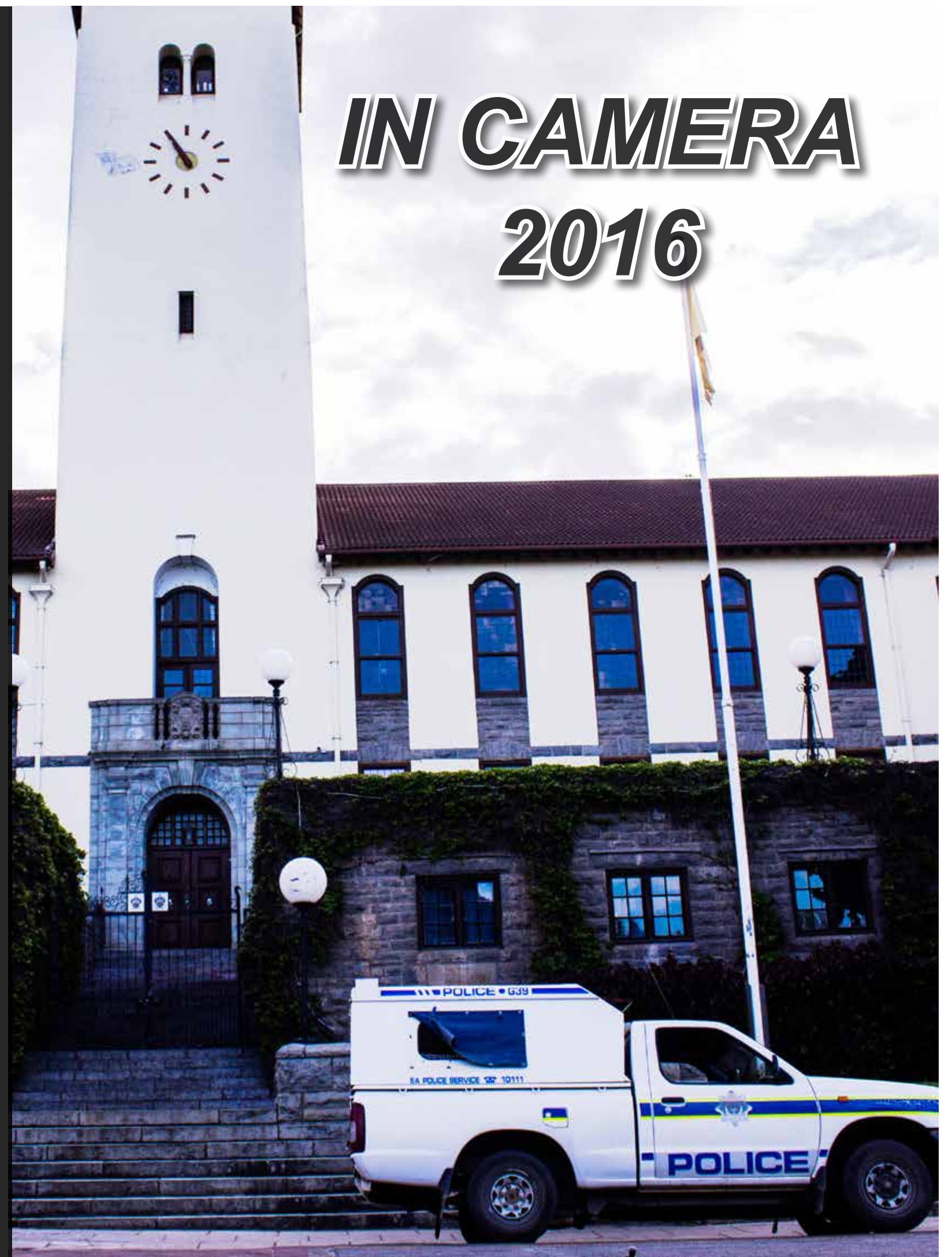


Rhodes University Law Society 2016

# ***IN CAMERA*** **2016**



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# Table of Contents

## Editorial and Reports

- A Note from The Editors
- Faculty of Law Report 2015-2016
- Law Society Report
- Black Lawyers Association Report

## Articles

- Virginitv Testing: A mark of Failure in South African Women's Rights
- Women's Access to and Ownership of Land in Zambia
- Decolonising the Family Law Curriculum Essay Competition Winner
- The Council on Higher Education Reviews LLB Programmes
- A Brief on Legal Practice in Zimbabwe for Holders of Foreign Law Qualifications
- #RU Reference List Task Team Recommendations: The Importance of Addressing Foundational Principles in the Law
- Is Section 20 (9) of the Companies Act of 2008 the General Rule for Piercing the Corporate Veil?
- Insider Trading and the *Zietsman* Case
- Is South Africa Bound by International Law?
- The Role of International Law in Reforming South Africa's Anti-Dumping Regime
- Incorporating Ubuntu into South Africa's New Hate Crimes Bill
- Real life *Suits* or a Week-Long Interview: My vacation Work Experience with Norton Rose Fulbright

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# A Note from the Editors

Nkcubeko Balani and Kimberley Nyajeka

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The year 2016 has been a year fraught with challenges in South Africa. From the continued rise of student movements to ground-breaking judgments, we continue to see the call for transformation at all levels of society grow – in the hope of creating a tolerant, progressive and accountable democratic state. This year,

we are proud to bring to you a body of work that grapples with some these challenges that face our country in terms of transformation in various spheres of the law.

We would like to thank all the contributors who made submissions to this year's *In Camera*. We would also like to thank our generous sponsors, Norton Rose Fulbright, without whom this year's publication would not be possible. We would like to extend a hand of thanks to Natalie Dube, whose photographing skills helped us produce cover, and impressive photos of the contributors. To Chad Gill and Fezeka Mwelie, thank you for tolerating our incessant requests for emails to be sent out for contributions. We would also like to thank the committee members of this year's Rhodes Law Society for their support along the road to publication day. Lastly, we would like to thank Professor Glover for his editorial skills and for providing us his time and guidance in the production of this year's publication. Thank you for being there for our team when we needed you the most. To the reader, we hope you enjoy this year's edition!

*\*The views expressed in this publication do not reflect those of the Rhodes Law Faculty or the Law Society. The re-publication of any article contained herein is strictly prohibited.*

## Faculty Report 2015 - 2016

**Professor Rosaan Krüger** (Dean of Law, with input from staff and students)

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### Introduction

The front page of the 2015 *In Camera* magazine boldly proclaimed 2015 to be 'the year of the student'. As I look back on the 2016 academic year and try to think of a catch-phrase for this year, numerous such phrases come to mind – 'a challenging academic year', 'the year of the national review of the LLB', 'a year of protestors in our lecture venues', 'a watershed academic year'. Ultimately 2016 has been a year marked by complexities from which we there are many lessons to learn.

The pressure in the public higher education sector in South Africa has increased significantly in the last year, in the wake of the 2015 #FeesMustFall protests. Virtually all public universities in South Africa have experienced protest action in 2016, and at Rhodes it was no different. In April and May of this year, the #RURerenceList protest relating to sexual violence on campus, and the #FeesMustFall protest in September/October relating to financial accessibility of higher education, impacted significantly on the Rhodes University

community, both academically and otherwise. The 2016 protests raised particular concerns, while the debate transformation, particularly as it relates to curriculum and institutional culture at universities, continued. These issues are of great concern to the higher education sector and to our local university community. If we choose to ignore these, we do so at our peril. The responsiveness and 'the fit' of the current academic offerings in the South African and African context, freedom from violence (sexual and otherwise, and legal and societal responses to such violence) and the affordability of higher education for the majority of our students speak to the very survival of quality public higher education institutions in South Africa. What we have learnt from 2016 and our as-yet inconclusive attempts to respond to and engage with these issues, is that both nationally and locally we urgently need to strengthen our institutions (despite the fact that these very institutions are challenged, and their relevance questioned) to enable constructive and effective engagement to ensure the future of quality higher education at Rhodes University and in South Africa.

This annual report looks back on the past academic year in all its complexities, highlighting the achievements of our students and staff, and the notable events of the year.

At the outset of the report, I wish to pause to remember the tragic passing of penultimate-year LLB student, Wesley Day, during the examinations period in June of this year. His life is celebrated and the loss thereof mourned by the Faculty and the class of which he was a member.

## **Students, student news and activities**

### ***Graduation and awards***

On 1 April 2016, 79 students graduated with LLB degrees from the Faculty. One LLM candidate, **Tladi Marumo**, graduated at the ceremony. His thesis, supervised by Prof Rosaan Krüger, is entitled 'Class actions as a means of enhancing access to justice in South Africa'. Rhodes University also honoured renowned Zimbabwean human-rights activist, Beatrice Mtetwa, with an Honorary Doctorate at the graduation ceremony on 1 April. Dr Mtetwa has been honoured by several universities outside Africa for her human-rights work and commitment, and the Faculty is proud to have nominated her for this award, her first African honorary doctorate.

The Faculty celebrated graduation with our graduands, their partners and their parents at a lunchtime function held at the Faculty, at this celebration, 29 final-year students (37% of our 79 LLB graduates) were awarded Dean's list certificates in recognition of academic achievement (attaining an average of at least 65% for

all their final-year courses). A number of individual prizes were also awarded at this function:

- **Brian Peckham Memorial Prize:** Best student in Environmental Law: **Chloe Hoffmann**
- **Lexis Nexis Book Prize:** Internal book prize for Moot winner(s) in the Final-year: **Sazi Ntuli**
- **Fasken Martineau Prize:** Best LLB student in Competition Law: **Shivani Moodley**
- **Judge Phillip Schock Prize:** Best final-year LLB student: **Ryan McKerrow**
- **Juta Law Prize:** Best final-year LLB student, based on results over penultimate and final-year LLB: **Shivani Moodley**
- **Mtshale and Sukha Prize:** Best student in Legal Ethics and Professional Responsibility: **Ryan McKerrow**
- **Spoor & Fisher Prize:** Best student in Intellectual Property (Patents & Copyright): **Chelsey Byron**
- **Phatshoane Henney Incorporated medals:** Awarded to students who obtain their LLB degrees with distinction: **Shivani Moodley, Ryan McKerrow, Chloe Hoffman, Memory Makumire, Ben Rule and Kelly Dixon**
- **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:

**Aimee Thorne**

- **Rob and Trish Midgley Prize:** Awarded to the student who has contributed substantially towards a holistic educational experience
- for law students at Rhodes University: **Koketso Molohe**

Rhodes University LLB graduate, Jason Houston-McMillan, won the prestigious international SIEL/CUP international trade law essay competition for 2015 for his essay entitled 'A Critical Analysis of the Legitimate Regulatory Distinction Test as conceived in *US-Clove Cigarettes*, *US-Tuna II* and *US-COOL*'. The competition annually draws entries from all over the world and the winners are often from well-known institutions such as Harvard Law School or Cambridge University. Houston-McMillan's winning essay, supervised by Ms Vicky Heideman, shows that Rhodes Law Faculty, small as it is, is world-class. The Faculty celebrated his achievement with him at the graduation function.

### **LLB intake 2016**

79 students accepted offers into LLB this year, only nine of whom are registered for the four or three-year LLB degree. As in years before, the preference of our students is clear: 89% of our law students

choose the five-year stream, entering the LLB only after completing an undergraduate degree.

### **Postgraduate students and student research**

The number of postgraduate students in the Faculty is increasing steadily, with a total of eight LLM candidates and three PhD students registered. Dr Charles Khamala, a post-doctoral candidate, originally from Kenya, joined the Faculty at the beginning of 2016 on a year-long post-doc fellowship to conduct research under the supervision of Prof Laurence Juma.

### **Student news and activities**

#### **Legal Activism**

Under the chairmanship of Marshall Nyaungwa, the Legal Activism Society has reached out to the Rhodes community in various ways over the last year. The society ran workshops on the law relating to rape and sexual violence in residences, partnered with Rhodes Music Radio on a weekly basis to provide information on legal topics, and worked with the Community Engagement Directorate and the Law Clinic on the skills development of its members. Through social media, the society also provided further education on human-rights in the Rhodes university community.

#### **Law Society**

By and large 2016 has been a successful year for the Rhodes University Law Society. Under the leadership of Jason Manyenyeni and Jonathan Espen, the Law Society has endeavoured to serve the Faculty and student body in hosting both career-related and social events. The two key events in the Law Society's calendar are always the annual Market Day and the Law Ball. Due to the protests the Law Ball was cancelled at a late stage.

The Law Society began the year by hosting a series of CV-writing and interview-skills workshops in preparation for Market Day. On 16 March, the Law Society hosted Market Day with resounding success. Law students from first to final-year were able to interact with the 23 law firms and legal organisations in attendance. Some firms held interviews on Market Day, and a few students secured articles after these interviews. The feedback from both students and the organisations which attended was very positive.

This year has seen the Moot Club of the Law Society taking off, largely as a result of the dedication of Moot Club Chair, Blessings Chinganga. Students met every other week to conduct their own moots and mock trials. The Club hosted its first internal moot completion during the course of September.

***Black Lawyers Association: Student Chapter, Rhodes University***

After its first successful year as a student society at Rhodes University in 2015, the BLA went from strength to strength in the past year. It contributed actively to discussions regarding institutional transformation (particularly relating to fees) at Rhodes, and played an important role in disseminating information about acceptable behaviour during protests to the university community.

The society also had time for serious discussions in a more informal environment. It hosted a champagne breakfast in April 2016, and invited Mrs Pumeza Bono from Pumeza Bono Incorporated in Port Elizabeth, and student, political commentator and author of *Memoirs of a Born Free, Reflections on the Rainbow Nation*, Ms Malakia Mahlatsi to engage on the topic of social responsibility in a transforming society.

During women's month in August the BLA organised a sanitary-pad drive to collect pads for disadvantaged young women who often miss school because they cannot afford sanitary products. The project is ongoing.

The Faculty was fortunate to host the BLA Legal Education Centre from 9-11 September which offered trial advocacy training that was intended to culminate in a national mock-trial competition in October. The training programme was successful, with students learning from experienced practitioners. Unfortunately



however the national competition was cancelled as a result of the ongoing protests on many university campuses.

The society hosted a 'Women's Rights vs Women's Empowerment' dialogue on 15 September, with Adv Shuaib Rahim and Ms Lihle Ngcobozi as guest speakers. The dialogue questioned the binary divide between empowerment and rights in a patriarchal society. The BLA, in partnership with the Black Management Forum and the Pan African Youth Dialogue, hosted an event to expose graduates to challenges they may face in the working world and to provide advice.

### ***2016 and Beyond – Students in Governance Structures of the Faculty***

The discussion around student representation in Faculty structures is ongoing and will be prioritised in 2017 for finalisation.

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

#### ***Internal:***

The 2016 Internal Moot Competitions for both the Penultimate- and Final-year LLB students were successful.

The final of the Final-year Moot was held on Market Day and this added to the lustre of the occasion. The four finalists were Steph Stretch, Daniel Kirk-Cohen, Jason Manyenyeni and Declan Williamson. Judge Murray Lowe of Eastern Cape High Court, Grahamstown was joined on the

bench by Mr Bokang Taoana from Cliff Dekker Hofmeyer Attorneys, and Professor Rosaan Kruger, Dean of the Law Faculty, heard an application concerning access to information in the context of the Companies Act. Steph Stretch won the competition and Jason Manyenyeni was the runner-up. They represented Rhodes University in the Africa Human-rights Law Competition in Pretoria in October.

The internal moot competition for Penultimate-year LLB students took place in the second semester. The students were required to argue about whether evidence obtained by spurious, or unlawful, means was admissible in a court of law. Rob Harris, Charlie Hammick, Paul Eilers and Aidan Whitaker were selected to argue in the final round before a panel consisting of Judge Clive Plasket of the Eastern Cape High Court, Grahamstown, Advocate Matthew Mpahlwa, from the Grahamstown Bar, and Ms Vicky Heideman, lecturer in the Law Faculty. The competition was won by Paul Eilers, with Aidan Whitaker the runner-up.

#### ***External:***

#### ***ELSA Moot***

The 2016 African Regional Round of the ELSA Moot Court competition took place at Rhodes University in April, ably hosted and organised by Ms Vicky Heideman financial support for all the teams,

covering their travel expenses and accommodation costs. Contributions were received from United Nations Economic Commission for Africa (UNECA), Webber Wentze, the Rhodes University International Office, and the Office of the Vice-Chancellor. Ten teams from Kenya, Uganda, Tanzania, Ethiopia and South Africa participated in the third African Regional Round of the competition. The Rhodes team, consisting of four final-year LLB students-Nkosazana Lulu Dweba, Steph Stretch, Declan Williamson and Moya Vaughan-Williamson-won the African Regional Round, while the team from Wits University was placed second. Nkosazana Lulu Dweba was awarded a fully paid scholarship for a one-year LLM degree at the University of Barcelona's IELPO programme.



**The Rhodes ELSA Moot Team**

The Rhodes team participated in the Final Oral Round of the ELSA Moot Court Competition on WTO Law in Geneva from 7-10 June. The conference coincided with the annual WTO Law Conference, which the students were able to attend.

## ***NLU Delhi – HSF International Negotiation Competition***

Two final-year LLB students, Orla Murphy and Relebohile Chabeli, accompanied by Ms Tarryn Cooper-Bell, an attorney at the Rhodes University Law Clinic, participated in the 3<sup>rd</sup> annual NLU Delhi – HSF International Negotiation Competition which was held in Delhi from 9-11 September 2016. Universities are invited to participate in this competition and this year 28 teams from universities around the world competed in simulated negotiations against each other.

In the preliminary the Rhodes team came up against teams from the University of Mumbai and Kings College, London. The team did not proceed to the further rounds of the competition, which was ultimately won by the University of the Sunshine Coast, Australia. However, the team did not return empty-handed. The Rhodes University team won the trophy for upholding the 'Spirit of the Competition', as voted for by all the participating teams.



***Orla Murphy, Ms Tarryn Cooper-Bell  
and Relebohile Chabeli; the Spirit  
of the Competition Award***

***25<sup>th</sup> African Human-rights Moot  
Court Competition***

Steph Stretch and Jason Manyenyeni represented Rhodes University at the 25th African Human-rights Moot Court Competition organised by the Centre for Human-rights, University of Pretoria in collaboration with the African Commission on Human and Peoples' Rights and The University of The Gambia, from 3 to 8 October 2016 in Pretoria.

***The Child Law Moot Court Competition***

Rhodes was represented at this competition by Abigail Butcher and Bule Myeni, who were selected after a rigorous internal selection process. The competition was held in early October and was hosted by the Centre for Child Law at the University of Pretoria. The students were accompanied and coached by Ms Brahmi Padayachi.

***LexisNexis Mock Trial Competition and  
the Kovsie First Year Moot Competition***

The 2016 competitions were cancelled

***Alumni news***

Rhodes alumnus and former Dean of the Faculty of Law, Professor Rob Midgley

was recently appointed as the Vice-Chancellor of Walter Sisulu University, crowning his long career in academia. Professor Midgley left Rhodes in 2008, and served as Deputy Vice-Chancellor of the Universities of Fort Hare and Zululand before taking up his position at WSU in April.

Rhodes alumnus Avinash Govindjee was appointed as the Executive Dean of the Faculty of Law of Nelson Mandela Metropolitan University in June of this year. Professor Govindjee was honoured with an Emerging Old Rhodian Award by Rhodes University in 2015.

The university honoured Law Faculty Alumni, Judge Lex Mpati and Mr Mbuso Mtshali, with Distinguished Old Rhodian Awards in August 2016. Judge Mpati is the Chancellor of Rhodes University and, while officially retired from his position as the President of the Supreme Court of Appeal, continues to serve in that capacity. Mr Mtshali is the Company Secretary and head of Legal and Compliance at Sanlam Investments. Mr Mtshali contributes to the Law Alumni Bursary and is a co-sponsor of the Mtshali and Sukha Prize for the best student in the course Ethics and Professional Responsibility.

***National Review of the LLB: Council  
on Higher Education***

Following the development and finalisation of the National Standard for the LLB

during 2015, all law faculties and schools in South Africa were tasked, towards the end of 2015, to prepare a comprehensive self-evaluation report speaking to the Standard, with a view to review and reaccredit the qualification as offered at various institutions.

The preparation of this report required dedicated work and introspection, asking of us to explain how we teach and engage with students through our curriculum, why we choose to do things in a particular way and to identify our strengths and challenges. Professor Graham Glover ably coordinated and put together our comprehensive report, based on documentary evidence and statistics, as well as input and discussions from staff. The lengthy report was submitted in May and the CHE provided brief written feedback by September. In October, the Faculty hosted a panel of experts from the CHE who interacted with staff, students and alumni on the basis of our report with a view to providing comprehensive feedback on our LLB early in 2017. The national review process will culminate in an all-inclusive national report on the LLB qualification in South Africa.

### **Staff, staff news and activities**

#### **Staff news**

After a successful recruitment drive, two new staff members joined the Faculty during the course of 2016, after the departure of Dr Gustav Muller (to join the

Faculty of Law at Pretoria University) at the beginning of the year, and Mr Tladi Marumo (to return to private practice) during the last part of 2015. The staff members who joined the Faculty during 2016, are Adv Shuaib Rahim and Mr Luzuko Tshingana. Adv Rahim, an established academic, joined the Faculty as a senior lecturer from the Faculty of Law at NMMU, while Mr Tshingana, an LLB graduate from NMMU who also holds a LLM from King's College, London, comes from private legal practice. We hope that our new colleagues will find an academic home in our Faculty as they fill much-needed expertise gaps in the law of property and labour law respectively.

Professor Jonathan Campbell has remained at the helm of operations of the Law Clinic as acting director. To fill the teaching gaps left by his absence, Ms Kruuse's academic leave, and the resignations, the Faculty secured the services of alumna Ms Anita Bosch, an admitted attorney, to teach parts of Commercial Law 1, Foundations of Law and Environmental Law. Adv Nicola Redpath-Molony's practical experience in the criminal courts placed her ideally to teach Criminal Procedure B, and Mr Lutho Dzedze, an attorney from the Clinic, ably assisted in the teaching of a paper in Commercial Law 2. Mr Ryan McDonald taught the Law of Life Partnerships and shared responsibility for the compulsory course on Ethics and Professional



Responsibility. Local attorney and CCMA commissioner, Mr John Robertson assisted the Faculty by taking responsibility for the Labour Law course.

Professor Enyinna Nwauche graduated with his LLD degree from North-West University in May 2016. He was also approached to act as a judge for the prestigious Ismail Mohamed Law Reform Essay Competition, and continues to serve as a peer reviewer for several journals, and as an external examiner for Wits University.

Mr Phumelele Jabavu was admitted as an advocate of the High Court of South African in May. Mr Jabavu continues his research for an LLM degree under the supervision of Professor Laurence Juma.

Senior lecturer Ms Helen Kruuse has been on academic leave in 2016 and continues her research in the field of legal ethics. She is a PhD candidate in the Faculty and her supervisors are Visiting Professor Donald Nicolson and Professor Graham Glover. Ms Kruuse is also the coordinator of a task team of the South African Law Deans' Association, responsible for the development of a model Legal Ethics Curriculum.

Professor Laurence Juma continues his invaluable research into forced migration and in July of this year he was elected to serve on the executive committee of the International Association for the Study of Forced Migration as a member of the

Programme Affairs and Innovation Committee.

Visiting Professor Donald Nicolson spent some time at the Faculty during the course of the year and contributed to the intellectual life of the Faculty through supervision, mentoring and advising of staff, and teaching in the Legal Practice, Ethics and Jurisprudence courses.

Judge Clive Plasket was able to deliver a number of lectures during the course of the year in his capacity as visiting professor, sharing his expertise in administrative law with our students, and his vast experience on the bench with first year students.

The visits of Judge Nambitha Dambuza and Adv Wim Trengove were cancelled as a result of protests on campus.

## **Community Engagement**

### ***Staff involvement***

The efforts of staff in this critical aspect of the University mission are expanding slowly but surely with the development of a coherent and coordinated Faculty plan in the offing.

Professor Nwauche participated in two radio interviews/discussions on Power FM on constitutionalism in Africa and on universalism. Adv Shuaib Rahim joined forces with the Rhodes Business School and participated in its Alumni Community Engagement Project in August 2016. He is also a board member of the Outology

Network and participates in the projects of the network.

### **The Law Clinic**

Following the retirement of Professor Jobst Bodenstein, Professor Jonathan Campbell has continued to act as Director of the Clinic. Mr Patrick Pringle retired at the end of 2015, and the Clinic welcomed Mr Ryan McDonald as attorney from January 2016. Ms Jaylynne Hiller left the Clinic in August 2016, and is still to be replaced. In the last year Ms Abelwe Mpapela, Mr James Ekron and Ms Zipo Zuba, all former candidate attorneys at the Clinic, were admitted as attorneys of the High Court. With the completion of articles of clerkship of several candidate attorneys, Mr Ndumiso Khumalo (UZ) was appointed as candidate attorney in the Grahamstown office, and Ms Gugu Vellem (UFH), Ms Noluyolo Nqodwane (UFH) and Mr Bandile Gcaza (WSU) were appointed as candidate attorneys in the Queenstown office. Ms Hazel Dibela was appointed as Projects Assistant after the resignation of Ms Nonzame Mpofu.

### ***Projects of interest to law students***

Clinic attorneys and candidate attorneys consulted with clients every Thursday at the Assumption Development Centre (ADC) in Joza, conducted workshops at the ADC on fortnightly, and conducted talk shows on Radio Grahamstown fortnightly

on topical, practical legal issues that are of relevance to the local community. Ten Legal Activism students participated in a Street Law facilitators training workshop in April run by the Law Clinic to equip them to run workshops more effectively.

### **Research**

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

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

### **Books/Chapters/Monographs**

**Bodenstein, J.** (2015) 'Chapter 11: Drafting of Wills' in Mahomed, S.H. and Kirsten, B. (eds) *Clinical Law in South Africa*. 3rd Ed. Durban: LexisNexis (Pty) Ltd. p.221-252. ISBN: 9780409122015.

**Koyana, D.** (2015) 'Seeking the Common Good in Pluralistic South Africa: With Special Reference to Customary Law' in Coertzen, P., Green, M.C. and Hansen, L. (eds) *Law and Religion in Africa: The quest for the common good in pluralistic*

societies. Bloemfontein: SUN MeDIA. p.205-223. ISBN: 9781919985633.

**Krüger, R.** (2016) 'Equality' in Govindjee, A (ed) *Introduction to Human-rights Law* 2<sup>nd</sup> ed. LexisNexis ISBN 9780409118346.

**Nicolson, D.J.** (2016) 'Teaching Ethics Clinically without Breaking the Bank' in Qafisheh, M (ed) *Global Legal Education Approaches: Special Reference to the Middle East* Cambridge Scholars Publishing: Newcastle UK.

**Nwauche, E.S.** (forthcoming) 'The Indirect Protection of Economic Social and Cultural Rights' in Chirwa, D and Chenwi, L (eds) *The Protection of Economic Social and Cultural Rights in Africa*. Oxford University Press.

**Nwauche, E.S.** (forthcoming) 'National Human-rights Institutions and the Accommodation of Religious Diversity in Africa: Preliminary Thoughts' in Durnham, C and Thayer, D (eds) *Pluralism Expression and Minorities*. Ashgate ICLARS Law Religion.

**Nwauche, E.S.** (forthcoming) 'The Right to Intellectual Property' in Grote, R; Lachenmann, F and Wolfrum, R (eds) *Max Planck Encyclopedia for Comparative Constitutional Law*. Max Planck Foundation for International Peace and the Rule of Law.

Oyewunmi, A and **Nwauche, E.S.** (forthcoming) 'The Enforcement of Intellectual Property Rights in Africa' in

Oyewuni, A (ed) *Intellectual Property Law in Africa*. WIPO 2016.

**Van Coller, E.H.** (2016) 'Homosexuality and the Churches: Controversies and Challenges' in Coertzen, P (ed) *Religious Freedom and Religious Pluralism in Africa: Prospects and Limitations* (2016) 307-324. SUN media, Stellenbosch South Africa.

### Journal Research Publications

**Kruuse, H.** (2015) 'Book Review: *The law of divorce and dissolution of life partnerships in South Africa* Jacqueline Heaton (Editor). *Journal for Juridical Science* 40 (1). 69-74.

Mwanbene, L. and **Kruuse, H.** (2015) 'Unfulfilled Promises? The Implementation of the Recognition of Customary Marriages Act in South Africa' *International Journal of Law Policy and the Family* 29 237-259.

Robertson, M and **Kruuse, H.** (2016) 'Legal Ethics Education in South Africa: Possibilities, Challenges and Opportunities' *South African Journal on Human-rights* (forthcoming).

**Houston-McMillan, J.** (2016) 'The Legitimate Regulatory Distinction Test: Incomplete and Inadequate for the Particular Purposes of the TBT Agreement' *World Trade Review*, available on CJO2016. Doi:10.1017/S1474745616000239.

**Nicolson, D.J.** (2016) 'Our Roots Began in (South) Africa: Modelling Law Clinics To Maximise Social Justice Ends' 23 *Int Jnl of Clinical Legal Education* 87-136.

**Nicolson, N.J.** (2015) 'Legal education, ethics and access to justice: forging warriors for justice in a neo-liberal world' *International Journal of the Legal Profession* 22 (1) 51-69.

**Nwauche, E.S.** (2015) 'Affiliation To A New Customary Law In Post-Apartheid South Africa' *Potchefstroomse Elektroniese Regsblad/Potchefstroom Electronic Law Journal* 18 (3) 569-592.

**Nwauche, E.S.** (2015) 'Child marriage in Nigeria: (Il)legal and (un)constitutional?' *African Human-rights Law Journal* 15 421-432.

**Nwauche, E.S.** (2015). 'Book review on Bennett, T.W. (ed.). *Traditional African Religions in South African law*. *Journal of Law and Religion* 30 (3) 538-540.

**Van Coller, E.H.** (2016) 'Geloofsinsettings en die Toepassing van die Leerstuk van "Nie-inmeniging" en "Marginale toetsing" deur die Howe: 'n Regsvergelykende Perspektief' *Journal of South Africa law/ Tydskrif vir die Suid-Afrikaanse Reg* 205-219.

#### **Research Papers Presented at Academic/Scientific Conferences**

**Bodenstein, J.** 'The refusal by the South African government to accede to the ICC warrant of arrest of Al Bashir, the

Sudanese President: the implications and a possible way forward' *Justice Today for Peace Tomorrow: A conference marking 10 years of MICC*. Topography of Terror Documentation Centre, Berlin. Germany. October 2015.

**Heideman, V.** 'The legitimate regulatory distinction: challenging the boundary between interpretation and law-making in the Appellate Body' 16<sup>th</sup> *Annual Conference on WTO Law*. WTO and the Graduate Institute. Geneva. June 2016

**Heideman, V.** Poster presentation: 'Transformation and social redress as a reflection of public morals: should Article XIV GATS allow for undisguised protectionist measures?' *Society of International Economic Law Conference*. University of the Witwatersrand. Johannesburg. July 2016

**Jabavu, P.** 'Oral traditions and history: Tools for socio-educational change and the reformulation of being' *Oral History and Religion Heritage Conference*. Steve Biko Centre, King Williams Town. South Africa. October 2015.

**Jabavu, P.** 'Reconsidering the nationality-citizenship dichotomy' *Annual Emerging Legal Scholarship Conference*. Nelson Mandela Metropolitan University, Port Elizabeth. South Africa. February 2016.

**Juma, L.** 'Regulation of the private military security industry in Africa: A background paper' *Regional Workshop for Anglophone Countries on the Montreux Document on*



*Private Military and Security Companies*, organised by the Geneva Centre for the Democratic Control of Armed Forces (DECAF). Addis Ababa, Ethiopia. November 2015.

**Juma, L.** 'The "Malabo Protocol" and domestic criminal justice systems in Africa: harmony or discordance?' *GIMPA Law Conference: The International Criminal Court and Africa: A Discussion on Legitimacy, Impunity, Selectivity, Fairness and Accountability*, Accra, Ghana. March 2016.

**Juma, L.** 'Protection of Internally Displaced Persons in Kenya under the *Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act* of 2012: Operational Pitfalls and Prospects for Further Legislative Action' *16<sup>th</sup> Conference of the International Association for the Study of Forced Migration (IASFM)*, Adam Mickiewicz University, Poznan, Poland, July 2016.

**Krüger, R.** 'Free speech, hate speech and commemoration' *North West University Law Faculty in celebration of its 50th anniversary*. North West University, Potchefstroom. South Africa. September 2015.

**Kruuse, H.** 'On the frontiers of change: Legal Ethics Education in South Africa' *International Legal Ethics Conference*, New York, USA 14-16 July 2016.

**Kruuse, H** and Mwanbene, L 'The thin edge of the wedge: ukuthwala and consent' *Private Law and Social Justice Conference*, Port Elizabeth, 22-23 August 2016.

**Nwauche, E.S.** 'The Right to Ritual Slaughter in Africa'. *Harvard University Animal Law and Comparative Constitutional Law Conference*. Harvard Law School, Cambridge, Mass, USA. 18-19 February 2016.

**Rahim, S.** 'The Communal Property Associations Amendment Bill, 2016: An exercise in Plain Language, now, lost in Translation' *Private Law and Social Justice Conference*. Nelson Mandela Metropolitan University, Port Elizabeth, 22-23 August 2016.

**Van Coller, E.H.** 'Homoseksualiteit en die Kerk' *Annual Symposium SA Akademie vir Wetenskap en Kuns: Spanning: lokaal en globaal/Tensions: local and global*. University of Pretoria, Pretoria, October 2015.

**Van Coller, E.H.** 'Burial Rights Protecting the Religious Rights and Heritage of Communities' *Religious Pluralism, Heritage, and Social Development in Africa: Fourth ACLARS (African Consortium for Law and Religion Studies) Conference*. Faculty of Law, University of Addis Ababa, Ethiopia, May 2016.

**Van Coller, E.H.** 'Religious Ministers – Working for God or Working for the Church?' *Fourth ICLARS (International*

*Consortium for Law and Religion Studies) Conference “Freedom of/for/from/within Religion: Differing Dimensions of a Common Right?” St Hugh’s College, Oxford, United Kingdom. September 2016.*

**Van Coller, E.H.** ‘Public Law “Rights” and “Values” and the Intersections between Administrative Law, Public Administration and Good Governance - A South African Perspective’ *Cambridge Public Law Conference The Unity of Public Law?* Faculty of Law. University of Cambridge. United Kingdom. September 2016.

#### ***Other involvement***

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

**Professor Laurence Juma**, joint winner of the Vice-Chancellor’s Senior Distinguished Research Award for 2014, delivered a lecture to celebrate his achievement in October 2015. The lecture was entitled ‘Accountability for international crimes in Africa: In search of complementarity between domestic and international legal institutions’.

**Professor Graham Glover** delivered a seminar for judges of the Eastern Cape High court on the potential impact of the Consumer Protection Act 68 of 2008 on judicial practice in October 2015. Through this invitation, Prof Glover’s expertise in the field has received a judicial stamp of

approval since invitations of this nature from the bench are few and far between.

**Ms Liz Davies** participated in the *Third National LLB Writing Development Workshop* hosted by Stellenbosch University on 19 August 2016.

**Mr Phumelele Jabavu** participated in an employment-equity workshop hosted by the Department of Labour at the East London Convention Centre in September 2016, while earlier in June he presented a talk to the Eastern Cape Provincial Legislature on ‘Public Education, Public Participation and Management of Petitions in South Africa’s Constitutional dispensation’ held at the Fish River Sun.

**Dr Rosaan Krüger** delivered a public lecture entitled ‘Commemoration and the Fractured South African Past: Free Expression and Hate Speech’ at the invitation of the Center for International Education of Washington and Lee University in Lexington, Virginia in the United States on 9 November 2015.

**Ms Helen Kruuse** organised a successful Family Law Teachers’ Colloquium in Grahamstown and participated as a panel discussant on ‘Decolonising the family-law curriculum’ on 26-27 September 2016, Grahamstown. Third year Legal Theory student **Nkcubeko Balani** won the internal essay competition on decolonisation of the family-law curriculum and participated as a member of the panel at the Colloquium. Ms Kruuse further

continued her ongoing research with Professor Mwambene on ukuthwala with a research visit to Engcobo. The project is funded by the National Research Foundation.

**Professor Nwauche** acted as the chair of the closing session of the International Roundtable on Transformation of Higher Education and the Formation of Canon in African Philosophy and African Literature, held at the Postgraduate Village of Rhodes University in May 2016.

**Prof Helena van Coller** is the recipient of a Coimbra Group Universities grant for Young Researchers from universities in Sub-Saharan Africa. This grant will enable her to spend three months (1 February – 1 May 2017) at the Faculty of Canon Law, KU Leuven in Belgium to continue her research while on academic leave.

**Adv Shuaib Rahim** acted as host and workshop facilitator at the *Yale Alumni Leadership Exchange Programme Workshop* held at Nelson Mandela Metropolitan University in July and continues his work as a member of the Exchange Committee. He also acted as the Impartial Officer of the Independent Elections Board for the Rhodes SRC elections in August 2016. Adv Rahim also participates in discussions on the Communal Property Associations Amendment Bill, 2016 as part of the Task Team established by the *FEDUSA*

*Representative at the National Economic Development and Labour Council.* The Team met in August and deliberations are ongoing.

### **Faculty events**

Several events were cancelled this year in the wake of protests on campus, but two events stand out and deserve mention:

#### *Faculty opening*

Judge Nambitha Dambuza was the guest speaker at our Faculty opening in February 2016. Judge Dambuza minced no words – she impressed upon our students the importance of taking responsibility for oneself and for one's choices. She acknowledged the uncertainties that face our society, including our universities, and the often violent responses that those uncertainties elicit. Judge Dambuza encouraged students to remember the origin of our Constitution and to return to its values in difficult times.

Judge Dambuza handed out prizes and engaged with staff and students after her inspiring address. The Faculty was honoured by the presence of both the Chancellor and the Vice-Chancellor at this event.



**Judge Nambitha Dambuza**

*Panel discussion: The Role of Universities in Building Inclusive Societies*

On 25 July 2016, the Faculty co-hosted a panel discussion with the Centre for Constitutional Rights, supported by the Konrad Adenauer Stiftung. The Centre, through arranging discussions such as these, aims to 'bring the Constitution to life'. The speakers were Dr Sizwe Mabizela and Mr Mpumelelo Ncwadi, the Director of the Indwe Trust, a non-profit organisation that works with rural communities in the Eastern Cape. Universities, according to the VC, have the important role to model inclusivity by broadening access to quality education and cultivating a sense of belonging for everyone in the institution and promoting tolerance for difference.

## **Conclusion and prospects**

The complexities of the past year force us to take stock, to reflect, to learn and to plan as best we can for an unknown and unknowable future in which only one thing

seems certain that institutions and the law (the rules by which we live) will increasingly be challenged and questioned. As members of a university community we must be responsive and responsible in our engagement with our students who form part of, and who resist, the institutions and the laws that flow from these institutions.

Our response to the challenges will not be perfect or unfold in a linear, logical fashion, but we shall continue to learn as we respond to our challenges as a university, and as the Faculty that represents the law and the Constitution in this community, building on that solid foundation that 'we, the people' agreed upon in 1996.

**R Krüger**

31 October 2016



## Rhodes University Law

### Society Report 2016

**Jonathan Espen** (President 2016)

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I am pleased to report that 2016 has been both an eventful and successful year for the Rhodes University Law Society. Last year's outstanding committee endeavoured to maintain the Law Society's status as the premier society for law students at the university. This year our committee comprising of **Declan Williamson (Secretary)**, **Aidan Whitaker (Treasurer)**, **Kimberley Nyajeka (In Camera Editor)**, **Blessings Chinganga (Moot Club Chairperson)**, **Perpetual Chivere (Public Relations Officer)**, **Nkcubeko Balani (In Camera Editor)** and **Tshwanelo Mabelane (Legal Aid Liason)**, were motivated to use their momentum and take the society to new heights. With a record membership base of 409 students, we have been well supported and our events well attended.

#### Events

One of the major highlights in the Law Society's calendar is the annual Law Faculty Market Day, and it was in anticipation of this auspicious day that our year began. We started off with a CV workshop which was followed up

by a separate interview-skills workshop. The CV workshop was held in collaboration with the University Career Centre and included a panel discussion and presentation by Ms Christine Lewis. For the interview-skills workshop, we fortunate to have the HR team leader from ENS Africa, Ms Pfano Rasivhetshela, give an excellent talk on the job application process and the 'dos and don'ts' of interviews. We also had the privilege of having two presentations from directors at Norton Rose Fulbright both the day before and on Market Day. Both of these events were appreciated by the students who benefited tremendously when it came to applying and being interviewed at the Market Day.

The Market Day took place at the end of the first term and was a resounding success. The feedback from the 23 law firms and legal organisations in attendance was very positive, and the event was lauded as being the best Market Day to date. Teas and lunch were generously sponsored by ENS Africa, Hogan Lovells, and Adam and Adams. Throughout the day students could interact with the visiting delegates. This providing networking opportunities, which proved to be fruitful as some students secured vacation work and articles as a result.

This was the first year that the final-year LLB moot final was held on the same day as the Market Day. The finalists- Steph Stretch, Daniel Kirk-Cohen, Jason Manyenyeni and Declan Williamson- were sublime, making for a difficult decision for the judges, Judge Louw from the Grahamstown High Court, Prof Kruger, and alumnus BK Taoana. The day was drawn to a close at the cocktail function where Steph was announced as the winner.

In the second term, we held a meet-and-greet for our members which also functioned as a platform for our by-election. This was exciting for us as we got to mingle with our members and welcome two new additions to our committee, Tshwanelo Mabelane and Nkcubeko Balani. What made it particularly exciting is that this was the first time a first-year student has ever been elected into our committee.

Every year we design and sell a hoodie to all law students. This year a competition was created for students to submit their own designs for the hoodie, and the winner was final-year LLB student Alexandra Edwards. We received generous sponsorship for the hoodies from Norton Rose Fulbright, which allowed us to make them available to financial aid

students at a significantly reduced cost.

At the beginning of the fourth term, ENS Africa kindly sponsored our AGM at Saints Bistro, where the new committee for 2017 was elected. The competition for positions was stiff and so congratulations are in order for those who were elected.

### **Exciting developments**

The Rhodes University Law Society Moot Club was conceived in 2014, but only became fully functional in 2016. Our vision for the Moot Club in 2016 was to create an educational and non-competitive space where students are taught how to moot and conduct mock trials. The club has convened on weekends in the Moot Room where chairperson Blessings Chinganga facilitated the sessions. It is with pride that I can say the club has now grow to the point where it is fully autonomous and has even held its first internal moot competition.

### **Farewells**

My two years serving on the Law Society Committee have provided me with some of the most rewarding experiences during my time at university, and there are a great many people I need to thank for that, both

personally and on behalf of the Society.

Firstly, I would like to acknowledge the staff of the Law Faculty for always supporting the Law Society in all its endeavours. In particular, I would like to thank Andrea Comley, Chad Gill and Fezeka Mweli for your assistance in making all that we do run smoothly. And to Adv Renaud, thank you for being 'the gentle hand on the tiller', for having faith in us and guiding us.

To the 2016 Committee, so much of what we have achieved this year is because of your tenacity and unwavering support for one another. Working with you has been a pleasure and privilege, and I thank you for all you have done for me, the Society and the Faculty.

To my final-year classmates, we have come a long way together and while we still have some way to go, it has been an absolute joy sharing this part of the journey with you. We have helped each other through the long days and sleepless nights, through seas of deadlines and relentless exam periods. The fact that we have made it through is testament to who we are and what we have to offer. We have been fortunate receive our LLB degrees and whether not you pursue a career in law, I encourage you to

make use of your education and I encourage you to lead.

"Do not follow where the path may lead. Go, instead, where there is no path and leave a trail." ~ Ralph Waldo Emerson.

# **Black Lawyers Association: Rhode University Student Chapter 2016 Report**

**Nonkululeko Sibambato** (President)

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Many have asked “What is the significance of the BLA in 2016?” Mr E M Ngubane, writing in 2004 in response to the *Without Prejudice* editorial that questioned the relevance of the BLA, stated that the BLA represents primarily the interests of justice and of the disadvantaged communities in our country”. This has not changed in 2016 and therefore the BLA is still relevant in our society. The foundational values of the BLA Student Chapter are transformation, non-sexism and non-racialisation. The aim of the Society for 2016 was to continue the work of transforming the institutional practices of universities which remain untransformed and exclusionary.

2015 saw the rise of student protests mainly in the form of #Feesmustfall and specifically the #Rhodesfessmustfall movement. The BLA participated in the discussions about the restructuring of the Minimum Initial Payment and the overall fee structure. The BLA also formulated a Rhodes Student Safety Guide during Protests in order to inform students what was legally permissible during the protest action.

On the 23<sup>rd</sup> of April, we hosted our first annual champagne breakfast. The theme of dialogue was “The court room, a space of resistance, reflection and celebration”. Our speakers were Mrs Pumeza Bono from Pumeza Bono Incorporated in Port Elizabeth and student, political commentator and author of *Memoirs of a Born Free, Reflections on the Rainbow Nation*, Ms Malakia Mahlatsi. The purpose of the dialogue was to provide a space for future legal practitioners to discuss the social responsibility that legal practitioners have in transforming society and the legal profession. Likewise, the event aimed to celebrate the legal profession and to encourage our members to carry the responsibility of a future legal practitioner with pride and joy.

For Women’s Month in August, we ran a pad drive to collect sanitary tissues for disadvantaged young women who miss school on a regular basis because they cannot afford them. The initiative continued through to October as the matter should not only be a concern during Women’s Month.

From the 9<sup>th</sup> of September to the 11<sup>th</sup> of September the BLA-Legal Education Centre hosted a Trial Advocacy Training Programme. The training was designed to improve the litigation skills, trial technique and confidence of prospective lawyers. The training included case-analysis



planning and exercises on opening statements, examination in chief, cross examination and closing arguments. The training was facilitated by two lawyers, one of whom have been litigating and running a practice for over 15 years.

On the 15<sup>th</sup> of September we hosted our Women's Rights vs Women's Empowerment dialogue, with Adv Shuiab Rahim and Ms Lihle Ngcobozi as our guest speakers. The purpose of the dialogue was to interrogate why women's rights and women's empowerment are concepts that are often spoken about in isolation, and also to interrogate how to bring the two concepts together in this patriarchal society. In addition to that, the dialogue also touched on the way in which women navigate their way around the confines of culture and societal barriers to claim their rightful place in society and feel empowered.

On the 17<sup>th</sup> of September the BLA, in partnership with the Black Management Forum and the Pan African Youth Dialogue, hosted an event which aimed to expose graduates to challenges after university and to encourage them by providing critical advice, assistance and guidance to being successful in this tough economy. Speakers from different disciplines and walks of life were present to facilitate the discussion.

The BLA Rhodes Student Chapter, which is one year old, has engaged students on

a range of issues that plague our society and has provided spaces where solutions can be discussed. The goal is to ensure that when graduates are released into the world, they are released as compassionate, sensitized, open-minded and powerful individuals that can help better shape our society by their thoughts and actions and can this world a better place for all. The BLA is passionate about strengthening and defending the pillars of our democracy. With that being said, the BLA Rhodes Student Chapter is confident that it is taking a step in the right direction in the journey that is transformation- that being transformation for the benefit of all marginalised groups in society.



## Introduction

Any legal professional, prospective or established, is aware that the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution') protects the cultural values of all the citizens. As the preamble eloquently states, 'South Africa belongs to all who live in it, united in our diversity'. When our diversity spreads over 11 official languages and many more cultural groups, it is not surprising that achieving this unity is proving to be difficult – and that is putting it lightly.

With the Constitution being the 'supreme law of the Republic,'<sup>1</sup> it follows that any practices that do not uphold the values enshrined in the Constitution are invalid. These values are articulated in the Bill of Rights. The Bill of Rights is not immune to

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<sup>1</sup> Section 2.

## Virginity Testing: A Mark of Failure in South African Women's rights

**Blessings Chinganga and Zintle Tsholwana** (Legal Theory III Students)

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certain limitations, much like the rest of the Constitution.<sup>2</sup> That being said, the preservation of culture and heritage has been the foremost objective for a large group of South Africans. The heated debates surrounding virginity testing of young girls highlight a number of issues – the first being that the development of South African law has not been successful in building a harmonious balance between the Constitution and customary law. The second is the need for an honest assessment of cultural practices. The purpose of this assessment should be to determine whether certain practices or rituals make sense in the society we live in today. This article will argue that virginity testing does not in fact, serve a positive purpose for the people who are subjected to it. Furthermore, it will be argued that the legislative measures that have been in place by government do not adequately deal with the problematic consequences of virginity testing, especially for women.

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<sup>2</sup> Section 36.

## History and process of virginity testing

Currently, virginity testing is closely associated with isiZulu culture. This association is not unfounded, as the Zulu Royal House, and especially the Zulu King, has publicly defended virginity testing; stating that the call to ban the practice is “unjustified”.<sup>3</sup> Staunch defenders of the practice state that virginity testing is the best way to stop HIV infections and pregnancies amongst the youth.<sup>4</sup> This is supposedly achieved by instilling a sense of pride in being virgins, and their communities celebrate girls who maintain their virginity.

The method of virginity testing is fairly uncomplicated. Essentially, the hymen is examined and if it is deemed to be intact, then the girl is announced to be a virgin. Once the girls’ genitals have been examined, they are usually given a mark on their bodies to symbolise their results. In some communities, the ‘virgins’ are marked, whereas in others, the ‘non-virgins’ are the ones who are marked. This way, even though the actual examination of genitals is private, the entire community is made privy to the results.<sup>5</sup> In the context of human-rights, specifically the right to

bodily integrity<sup>6</sup> and human dignity,<sup>7</sup> one understands why virginity testing is still a heated debate. When a girl is found not to be a virgin, there is an ostracising and shaming process that takes place. During this time, she is required to reveal when and with whom she engaged in sexual intercourse. The consequence of this is that the young girl is made to internalise her shame. Her self-confidence plummets, and for as long as she remains in that community, her value as a member is diminished.

In an effort to prevent this social trauma, some girls are resorting to inserting toothpaste or thin pieces of meat in their vaginas as fake hymens in order to pass the test.<sup>8</sup> This illustrates that girls will go to great lengths- even put their health at risk- in order to escape the shaming and ostracising that comes with failing the virginity test. More alarmingly, this shows that girls who so choose, will continue to be sexually active because there is a high chance that they will still be able to pass the test. Consequently, virginity testing will have achieved nothing by way of combating HIV/AIDS or teen pregnancies. Furthermore, it has been proven that in areas where there is a high rate of tests performed, there is also a high rate of anal-related sexual injuries. This shows

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<sup>3</sup> K Behrens “Virginity testing in South Africa: a cultural concession taken too far?” (2014) 33(2) *South African Journal of Philosophy* 177.

<sup>4</sup> B de Robillard “Girls and virginity: Making the post-apartheid nation state” (2009) 23 *Agenda* 85 at 87.

<sup>5</sup> See documentary “Zulu Tribe Virginity Testing South Africa”

(<https://www.youtube.com/watch?v=hWCio7Bb928>) .

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<sup>6</sup> Section 12(2).

<sup>7</sup> Section 14.

<sup>8</sup> Suzanne Leclerc-Madlala (2003) “Protecting girlhood? Virginity revivals in the era of AIDS” *Agenda* vol 17 at 16-25.

that in order to pass the test, but nevertheless to continue being sexually active, girls are resorting to anal sex. This does not eradicate the risk of contracting HIV/AIDS, but in fact, increases it.<sup>9</sup>

### **Concessions so far between the law and tradition**

Regardless of the tensions that exist between the law and tradition when considering virginity testing, there have been some concessions reached. The Children's Act, for example, prohibits virginity testing for girls under the age of 16<sup>10</sup> and has legalised virginity testing for girls above that age subject to the girl having given her consent after proper counselling in the manner prescribed in the Act.<sup>11</sup> Furthermore, the body of a girl who has been tested cannot be marked in any way,<sup>12</sup> and her results may not be disclosed without her consent.<sup>13</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act also contains a clause which prohibits discrimination on the basis of gender; including any religious/traditional acts that impair the dignity of women and undermine the equality between men and women.<sup>14</sup> This clause could be applicable to virginity testing, as some believe strongly that it is

an outdated practice that seeks to reinforce patriarchy by allocating disproportionate sexual responsibility on women to "protect" their virginity, whereas there are no such measures put in place for men. Therefore, it is a welcome relief that the law is cognisant of this and has put measures in place to attempt to combat these patriarchal and misogynistic attitudes towards women that are, unfortunately, inherent in African traditional customs and practices.

However, it is unfortunate that these legal measures are not enough. For example, there are no prescribed ways of monitoring if these provisions mentioned above are upheld by communities that practice virginity testing. There are a number of media reports each year which suggest that in some communities, these provisions are completely disregarded. Therefore, the provisions have failed to achieve their purpose – there are still instances where young girls' rights to dignity and bodily integrity are being compromised. An example of a provision in the Children's Act which is not adhered to by some practitioners is section 12(7), which states clearly that "the body of a child who has undergone virginity testing may not be marked". Unfortunately, as has been discussed above, girls are still marked according to their results. Clearly, the Children's Act is not nearly enough to protect the young girls who are subjected to virginity testing. The legislature's efforts

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<sup>9</sup> McKerrow N (2000) "At risk groups" Paper presented at Second Annual HIV/AIDS Conference, Pietermaritzburg.

<sup>10</sup> 2005 Section 12(4).

<sup>11</sup> 2005 Section 12(5).

<sup>12</sup> 2005 Section 12(7).

<sup>13</sup> 2005 Section 12(6).

<sup>14</sup> 2000 Section 8(d).

to balance the Constitution as well as the preservation of customary law have not passed the test.

### **Conclusion: The way forward**

It is acknowledged and appreciated that the law is cognisant of the constitutional right to practice culture and cultural practices freely. However, the law has an even greater burden and responsibility to protect the rights of minors and these rights are paramount in matters that involve minors, in South Africa.<sup>15</sup> Therefore, there need to be stricter provisions in the Children's Act that ensure that (minor) girls' rights to dignity and bodily integrity are not infringed when it comes to virginity testing. Abolishment of virginity testing is a matter that needs to continue to be discussed in communities and within the relevant legislative bodies because, on a balance of facts, this practice harms more than it benefits girls. Furthermore, this practice is an archaic reinforcement of patriarchy and those who vehemently seek to protect this practice are doing so in order to protect the patriarchal and misogynistic structures that currently exist in African traditions and customs.

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<sup>15</sup> Section 28(2) of the Constitution.



This article focuses on women's land rights in Zambia. Land is a fundamental prerequisite for economic growth, as most people depend primarily on it for survival.<sup>1</sup> It is true 'that land is life' because of its many significant uses. For instance, when one wants to build, one needs land. In addition, when one wants to farm crops for consumption or sell, they need land. Its importance is also evident in that the owner of a piece of land can use it as collateral for loans which enable the person to participate actively in the economy of a country.

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<sup>1</sup> R Spichiger and E Kabala "Gender equality and land administration: the case of Zambia" (2014) 9 DIIS Working Paper, Denmark.

## **Women's Access to and Ownership of Land in Zambia**

**Margaret Mwape** (Final-year LLB student)

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These, among other examples, illustrate the need for one to access and own land. Despite the importance of accessing and owning land, women in Zambia are most disadvantaged when it comes to land distribution.

### **Women's rights vis-a-vis land in Zambia**

Women consider land as the most fundamental resource to their living conditions, and economic empowerment. Be this as it may, however, they rarely access, own or control land, primarily because women's land rights are grossly neglected. This is due to a number of reasons, such as the provisions of the 1996 Constitution of Zambia, statutory laws, and the customary laws that coexist in Zambia. Other issues that exacerbate the discrimination of women's land rights are unsuitable land administration, the inadequate number of female representatives in high positions of land administration, illiteracy and poverty among women, land transaction procedures, and inadequate access to credit in order to purchase land.



## Distribution of land in Zambia

The Lands Act stipulates that all land in Zambia is distributed at the behest of the President. Zambia has a total landmass of approximately 769,000 km<sup>2</sup>. This land is divided into two tenure systems, namely *customary land* and *state land*. Customary land covers about 90% of these areas, while the remaining 10% is state land. In the customary system, chiefs regulate the allocation of land, whereas the case of in state land the commissioner of lands on behalf of the state does so.

The Constitution is an indication of how the law inadequately protects women against discrimination. The Zambian Constitution provides for fundamental human-rights which include the prohibition of discrimination on the grounds of, *inter alia*, gender.<sup>2</sup> However, the problem lies in article 23(4)(c) which excludes the application of the anti-discriminatory provision to matters concerning personal law and customary law. The implication of this is that the Zambian Constitution compromises its status as the highest law of the land, thus making it almost subordinate to traditional practices which are mostly discriminatory against women. It can then be argued that article 23 (4) (c) protects customary law which is mostly discriminatory. This is problematic in a country like Zambia where most land (90%) is held under customary laws and

thus is governed by various customs.<sup>3</sup> In addition, it can be argued that the Lands Act which applies to administration of land only applies to state land and not customary land. Similarly, the Intestate Succession Act does not apply to land held under customary law. Therefore, where a person dies intestate and owns land under customary law, the rules stipulated in the Act relating to distribution of property do not apply.

From the above, it is evident that women's land rights are to a large extent affected by customary law.<sup>4</sup> This is because most customs are patriarchal in nature and so land administration and distribution favours men more than women. In cases where women access land, this is done through their male counterparts; the same is true regarding ownership land.<sup>5</sup> For instance, in the Southern Province of Zambia, in the Monze District, a woman whose parents passed away and left land was chased away from the land by her paternal uncle. The man's argument was that the late brother's land now belonged to him. Attempts in getting the land back have been unsuccessful, as the traditional court keeps ruling in favour of the uncle.<sup>6</sup>

<sup>3</sup> PK Makasa *The 1996 Zambian National Housing Policy* (2010) 40.

<sup>4</sup> RN Ozoemena *African Customary Law and Gender Justice in a progressive democracy* (LLM Thesis, Rhodes University, 2006).

<sup>5</sup> M Adams *Land Tenure Policy and Practice in Zambia: Issues Relating to the Development of the Agriculture Sector* (2003).

<sup>6</sup> A Mgugu *Land Rights of Women in Southern Africa* (2013).

<sup>2</sup> Article 23.

It is then only true that if women face so many hardships in accessing land, certainly owning land would equally be difficult.

### **A look at case law: *Mwiya v Mwiya* and *Chilala v Milimo***

The case of *Mwiya v Mwiya*<sup>7</sup> is a good illustration of the impact of customary law on the rights of women. In this case, a *Lozi* custom that a divorced wife was not entitled to a property settlement or maintenance was held to be valid. This case is evidence of how customary law is patriarchal, and how it easily advances the rights of men over those of women.

The effect of the patriarchal ideology on women with regard to land is as follows: where a woman is married, when her husband dies, she loses the land or land rights given to her upon marriage. For instance, in the *Tonga* tradition of Southern Province, the widow cannot inherit land from her late husband. The land goes to the husband's nephews or a man who takes over the widow. Therefore, in an event that a woman does not agree to being taken over, she loses the land rights that she had through her husband. In some more favourable cases, a woman is allowed to keep the land in the event that she does not remarry. However, in unfavourable circumstances, this land would simply be grabbed from a woman.

In the case *Chilala v Milimo*,<sup>8</sup> a widow had been chased away from the husband's property and the land was then used as a graveyard. In the case of divorce, the woman goes back to her own village, where she may be allowed to cultivate a piece of land. In other traditions a husband is not obliged to share his property with the wife upon divorce.

Although the Lands Act allows for both women and men to acquire land title, customary land tenure is also recognised and is administered by the local courts according to the customary traditions which, as discussed above, are mostly discriminatory against women. Despite the promotion of gender equality in Zambia, it is clear that in practice this has not been realised in most aspects that involve customs and traditions due to the myth that men are superior to women. I submit that it is time for the harmonisation of the two systems of law in Zambia, being statutory and customary law, to achieve equality. Customary law should be developed and applied in a manner that is not discriminatory to women.

As highlighted above, other factors that affect women's access to land include poverty, illiteracy and HIV/AIDS. All these circumstances are interrelated. As women are among the poorest group in the Zambian population, they are precluded from enjoying other opportunities and

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<sup>7</sup> 1977 ZR 113

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<sup>8</sup> Lat 099/1999.

resources that would enhance their lives. Therefore, giving women access to resources such as land and other essentials (for example, loans) would result in economic empowerment, which could subsequently lead to a reduction in the rates of poverty, illiteracy and HIV/AIDS. Likewise, as women play a very large role in rural agricultural activities in Zambia, allowing them access to such resources could also potentially strengthen food production and the economy of the country as a whole.



## Decolonising the Family-Law Curriculum Essay Competition Winner

**Nkcubeko Balani** (Legal Theory III Student)

on how the family-law curriculum could be decolonized.

### *De-privatizing and rehabilitating the public space*

The first suggestion Mbembe provides in Decolonising knowledge, or in this case, the curriculum, is the “de-privatisation and rehabilitation of the public space”.<sup>2</sup> By this Mbembe suggests that access to the university, or the university course being taken, be opened to all members that make up the university or take that particular course.<sup>3</sup> “The creation of [these] conditions,’ he continues, ‘will allow the black staff and student to say of the university: ‘This is my home. I am not an outsider here. I do not have to beg or to apologize to be here. I belong here’.”<sup>4</sup> This step comes with a disclaimer, however: the creation of conditions for belonging “has nothing to do with charity or hospitality” or tolerance, or assimilation but “with ownership of a space that is a public, common good”.<sup>5</sup>

### A theoretical basis on decolonization

The philosopher Achille Mbembe sums up the importance of decolonization in his definition of it as “[the destruction of all things] whose function all along, has been to induce and normalize particular states of humiliation based on white supremacist presuppositions.”<sup>1</sup>

This essay will discuss the project of decolonization in the context of the family law curriculum. It will draw heavily on Mbembe’s ideas on the decolonization of the university space and submit proposals

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<sup>1</sup> A Mbembe “Decolonizing Knowledge and the Question of the Archive” (2016) Unpublished paper 1 at 6.

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<sup>2</sup> Mbembe Unpublished paper 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

### ***Re-inventing the classroom***

Mbembe's second proposal focuses on the relationships within the lecture room, that is, the curriculum as it comes to life. Here, he argues that the classroom needs to be "re-invented" to "a classroom without walls in which we are all co-learners; ... that is capable of convening various publics in new forms of assemblies that become points of convergence and platforms for the redistribution of different kinds of knowledges".<sup>6</sup> Mbembe says that this is important because "[a] [n]umber of our institutions are teaching obsolete forms of knowledge with obsolete pedagogies".<sup>7</sup>

### ***Decolonization is about re-centring, finding the centre***

Another scholar who offers impactful insight on decolonization is Ngũgĩ wa Thiong'o. Wa Thiong'o argues that decolonization must allow us, as Africans, "to see ourselves clearly in relationship to ourselves and to other selves in the universe," to "[see] ourselves clearly" and emerge out of a condition of "blindness or giddiness".<sup>8</sup> He views decolonization as a process of "recentering", because, he argues, cultural domination through imperialism disjunctures views on the world, centres those which assist the work

of domination, and pushes to the periphery those that fall outside of this work.<sup>9</sup> As Mbembe asserts, wa Thingo'o's answer to these questions is not a suggestion of "closing the door to European or other traditions".<sup>10</sup> Instead, it is about "defining clearly what the centre is," and for wa Thiong'o, "Africa has to be placed at the centre".<sup>11</sup> Wa Thiong'o demands that we account for the violence of erasure of African cultural traditions and people. His approach suggests that Africa will be decolonized not only when systems of colonially manufactured violence on African people are demolished but when Africa rejects the assumption that the modern West is the central root of Africa's consciousness and cultural heritage. This is when:

"[a]ll other things are to be considered in their relevance to our situation and their contribution towards understanding ourselves. With Africa at the centre of things, not existing as an appendix or a satellite of other countries and literatures, things must be seen from the African perspective."<sup>12</sup>

### **Decolonising the Family-Law curriculum**

#### ***De-privatizing and rehabilitating the public space***

I suggest two ways in which the family-law curriculum can be as it is currently can be

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<sup>6</sup> Mbembe Unpublished paper 6.

<sup>7</sup> *Ibid.*

<sup>8</sup> N wa Thiong'o *Decolonizing the Mind: The Politics of Language in African Literature* (1994) 87.

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<sup>9</sup> Mbembe Unpublished paper 17.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

de-privatised and rehabilitated. The first concerns the curriculum as it is on paper, and the second is connected with the curriculum as it comes to life.

Firstly, evoking wa Thiong'o's argument that there be a re-centring of episteme such that Africa is placed at the centre, the curriculum needs to take a firmer stance with regard to cultural practices of African people. I raise this as an important point because a fellow student who had finished the course once intimated, in a conversation, the following to me:

"If you were to start working at a firm in Grahamstown, and you had a client come from Joza or the outskirts of Grahamstown and they have a problem because the husband had died, you don't even know where to start with Xhosa culture. I wouldn't know whether she is entitled to certain things or not. We finished a whole family-law course and yet we can't answer those questions."

The curriculum should play an active role in centring marginalized cultures in our country and simultaneously giving those people back their human dignity. As Adichie has argued,<sup>13</sup> erasure of the lived experience of those who fall outside of hegemonic power is violent. This is particularly important in the classroom context because some of these people are compelled to partake in the erasure of their own selves. The curriculum can give

the appropriate recognition to cultures in South Africa through class assignments that are heavily imbued with a purpose of learning more about marginalized communities and cultures in our country. One could take for example a class assignment for my 2016 family-law course at Rhodes University that was a discussion on adultery. In my respectful view, the assignment was a missed opportunity to incorporate local and indigenous scenarios that the majority of the class would have been ignorant about. The assignment was more frustrating in that suing a third party for adultery is no longer a claim in law anymore and therefore a discussion on that is not as relevant as issues surrounding customary law and indigenous communities.

### ***Using service-learning in de-privatizing and rehabilitating space***

The curriculum could also achieve this decolonial purpose in a second, and more practical, way. This proposal evokes Mbembe's point that the classroom be "re-invented" to one that is "capable of convening various publics in new forms of assemblies" that become equilibrical spaces for the interchange of different kinds of knowledges.<sup>14</sup> The curriculum could have, as one its class assignments, practicals that require that students engage positively with the local,

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<sup>13</sup> CN Adichie "Jumping Monkey Hill" *Granta* <https://granta.com/jumping-monkey-hill/> (accessed 7 September 2016).

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<sup>14</sup> Mbembe Unpublished paper 6.



marginalized community, using the content that has been learned throughout the family-law course. The class could be assigned designated days in which students are required to set up stands at a venue that is accessible to people who may not be able to afford legal consultation, and where the students will engage with the members of the community and assist them in whatever family-law issue affects the person. To assist the students, a senior member of the faculty could be present, both as a supervisor and to aid the students should they struggle with a concept. This endeavour would make public, or less private and elitist, the formerly white university space as it is, bolster engagements with those who have been excluded by a white supremacist culture and academia and normalize an active relationship with them. It would also initiate a process of granting them back their humanity. Furthermore, it would give recognition and a sense of belonging to those who are fluent in languages other than the English language, or who have a hard time grappling with the English language and who, as a result, feel a deep exclusion in the classroom and a fear to engage or participate.

### ***The curriculum as it comes to life and representation***

Another important decolonising act is representation in academia and in the

classroom. The curriculum as it comes to life is sometimes poorly served in terms of academics who are poor and black. It is important that the lecture make-up in family law is diversified, as representation heavily affects the dreams and aspirations of those who are presented to, written to and taught. It speaks to what is acceptable and who can make it in the particular field.<sup>15</sup>

### **Conclusion**

This work has discussed decolonization as a concept, with a focus on the decolonization of the university space. It has explored a few ways in which the family-law curriculum in particular could be decolonized. There are many more ways in which the family-law curriculum may be revised which cannot be discussed due to the nature of this assignment and time limitations.

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<sup>15</sup> A Bennett “23 Reminders that representation is everything” *Buzzfeed* [https://www.buzzfeed.com/alannabennett/reminders-that-representation-really-is-important?utm\\_term=.qpdgdvj8Vq#.iwQErZaB2W](https://www.buzzfeed.com/alannabennett/reminders-that-representation-really-is-important?utm_term=.qpdgdvj8Vq#.iwQErZaB2W) (accessed 7 September 2016).

## Reasons why our Rhodes alumni chose a career at Norton Rose Fulbright:



**Ismail Laher (Director)**

I can give a number of reasons why I joined Norton Rose Fulbright and explain the benefits of working in a global law firm but I prefer to say why I choose to stay at Norton Rose Fulbright. It is down to the people and the way we treat each other. We work together to ensure an efficient and quality service for our clients. Without anyone of us, regardless of positions, the team is lessened.



**Avayaik Gray (Signed 2017)**

The global coverage, corporate identity and dynamism were all factors in my choice, but the positive work environment set the firm apart from the rest. I want to enjoy where I work, as well as the people I work with, and Norton Rose Fulbright was the only firm which could truly offer that.



**Rosalind Lake (Director)**

I have watched the firm grow from strength-to-strength. We have a wonderful diversity of people and clients. After 10 years at the firm, I still find it a stimulating and rewarding environment.



**Verushka Reddy (Director)**

Norton Rose Fulbright exposes me to diverse clients and legal work, and excellent training and mentoring. The opportunities to learn and develop as a lawyer are there for the taking. Most importantly, there is a warmth of spirit amongst the people that makes it easy to feel at 'home'.



**Lebo Motsumi (Associate)**

I chose a career at Norton Rose Fulbright because I wanted to serve my articles at well recognized law firm which would provide me with exposure to different areas of the law.



**Kelly Dixon (Candidate Attorney)**

From the beginning of my LLB, I have aspired to work for a prestigious law firm like Norton Rose Fulbright. At Norton Rose Fulbright the opportunities are endless. What makes the firm special is the people that work here, not only are they some of the best attorneys in South Africa and the world, but they are also great people who are willing to share their knowledge and experience.



**Lee Crisp (Associate)**

I chose a career at Norton Rose Fulbright because one can sense the difference in firm culture and comradery with one's peers from other law firms. This firm culture also encourages being involved in activities, such as the firm's choir, which allows one to interact with colleagues across departments, levels of seniority and job roles.



**Jane Hoffe (Candidate Attorney)**

Norton Rose Fulbright offers incredible exposure to international business, travel opportunities and areas of law not often found at other firms. Furthermore the exceptional teamwork displayed between the offices nationally and internationally, make Norton Rose Fulbright not just an international firm by description but also in practice.



**Liesl Williams (Director)**

I was thrilled to get articles with the firm. It was a big firm with a good reputation. I knew I would get good training. I was offered my dream job – to help people, pro bono.



**Michelle White (Associate)**

Norton Rose Fulbright was a no-brainer for me. The Norton Rose Fulbright Aviation Transport team has a fantastic reputation in the industry and I haven't looked back since becoming part of the Norton Rose Fulbright family.



**Donovan Brown (Associate)**

Norton Rose Fulbright is a preeminent global brand and one that is at the forefront of some of the largest international transactions. As a Project and Trade Finance Attorney, I chose to build my career at Norton Rose Fulbright primarily due to the international exposure and exceptional training offered at the firm. From working with our teams in Melbourne, London, Dubai and Washington DC in putting together a transaction for a large solar project in South Africa to learning about the company laws of Kenya, Norton Rose Fulbright has given me a platform to reach my goals and, most of all, have fun whilst doing so.



**Daniel Breier (Associate)**

I chose to do articles at Norton Rose Fulbright because it was the only truly national law firm in SA. In the years since I joined, we became a truly international firm with amazing opportunities for cross-border work.



**Sinal Govender (Associate)**

'With offices across the world, Norton Rose Fulbright was the obvious choice in a time where clients are looking to push boundaries, and expand their businesses beyond their home countries. My practice spans across acting for blue-chip clients across various industries, to providing services on a pro bono basis for humanitarian NGOs. The team that makes up the firm is just as diverse as the work, and there is always knowledge available to be shared.'



**Carol Holness (Associate)**

Norton Rose Fulbright was the first law firm I applied to (for vac work and articles) whilst I was still studying at Rhodes. I did vac work in the Durban office and I loved the people and the city. Looking back, I wouldn't have had the same opportunities if I had worked anywhere else.



**Fezeka Mbatha (Signed 2017)**

Norton Rose Fulbright has a global influence with local feel, and those are one of the many reasons I chose a career with the firm. I'm looking forward to being part of a team that gives clients high quality legal advice.





The 2016 academic year has been a singularly significant one for all universities offering an LLB programme. In 2015 the Council on Higher Education (CHE) (the national body delegated the task of quality assurance in higher education in South Africa in terms of the Higher Education Act 101 of 1997) announced that it would be conducting institutional quality assurance audits of all LLB programmes offered in South Africa during the 2016 academic year. This is the first time that a national LLB audit of this kind has ever been conducted in South Africa. The LLB review process follows a variety of other national programme audits of the MBA, the various education qualifications degree, and the degree in

## **The Council on Higher Education Reviews LLB Programmes**

**Professor Graham Glover** (Associate Professor)

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social work, all of which have occurred in the last six years.

The impetus for the CHE's decision to undertake a review of LLB appears to have come partly from what was known as the 'LLB Summit' — a high-level meeting of all stakeholders involved in the legal system in South Africa which was held on 29 May 2013. At the summit, representatives of the judiciary, the Law Society of South Africa, the General Council of the Bar, the Prosecuting Authorities, the Justice Department, the Department of Higher Education and Training and the South African Law Deans' Association discussed the future of the four-year LLB, their general impressions of the quality of the LLB programme, and its fitness for purpose. It was clear from the discussions at the summit that there was much dissatisfaction with the four-year programme, the perceptions of the differing quality of LLB degrees offered by different institutions, and the poor work-readiness of many LLB graduates, both in terms of legal knowledge and basic reading, writing and numeracy skills. At

the conclusion of the summit, the chief executive officer of the CHE, Dr Ahmed Essop, indicated that the time was ripe for a national quality-enhancement review of all LLB programmes (see Mapula Sedutla 'LLB summit: Legal education in crisis?' (2013) July *De Rebus* 113).

Most stakeholders argued at the summit that the root of the problem with legal education in South Africa was the decision at the turn of the century to move from a five-year law qualification to a four-year LLB. However, when the terms of reference for the 2016 review were announced, it was made quite clear by the CHE that the question whether the four- or five-year programme was the better one was 'off the table'. Instead, the focus of the review would be on the quality of the *existing* programmes presented by the seventeen universities that offer LLBs in South Africa. Whether or not the ultimate accreditation report will make any recommendations about the future look of an LLB qualification is unclear. At Rhodes, 95% of students do a two degree, five-year programme, so Rhodes students would appear to be benefiting by comparison with other graduates in the country, who mostly do a four-year single-degree LLB.

What does the review process entail? In a nutshell, the LLB programme that any university is currently registered to offer

must be measured against the Higher Education Quality Committee's (HEQC's) 'criteria for programme accreditation', to see whether the university should continue to be accredited to offer the degree. The quality criteria against which the HEQC measures any LLB programme cover a wide range of aspects relevant to the operation of any academic programme. In summary, a university has to attest to the quality of the following things:

- Programme design (e.g. how the LLB programme is connected to the university's mission and central academic planning, the needs of students and employers; whether it has clearly articulated outcomes, is coherent in its curriculum design and construction, and has intellectual credibility.)
- Student recruitment, admission and selection (recruitment practices; admissions policies; adherence to legislation; issues relating to equity, widening of access and the capacity of the programme to offer quality education relative to numbers.)
- Staffing (qualifications [discipline specific and education related]; size; seniority; research profiles; full-time vs part-time components; staff development opportunities; human resource management.)

- Teaching and learning strategy (teaching and learning methods; promotion of student learning; evaluation; policies)
- Student assessment policies and procedures (internal assessment methods; internal and external moderation; validity and reliability of assessment; security and integrity of recording of results.)
- Infrastructure and library resources (venues and facilities; IT infrastructure; size and scope of library resources; library support, staffing and access.)
- Administrative services;
- How the programme prepares graduates for the world of work or postgraduate programmes.

To give context to a law-specific review process, the CHE first mandated the Higher Education Qualifications Sub-Framework Committee (HEQSF) to produce a national LLB qualification standard, against which all LLB programmes could specifically be evaluated. This occurred during 2014 and the first part of 2015, and involved a sub-committee comprising members of most of the law faculties in South Africa. Once this LLB qualification standard was settled and agreed to, the CHE instructed all law faculties first to produce a 'self-evaluation report' — i.e. a written narrative self-assessment of the faculty's LLB

programme, compiled in relation to both the national academic and LLB-specific criteria and standards, and after a process of engagement with staff, students, law clinics and administrative staff. This was to be supported by evidence to back up the claims made in the narrative report.

Rhodes's self-evaluation report was compiled in the first five months of 2016, and was submitted to the CHE on 16 May 2016. The narrative report ran to over 200 pages, and is over 105 000 words in length. The report is supported by 1000s of pages of evidence which has been archived both electronically and in hard-copy form. The narrative report was subjected to a desk-top evaluation by a CHE-appointed panel of both law and education experts in July 2016. This desk-top evaluation was then followed by a site-visit by the independent CHE-appointed panel of experts who visited Rhodes in the last week of October 2016 to conduct an on-the-spot investigation and evaluation of the Faculty's facilities and LLB programme, over the course of three intensive days. This site visit included interviews with staff, students, administrators and librarians, university management and alumni. The site-visit panel will compile a further report at the end of its visit which will feed into the CHE's ultimate report (planned for publication some time in 2017) which will



decide whether Rhodes's LLB programme will continue to be accredited.

Although the preparation of everything necessary for the review process has been an exhaustive (and sometimes exhausting!) process, the Rhodes Law Faculty has adopted the view that the exercise is a welcome one, and has given us as a Faculty an opportunity to conduct an honest and frank audit of our academic practices in offering the LLB.

We as a Faculty are proud of our LLB, and believe it is one of the better qualifications of its sort in the country. Nevertheless, after conducting the self-evaluation process the Faculty has identified that the programme has inevitable shortcomings, and has aspects which could do with improvement in the interests of the education our students receive at Rhodes, and the launching pad it gives them for future professional success. The Faculty looks forward to constructive engagement with the CHE in the ultimate accreditation process, and has confidence not only that its LLB programme will be reaccredited, but will also be able to benefit from the improvements we ourselves have identified as being necessary, as well as any further recommendations the CHE makes in its report.

The national process will also feed organically into internal university

discussions and review processes about curriculum design and transformation which were instituted by the Vice-Chancellor during the course of the 2016 academic year.



This article is aimed at explaining the validity of foreign legal qualifications for the purpose of legal practice in Zimbabwe. The Council for Legal Education is the regulatory body that determines the designation of legal qualification for the purposes of working in the legal fraternity in Zimbabwe. The impetus for this brief is the repeal of previous legislation that validated a number of foreign legal qualifications.

The new statute will have a profound effect On those students currently undertaking legal studies in South Africa and beyond and will be a useful guide for those intending to apply for enrolment into the LLB program at Rhodes.

## **A Brief on Legal Practice in Zimbabwe for Holders of Foreign Law Qualifications**

**Farai Nduma** (LLB Graduate, Master of Commerce Candidate) and **Allan Chaumba** (Penultimate-year LLB Student)

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**Current legislation: Statutory Instrument 111 of 2016, cited as Legal Practitioners (designated Legal Qualifications) Notice, 2016**

Statutory Instrument 111 of 2016, cited as Legal Practitioners (designated Legal Qualifications) Notice, 2016 has had the effect of designating degrees from the University of Zimbabwe and Midlands State University as the only recognised legal qualifications in Zimbabwe for the purpose of practising law as an Advocate or Legal Practitioner immediately upon completion of the LLB degree. The Legal Practitioners (Designated Legal Qualifications) Notice, 2016 effectively repeals the Legal Practitioners (Designated Legal Qualifications) Notice, 2007, published in Statutory Instrument 30C of 2007.

**Repealed legislation: Legal Practitioners (Designated Legal Qualifications) Notice, 2007, published in Statutory Instrument 30C of 2007**

Outside Zimbabwe, the designated legal qualifications recognised by the Council for Legal Education were the LLB equivalent issued from Universities in Zambia, Botswana, Lesotho, Swaziland, South Africa and the United Kingdom. This has been the source of legislation that enabled many students to study the law in the above named jurisdictions, eventually write conversion examinations regulated by the Council for Legal Education, and then sworn in as an officer of the court in Zimbabwe.

**Implications**

The effect of the 2016 Statutory instrument is that only LLB graduates from the University of Zimbabwe and Midlands State University can be sworn in at the High Courts and have *locus standi* to appear before all the courts in Zimbabwe directly after completing their LLB studies. Those who complete their studies at other universities in the country or in foreign jurisdictions will have to apply to the Council to write conversion exams. Before the repeal of the Statutory Instrument 30C, students previously were entitled to write the exams after they graduated.

It must be noted that one can pursue the LLB in other countries and still work in

other areas of law- for example, in Banking, Insurance, International Trade Law, Human Rights, among others, which do not necessarily require one to be admitted as an officer of the courts in Zimbabwe.

**Conclusion**

The purpose of the brief was to highlight the current legal developments regulating the status of the foreign LLB qualification in the legal context of Zimbabwe. The ability to practise law as an advocate or attorney while holding a foreign qualification has been significantly hindered. Graduates holding foreign LLB degrees will now have to apply to write the conversion exams; with applications being dealt with on a case-by-case basis. This should serve as a warning for current and prospective LLB students in so far as career orientation is concerned.

**Further clarity on the issue can be obtained from the Council for Legal Education in Zimbabwe.**



Early this year in response to the week-long #RUPreferenceList protest, a Sexual Violence Task Team was set up to “address issues and procedures regarding sexual violence at Rhodes University”.<sup>1</sup> Given that a university is a place where problems are addressed through debate and discussion, I therefore support the work of the task team and, in this vein, have written this article as a small contribution to its work. Recently the Task Team released a draft “Foundation Document and Report (Part One)” which included seven recommendations on changes to the University’s Student Disciplinary Code. The Task Team recommends:

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<sup>1</sup> Sexual Violence Task Team “Foundation Document and Report Part One Draft Document for Comment” (August 2016) 44.

## **#RU Reference List Task Team Recommendations: The Importance of Addressing Foundational Principles in the Law**

**Julian Barker** (Final-year LLB Student)

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(a) A restorative justice procedure be made available in cases of sexual violence; and (ii) the survivor/victim may choose to make use of multiple approaches (e.g. mediation and disciplinary procedures) either concurrently or separately;

(b) there should be a prescribed sanction of exclusion for rape and sexual assault;

(c) the sanctions that apply in other cases (e.g. exclusion) should apply equally when students are found not guilty due to a lack of mental capacity;

(d) the Disciplinary Board for Sexual Offences should be retained but expanded to five members. Additional members should be appointed on the basis of their knowledge of gender-based violence and their sensitivity to psychological issues;

(e) it is recommended that the Prosecutor provide guidance to the survivor/victim, but that the ultimate

decision on whether to proceed with a disciplinary case reside with the survivor/victim; and

(f) the prosecutors emphasise the protective measures (e.g. no contact and suspension orders) to which the survivor/victim has access.

It is my contention that a number of the recommendations, specifically (a)(2), (b), (c), and (e), contravene firmly accepted legal principles and are fundamentally flawed. The principles that I allude to are vital to substantive and procedural fairness in disciplinary hearings. Recommendations (a)(2), (b), (c) and (e), therefore, cannot be implemented. Others might be amenable to inclusion in the Disciplinary Code, depending on how the Task Team foresees their implementation.

### **Recommendation (c) of the Task Team report and foundational criminal law principles**

This article is restricted to recommendation (c) which, in my view, is the most problematic. The recommendation goes against the foundational criminal-law principle that no person who has been found not guilty of an offence due to their mental incapacity may be punished. Rule 7.28 of the Student Disciplinary Code reflects this

principle and it is codified in s 78(1) of the Criminal Procedure Act,<sup>2</sup> which states:

“A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable –

- a) of appreciating the wrongfulness of his or her act or omission; or
  - b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,
- shall not be criminally responsible for such act or omission.”

While a student disciplinary hearing is not a criminal matter in the sense that a guilty verdict does not result in a conviction, it is nonetheless informed and underpinned by the Constitution and principles of criminal law. The Student Disciplinary Code would lack legitimacy if it was not. Assuming, for a moment, that recommendation (c) is incorporated in the Student Disciplinary Code, no Proctor with legal training would implement it.

The current Student Disciplinary Code, at s 7.28, empowers Proctors at the University to order that a student who has

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<sup>2</sup> 51 of 1977.

been acquitted of a charge due to lack of mental capacity may not remain at the University or return to the University without undergoing a full psychiatric assessment, the findings of which must confirm that the student is of sound mind. This is in line with s 78(6) of the Criminal Procedure Act which allows courts to order that accused persons, who are found not guilty on the basis of their lack of mental capacity, may be held against their will. This is a protective measure and not a punishment.

The Task Team, however, in recommendation (c), advocates an approach which I view as morally reprehensible approach – that students who are not blameworthy should be punished. Following the logic of the Task Team, the University should, for instance, punish a student who unexpectedly has a stroke whilst driving and is involved in a collision causing major bodily injury to others.

### **The Recommendations' tacit amendments to the Disciplinary Code**

Proposing changes to the Student Disciplinary Code places a special responsibility on the Task Team to familiarise itself with the legal principles and values which underpin it. The Task

Team should not recommend draft changes to disciplinary codes while ignoring important legal principles and South African law.

Drawing on numerous texts on “restorative justice” must be accompanied by references to authorities on criminal law. The Task Team could refer to the description of rape, in appendix 2, by Koss *et al* as a supplement to the definition in s 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act since rape is a criminal act and is given a definition there.<sup>3</sup> The description by Koss *et al* has no relevance to disciplinary matters.

Law is not static, and timely amendments to the Student Disciplinary Code, perhaps incorporating elements of “restorative justice”, may be welcome. At present however, four of the Task Team's seven Student Disciplinary Code recommendations ought to be rejected. In the unlikely event that they are accepted, decisions based on them will be susceptible to being overturned by courts of law.

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<sup>3</sup> 32 of 2007.

## **Conclusion**

In the final, analysis law is not only for lawyers. The Task Team must properly address the law which underpins the Student Disciplinary Code, and fully justify recommendations that depart from firmly established legal principles.





## Is Section 20(9) of The Companies Act of 2008 the General Rule for Piercing the Corporate Veil?

**Sne Nene** (Penultimate-year LLB Student)

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Such statutory provisions, however, have never been codified in our company law until the promulgation of this section. Section 20(9) is broad and general, which allows it to be seen as a general rule for piercing the corporate veil.

### The meaning of 'piercing the corporate veil'

When a company is created, a veil or curtain is drawn between the company and its shareholders and directors. This serves the purpose of exempting them from liability for any debts or unlawful acts that the company commits.<sup>2</sup> In *Amlin (SA) Pty Ltd v Van Kooij*,<sup>3</sup> the court stated that piercing the veil means that the court "opens the curtains" of the particular company in order to see what the substance of it entails. The protection that the directors and shareholders enjoy is lifted, and their identity is disclosed. The

In the past, South African courts have failed to adopt a single, coherent rule that determines when the corporate veil should be 'pierced'. Section 20(9) of the Companies Act<sup>1</sup> has given the courts the discretion to disregard the principle that companies have separate juristic personality where there has been unconscionable abuse. Previous legislative provisions and common-law principles allowed courts to impose personal liability on shareholders and directors of a company in exceptional circumstances.

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<sup>1</sup> Act 71 of 2008.

<sup>2</sup> FHI Cassim *et al Contemporary Company Law* 2 ed (2012) 41.

<sup>3</sup> 2008 (2) SA 558 (C).

effect of piercing the veil is that the separate corporate personality of the company is disregarded, and the liabilities of the company are treated as those of its directors and shareholders.<sup>4</sup> There is a distinct difference between ‘piercing’ the corporate veil and ‘lifting’ it. The latter means that the courts only examine who the directors and shareholders are, without blurring the liabilities of the company and its directors or shareholders.<sup>5</sup>

### Interpretation of s 20(9) of the Act

Section 20(9) states the courts must pierce the corporate veil where there is ‘unconscionable abuse’ by those acting on behalf of the corporation.<sup>6</sup> The phrase is not defined in the section. However, in *Ex parte Gore NO and Others NOO*<sup>7</sup> the court stated that the phrase ‘unconscionable abuse’ is less extreme than the words ‘gross abuse’ which are used in s 65 of the Close Corporations Act.<sup>8</sup> The court stated that the word ‘unconscionable’ is synonymous with words such as ‘sham’. The court may pierce the veil whenever there is an unlawful use of a juristic

person which affects a third party in an unreasonable manner.<sup>9</sup> An interested person under s 20(9) according to *Gore*,<sup>10</sup> includes any person who as a direct or sufficient interest in the relief that is being granted. It is further stated by the court that s 20(9) provides a firm and flexible approach for piercing the corporate veil due to its broad language.<sup>11</sup>

### The difference between common law and s 20(9), and whether the statute prevails

When the corporate veil has been pierced through the common law, has resulted in uncertainty, as the courts have not formulated a general and consistent principle. Judges have relied on different approaches and categories to justify their decisions. Gower identifies six circumstances in which the veil may be pierced, which are formulated from case law. He states that “instances of piercing the corporate veil reveal no consistent principle beyond a refusal of the legislature and judiciary to apply the logic principle laid down *Salomon’s case*”.<sup>12</sup> The *Salomon*<sup>13</sup> case is where we find the roots of the categorization approach. The

<sup>4</sup> R Cassim “Hiding behind the veil” (2013) 1 *DeRebus*

[http://reference.sabinet.co.za/webx/access/electronic\\_journals/derebus/derebus\\_n535\\_a18.pdf](http://reference.sabinet.co.za/webx/access/electronic_journals/derebus/derebus_n535_a18.pdf) (accessed 4 March 2016).

<sup>5</sup> Cassim *Company Law* 46.

<sup>6</sup> Act 71 of 2008.

<sup>7</sup> 2013 (2) SA 437 (WC).

<sup>8</sup> Act 69 of 1984.

<sup>9</sup> 2013 (2) SA 437 (WC) para 34.

<sup>10</sup> Para 35.

<sup>11</sup> Para 34.

<sup>12</sup> LCB Gower *Modern Company Law* 4 ed (1979) 123.

<sup>13</sup> *Salomon v Salomon and Co Ltd* (1987) AC 22 (HL).

House of Lords in this matter stated that circumstances in which the veil may be lifted can be categorised in two specific ways. Our courts have followed this categorization approach as foreign law is of persuasive value in our law. Categorising instances when the veil may be pierced is problematic, as situations may occur where considerations of fairness or public policy may require the veil to be pierced; but the facts of that case may not fit into one of the recognised.<sup>14</sup>

In *Shipping Corporation of India Ltd v Evdomon Corporation*,<sup>15</sup> Chief Justice Corbett stated that it was not necessary to define the circumstances under which the court would decide to pierce the veil. It would be sufficient generally that there an element of fraud or improper conduct.<sup>16</sup> The principles laid out in this case are obiter because of the authoritative rule laid down by our courts states that courts are free to consider alternative approaches to piercing the corporate veil.<sup>17</sup> This approach coincides with s 20(9).

At common law, piercing the corporate veil is seen as a drastic measure and the

remedy must therefore be applied as a last resort. There has been much discussion about whether the same applies to s 20(9) and whether dependence could be placed on the section despite there being other available remedies. The courts have suggested, however, that reliance may be placed on s 20(9). In *Gore*,<sup>18</sup> the court stated that s 20(9) provides a flexible and well-founded basis for piercing the veil. It is applicable where certain facts of a case justify it, which diminishes the view that the remedy is exceptional and should only be used as last resort.<sup>19</sup>

Section 20(9) should not be seen as overriding the common law, but rather that the categories developed in the common-law should be used as a useful guideline when interpreting s 20(9). There is no fundamental difference between s20(9) and earlier cases which pierced the corporate veil before the coming into force of this section. This means that s 20(9) cannot be seen as prevailing over the common law, or being drastically different from it. The section must be regarded as being supplementary to the common law rather than replacing it.<sup>20</sup>

<sup>14</sup> A Domanski "Piercing the Corporate Veil: A New Direction" (1986) 103 SALJ 224 at 224-227.

<sup>15</sup> 1994 (1) SA 550 (A).

<sup>16</sup> Para 566.

<sup>17</sup> Domanski 1987 SALJ 228.

<sup>18</sup> 2013 (2) SA 437 (WCC).

<sup>19</sup> Para 34.

<sup>20</sup> R Cassim 2013 *De Rebus* 3.

**Closing remarks: Is s 20(9) a general rule for piercing the corporate veil?**

The language of s 20(9) is very broad and therefore encompasses a wide range of factual scenarios. It would be beneficial for this section to be viewed as a general guideline as it does not categorize the circumstances in which it applies – in contrast to the common-law approach. The remedy does not have to apply as a last resort because piercing the veil ultimately protects the public interest. It would be impossible to prevent and identify unlawful acts such as tax evasion, the laundering of money and unlawful competition without the form of transparency that the section provides.<sup>21</sup> It is the interpretation and wide scope of s 20(9) which supports it being a general rule.

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<sup>21</sup> R Rachlitz “Disclosure of Ownership in South African Company Law” (2013) 24 *Stellenbosch Law Review* 406 at 427-428.



## Introduction

The financial market in South Africa is very dynamic and competitive. As a result, investors or companies attempt to find ways to “cheat the system” through methods of “market manipulation” or “market abuse” in order to gain an unfair advantage in the market. One of the ways that this is done is through the practice of insider trading, a practice that is known to be the most common form of market abuse that occurs in the financial market.

## Insider Trading and the *Zietsman Case*

**Tsukudu Moreng** (Penultimate-year LLB Student)

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### Statutory law on insider trading

Section 78 of the Financial Markets Act<sup>1</sup> (FMA) strictly prohibits insider trading. Section 77 of the Act defines an “insider” as a person who has inside information through being a director, employee or shareholder of an issuer of shares, or a person that has access to such information by virtue of employment, office or profession. Section 84 of the Act sets out the powers of the Financial Services Board (FSB), which investigates cases of market manipulation such as insider trading, and is responsible for prosecuting those who are suspected of insider trading.

### ***Zietsman and Another v Directorate of Market Abuse and Another***

A recent case on the topic of insider trading is *Zietsman and Another v Directorate of Market Abuse and Another*.<sup>2</sup> *In casu*, the court was guided by the rules imposed by the section 72(b) of the

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<sup>1</sup> 19 of 2012.

<sup>2</sup> 2016 (1) SA 218 (GP).

Securities Services Act<sup>3</sup> (SSA) and principles from foreign landmark judgments such as *Gelti v Daimler AG*<sup>4</sup> and *Dura Pharmaceuticals Inc v Broudo*<sup>5</sup> in making a pivotal finding based on the facts before it. It must be noted that the SSA has since been repealed by the FMA, but section 72(b) of the SSA is covered by section 78 of the FMA and thus the same rules still apply.

The facts of the case are as follows. Mr Zietsman, who was the chairman of the board of directors of Harrison and White Investments (H&W), bought 100 shares from another company, Africa Cellular Towers (ACT), in an attempt to gain a majority interest in that company. During the process of negotiations between the two companies, Mr Zietsman obtained information that ACT would soon receive a loan of R99 million from the Industrial Development Corporation (IDC).

As it became clear that public knowledge of the loan would boost ACT's shares, an insider that bought shares after acknowledging this would be guilty of insider trading. Mr Zietsman instructed one of his employees to buy an additional 200 shares in ACT at a time before the information was made public. Once the

information become public, the share price of ACT increased from 11c per share to 17c per share (a 54% increase).

The enforcement committee of the FSB took note of this and found Mr Zietsman and H&W guilty of insider trading and imposed an administrative penalty of R1 million. The charges were brought under section 73 of the SSA,<sup>6</sup> which prohibits any dealing in securities in regulated markets if one "knows" that one is in possession of "inside information". The core issues in this case was whether Mr Zietsman had "inside information" as defined by the SSA, and whether he "knowingly" dealt in ACT shares.<sup>7</sup>

Counsel for Mr Zietsman argued that he was not liable on the basis that the information he had did not constitute insider information as defined by section 72 of SSA because:

- a) The information was not likely to have a material effect on the price or value of the ACT shares.<sup>8</sup>
- b) That the information was not "specific or precise" because the two companies had not finalised the loan agreement.
- c) That there was no difference between the information known to the public at the time and the information that they had, and consequently, that they did not

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<sup>3</sup> 36 of 2004

<sup>4</sup> [2012] EUECJ C-19/11

<sup>5</sup> 544 US 336 (2005).

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<sup>6</sup> 36 of 2004.

<sup>7</sup> *Ziestman* para 97.

<sup>8</sup> *Ziestman* para 9.

believe or know that the information that they had was “inside information” as required by the Act.

The court ascertained that the appellants were correctly found guilty of insider trading. It was found that Mr Zietsman could not, in his defence, argue that the information was not “specific and precise” on the basis that the companies did not finalise the loan agreement.<sup>9</sup> Furthermore, said the court, the information that was made known to the public was that there was a loan agreement in the works, but the specific amount of the loan was not mentioned. Mr Zietsman was aware that the loan was for R99 million. The exact amount was therefore inside information. The court found that the information was sufficient and material in that it would have the ability to affect the share price.

Mr Zietsman was found guilty of insider trading as the evidence proved that he was aware that the information regarding the loan was insider was capable of affecting ACT’s share price once it became public, and used that knowledge to his advantage by dealing in the additional 200 shares. The court thus held that the finding against Mr

Zietsman was correct, and the penalty was upheld.

### **Conclusion**

The *Zietsman* judgment is of particular significance to insider-trading law in South Africa, having shed additional light on the issue. The case has the potential to, in future, be a precedent in cases that are similar to Mr Zeitsman’s – where convicted persons may be of the belief that the information that they have used is not in fact inside information.

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<sup>9</sup> *Ziestman* para 42.





## Is South Africa Bound by International Law?

**Abigail Butcher** (Penultimate-year LLB Student)

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National Party's defence of 'sovereignty' when called to account for human-rights violations on international platforms such as the United Nations.<sup>2</sup>

This article will consider the importance of the harmonisation between a state's ratified treaties and domestic law. It will draw particular attention to the theoretical approaches to domestic law within the sphere of the international, and the prescriptive nature of both the South African Constitution and jurisprudence when incorporating the international into the domestic.

It will be argued that, despite this prescriptive nature, the compliance by the South African executive with regard to certain international obligations has given rise to questions around the rule of law. That is, to what extent can the courts force the executive to comply with the treaties

The Preamble to the South African Constitution<sup>1</sup> commits to building a united and democratic South Africa that is able to take its rightful place as a sovereign state in the family of nations. The value of this mission statement by the drafters of the Constitution cannot be underestimated. The intention of the legislature in post-Apartheid South Africa was clearly to place South Africa within the sphere of international law and its obligations, and, in particular, within the sphere of international obligations on human-rights in light of the Apartheid era, and the

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<sup>1</sup> The Constitution of the Republic of South Africa, 1996.

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<sup>2</sup> J Dugard "International Law and the South African Constitution" (1997) 1 *EJIL* 77 at 77.

which they themselves have ratified? As a concluding remark, it will be noted that the reluctance by the executive to comply with international human-rights obligations is troubling in light of both South Africa's, and Africa's oppressive history.

### **The difference between international and domestic law: a theoretical analysis**

International Law may be defined as a "body of rules and principles" which, upon consent, are "binding upon states in their relations with one another"<sup>3</sup> and can be found, *inter alia*, in treaties ratified by states. These rules and principles are not imposed by a central law-making body – instead, a horizontal system of obligations is created between states. This differs from the vertical nature of municipal law, where the state imposes law on individuals by virtue of them being legal persons.<sup>4</sup> Arising from the nature of treaty obligations, there is a general and compelling obligation to bring municipal law into conformity with international law.<sup>5</sup> However, the theoretical approaches as to how to do so differ.

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<sup>3</sup> J Dugard *International Law: A South African Perspective* 4 ed (1994) 1.

<sup>4</sup> Dugard *International Law: A South African Perspective* 3-4.

<sup>5</sup> I Brownlie *Principles of Public International Law* 7 ed (1966) 35.

A distinction is drawn between states that are monist and dualist. A monist state is one in which international treaties are directly applicable by courts in the same way as national legislation.<sup>6</sup> Essentially, monism is the "assertion of the supremacy of international law even within the municipal sphere",<sup>7</sup> which means that international obligations must be enforced by national courts even in the absence of supporting municipal legislation. In direct contrast is the dualist state, which requires that parliament must either incorporate the treaty through national legislation, or use the treaty as a basis for national legislation.<sup>8</sup> This approach requires a vigilant harmonisation between the international and the national legal order. One of the crucial purposes of such harmonisation is to hold states accountable to the norms and standards required of them within international law, so as to protect individual citizens from an over-exertion of state power.<sup>9</sup>

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<sup>6</sup> M Killander "How international human-rights law influences domestic law in Africa" (2013) 17 *Law Democracy and Development* 378 at 379.

<sup>7</sup> Brownlie *Principles of Public International Law* 32.

<sup>8</sup> Killander 2013 *Law Democracy and Development* 379.

<sup>9</sup> Killander 2013 *Law Democracy and Development* 380.

## Implementation of international obligations in the South African context

The South African approach with regard to international obligations is dualist, in so far as national legislation must be generated in the spirit of international obligations. s 231 of the Constitution deals with the negotiation and ratification of international treaties within the Republic and places the responsibility to do so on the executive branch of government. This was affirmed by Justice Ngcobo in *Glenister v President of RSA*:

“An international agreement that has been ratified by Parliament under section 231(2) does not become part of our law until and unless it has been incorporated in our law and can be a source of rights and obligations”.<sup>10</sup>

This was further confirmed by the court in *AZAPO v President of the Republic of RSA*, where it was held that

“international conventions do not become part of the municipal law of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment”.<sup>11</sup>

s 233 of the Constitution deals with the application of international law and

provides that when interpreting any legislation, courts must prefer a reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. In light of this, s 39(1)(b) requires that when interpreting the Bill of Rights, a court must consider international law in so far as it has been consented to by the state or applies to the state by virtue of custom.<sup>12</sup> This is fitting, in so far as the Bill of Rights was in part designed to make tangible international treaties to which South Africa is a signatory,<sup>13</sup> such as the African Charter on Human and People’s Rights and the Rome Statute.

That the Constitutional Court takes seriously the prescriptive tone in the above provisions is clear in *National Commissioner of The South African Police Service v Southern African Human-rights Litigation Centre*,<sup>14</sup> where the court found that it was the duty of the South African Police Service to investigate allegations of torture committed against Zimbabwean nationals by the Zimbabwe African National Union Patriotic Front (the ‘ZANU PF’ party).

<sup>10</sup> 2011 (7) BCLR 651 (CC) para 92.

<sup>11</sup> 1996 (8) BCLR 1015 (CC) para 26.

<sup>12</sup> *National Commissioner of the South African Police Service v SAHRLC* 2015 (1) SA 315 (CC) para 23.

<sup>13</sup> Killander 2013 *Law Democracy and Development* 387.

<sup>14</sup> 2015 (1) SA 315 (CC).

The South African Human-rights Litigation Centre (as *amicus curiae*) requested the National Prosecuting Authority to consider the evidence, and to launch an investigation into the allegations of torture based on South Africa's obligations under the Implementation of the Rome Statute of the International Criminal Court Act.<sup>15</sup> It was undisputed that the Act would apply in so far as, if the allegations in the evidence were proved, "the conduct of the Zimbabwean police officers could amount to crimes against humanity",<sup>16</sup> and the primary purpose of the Act is to enable the prosecution of persons accused of having committed atrocities.<sup>17</sup> Throughout the judgment, and in particular, the order, it is clear that the court takes seriously the Constitutional imperative to comply with international obligations. It is arguable however, that the executive does not share the same impetus.

### **The *Al Bashir* case and failure by the executive to uphold international law**

In the recent case of *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre*,<sup>18</sup> the Supreme Court of Appeal found that the failure by the Minister of Justice to

arrest and detain the Sudanese President, Omar Hassan Ahmad Al Bashir when he first arrived in South Africa was inconsistent with South Africa's obligations in terms of the Rome Statute and s 10 of the Implementation of the Rome Statute of the ICC Act and was therefore, unlawful.<sup>19</sup>

In the judgement, Wallis JA draws attention to the fact that the Implementation Act provides for the arrest of persons accused of international crimes and their surrender to the ICC, for the specific reason contained within the preamble to the Act – that "millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law".<sup>20</sup>

Despite this compelling reaffirmation by both the High Court and the Supreme Court of Appeal of the commitment within the Constitution to international obligations, the executive insists that due to the political narrative that the ICC targets only African Heads of State and is thus a continued enforcement of Western power, they are entitled to contravene international treaties. While this may well be the case, this narrative is insufficient to defer the obligations South Africa

<sup>15</sup> Act 27 of 2002.

<sup>16</sup> *National Commissioner* para 12.

<sup>17</sup> *National Commissioner* para 34.

<sup>18</sup> (867/15) [2016] ZASCA 17 (15 March 2016).

<sup>19</sup> *Minister of Justice v SALC* para 107.

<sup>20</sup> Act 27 of 2002.

conferred upon themselves when they ratified the Rome Statute. One would think that in light of the mass human-rights violations during the Apartheid era, the self-same government that sought liberation would endeavour to comply with a treaty that seeks to protect human-rights, and which the Constitution, as well as the Vienna Convention on the Law of Treaties obliges them to govern within.



## Introduction

*International Trade Administration Commission v SCAW South Africa*<sup>1</sup> was the first case in which the Constitutional Court had to decide on international disputes regarding dumping and anti-dumping regimes. Since the Constitutional Court is the highest court in the country, its decisions are of great importance in terms of legal clarity. The issue in this appeal was the constitutional appropriateness of granting an interdict that extends a prevailing anti-dumping duty in a manner that implicates the separation of powers and the international trade obligations of the Republic.

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<sup>1</sup> 2012 (4) SA 618 (CC).

## The Role of International Law in Reforming South Africa's Anti-Dumping Regime

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In order to adjudicate the dispute, the court raised some matters of constitutional concern. Firstly, it was stated that the interdict granted by the High Court prevents the Minister of Trade and Industry from performing its executive function of implementing and developing national legislation to be consistent with international trade obligations.<sup>2</sup> The Board on Tariffs and Trade Act<sup>3</sup> (BTT Act), the International Trade Administration Act<sup>4</sup> (ITAA) and the Customs and Excise Act,<sup>5</sup> require the Minister to impose, change or remove anti-dumping duties in order to give effect to the objective and purpose of the statutes.<sup>6</sup> The second matter raised by the Constitutional Court involved the recommendation that was made by the International Trade Administration

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<sup>2</sup> The *ITAC* case para 42, the empowering provision is s 85(2)(a), (b) and (c) of South African Constitution, 1996.

<sup>3</sup> Act 107 of 1986.

<sup>4</sup> Act 71 of 2002.

<sup>5</sup> Act 91 of 1964.

<sup>6</sup> L Ndlovu "South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy" (2013) 28 *SAPL* 301.

Commission (ITAC). It was stated that the recommendation made is in accordance with national legislation and that such legislation is indeed enacted to administer trade relations in order to give effect to the international obligations of the Republic.<sup>7</sup>

### **Dumping defined**

Dumping refers to the introduction of foreign products into the South African market at an export price that is lower than its normal value in the domestic market, or for a price that is lower than its cost of production.<sup>8</sup> Normal value has been defined as the selling price of the product in the country of export.<sup>9</sup> This usually takes place in situations where there is international price discrimination in relation to price as well as the cost between exporting and importing countries.<sup>10</sup> In order to prove the occurrence of dumping, the affected party has to produce evidence that shows that the products are being introduced at less than 'fair' value; importantly, the affected party must prove that the imports adversely impact local industries that produce like products.<sup>11</sup>

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<sup>7</sup> Ndlovu 2013 SAPL 302.

<sup>8</sup> BTT Act s1.

<sup>9</sup> Ndlovu 2013 SAPL 282.

<sup>10</sup> P van den Bossche and X Zdouc *The Law and Policy of the World Trade Organisation* 3ed (2014) 676 -677.

<sup>11</sup> Ndlovu (2013) SAPL 282.

The World Trade Organisation (WTO) Agreement, known as the Anti-Dumping Agreement, confers on its members the right to impose an extra duty on products in order to bring the export price closer to its normal value, thus removing the material injury to local industries in the importing country.<sup>12</sup> Thus anti-dumping laws are used as protective measures against dumping and trade-distorting mechanisms.<sup>13</sup> The provisions which regulate dumping on international level are contained in Article VI of the General Agreement on Tariffs and Trade (GATT),<sup>14</sup> and the Anti-Dumping Agreement.

### **How has international dumping law affected our domestic law?**

South Africa joined the WTO, thus becoming a party to all the WTO agreements, including the Agreement on Implementation of Article VI of GATT (the Anti-Dumping Agreement). Article VI confers rights to contracting parties to implement anti-dumping mechanisms – protective measures to safeguard against imports at an export price which is lower than its normal value, if such dumped imports cause material injury to a

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<sup>12</sup> OS Sibanda "The South African anti-dumping law: consistency with the GATT and the Anti-Dumping Code" 2001 *CILSA* 243.

<sup>13</sup> Sibanda (2001) *CILSA* 243.

<sup>14</sup> Act 29 of 1948.



domestic industry situated in the importing country.

Article 1 of the Anti-Dumping Agreement states that anti-dumping measures must only be applied once investigations of dumping have been conducted. The criteria used to determine whether dumping exists is any evidence of an injury to the domestic market in terms of a decline in sales volumes, profits, market shares and employment.

Although South Africa is a member of the WTO, WTO agreements do not form part of domestic legislation because the agreements have not yet been promulgated as municipal law, even though they have been ratified by Parliament.<sup>15</sup> An international law can only be binding in South Africa if it has been approved by resolution in the National Assembly and National Council of Provinces.<sup>16</sup> In *Progress Office Machines v South African Revenue Services*,<sup>17</sup> it was held that the WTO agreements are binding on South Africa irrespective of the absence of the domestication of the

agreements that is required by the Constitution.<sup>18</sup>

The enactment of ITAA and the promulgation of the Anti-Dumping Regulations is an indication that Parliament wished to give effect to the international treaty obligations binding South Africa. The Anti-Dumping Regulations give effect to the WTO Anti-Dumping Agreement.<sup>19</sup>

### **Is our domestic law consistent with international law?**

The Anti-dumping measures found in the BTT Act and the Customs and Excise Act have governed anti-dumping and countervailing measures. These statutes were enacted to warrant against South Africa becoming a dumping destination for cheap exports.<sup>20</sup>

In order to comply with the WTO Agreement, South Africa enacted the ITAA, which repealed other laws.<sup>21</sup> However, this country is one of the few that adopts a strict approach in its domestic legislation and regulations “including mandatory application of the lesser duty rule in instances where

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<sup>15</sup> WC Murigi *The Development of a successful anti-dumping regime in Kenya* (LLM thesis, University of the Western Cape, 2013) 54.

<sup>16</sup> Ndlovu 2013 SAPL 287.

<sup>17</sup> 2008 (2) SA 13 (SCA).

<sup>18</sup> *Progress Office Machines* para 6.

<sup>19</sup> Ndlovu 2013 SAPL 294.

<sup>20</sup> Sibanda 2001 CILSA 243.

<sup>21</sup> M Tao *Dumping and Antidumping Regulations with Specific Reference to the Legal Framework in South Africa and China* 2006 53.

importers and exporters have cooperated in the investigation”.<sup>22</sup>

The focus here is on the interpretation of the legislation in order to find out if our domestic law is consistent with that of international law. Moseneke DCJ in *International Trade Administration Commission v SCAW South Africa*,<sup>23</sup> stated clearly that the recommendation of ITAC has been made in terms of national legislation (national legislation regulating international trade) and its aim is to give effect to South Africa’s obligation under the international law. He added further that the court is required to interpret domestic anti-dumping duties, specifically in relation to the duration of such duties, consistently with international obligations.

In paragraph 37 of the abovementioned case, Moseneke states that the Anti-Dumping Regulations which are part of our domestic law ‘echo’ the related provisions of the Anti-Dumping Agreement. For example, Regulation 38.1 provides “that the term of an anti-dumping duty may be extended if it is reviewed prior to the lapse of the five-year period”.

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<sup>22</sup> M Nkomo and M Van Wyk “Competition and Trade Policy – Frenemies?” 5 [http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/4765/Chapeyama\\_s\\_llm\\_law\\_2015.pdf?ssequence=1](http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/4765/Chapeyama_s_llm_law_2015.pdf?ssequence=1).

<sup>23</sup> The *ITAC* case 43.

### ***International Trade Administration Commission v SCAW South Africa***

Moseneke DCJ was correct in finding that it is inappropriate for a court to extend an anti-dumping duty beyond its statutory prescribed lifespan.<sup>24</sup> The interdict transgressed the separation of powers by preventing the Minister from receiving recommendations and from implementing such recommendations.<sup>25</sup> The interdict overrides mandatory legislative provisions which stipulate that the existing anti-dumping duty would have ended either by the operation of law or the implementation of the recommendation made by the ITAC.<sup>26</sup>

When interpreting anti-dumping laws, courts should be cautious in determining whether the duty created by legislation is protecting domestic industries or is merely a protectionist trade policy in disguise. In this instance the fishing ropes produced by Bridon UK are not introduced into the local industry since they have been kept in warehouses and sold to foreign vessels. Thus the dumping of the fishing ropes does not cause material injury since they do not compete with like products produced by domestic industries.<sup>27</sup>

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<sup>24</sup> The *ITAC* case para 104.

<sup>25</sup> The *ITAC* case para 104.

<sup>26</sup> The *ITAC* case para 104.

<sup>27</sup> The *ITAC* case para 22.

It is of great importance to note that anti-dumping duties are meant to protect domestic industries from the harmful effects of substantially low export prices. Art 11:1 states that anti-dumping measures should remain in force to the extent of counteracting the dumping which is causing material injury. They are meant to inhibit competition between similar products within the economy.<sup>28</sup>

Therefore, an anti-dumping duty should not be imposed to protect an industry from healthy competition. Furthermore, the imposition of duty on Bridon UK's products did not constitute a material injury on domestic industries. The goods were not sold within SACU thus pose no threat. When a threat of a material injury no longer exists, the anti-dumping duty should be removed by the Minister. The extending of anti-dumping duty for an indefinite period (the end result of the interdict) would breach international obligations since the purpose of the duty is to deal with the material injury only in so far as is necessary.

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<sup>28</sup> The *ITAC* case para 79.



## **Incorporating *Ubuntu* into South Africa's New Hate Crimes Bill**

**Dr Charles A Khamala** (Andrew W Mellon Post-Doctoral Fellow, Faculty of Law, Rhodes University)

### **Introduction**

South Africa's Minister of Justice, Michael Masutha, praises the fourth estate for bringing "social intolerance upfront and reminding all of us that there is still work that needs to be done in transforming the country".<sup>1</sup> This is after a "[f]ormer estate agent Penny Sparrow was ordered to pay a R150 000 fine by the Equality Court for her Facebook post comparing black beachgoers in Durban on New Year's Day to monkeys".

Clearly, the post-Apartheid Constitution cannot tolerate absolute free-speech rights. It is therefore appropriate that "a bill that will impose harsher punishment on hate crimes is under way". For despite free speech promoting both technological advancement and democratic choice, multicultural societies curtail it for two reasons: to protect reputations, and reinforce human dignity. Coincidentally, Durban hosted the United Nations "3<sup>rd</sup> World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance"<sup>2</sup> in 2001. Its Declaration mandates South Africa to produce a National Action Plan to combat these vices, pursuant to which the Department of Justice and Constitutional Development invites consultations on its Prevention and

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<sup>1</sup> L Tandwa "Plans to Impose Harsher Punishment for Hate Crimes – Masutha" *News24*, 9 July 2016.  
<http://www.news24.com/SouthAfrica/News/plans-to-impose-harsher-punishment-for-hate-crimes-masutha-20160709> (accessed 21 September 2016).

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<sup>2</sup> Draft for Public Consultation "National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016–2021".  
<http://www.justice.gov.za/docs/other-docs/NAP/NAP-A4-PublicConsultationBook.pdf> (accessed 22 September 2016).

Combating of Hate Crimes Bill.<sup>3</sup> What then is hate-speech legislation's legitimate scope in South Africa?

### **An overview of hate crimes**

Gail Mason highlights four common features of hate crime legislation: (1) they explicitly target crimes where hostility, bias, hatred or prejudice towards a presumed attribute of the victim are an integral or associated element of the offender's behaviour; (2) only some legislation requires proof of motive; (3) hate-crime laws provide an extra layer of protection and recognition for selected victim groups, but they do this through a distinct form of criminalization that, largely, imposes harsher punishment upon offenders: a form of punitive justice in the name of social justice; and (4) most hate - crime scholarship on victim protection has focused on well-recognized minority groups (e.g. disabled people) or relatively benign victim characteristics (e.g. homelessness).<sup>4</sup>

In the US, it is sufficient if the offender selects the victim on the basis of a protected characteristic, for example

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<sup>3</sup>[http://www.justice.gov.za/m\\_speeches/2016/20160330\\_HateCrimes.html#sthash.vhQulwe4.dpuf](http://www.justice.gov.za/m_speeches/2016/20160330_HateCrimes.html#sthash.vhQulwe4.dpuf) (accessed 22 September 2016).

<sup>4</sup> G Mason, "Victim Attributes in Hate Crime Law: Difference and the Politics of Justice" (2014) 54 *Br J Criminol* 161-163.

because of race. In the UK, a hate crime accrues if the offender demonstrates group hostility towards the victim immediately before, during or after the commission of the offence (e.g. use of racist language in a robbery). In most jurisdictions, specific hate-crime laws are not necessary to prosecute or sentence prejudice-related crime, as much of the conduct they target is already criminalized. "The imposition of the extra penalty for the element of prejudice (whether prejudice is proven through motive, group selection or demonstration of hostility) is thus the core feature of most hate crime law."<sup>5</sup>

Currently, "the 'five strands' of race or ethnicity, religion, sexual orientation, gender identity and disability"<sup>6</sup> are among the most globally recognized categories. By covering prejudice towards "sex, ... social origin, colour, ... belief, culture, language, birth, HIV status, nationality, ... intersex, albinism and occupation or trade,"<sup>7</sup> clause 4 of South Africa's Hate Crimes Bill broadens the internationally specified victim attributes. Although they are "'message crimes' intended to speak to the entire 'hated group'", Gideon Muchiri explains:

"Jurisprudence from South African courts shows that xenophobia related cases have been prosecuted under the criminal

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<sup>5</sup> *Ibid* at 163-4.

<sup>6</sup> J Garland & P Hodgkinson, "F\*\*king Freak! What the Hell Do You Think You Look Like?" (2014) 54 *Br J Criminol* 613 to 616.

<sup>7</sup> *Supra* note 4.

justice system. The SA Equality Act, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) as well as section 9 of the Constitution are some of the tools that have been available to the state to use to fight hate crimes such as xenophobic conduct”.<sup>8</sup>

Unfortunately “nationality, gender identity, HIV status, albinism, intersex and occupation or trade are not mentioned in section 9(3) of the Constitution”.<sup>9</sup> Do all these new categories need protecting? Strategically, by explicitly criminalizing anti-foreigner rhetoric,<sup>10</sup> the proposed Hate Crimes Bill may boost foreign investment. In contrast, states which selectively permit expressive freedom to denigrate anti-foreign cultures prefer narrow “hate crime” categories which reject emerging forms of social differentiation. However, it is only where international crimes occur, e.g. from ethnic cleansing, that “othering” warrants international criminal legal responses.

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<sup>8</sup> G Muchiri “The Upcoming Hate Crimes Bill: A Welcome Development in the Fight Against Xenophobia and Hate Crimes in South Africa” *AfricLaw*, 5 August 2016 <https://africlaw.com/2016/08/05/the-upcoming-hate-crimes-bill-a-welcome-development-in-the-fight-against-xenophobia-and-hate-crimes-in-south-africa/> (accessed 21 September 2016).

<sup>9</sup> Mason 2014 *Br J Criminol* 161.

<sup>10</sup> L Mukosi, “Are the Attack on Foreign Nationals in South Africa and Violent Land Grabs in Zimbabwe part of the Same Culture?” 2015 *In Camera* 51 at 53.

## Incitement as an International Crime

Severe sentences are meted out for inciting genocide. Take Rwanda for example. From July 1993 to July 1994, *Radio Télévision Libre des Mille Collines* broadcasted despicable radio messages of Hutu opposition members as accomplices of the Tutsi enemy. During the 1994 Holocaust, RTLM employee, Belgian-Italian journalist Georges Ruggiu, called anti-Tutsi *inyenzi* (cockroaches). His guilty plea for inciting Hutus to massacre Tutsis with the intention of destroying, in whole or in part, the Tutsi ethnic group in Rwanda earned 12 years’ imprisonment.<sup>11</sup> Additionally, 11 000 locally-elected *inyangamugaya* (people of integrity) heading *Gacaca* Tribunals dealt with over 100 000 lower level atrocity culprits through traditional restorative justice approaches.<sup>12</sup>

Incidentally, genocide denial is a cognate hate crime by which prosecutors can restrict defences of those accused of genocide. In 2008, Peter Erlinder – lead ICTR defence lawyer – wrote an article entitled: “The Great Rwanda Genocide Cover Up.” He suggested that “new

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<sup>11</sup> *Prosecutor v Georges Ruggiu* Case no ICTR-97-32-I, Judgment and Sentence (TC1), 1 June 2000.

<sup>12</sup> P Clark *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda. Justice without Lawyers* (2010) 67.

evidence at the UN Rwanda Tribunal exposed Kagame as the war-criminal who actually touched-off the 1994 Rwanda Genocide by assassinating the previous President<sup>13</sup> Juvenal Habyarimana. In 2010, Rwanda charged Erlinder – who is also a US law professor – with genocide denial, which President Paul Kagame said threatened state security. Had he been found guilty of grossly minimizing or attempting to justify the 1994 genocide in which 800 000 people died, he would have faced up to 20 years in prison. After retracting his offensive statements, Erlinder was released.

By diluting democracy through sacrificing free speech, Rwandans pay a peculiarly high price to sustain ethnic peace and promote economic development. With pervasive electronic media now piercing private spaces, the SA Truth and Reconciliation Commission's restorative justice mantra is worth remembering.<sup>14</sup> While apartheid nowadays constitutes an unforgivable crime against humanity,<sup>15</sup> criminalizing "apartheid denial" domestically through hyper-expansive

prejudice categories, fetters expression. Rather, forgiveness and apologies for foul speech may maintain racial peace, and spurs the GDP. Thus, if the Hate Crime Bill adopts exclusively retributive justice which undermines African *ubuntu* values, the rainbow dream may risk unravelling.

### **Defamation damages and the *ubuntu* alternative**

Emerging restorative justice remedies are deductive by analogy to defamation law. Consider the *Dikoko* case.<sup>16</sup> David Dikoko appealed to South Africa's Constitutional Court from a High Court order to pay R110 000 defamation damages to Southern Municipality's CEO, Thupi Mokhatla. Mokhatla agreed to write-off a significant part of Dikoko's accumulated excessive cell phone bill. Dikoko accused him of intentionally changing the charging scheme from monthly to periodic to precipitate excessive indebtedness. This provided Dikoko's political opponents with grounds to criticize his integrity. Notwithstanding that that testimony was given before the NW Provincial Standing Accounts Committee, Justice Yvonne Mokogoro upheld the High Court's dismissal of Dikoko's defence of Privileged Statement. Her minority opinion – with which Justice Albie Sachs concurred – rejected exclusive

<sup>13</sup> H Holland, "American Denied Bail in Rwanda" *Africa IOL*, 8 June 2010 <http://www.iol.co.za/news/africa/american-denied-bail-in-rwanda-486431> (accessed 21 September 2016).

<sup>14</sup> *Truth and Reconciliation Commission of South Africa Report: Volume 1* (1999).

<sup>15</sup> Article 7(1)(j), Statute of the International Criminal Court (Rome: UN, 1998).

<sup>16</sup> *Dikoko v Mokhatla* (2007) BCLR 1 (CC).



preoccupation with monetary awards as the remedy for defamation. Notwithstanding simultaneously upholding liability, they developed the *ubuntu* notion of involving and encouraging apology. Nonetheless, the majority judgment upheld the enormous of damages.<sup>17</sup>

A progressive decision by the African Court on Human and Peoples' Rights demonstrates judicial control over domestic penal laws which unjustifiably stifle free speech. In *Lohé Issa Konaté v Burkina Faso*<sup>18</sup> Konaté, a contributing editor for the weekly newspaper *L'Ouragan*, published some articles in August 2012 detailing allegedly corrupt practices of state prosecutor Placide Nikiéma, accusing him of unlawfully interceding in cases concerning alleged currency counterfeiting and illegal trading in second-hand cars. The Ouagadougou High Court convicted Konaté of defamation, public insult, and insult of a magistrate, a decision later affirmed by the Court of Appeals. In addition to suspending *L'Ouragan's* publication for six months, Konaté – together with Roland Ouédraogo, its editor-in-chief – was imprisoned for 12 months, fined the equivalent of R40 338 and ordered to pay

Nikiéma R108 495 in compensation. However, in December 2014, the ACHPR reversed the Burkina Faso court, since: “apart from serious and very exceptional circumstances for example, defence of international crimes, public incitement to hatred, discrimination or violence or threats of violence against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences, without going contrary to the African Charter and the ICCPR”. Hence universal rights trump draconian press laws.

## Conclusion

Sparrow's high fine by the KwaZulu-Natal Court for racially derogatory comments may amount to an aggravated civil remedy. Glorifying apartheid's irrational and insensitive memories seems particularly harmful towards survivors who suffered that era's horrific, discriminatory indignities. But “punitive constitutional damages” remain unknown to South African law.<sup>19</sup> By imposing a heavier penalty than that which is applicable to comparable crimes that do not have this element of prejudice, much-awaited hate

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<sup>17</sup> D Cornell & N Muvangua (eds.) *uBuntu and the Law: African Ideals and Post Apartheid Jurisprudence* (2012) 197.

<sup>18</sup> Application no/004/2013.

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<sup>19</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 para 92, per Ackermann J.

crime laws create “parallel crimes” merely functioning to top-up the traditional criminal law.<sup>20</sup> While multicultural democracies are justified in imposing extra sanctions for hate-speech, excessive defamation awards which inhibit public debate are politically retrogressive. Only prejudice against categories with exceptional identifying features constitute legitimate hate crimes. There seems scope aplenty for reasonable hate speech legislation, like proscribing “apartheid denial”. However, over-criminalization kills *ubuntu*. If hate speech extends to cover amorphous categories like “occupation or trade,” even Shakespeare would be culpable for his battle cry by disgruntled Dick the Butcher: “The first thing we do, let’s kill all the lawyers!”<sup>21</sup>

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<sup>20</sup> Mason 2014 *Br J Criminol* 164.

<sup>21</sup> William Shakespeare, *King Henry VI* [US] Act 4 Part 2.



## Real life *Suits* or a week-long interview: My vacation work experience with Norton Rose Fulbright

Law students are no strangers to vacation work. To first years, it is an exciting, mysterious and sometimes daunting idea. To LLB students, it's an eye opening experience at a fast paced, cutting edge firm as well as a necessary pathway to a future career in law.

I had the privilege of taking part in a vacation work program during the June holidays. Going against the trend of Rhodes students packing their bags and heading up to Gauteng in search of greener pastures, I opted for the natural beauty and cosmopolitan draw of the mother city. As a Port Elizabeth native, Cape Town has been my second home throughout my childhood, and many a school holiday was spent down in the Cape with family and friends. Needless to say, after my last exam I promptly packed my bags and set off.

This was not my first vacation work experience with a big law firm, but it was undoubtedly the most unique, comprehensive and undoubtedly superior one. Upon arriving at the firm's offices in Riebeeck Street, in the heart of the city centre, I made my way up to the reception area on the 10th floor of Norton Rose Fulbright. Exiting the elevator, I was met with a modern reception, complete with Barcelona chairs, coffee tables and a massive reception desk with the words 'Norton Rose Fulbright' emblazoned on the wall behind it. As much as one can build up an idea of what a top tier firm is like, that shock factor of walking through the front door really leaves one with, firstly, a feeling of fulfilment in getting that far, and, secondly, a boost in your ambition to one day work there permanently.

The first day consisted of meeting the other vacation work students, candidate attorneys, lawyers, secretaries as well as the recruitment team. I was placed in the litigation department. During my time there, I sat in on meetings between clients and directors from the firm, had the opportunity to contribute to real-life cases and briefs by researching contentious areas as well as analysing personal injury claims. Aside from that, I accompanied a candidate attorney on a visit to the registrar, and found out first-hand how complicated the court system can get before a recess. An enriching experience overall, there's nothing like doing actual legal work in a living, breathing law firm in one of Africa's economic hubs to help you decide if you're cut out for life in corporate law. I felt right at home.

Aside from the practical work in litigation, we had daily presentations from the heads of each department in order to get a holistic feel of the firm and the work that they do – as it's simply not possible to work in each department given the time constraints of the program. I took the opportunity to speak to as many candidate attorneys, associates and directors as I could, in order to get a real feel for the firm, and most importantly the people that work there. Aside from asking legal questions, most of which were answered in the formal presentations, I wanted to connect with the human element behind the firm. Contrary to popular belief, we law students and lawyers are human beings too.

What I found was a professional work environment, filled with the perfect blend of personality types; intelligent, social and competent people, always willing to help and all undoubtedly team players. Nowhere did I experience that "cold, impersonal, corporate law" feel that is so prevalent at some companies. That personal aspect is so crucial to your development as an attorney, and a firm with a literal open-door policy and higher ups that are always willing to impart knowledge and lend a hand is exactly what I was looking for. It was clear that Norton Rose Fulbright was a great fit for me. All that was left was the most important part. The firm had to choose me.

We also had a few formal assessments. Whilst acknowledging the importance of these formal assessments, it would be naive to assume that this is the sole determining factor in whether an offer of articles is made or not. Quite simply, the entire process should be looked at like an extended interview, both for the student, to see if the firm is a good fit for you, and for the firm to conduct their usual candidate assessment process.

Overall, it was an exciting experience to be part of the Norton Rose Fulbright family. Seeing the content that we learn over the course of LLB in practice is a special experience, and I learnt a huge amount in my short time with the firm. I am unbelievably excited to return and begin my articles with the firm next year.

**Avayaik Gray**  
(Final-year LLB student)

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## Notes

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