of the trade marks in terms of s 27(1), the SCA dealt with s 27(1)(*b*) first, on the basis that it related to s 27(1)(*a*) insofar as time was concerned. In this regard, the SCA asserted that the Appellant had the onus to prove use of the trade mark, or alternatively a *bona fide* intention to use the trade mark. The Court, in my opinion correctly so, held that the Appellant in referring to its invoices and catalogues was able to show a genuine use of the trade mark.[47] Moreover, the Court held that it needn't undertake an analysis of the remaining trade marks in terms of intention to use as the Applicant conceded it had not been used. Accordingly, the Court upheld the appeal in certain classes, and dismissed the appeal in other classes.[48]

Finally, in relation to the issue of the cancellation of the Respondents trade marks found in the ambit of s 10(13) concerning potential confusion or deception, I submit that this argument raised by the Respondent was untenable. Schippers JA correctly pointed out that Polo has been selling its goods in South Africa for over 40 years, with physical stores across the country. It would be highly unlikely, if almost impossible, for a consumer to conflate Ralph Lauren with Polo

41 [2022] ZASCA 20 paras 99-118.
42 [2022] ZASCA 20 para 118.
43 [2022] ZASCA 20 para 121.
44 O Dean and A Dyer *Introduction to Intellectual Property Property Law* (2014) 129.
45 [2022] ZASCA 20 para 130.
46 [2022] ZASCA 20 para 146.
47 [2022] ZASCA 20 para 161.
48 [2022] ZASCA 20 para 209. [54] [2022] ZASCA 20 para 203.

where no physical Ralph Lauren store exists in South Africa.[54] Moreover, Ralph Lauren only markets perfumes and cosmetics in South Africa, with its brand clearly distinguishable in this category of goods. Therefore, the likelihood of misconstruing Polo with Ralph Lauren in South Africa is highly unlikely.

Conclusion

In this case note, I have made mention of the various aspects relating to the trade marked brand "POLO" in South Africa. I have discussed the arguments advanced by the parties, and the reasoning of the court *a quo* in holding liable for cancellation the Respondent's trade mark, by concluding that the trade mark was non-distinctive; confusing or deceptive, and registered without use, or intention to use. In the light of this, I have referred to the judgment written by Schippers JA in which the Respondent correctly appealed the decision of the High Court, and in which the SCA set aside the peculiar finding of the court *a quo*.

Consequently, I am of the opinion to find that the majority judgment of the SCA reinstalled balance in the realm of trade mark law, and confirmed that a horse is not, by its very name, just a horse.

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Farewell message to the final years

Farewell and Fare Well

By Professor Graham Glover
July 2022

It is my great privilege that the 2022 editors have requested me to pen a parting word to the final year class on behalf of the staff for the resurrection edition of In Camera. It feels slightly odd too, though, seeing as I only ever actually lectured the class (in the real, physical sense of standing up before the group) for five short weeks in 2020 in Contract A, before … well, we all know too well what happened. So, the bulk of my engagement with the class was in that weird Covid void we inhabited, where we operated like satellites, orbiting far removed from one another in space around our online course material. I would have thought that having to listen to the dread tone of my disembodied voice for almost two years would have driven you all mad! But perhaps not having to listen to it in 2022 dimmed the memory of it, and the the torturous experience online learning was for us all.

I know from personal experience that the LLB is a hard two years, and is not always the most pleasant of experiences, full as it is with a lot of work, stress, and worrying about the future and what comes next. And so I want to acknowledge your individual and collective bravery in being adaptable and taking on the challenge of online learning in 2020-21 with resilience and good grace. We as the staff were well aware of how hard it must have been. I polled a number of my former classmates as to how they would have coped if they had been despatched home and told to study all on their own. They all said it would have been a total disaster. That you managed to do it, all challenges accepted, is a ringing tribute to your self-discipline. Some people mutter about how the results of those who studied under Covid are to be mistrusted, and that employers will be sceptical of graduates of this time. I would dispute that. To have got through what you did (each of you facing your own significant challenges of some kind) suggests to me that you are the sort of dogged, head-down-and-get-on-with-it type of people whom employers will value. I suspect that had Covid come along around 2015-16, Rhodes might well have just closed. But the student generation of 2020-22

was tougher, stronger, and showed an admirable can-do attitude that kept the ship afloat.

And then … you had to come back in 2022 and go back to pre-Covid face-to-face learning. That in itself was just about as hard. To write sit-down exams again – to learn independently, and not just to rely on the hive of bees humming information on WhatsApp – was no doubt a shock to the system. But you have persevered. You have done it the hard way; perhaps the hardest way any LLB students at Rhodes have done it since the students who did their LLB here in the Second World War. A stark reminder of this is that one of your number – Bennita Benza – did not make it through Covid. Remember her, and how excited she was to get a place in the LLB, only to have the opportunity you have all been privileged to have (to live; to study; to improve yourselves) snatched away from her.

Well done to you for making it. You can be proud of yourselves. And we are proud of you.

When you receive this copy of *In Camera* for the first time, most of you will be ready to leave, and may even be glad to see the back of the Faculty. But (mark my words) when you stumble upon your copy in a folder on your computer in years to come, you will stop what you were doing, will read through it, will reacquaint yourselves with the characters you studied with, and the memories will come flooding back. And I am prepared to bet that a lot of those memories will be fond ones, and you will feel a surge of nostalgia, and will miss Rhodes and this funny little town! If it is true that we are all the product of our experiences, the fact that you studied law at Rhodes will always be a special part of who you are, and you will join a special club of people who can boast of the accomplishment, and with whom you will have "Rhodes" in common.

All the very best and "fare well" in the future: those of us who are to stay behind will watch your progress with keen interest. And – if it isn't too predictable – let me sign off with those two pieces of advice that will be more valuable to you than all the other law you have learnt or forgotten: (1) please read and check any document before you sign it; and (2) do not let any of your matters prescribe!

FINAL-YEAR CLASS OF 2022

Ayla Nadine Blair

"I am no ordinary woman, my dreams come true." - Daenerys Targaryen, *Game of Thrones*

Tamara Chinganya

"You miss 100% of the shots you don't take." - Wayne Gretzky

Ramaesela Vincentia Ellah Chuene

"Don't wish things were easier, wish you were better. Don't wish for less problems, wish for more skills. Don't wish for less challenges, wish for more wisdom." - Jim Rohn

Eugean Tanaka Danha

"It can not be bought, stolen or inherited, it cannot be held onto without constant work." - Anonymous

Portia Davies

"What counts in life is not that we have lived. It is what difference we have made to the lives of others that will determine the significance of the life we lead." - Nelson Mandela

Fezekile (Fez) Dhlamini

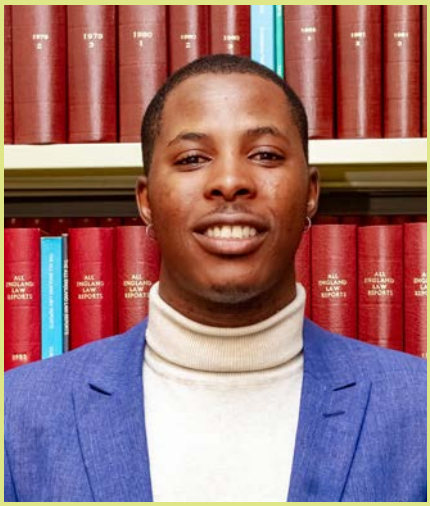
We need to shift from thinking "I am not Ready to do that", to thinking " I want to do that and I will learn by doing it." - Sheryl Sanderburg

Angeline N Dondo

"As we express our gratitude, we must never forget that the highest appreciation is not to utter words, but to live by them." - J.F. Kennedy

Tinashe Famba

"Viriliter Age."

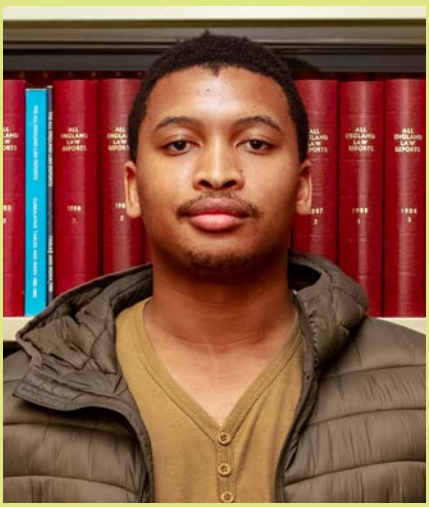


Lusanda Goba

"Even if you are not ready for the day, it cannot always be night." Phum

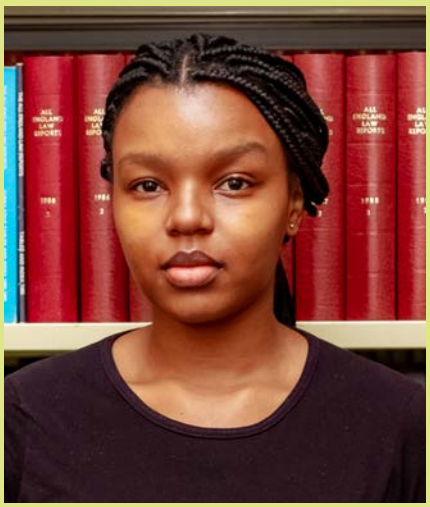
Megan Goliath

"Have some fire. Be unstoppable. Be a force of nature." - Christina Yang, *Grey's Anatomy*



Chuma-Nande Gora

"The mind is a powerful place, and what you feed it can affect you in a powerful way." - NF



Nomfundo Gumede

"His Grace + Faith > Personal Might- Joshua 1:9."

Cameron Hardy

"This degree is sponsored by Red Bull, Score and Monster."

Nathan Heggie

"I'd like to thank Google, Wikipedia and whoever created copy and paste. Viva backbrow, Thanks!"

Cheryl-Ann Joubert

"Never be late to do what you wanna do right now, because at one point kf, someday, everything you did would be exactly what you will be" - From BTS Intro: O!RUL8, 2?"

Sacrée Céline Kabeya

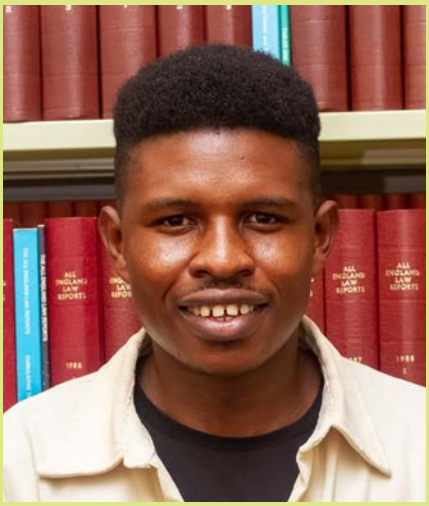
"It`s not your job to be likeable. It`s your job to be yourself. Someone will like you anyway."- Chimamanda Ngozi Adichie

Vhenekai Dakarai Nicole Kashangura (VDNK)

"One day, I am going to change my country's justice system. Philippians 4:13, Since first year."

Precious Katamelo

"Do what you have to do, until you can do what you want to do." - Oprah Winfrey



Amukelani Machabi

"Whatever the question, love is the answer."
- Wayne W. Dyer

Samkelisiwe (Sam) Makhanye

"To live like a Queen, you gotta work like a Slave."- Anonymous

Ntsako Mabuza

"If my mind can conceive it, if my heart can believe it, then I can achieve it."
- Muhammad Ali

Silindile Khanyile

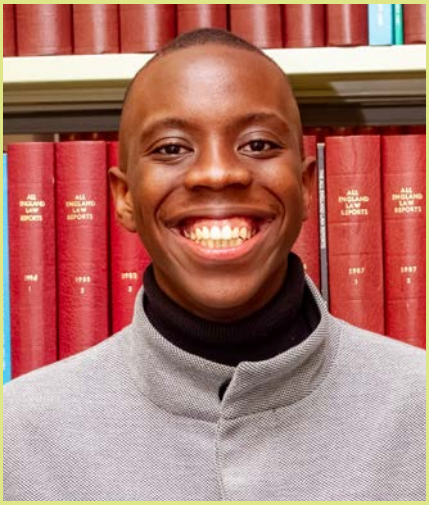
"I survived a pandemic for this degree, we're not the same."

Sithandwa Khuzwayo

"Real Gs move in silence like lasagna."
- Lil Wayne

Tinstwalo Komonde

"When you reach the end of your rope, tie a knot and hang on." - Franklin D. Roosevelt.



Collen R Kwaramba

"By the time you're all able to read this, you'll understand how I am, who I am, and that even now at this age, I knew that I'd be where I am today."

Lebone Lehlokoe

"I triple majored in law, dramatic arts and psychology in undergrad...swear I'm not a good liar though"

Dzunisani Maluleka

"Waste no more time arguing about what a good man should be. Be one."
- Marcus Aurelius

Panashe Mildred Maneya

"The Joy of the Lord is my strength."
- Maverick City Music

Leletu Mateta

"We pray away the pain of not being in alignment with our dreams."- Msaki

Linda Milazi

"One of the truest tests of integrity is its blunt refusal to be compromised." - Chinua Achebe

Phumeza Mjanyelwa

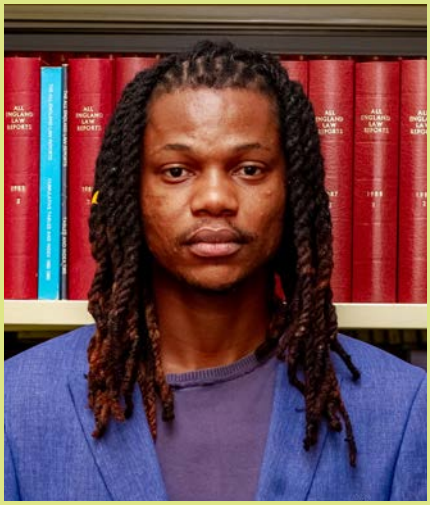
"One thing about life? It is not about ubomi. So make it your mission everyday to: Vuka, Ugeza Ubangene."

Xolelwa Mkula

"You were favoured, from the very first day I conceived You."
- My Mothers' words of reassurance

Panashe Mlambo (Louise)

"You must never be fearful about what you are doing when it is right." Rosa Parks



Xolela Mndayi

"Yesterday's price is not today's price."

Nobesuthu Mnkandla (Madam Secretary- General)

"Be nice to me, your daughters will do their dissertations using my judgments."

Jordan Moonsamy

"When in doubt, *S v Makwanyane*."

Mpokiseng Clive Morengoa

"My Hope and Prayer is to come back to this picture one day and tell myself CONGRATULATIONS YOU MADE IT."

Paballo Mosikidi

"I should have been a housewife but I'm 2 degrees in, exhausted and too deep in the game."

Mbasa Mrwebi

"A luta continua; vitória é certa."

Washington 'Booker' Mutaringe

"Enjoy 'EVERY' moment of your life, time is like a river you cannot touch the same water twice, because the flow that has passed will never pass again, this too shall pass uye kusina amai hakuendwe!"

Thobani Ndebele

"It's better to remain silent and be thought a fool than to open one's mouth and remove all doubt." - Abraham Lincoln

Andile Ncube

"Sometimes it's okay to accept defeat - go to sleep and try again tomorrow!" - unknown

Thembelani Ncube

"Once you know what it is that you want, your ambitions become your reality - it may not be easy but it's possible."

Langelihle Ndlovu

"The ugly part of your story is going to be the most powerful part of your testimony."

Talent Neliswa Ndlovu

"We don't know who we are until we see what we can do."

Lusanda Zamantusi Ngema

"My mission in life is not merely to survive, but to thrive, and to do so with some passion, some compassion, some humour and some style." - Maya Angelou

Tshepang D Nkosi

"Self improvement can be very challenging, but where there's a will, there's a way. Make your own way!" - Melica Niccole

Zombuso Ntombela

"Mbonge uJehovah, mphefumlo wam." - A hymn my grandmother loved

Ruponeso Nyakurimwa

"Looks like you don't know people as well as you think you do. You miscalculated, I love Elohim more than I fear you." ~ Mai from *Avatar: The Last Airbender*

Skhumbuzo Nyati

"We know these roads, in fact we built these roads." - Dave Chappelle

Shamiso Faith Nyemba

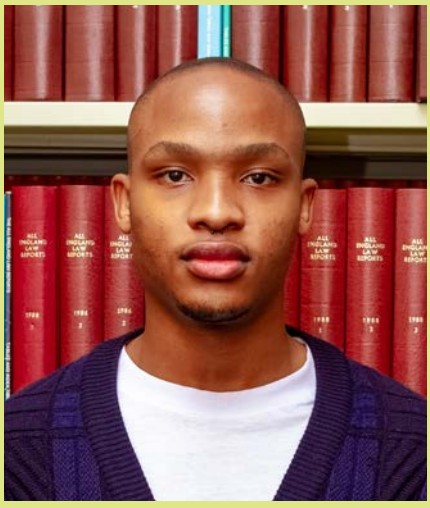
"It always seems impossible until its done." ~ Nelson Mandela, Philippians 4:13

Junaid Nyker

"Do not be afraid, you were created free."

Paulina Quartey

"The most difficult thing is the decision to act, the rest is mere tenacity."
- Amelia Earhart



Laone Setshedi

"Liberate yourself from that idea that people are watching you." - Russell Brand

Jason Andrew Shephard

"Justice consists not in being neutral between right and wrong, but in finding out the right and upholding it, wherever found, against the wrong." - Theodore Roosevelt

Achume Sidyiyo

"You're not dying, you're just getting an LLB." - Prof Juma

Anetta Sikhakhane

"No matter how hard it gets, keep your chest out, keep your head up and handle it." - Tupac Amaru Shakur

Mihlali Solwandle

"Every sunrise is a chance to try again, gowa but buya." - unknown

Caitlin Stoltz

"If you can dream it, you can do it." - Walt Disney

Georgia Webber

"You are who you choose to be." - *The Iron Giant*

Phumelele Zwane

"I do not know anyone who has got to the top without hard work. That is the recipe. It will not always get you to the top, but it should get you pretty near."- Anonymous

wishing you all the best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