

Special edition

The 18th Commonwealth Law Conference

JUNE 2013





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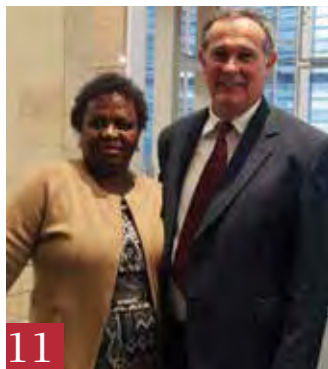
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THE 18TH COMMONWEALTH LAW CONFERENCE

The 18th Commonwealth Law Conference, which took place in April, brought over 900 Chief Justices, judges, lawyers, legal academics and others in legal-related fields to Cape Town to focus on current trends under the theme 'Common challenges – common solutions: Commonwealth, commerce and *ubuntu*'.

De Rebus editor Kim Hawkey and deputy editor Mapula Sedutla have prepared a number of articles on some of the topical conference sessions, including on the opening and closing ceremonies and from the four conference streams, which are set out below.



16 Opening and closing ceremonies and plenary sessions

During the opening and closing ceremonies, delegates were addressed by a number of high-profile keynote speakers, including the South African Chief Justice and Justice Minister, the United Nations High Commissioner for Human Rights and the Lord Chief Justice of England and Wales. In addition, during the special plenary sessions, there were presentations on the situations in Zimbabwe and Sri Lanka, as well as on the South African Constitutional Court 20 years after its inception.

26 Corporate and commercial law

Under this topic, we have a report on whether specialised commercial courts are a good or a bad idea.

28 Legal and judicial profession

We have a number of articles under this topic, including on regulation of the legal profession; access to justice; perspectives on legal education and vocational training; the challenges of junior lawyers; managing modern law firms; and judicial appointments.

40 Constitutionalism, human rights and the rule of law

For this stream, we have reports on the challenges of modern constitutions; and on the implications of the Marikana tragedy for employment law in South Africa.

44 Contemporary legal topics

Under this heading, we have articles on information, secrecy and WikiLeaks; and defamation law reform.

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A global legal profession

This month's *De Rebus* is dedicated to the 18th Commonwealth Law Conference (CLC), which took place in Cape Town from 14 to 18 April under the theme 'Common challenges – common solutions: Commonwealth, commerce and *ubuntu*'.

This was the first time the CLC had taken place in South Africa, which Justice Minister Jeff Radebe noted was 'a confirmation of the embrace which the world has extended to our new democracy'.

During the closing ceremony of the conference, which brought over 900 Chief Justices, judges, lawyers, legal academics and others in legal-related fields to the country, the event was described as 'the most successful conference in recent history'.

What stood out for me about the conference was that, although a number of country-specific challenges were raised, many of the discussions during the course of the conference – both formal and informal – demonstrated how many of the challenges the legal profession is currently facing are universal, or have a universal impact.

Some of these relate to, for example, how best to provide a system of legal aid; the best model for regulating the legal profession (noting some of the similarities between the United Kingdom Legal Services Act 2007 (c29) and the South African Legal Practice Bill (B20 of 2012)); whether specialised commercialised courts are viable; and whether court-annexed mediation should be enforced.

In addition, various countries compared notes on challenges related to modern constitutions, human rights violations, managing modern law firms, practising as a young lawyer and various law reform options.

The conference also created a platform for awareness about what is happening on the ground in the legal profession and related sectors in other countries, such as Sri Lanka and Zimbabwe.

By the end of the conference it was evident that we have much to learn from each other, which can only be to the benefit of our individual countries, as well as the legal profession globally.

It is worth mentioning the words of the Lord Chief Justice of England and Wales, Lord Igor Judge, who gave the keynote address during the closing ceremony of the conference, in which he spoke on equality before the law in light of South Africa's past, to which he received a standing ovation:

'Perhaps then, above all else, this conference in Cape Town has underlined for me that, of all the many facets of the rule of law, we must remain resolved that whatever the colour of our skin, race, creed, gender, or whatever it might be, the starting principle for the rule of law is that, in law, we are equal, and that it is the fundamental obligation of the law to treat us so. Here in Cape Town we have been vividly reminded by the living recent history of South Africa that this indeed must be and must remain our common purpose, and that we must be vigilant to maintain it.'

This, again, illustrates our common goals and aspirations, and our joint dedication to maintaining and strengthening the rule of law, while not forgetting our unique country-specific experience.

One downside related to the conference was that, unfortunately, many local attorneys were not able to attend the gathering. I suspect this was primarily due to financial constraints. For this reason, perhaps it is time to look at creating other ways of interacting with our colleagues in the legal profession on a global scale. In this electronic age, I am sure that there are many options available for doing so.

In the meantime, until these options are explored further, we have prepared a report on some of the sessions at the conference.

Of gender and style

On a separate note, you may notice a change in style from this month's *De Rebus* onwards. We have decided that, in a constitutional democracy where discrimination in any guise must be abhorred, it is only appropriate that we reflect this in the pages of our journal. In the past the journal has referred to 'he' when referring generically to a person, which will now change to incorporate gender inclusive language.



Kim Hawkey – Editor

We are also in the process of updating our style guide and you may notice more style changes over the next few months. This is part of our aim to ensure that the journal is of the highest quality and standard in all respects.

Would you like to write for *De Rebus*?

De Rebus welcomes article contributions in all 11 official languages, especially from legal practitioners. Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za

The decision on whether to publish a particular submission is that of the *De Rebus* Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the 'Guidelines for articles in *De Rebus*' on our website (www.derebus.org.za).

Upcoming deadlines for article submissions: 18 June and 22 July 2013.

LETTERS

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Letters are not published under *noms de plume*. However, letters from practising attorneys who make their identities and addresses known to the editor may be considered for publication anonymously.

TO THE EDITOR

Appoint judges on merit

I am a young law graduate currently enrolled with the School for Legal Practice. I write this e-mail with great sadness and disappointment at the figures we, as law graduates, are supposed to look up to in this honourable profession.

To be specific, I am referring to recent events regarding the Judicial Service Commission (JSC) interviewing various candidates for vacant positions in the North and South Gauteng High Court, as well as the Supreme Court of Appeal.

It has been said by some that white males will only be considered for appointment in exceptional circumstances. If a candidate has the requisite experience, I think the JSC should appoint on merit. The judiciary has the duty to serve the people of this country by making the courts accessible, which includes having the best candidates as judges. In 2011 there were two positions in the Western Cape that were not filled despite white candidates being available. Surely this hampers the administration of justice. When will we, as South Africans, move away from this black/white issue? It really has to stop.

Vuyo Tshiki, student, East London

Legal Practice Bill hearings – the Attorneys Fidelity Fund

Your report in the April 2013 *De Rebus* (2013 (Apr) DR 29) on the presentation by the Attorneys Fidelity Fund (AFF) to the Justice Portfolio Committee in hearings on the Legal Practice Bill (B20 of 2012) requires a response.

Nature of funds

The fund's chief executive officer, Motlatsi Molefe, is reported as stating categorically that the assets of the fund are public funds. The matter is not that

simple as, in terms of the Attorneys Act 53 of 1979, the funds belong to the AFF, not the public. The attorneys' profession initiated the fund some 71 years ago with amendments to the governing legislation to safeguard the public from theft of trust money by colleagues, and for years we paid contributions to the fund. In the 1960s the fund lobbied government for legislative amendments to allow the fund to gain ownership of interest earned on certain trust funds and this boosted the income of the fund, allowing contributions to be suspended – not scrapped.

Payments to law societies and the fund's income

Mr Molefe is reported as saying at the hearings that 60% of the fund's expenditure in 2012 'went toward propping up the profession'. The fund's 2012 figures indicate that R 275 million was paid over by the societies, being interest from trust accounts, while R 200 million was used towards reimbursement of bank charges and audit fees to attorneys, agency fees to the law societies for collecting trust interest, disciplinary hearings and honoraria to the Law Society of South Africa, the Black Lawyers Association and the National Association of Democratic Lawyers – thus less than 40% of a total of R 490 million expenditure, not 60%.

Incidentally, the fund will not be able to collect trust interest itself without incurring substantial cost and, for that reason, the societies are paid a collection fee.

In addition, R 94 million was paid to the Attorneys Insurance Indemnity Fund, the fund's wholly owned insurance company, for a professional indemnity premium for attorneys. If this is not sustainable, alternative priorities can be explored to reduce overheads.

It also appears that the fund's administrative expenses, such as salaries, in-

creased by 20% in 2012 and that the value of a building in Gauteng has been written down by R 7,66 million, presumably as a result of a poorly judged investment by the fund. Despite this, the net asset value of the fund increased by 12,3% to R 3 798 000 000 – expenses amounted to 13% of net asset value; investment portfolio growth was 20%.

The fund has successfully built up huge reserves with careful oversight by the board of control over years and it is to be expected that some of the reserves may at times have to be used to cover expenses during periods of reduced inflow. This is not contrary to prudent governance principles, provided sustainability is not jeopardised in the longer term. There is provision for actuarial control in the Act and actuarial projections are relied on to ensure the viability of the fund, having regard to claim profiles, expenditure and income.

Composition of the board of control

Attorneys have successfully overseen the control of the fund since inception and for Mr Molefe to plead that attorneys should be excluded from membership of the board and be replaced by others is completely wrong. He is reported as having said, in effect, that 'attorneys should not sit on the board of the fund because they were potential defaulters who could steal the very funds they were supposed to protect for the public' – the sort of unfounded invective that should never have been uttered. Major shareholders sit as directors on the boards of public companies, and the fund is no exception to this established practice. As a profession, we are responsible enough to continue to oversee the functions of the fund, although I have no difficulty in introducing outside members to the board of control,



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provided the profession comprises a substantial component.

For Mr Molefe (and the board of control of the fund itself, if that is its position) to imply that all attorneys are potential thieves, and should thus be excluded from membership of the board, is absurd.

Ultimate responsibility

Mr Molefe tried to 'spook' the committee with words such as '[t]en years from now we will not be in existence. And, more importantly, government will begin to be the guarantor for thieves'. This is disingenuous as we, as attorneys, are the ultimate underwriters of the fund – not the government. As said above, we can and will be levied again if the need arises.

For Mr Molefe and the fund to appeal for exclusion of attorneys from the board of control is as ridiculous as barring taxpayers from sitting in parliament to make laws about taxation.

Mr Molefe initiated communication with me several days prior to writing this letter and attempted to persuade me to his (and presumably the fund's) point of view. I requested a transcript of the debate at the board of control where the fund's written presentation to the committee was discussed and sanctioned and where his verbal presentation was authorised. Despite several requests, this has not been received. Had the transcript been made available, one might have gained better insight into the considerations surrounding the fund's presentation and Mr Molefe's address to the committee.

A response from the board of control of the fund is expected by the profession.

Andries Landman, attorney,
Cape Town

- The AFF's CEO was invited to provide a response to Mr Landman's letter; however, it declined the offer.
- See p 11.

Senior counsel status discriminates

Roshnee Mansingh, whose application to have the conferral of senior counsel status declared unconstitutional was recently dismissed on appeal (*General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA)), is reported in the press as having the intention of taking the matter on appeal to the Constitutional Court (see 2013 (May) DR 10).

It is surprising that she and her legal team have, in both the Supreme Court of Appeal and the court below, missed the elephant in the room. Attorneys who have the right of appearance in terms of the Right of Appearance in Courts Act 62 of 1995 are on par with advocates. They are capable of doing the functions of advocates. Yet, in terms of the common law, as it is presently interpreted, such attorneys are not eligible for senior counsel status.

The discrimination and concomitant violation of the equality clause of the Constitution is glaring. There appears to be no prospect whatsoever of this discrimination surviving the limitation clause (s 36 of the Constitution). I thought this would have been the strongest ground on which to found a challenge to silk status. I trust Ms Mansingh is reading this and will take the hint for her upcoming Constitutional Court battle.

Emraan Vawda, advocate, Durban

The relationship between CAs and principals

We received an overwhelming response to the letter 'Protection of candidate attorneys' and the KwaZulu-Natal Law Society's response thereto, as well as the editor's note on the same topic, which appeared in the March 2013 edition of *De Rebus* (2013 (Mar) DR 3 and 4).

There were a number of common points made by the candidate attorneys (CAs) and attorneys who wrote to us. Below is a brief summary of these, followed by some of the letters that add to the debate.

Some of the matters raised by CAs were:

- The difficulties experienced in securing a position as a CA.
- The lack of a minimum wage for CAs.
- Principals should be screened before taking on CAs.
- The law societies do not provide a check and balance to ensure that CAs acquire the necessary experience, and that principals provide CAs with adequate training.
- The law societies should monitor the situation by visiting firms.
- CAs are limited in their ability to lodge complaints in respect of their principals and, in turn, principals are not held responsible for not providing the required experience and training.
- Being a CA is 'nothing but an intern occupation' that does not result in CAs becoming experienced in the industry.
- The role of a CA has little value these days and does not achieve its purpose.
- CAs often do not know what to expect during the articles' period.
- The law societies need to address these issues as a matter of urgency.

In addition, a recently admitted attorney wrote about her positive experience as a CA: 'I have received the most inspiring, practical, caring and meaningful tutelage under my principal,' she wrote. This was in part due to the fact that she underwent an induction process and knew what was expected of her from the first week of articles, she said.

Some of the issues raised by attorneys included:

- The incompetence of some CAs.

- CAs who have caused embarrassment to their principals and have risked cost orders against their principals.

- CAs whose university results reflect a good theoretical knowledge of the law but who cannot absorb or understand everyday practice.

- 'Lazy and slothful' CAs, who refuse to spend extra time working on matters and do not take pride in their work.

- Inefficient candidates, who do not have the fundamentals of law 'that they should know from first-year university'.

- CAs are meant to do the court run; even directors need to do this at times, as well as indexing and paginating when necessary.

- Law is a stressful job; it does not keep ordinary hours. Law is a responsibility; not just a profession.

Further, based on the content of the letters, there appears to be uncertainty about the extent to which the provisions of the Basic Conditions of Employment Act 75 of 1997 apply to CAs.

In this regard, s 3(2) of the Act provides:

'This Act applies to persons undergoing vocational training except to the extent that any term or condition of their employment is regulated by the provisions of any other law.'

We appreciate the many responses we have received on this topic and now ask that our readers make suggestions on how the situation can be improved. Those letters that take the debate further will be considered for publication in future issues of *De Rebus*.

Below are some of the letters we received on the topic that do so.

Regulate CA employment

In response to the correspondence on the topic of the relationship between candidate attorneys (CAs) and their principals, it is worth looking at the meaning of an 'employee' in terms of the Labour Relations Act 66 of 1995 (LRA).

Briefly, s 213 of the LRA defines an 'employee' as a person who works for another, assisting him or her in the business, and receiving remuneration for the work done. In the light of this definition, it is clear to me that a CA is an employee in terms of the Act.

It is amazing that interns in other professions are treated with dignity and respect, while this does not apply to CAs. In my experience, many CAs do not enjoy the benefits offered by other industries.

CAs are not against working more hours, but they do ask for their employers' compliance with the Basic Conditions of Employment Act 75 of 1997.

This can only be achieved if consensus is reached that CAs are regarded as em-

ployees and are treated with respect and dignity.

It is a shame that some CAs are without a contract of employment; the only contract in existence being the one of articles.

I am of the view that law societies in all provinces need to address this issue urgently.

On the issue of salaries for CAs, there must be a clear definition of what constitutes a fair salary. Why is it that in other industries there are minimum salaries, for example for domestic workers? It is my submission that, before a principal is allowed to take in a CA, his or her financial position must be considered by a committee established by the law societies.

It must be noted that institutions such as the Safety and Security Sector Education and Training Authority (SASSETA) provide for a stipend for CAs, and principals can make an arrangement in this regard. It is discouraging that some principals take this money for themselves.

This supports the view that this issue has nothing to do with a lack of financial means, but is due to a lack of respect for the same law that they took an oath to uphold.

Only the big law firms, the state attorney's office and Legal Aid South Africa appear to be promoting the protection of CAs, in particular in relation to salaries and respect for the country's labour laws.

I believe that we need to look at how best they are dealing with CAs and learn from them.

Busani Lemuel Baloyi,

candidate attorney, Johannesburg

- The allegation that a CA does not receive the benefit of a grant allocated by the SASSETA, and to which he or she is entitled, is serious. The Law Society of South Africa has requested its representative on the board of the Sector Education and Training Authority to investigate the allegation and the terms of grants on a basis of urgency and to report back.

Nic Swart, chief executive officer of the Law Society of South Africa and director of its Legal Education and Development division

Balancing act between CAs and principals

I have read the letter 'Protection of candidate attorneys' and the response of the KwaZulu-Natal Law Society, as well as the editorial on the same topic in the March 2013 edition of *De Rebus* (2013 (Mar) DR 3 and 4) with interest.

I, as a principal who has served many candidate attorneys (CAs) over many years, have fallen victim to the conduct of a 'millennial' recently.

I am presently involved in a review application in the Labour Court in which

an acting commissioner had to rule on whether a principal can unfairly dismiss a CA in the following circumstances:

- I agreed to provide the CA in question with training and an agreement was concluded as per the standard terms and conditions of the Law Society of the Northern Provinces (LSNP).

- Notwithstanding due and proper training and all efforts to make the CA comprehend at least the basics of civil procedure, the CA simply did not make any progress and caused me many embarrassments, not to mention the risk of cost orders against me, as the principal.

- The last straw was when the CA, after having been properly trained on how to index and paginate papers, simply omitted to do so and admitted that the CA had 'forgotten' to do so. I thus asked the CA to leave and seek articles elsewhere.

- The CA referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) and, notwithstanding comprehensive argument with reference to the Attorneys Act 53 of 1979 and the Basic Conditions of Employment Act 75 of 1997, the latter of which, on my interpretation, excludes the provisions of the Act applying to those receiving training regulated by another Act, the acting commissioner ruled that the CA was unfairly dismissed – not by me, as the principal, but by the incorporated firm of which I am a director. Unfortunately, the LSNP preferred not to become involved – which is a pity.

In my view, the implications of this include:

- A CA can take his or her principal to the CCMA and thus exclude the jurisdiction of the law societies as stipulated in the Attorneys Act. Instead of requesting the relevant law society to intervene, it will be much easier and more intimidating for a CA to refer a dispute relating to an unfair labour practice to the CCMA, regardless of whether it has merit.

- A CA can now claim the protection of the Basic Conditions of Employment Act, including payment for overtime (especially if required to consult with his or her principal and clients after hours and on weekends, which often happens), minimum leave, lunch hours and maternity leave. Who must pay the overtime – the attorney or his or her client?

Further, what if an attorney is of the view that a CA should not be admitted as a practising attorney due to a lack of skill? Are we merely rubber stamps or are we obliged to serve the public and the law societies by refusing CAs admission in circumstances where they are simply not up to standard?

I have thus taken the ruling on review to the Labour Court and the matter is pending.

I invite the law societies and those attorneys reading this letter who share the same concerns to contact me should they

wish to support me in the review of the ruling of the acting commissioner in the Labour Court.

Nothing contained in this letter must be construed that I am not a responsible principal and wish to make the lives of CAs unbearable.

In my response to the question asked in your editorial as to what role the law societies should play in disputes between CAs and principals, my comment is:

They should become totally involved, as that is what they are, *inter alia*, paid for. If they do not do so, they are failing the legal profession and the public.

DJ Schoeman, attorney, Pretoria

LSNP response

I have noted the concern expressed by DJ Schoeman relating to the problems experienced by him as the principal of the CA concerned. There is, in fact, some authority for the law society to assist, in terms of r 59.1 of the rules of the law society, in cases where, after due inquiry, it is found that the relationship between a member (principal) and a CA has broken down. The law society can intervene in terms of the procedure referred to in the rule to arrange for a cession of the contract of the CA to another attorney. Section 72(1)(b)(i) of the Attorneys Act 53 of 1979 also provides authority for the law society to suspend or cancel articles of clerkship if a CA has acted unprofessionally.

Should such a case be brought to the attention of the law society, arrangements are in the first instance made for the principal and the CA to discuss the dispute or complaint (by any one of the two parties) with a committee of the law society, which will endeavour to resolve the dispute.

However, the problem is that the law society does not have the authority to compel the parties, by way of a directive, to either cancel or continue with the contract of articles of clerkship.

In addition to the formal relationship between a principal and a CA under the Attorneys Act, the provisions of the Basic Conditions of Employment Act 75 of 1997 also apply and a CA can therefore not be prohibited from initiating proceedings against the principal in terms of the labour legislation, as their relationship is also one of employer and employee.

The law society is not, however, apathetic to these conflict situations between principals and CAs and will certainly always, if approached, refer the conflict to a committee for mediation or conciliation, as has often been done in the past.

Thinus Grobler, director, Law Society of the Northern Provinces



In April Chief Justice Mogoeng Mogoeng gave the 2013 Annual Human Rights Lecture at the University of Stellenbosch's law faculty. He spoke on 'the implications of the Office of the Chief Justice for constitutional democracy in South Africa'.

Chief Justice Mogoeng said that South Africa needed a 'truly independent body of judges' to safeguard its constitutional democracy.

He noted that the executive and legislature –

- had their own vote account;
- were free to decide on administrative support, job descriptions and salaries; and
- could decide which projects to prioritise.

'But the same cannot be said of the South African judiciary,' he said.

Challenges

The Chief Justice highlighted several challenges for the judiciary, such as –

- court budgets being determined without consultation with the judiciary;
- inadequately trained administrative staff;
- a shortage of court rooms and chambers for judges and magistrates; and
- substandard interpretation services.

'It is for these reasons that the judiciary has been calling for a radical paradigm shift from the current executive administration system to one that is led by the judiciary,' he said.

Institutional independence

Referring to 'institutional independence', the Chief Justice said that this ensured that the courts were 'not directly or indirectly controlled or seen to be controlled by other arms of government'.

In this regard, Chief Justice Mogoeng noted: 'The placement of court administration in the hands of the ministry has given rise to an unfortunate public perception that the Minister for Justice and Constitutional Development is the head of the judiciary' and that this 'underscores the critical importance of the debates that have been going on between the judiciary and the executive about judicial self-governance over the years'.

The Office of the Chief Justice

Speaking on the creation of the Office of the Chief Justice, Chief Justice Mogoeng outlined the three phases that established the office. Phase one saw the formation of the office as a 'national department located in the public service to support the Chief Justice as head of the judiciary and head of the Constitutional Court'. Phase two established it as an 'in-

Chief Justice Mogoeng seeks judicial independence

dependent entity' and stage three saw the establishment of a 'structure to provide judicially-based court administration'.

As the head of the judiciary, Chief Justice Mogoeng stated that the Chief Justice was responsible for developing policies, norms and standards for case management and to monitor and evaluate performance of the courts.

He noted that the Office of the Chief Justice was also responsible for information technology and knowledge management, which were important for improving access to justice.

'We continue to grapple with issues relating to the achievement of a truly independent judiciary,' he said.

Chief Justice Mogoeng made note of both the Constitution Seventeenth Amendment Act of 2012 and the Superior Courts Bill (B7 of 2011), which will 'vest additional powers and functions in the Chief Justice'.

The Chief Justice referred to the judicial leadership retreat that took place last year, which allowed for a 'brutal self and institutional introspection'. He said that ideas and strategies were discussed on how to achieve an 'independent and single judiciary'.

Modernisation

Chief Justice Mogoeng also spoke on court modernisation and automation, specifically electronic filing and record keeping, which would 'facilitate the efficient management of cases and their speedy finalisation'. This would also help alleviate the disappearance of records of proceedings, he said.

Chief Justice Mogoeng said that the judiciary had decided to begin a 'massive project' that would see the overhauling of all the rules of the High Court and magistrates' courts.

He said that this would 'inject flexibility', allowing for the implementation of electronic filing, electronic record keeping and video conferencing.

He added that this would also allow for greater access to justice.

Administration model

Chief Justice Mogoeng spoke on a preferred court administration model. He said that the model should be one led by a judicial council made up of members of the judiciary, constituted by the heads of court and guided by an advisory board.

Chief Justice Mogoeng added: 'Eventually, the entire Court Services Unit of the Justice Department, regional offices,

rule-making authorities, library services, information technology and facilities components of Justice would have to be transferred to the Office of the Chief Justice or the new entity created by legislation, together with the concomitant budget and personnel.'

As in parliament, there should be no cabinet member responsible for the court administration structure led by the judiciary, said Chief Justice Mogoeng.

He added that there had been engagement with other jurisdictions, including the United States of America, the Russian Federation, Singapore, Ghana and Qatar to find a model that would fit South Africa's constitutional democracy.

Chief Justice Mogoeng said that senior officials in the Office of the Chief Justice, guided by Justice Kenneth Mthiyane, the Deputy President of the Supreme Court of Appeal, and his committee of judges had begun working on this model and drafting a Bill, which they hoped to finish this year.

He said that former Chief Justice Sandile Ngobobo had appointed a committee on institutional models, with the purpose to 'propose a court administration system that would best serve the needs of the courts'.

It had produced a report titled: 'Capacitating the Office of the Chief Justice and laying foundations for judicial independence: The next frontier in our constitutional democracy: Judicial independence', which proposes a self-governance structure created by legislation that would perform the functions to be transferred to the Office of the Chief Justice.

The Office of the Chief Justice had made amendments to the report and had passed it on to the executive and a response is awaited, the Chief Justice said.

He added that the Office of the Chief Justice had managed to lay a 'solid foundation' for self-governance, which was the 'only remaining barrier to the attainment of complete judicial independence'.

Conclusion

In conclusion, Chief Justice Mogoeng said: 'The courts will be able to determine their policy and strategic priorities and how best to meet them, decide on projects to embark upon to help the courts take their rightful place as guardians of our constitutional democracy, and serve the nation more effectively and efficiently.'

Kevin O'Reilly,
kevin@derebus.org.za

On 25 April the Law Society of South Africa (LSSA) hosted an event honouring mentors in law firm development in Johannesburg.

The event was held to celebrate the success of the LSSA-Irish Aid commercial law projects. The programme, which was started in 2002, is a joint initiative between the LSSA, Irish Aid and Irish Rule of Law International. The objective of the programme is to use commercial law as a tool to establish sustainable economic development among the historically disadvantaged communities in South Africa and is aimed at attorneys from previously disadvantaged backgrounds.

The Irish ambassador to South Africa, Brendan McMahon, said that from the view of the government of Ireland, it was satisfied that its money was well spent on the programme and that it was committed to further development. 'We stand ready to continue our support as we think this is a very good programme,' he said.

Mentors honoured



His Excellency Brendan McMahon, Irish ambassador to South Africa (left); with Nic Swart, chief executive officer of the Law Society of South Africa (centre); and Kathleen Matolo-Dlepu (right), newly elected co-chairperson of the Law Society of South Africa.

Kathleen Kriel, kathleen@derebus.org.za

New UNESCO Chair in Education Law in Africa



Professor Ann Skelton, the recently appointed United Nations Educational, Scientific and Cultural Organisation Chair in Education Law in Africa.

Professor Ann Skelton, the director of the Centre for Child Law at the University of Pretoria, has recently been appointed as the incumbent of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair in Education Law in Africa.

According to a statement released by the university, the programme was established in 1992 as a way to advance research, training and programme development in higher education. Currently there are 770 institutions involved in 126 countries and there are 644 UNESCO chairs.

The responsibilities of the chair include conducting and promoting research in education law in South Africa

and Africa; promoting good academic education and professional training in education law; playing an active role as an academic leader of the discipline at both national and international levels; managing strategic, academic and operational functions; and organising fundraising for the activities associated with the chair.

In 2012 Professor Skelton received an honorary award from the World's Children's Prize Foundation for her 25-year battle for the rights of children affected by the justice system in South Africa.

• See 2012 (July) DR 12.

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Justice Department's plans for the next five years

In March the Department of Justice and Constitutional Development released its strategic plan for the next five years, from 2013 to 2018. The plan highlights the department's priorities for the short, medium and long term, as well as some of the challenges it faces.

In the foreword to the document, Justice Minister Jeff Radebe makes special mention of the increase in the number of reported sexual offences cases and notes that the department will prioritise sexual offences by re-establishing dedicated courts throughout the country.

He adds that efforts to appoint a Solicitor General will be put in place in the 2013/14 financial year, with the incumbent overseeing all legal services of the state and assisting in the services offered to the state to ensure improved quality.

The Minister also notes that service delivery continues to be a priority.

The strategic plan indicates the department's commitment to, among others –

- prioritising access to justice services for people in poor and rural areas;
- promoting access to justice by the finalisation of court cases, as well as an increased use of alternative dispute resolution (ADR) mechanisms, the diversion of cases and the use of restorative justice processes;
- administering deceased and insolvent estates efficiently; and
- providing appropriate legal advice and litigation services to organs of state.

Under its policy mandates, the strategic plan notes some of the aspects of the National Development Plan that relate to the Justice, Crime Prevention and Security cluster, including the goal of achieving a 'single, integrated, seamless and modern justice system'.

Other relevant goals of the National Development Plan relate to the need for an 'ideal South African judge', who would have a 'progressive judicial philosophy' and understand the socio-economic context in which the law is interpreted and enforced; and the establishment of the Office of the Chief Justice – an example of the 'cutting-edge' commitment to judicial transformation.

In respect of the latter, the document states that: 'Necessary memoranda of understanding and protocols are being put in place to ensure that functions and responsibilities that are performed by the department in terms of the existing legislation and policies and that

fall under the mandate of the Office of the Chief Justice, in terms of the Presidential Proclamation, are transferred to the Office of the Chief Justice pending the amendments to the legislation concerned.'

The document further states that responsibilities applying to governance of the judiciary and rules addressing the case flow management processes will gradually be transferred to the Office of the Chief Justice.

Transformation of the justice system

Some of the policy initiatives the department plans to implement in respect of transformation of the justice system in the medium term include:

- Transforming the judiciary.
- Strengthening the independence and accountability of the National Prosecuting Authority.
- Strengthening the constitutional development portfolio.
- Reviewing the civil justice system.
- Addressing the department's capacity to provide quality legal advisory services.

The document also notes that the South African Judicial Education Institute, which has the mandate of providing judicial education to aspiring judicial officers, is governed by a council chaired by the Chief Justice and comprises representatives from the judiciary, the Justice Minister or a nominee, nominees of the legal profession, law faculty deans and House of Traditional Leaders representatives.

Review of the civil justice system

The strategic plan states that cabinet had approved a document that seeks to ensure the advancement of the Constitution, by dealing with issues related to –

- the transformation of the judiciary;
- the separation of powers; and
- collaboration between the three branches of government.

The document states that one of the targets is to establish a small claims court for each of the 387 magisterial districts by 2014.

It attributes slow progress in this regard to the lack of experienced legal practitioners who are willing to be appointed as commissioners. However, it states that Legal Aid South Africa has offered to assist by agreeing to avail its lawyers.

Economic impact

The document notes the negative impact of the global financial crisis on the justice system. It states that social problems 'are prevalent' as a result of economic strain, moral decay, increased crime, corruption and family violence.

It notes that these factors point to an increase in –

- demand for maintenance services, including the investigation of defaulters;
- civil matters (default judgments);
- sexual offences and domestic violence;
- demand for the services of the Master of the High Court (insolvencies and sequestrations);
- the case load emanating from state litigation and environmental crimes, such as rhino poaching; and
- demand for legal assistance in criminal matters for those who cannot afford this.

Budget cuts

The plan notes that the department has experienced budget cuts that have 'severely affected' its information technology infrastructure. The department has, however, identified an increased use of mobile devices, including tablets, and will investigate a mobile strategy, although it will first prioritise stabilising the 'information and communication technology backbone'.

The lack of funding means the department continues to explore alternative funding methods and public-private partnerships. The strategic plan states: 'There is a need for a major recapitalisation of the justice infrastructure in specifically identified areas.'

Increased litigation against the state

The strategic plan notes the significant increase in litigation against the state and lists the following as reasons for this:

- Citizens' realisation of their rights.
- 'Opportunistic litigation against the state by certain legal practitioners who exploit loopholes in legislation'.
- A fragmented approach in the management of state litigation.
- The lack of an effective framework to invoke ADR mechanisms.

In an attempt to 'curb the spiralling costs of litigation', the department has prioritised the transformation of state legal services and will implement the following interventions in the medium term –

- finalising the policy framework for the

efficient management of state litigation;

- capacitating and enhancing the Office of the State Attorney by increasing resources;
- preparing and implementing standardised fee structures for the payment of private counsel; and
- developing an ADR process to avert litigation or enable the settlement of matters outside of court.

Enhancement of the Master's Office

A paperless estate administration system was piloted at the Nelspruit office of the Chief Master. It was rolled out in the Durban, Johannesburg and Pretoria offices last year. The system will be rolled out to other offices and will allow practitioners and members of the public to view estate information online.

Strategic goals and objectives

The department outlined the following in the strategic plan:

- Enhanced organisational performance on all aspects of administration in line with set standards, and meeting and exceeding the needs and aspirations of key stakeholders.
- Facilitating the effective and efficient resolution of criminal, civil and family law disputes by providing accessible, ef-

ficient and quality administrative support to the courts.

- Effective and cost-efficient provision of state legal services that anticipate, meet and exceed stakeholder needs and expectations.
- Effective coordination of the Justice, Crime Prevention and Security cluster in the delivery of the third of its 12 outcomes – that all people in South Africa are and feel safe.
- Promotion of the Constitution and its values.

In terms of objectives, the strategic plan outlines the key priorities for its five programmes, namely:

Administration

One of the department's objectives is to obtain a sustained 'no audit qualification'. Another objective is to conclude 70% of fraud and corruption cases within the first year of entry.

Court services

The department seeks to improve finalisation of activities supporting its outcome that all people in South Africa are and feel safe, including improvements in respect of the number of cases on the backlog roll.

State legal services

In terms of this objective, the department seeks to 'supervise the administra-

tion of deceased and insolvent estates, as well as the liquidation of juristic persons, the registration of trusts and the management of the Guardian's Fund'.

National Prosecuting Authority

This objective seeks to improve the number of cases finalised (excluding ADR mechanisms) from 350 910 in 2009/10 to 446 866 in 2013/14, and increase the use of cases finalised through ADR mechanisms from 118 631 in 2009/10 to 151 991 in 2013/14.

Auxiliary and associated services

The four entities funded through the Department of Justice and Constitutional Development's vote account are Legal Aid South Africa, the Special Investigating Unit, the South African Human Rights Commission and the Office of the Public Protector.

Some of the output items are –

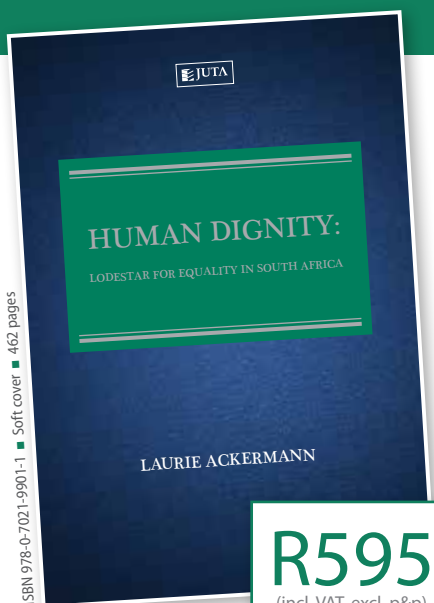
- finalisation of criminal and civil matters;
- provision of legal aid practitioners per court; and
- preparation of cases for civil and criminal litigation and disciplinary action.

Kevin O'Reilly,
kevin@derebus.org.za



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Compiled by Barbara Whittle, communication manager, Law Society of South Africa, barbara@lssa.org.za

LSSA elects new co-chairpersons

Johannesburg attorney and Black Lawyers Association (BLA) Vice-president Kathleen Matolo-Dlepu and Harrismith attorney David Bekker were elected co-chairpersons of the Law Society of South Africa (LSSA) at the LSSA's annual general meeting in Cape Town in mid-April.

Both Ms Matolo-Dlepu and Mr Bekker have placed the finalisation of the Legal Practice Bill (B20 of 2012) high on their agenda for their term as co-chairpersons, which runs until March 2014. Mr Bekker was one of the co-signatories of the 1996 Memorandum of Understanding – an agreement between the then Association of Law Societies, the statutory provincial law societies, the BLA and the National Association of Democratic Lawyers – setting up the LSSA. The main objective of the LSSA was to bring about new legislation to regulate the legal profession.

'I would like to finalise this issue, with special emphasis on smaller law firms and access by rural communities to legal practitioners,' said Mr Bekker.

Besides the focus on the Legal Practice Bill, Ms Matolo-Dlepu said: 'I plan to encourage women lawyers to participate actively in the affairs of the legal profession and also to encourage the mentorship of young lawyers.'

Mr Bekker added: 'My secondary objective is to improve and develop *ubuntu* between the different constituents of the LSSA, so as to serve as an example to all



New LSSA co-chairpersons Kathleen Matolo-Dlepu and David Bekker.

of the role that attorneys play in building a unified nation in a diverse community.'

About Kathleen Matolo-Dlepu

Ms Matolo-Dlepu serves on the council, Management Committee and Gender Committee of the LSSA. In addition, she is a board member of the Attorneys Insurance Indemnity Fund and is on the Attorneys Fidelity Fund board of control.

She read for her law degrees at the University of Limpopo, is an admitted attorney and conveyancer, and is currently

the senior partner at Molefe-Dlepu Inc in Johannesburg.

She served as a council member of the Law Society of the Northern Provinces for a number of years and was chairperson of its Gender and Transformation Committee. Ms Matolo-Dlepu was the national general secretary of the BLA until her election as Vice-president in 2011.

About David Bekker

David Bekker has been involved in law society matters as a councillor since 1989. He serves on the council and Management Committee of the LSSA, as well as on several LSSA specialist committees, including the Deceased Estates, Trusts and Planning Committee; Competition Law Committee and Practice Development Committee. In addition, he chairs the Communications and Financial Intelligence Centre Act Committees.

Mr Bekker obtained his law degree from the University of the Free State and has been a practising attorney and conveyancer since 1977. He is the senior partner of Harrismith firm Cloete & Neveling Inc, a member of the Phatshoane Henney Group of attorneys. He was President of the Law Society of the Free State from 1994 to 1996. Mr Bekker is a member of the appeal board of the Financial Intelligence Centre, a trustee of the Legal Provident Fund and represents the LSSA in the Commonwealth Lawyers Association.

LSSA makes further submissions on the LPB; comments on submissions by the Attorneys Fidelity Fund

The Law Society of South Africa (LSSA) last month made further submissions on the Legal Practice Bill (B20 of 2012) to the Justice Portfolio Committee. These submissions responded to a number of questions raised by the committee during oral hearings in February. In a separate annexure, the LSSA also responded to the oral and written submissions made by the Attorneys Fidelity Fund (AFF).

The LSSA pointed out that the oral and written submissions it made in February covered mostly principled issues of governance and regulation. The May document focused on some of the practical matters relevant to the governance of the profession in future. The LSSA stressed that it remained committed to engaging with the committee, not only to share the experience gathered and the results of research conducted, but also to explore the best possible methods that will suit a constitutional democratic South Africa.

The LSSA provided statistics on gender and race transformation in the attorneys'

profession over the past few years. It also included statistics on first-year LLB students registered at universities, law graduates, demographics of candidates registering articles in the profession, as well as admissions to the profession in specific years. These statistics show that, at these levels, female and black candidates are well represented in the numbers graduating and entering the profession. For example, in 1998 71% of attorneys admitted that year were white. This percentage had dropped to 53% by 2011. Women made up 37% of the candidates entering the profession in 1998. By 2011 this had increased to 56%. Currently, 41% of attorneys are white men and 24% black men; 23% are white women and 12% are black women.

The LSSA stressed that, although there has been a significant improvement in historically disadvantaged candidates entering the profession, many challenges still exist to improve this growth further.

The LSSA submissions also covered the role played by the attorneys' profession in promoting access to justice; fee

structures and the role of advocates in that equation; the process of unifying the rules of the provincial law societies into a uniform set, while taking into account issues of competition; the current funding of the attorneys' profession, as well as statistics relating to disciplinary offences by attorneys and how these are dealt with by the statutory provincial law societies.

In its comments responding to the AFF's submissions, the LSSA pointed out that the history of the AFF was intrinsically linked to that of the profession. Almost 70 years ago the legal profession had lobbied parliament to set up the fund in order to ensure protection for the public against theft by attorneys. To date, this objective remains key to the existence of the profession and its credibility in the eyes of the public.

The LSSA dealt with what it termed 'misconceptions and inaccuracies' in the AFF's submissions. The LSSA stressed that 'the well-being of the AFF was and is in the interest of the profession as much as the public. ... Part of the protection

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of the public is vested in the law societies, which are duty bound to regulate the profession in the interests of the public; a function which justifies financing by the AFF.'

On whether or not the monies in the AFF are 'public funds', the LSSA noted that the fund was initially one to which attorneys contributed. Later, when trust fund interest was used in South Africa to boost the AFF, such interest was, and still is, derived from deposits by attorneys' clients. While such clients are members of the public, any view that such interest is 'public money' is misdirected. The legislation

intended that such interest should vest in the AFF.

The LSSA noted: 'The attorneys in South Africa have, in the past, been called upon to contribute to the AFF, and they may in future be called upon to do so again, should there be a shortfall. The profession has a vested interest in ensuring that the AFF is safeguarded for its clients.'

• The LSSA's May submissions on the Bill will be covered more fully in the next issue of *De Rebus*. In the meantime, the submissions can be viewed on the LSSA website at www.LSSA.org.za

• See p 4.

LSSA raises concerns with Tax Administration Act draft rules

Earlier this year the Law Society of South Africa (LSSA) commented to the South African Revenue Service (SARS) on the draft rules to be promulgated under s 103 of the Tax Administration Act 28 of 2011.

The LSSA raised its serious concern with the fact that the taxpayer would be expected to file his or her grounds of objection first, whereas in the past SARS had to file its grounds of assessment first. The LSSA believed this to be unfair, particularly in light of the fact that the only documents available to the taxpayer to challenge an assessment or decision would be those that would have been obtained from the letter of findings in terms of s 42 of the Tax Administration Act, and the reasons requested from SARS after raising the assessment in terms of r 6.

The LSSA pointed out that, in *CSARS v Sprigg Investment 117 CC t/a Global Investment* [2011] 3 All SA 18 (SCA), 'adequate reasons' for an assessment had been interpreted by the Supreme Court of Appeal in a very restrictive manner. This, according to the LSSA, placed the taxpayer in a position where the case that must be answered would most likely be very vague, which in turn would be inconsistent with the

provisions of s 34 of the Constitution.

'Placing the taxpayer in this position may lead to constitutional challenges in respect of the rules in their current form. It is suggested that SARS should still prepare detailed grounds of assessment as the first step in the pleadings to the Tax Court, to which the taxpayer could then respond with his/her detailed grounds of objection. This process seems to have worked well in the past and we submit that there is no reason to change it now,' stated the LSSA.

The LSSA also pointed out that there was no opportunity for the taxpayer to request reasons for SARS disallowing the objection pursuant to r 9. The LSSA noted: 'The disallowance of the objection is an administrative action and should be subject to all the provisions of the Promotion of Administrative Justice Act [3 of 2000]. Failure to state this in the rules will cause unnecessary confusion and unnecessary litigation.'

• The full comments, as well as other comments made by the LSSA on recent draft legislation, are available on the LSSA website at www.LSSA.org.za under 'Legal practitioners - LSSA comments' or e-mail contact@LSSA.org.za.



People and practices

Compiled by Shireen Mahomed

Please note: Preference will be given to group photographs where there are a number of featured people from one firm in order to try accommodate everyone.

Kaplan Blumberg Attorneys in Port Elizabeth has two promotions and three appointments.



Katie Morris has been promoted to a partner in the litigation department.



Moya Rossouw has been promoted to a partner in the family law department.



Hanli Share has been appointed as a professional assistant in the labour law department.



Udo Gaiser has been appointed as a professional assistant in the litigation department.



Lizette Ferns has been appointed as a professional assistant in the family law department.

Spoor & Fisher in Pretoria has four promotions and two appointments.



Tertia Beharie has been promoted to a partner in the patent chemical department.



FJ Labuschagne has been promoted to a senior associate in the patent agency management department.



Tyron Grant has been promoted to a partner in the patent litigation department.



Cheryl Payne has been appointed as a senior associate in the trade mark prosecution department.



Reggie Dlamini has been promoted to a senior associate in the trade mark prosecution department.



Herman van Schalkwyk has been appointed as a senior associate in the patent mechanical department.

Jurgens Bekker Attorneys in Johannesburg has five new appointments.



Irene Welling has been appointed as a senior associate. She specialises in matrimonial matters, High Court and magistrate's court litigation and administration of estates.



Louis Poriazis has been appointed as an associate. He specialises in general litigation and debt collection.



Carien van Greunen has been appointed as a senior associate. She specialises in family law, general litigation and taxations.



Shelley Hobson has been appointed as an associate. She specialises in general litigation, company law and debt collection.



Andrew Boerner has been appointed as a senior associate. He specialises in media law, defamation law and general litigation.

Mason Incorporated in Pietermaritzburg has two new appointments.



Suné Taljaard has been appointed as a director. She specialises in conveyancing.



Craig Woolley has been appointed as an associate. He specialises in litigation.

J Leslie Smith & Company Inc in Pietermaritzburg has three new appointments.



Meagan Gillett has been appointed as a professional assistant in the conveyancing and commercial departments.



Sipho Mthethwa has been appointed as a professional assistant in the commercial and deceased estates departments.



Lauren Hicks has been appointed as a professional assistant in the agency conveyancing department.



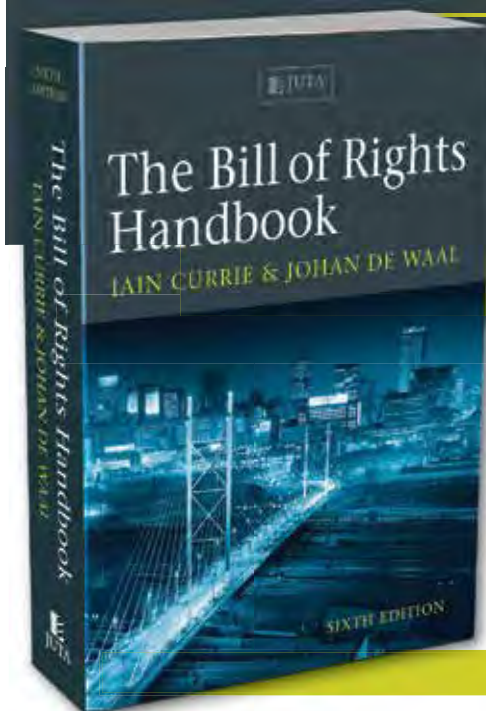
Van de Wall & Partners in Kimberley has appointed Steven Addinall as a partner. He specialises in High Court litigation.



Cox Yeats Attorneys in Durban has appointed Jason Goodison as an associate. He specialises in general commercial law, commercial litigation and has experience in mining law.



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5 minutes with

the Pretoria Attorneys Association

This month *De Rebus* news editor Nomfundo Manyathi-Jele spoke to the chairperson of the Pretoria Attorneys Association (PAA), Dawie Beyers, about the association.

What is the PAA?

The Pretoria Attorneys Association/Pretoria Prokureursvereniging/Mokgatlo Wa Bamedi Ba Pretoria is an association serving attorneys in Pretoria and the greater Gauteng area. Its executive committee consists of 14 members elected annually.

What does the PAA do?

We assist attorneys in liaising with the deeds office, Master's Office, as well as the courts and other bodies. Information and circulars affecting members' practices are sent to them on a regular basis via e-mail.

We also hold functions for candidate attorneys twice a year.

When was the PAA established?

The association was established in 1946.

Who can become a member of the PAA?

Practising attorneys who have good standing and abide by the ethical code of conduct of the association may apply for membership. Candidate attorneys can become associate members until they are admitted.

How does one become a member?

Any practising attorney may apply for membership by filling in an application form, which can be found on our website. The current member-

ship fee is R 199,50 per annum.

What is the PAA's current membership?

Our current membership is in excess of 1 600 members.

Where are the PAA's offices?

We have two offices in Pretoria. One at the North Gauteng High Court and one at the Pretoria Magistrate's Court, where attorneys can have photocopies made and documents typed. The offices also have telephone, fax and e-mail facilities.

At the magistrate's court members enjoy a pigeon-hole facility for sheriff/attorney correspondence and court documents.

Contact information

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If you would like to see a specific organisation featured in the '5 minutes with ...' column, please send an e-mail to derebus@derebus.org.za

De Rebus reserves the right to decide on which organisations will be featured in the column, including taking the initiative to approach organisations to be featured.

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The 18th Commonwealth Law Conference

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The 18th Commonwealth Law Conference, which took place in South Africa for the first time from 14 to 18 April, brought over 900 Chief Justices, judges, lawyers, legal academics and others in legal-related fields to Cape Town to focus on current trends under the theme 'Common challenges - common solutions: Commonwealth, commerce and ubuntu'.

De Rebus editor Kim Hawkey and deputy editor Mapula Sedutla prepared this report on the conference.

International keynote speakers opened the conference each day, followed by a total of 48 panel sessions (with over 175 speakers) divided into four streams, namely:

- Corporate and commercial law.
- Legal and judicial profession.
- Constitutionalism, human rights and the rule of law.
- Contemporary legal topics.

For more information, see the conference website www.commonwealthlaw2013.org/

Opening ceremony

South African Chief Justice Mogoeng Mogoeng and Justice Minister Jeff Radebe addressed delegates during the opening ceremony of the CLC, which was also attended by Supreme Court of Appeal President, Judge Lex Mpati; Western Cape High Court Judge President John Hlophe; Public Protector Thuli Madonsela; outgoing Commonwealth Lawyers Association (CLA) President, Boma Ozobia; and outgoing co-chairpersons of the Law Society of South Africa (LSSA), Krish Govender and Jan Stemmert. The LSSA hosted the event.

Mr Govender welcomed delegates to South Africa, while Ms Ozobia read a message from Queen Elizabeth wishing delegates well in their deliberations at the conference.

Minister Radebe welcomes delegates to the 'agenda setting' conference

In a welcome speech, Minister Radebe emphasised the international reach of the legal profession, as well as South Africa's place in the Commonwealth and its destination for international 'agenda setting and agenda changing conferences' such as the Commonwealth Law Conference (CLC). He noted that the conference was only the second conference of its kind to take place on African soil.

'Your presence here from all the corners of the globe is an indication of the global reach of the legal profession itself. Your ... being in Cape Town for your conference is, to all South Africans, not a ritualistic annual exercise, but a confirmation of the embrace which the world



Justice Minister Jeff Radebe welcoming over 900 Commonwealth Law Conference delegates to South Africa.

has extended to our new democracy,' he said.

Minister Radebe told delegates he 'concurred' with the theme of the conference, which would provide an opportunity to grapple with some of the challenges facing the profession internationally.

The Minister added that the issues expressed in the conference's theme resonated with the Singapore Declaration of Common Principles, including human rights, socio-economic justice, good governance, the rule of law, egalitarianism and peace.

He also briefly addressed an issue of concern in some Commonwealth countries, namely the safety and security of members of the legal and judicial professions. In this regard, he said:

'A state that prides itself on the supremacy of the rule of law should, in parallel responsibility, also accept the safety and security of the practitioners

who make that use of law possible. For the conference to revisit and to seek total adherence to the Latimer House Principles will not be an exercise of self-preservation, but the preservation of the rule of law itself.'

In conclusion, the Minister left attendees with these words: 'The future of the rule of law, and the improvement of jurisprudence for the benefit of millions of the people of the world, is in your hands.'



South African Chief Justice Mogoeng delivering the keynote address during the opening ceremony of the 18th Commonwealth Law Conference, which took place in Cape Town from 14 to 18 April.

Chief Justice Mogoeng addresses criticism of judicial appointments

In a keynote address, Chief Justice Mogoeng spoke about the separation of powers and the system of judicial appointments in South Africa, which was the subject of much scrutiny in the recent past.

Chief Justice Mogoeng used the platform of the international conference to tell delegates that the 'race factor' in the country's judicial appointment system was being 'distorted', which was creating a 'false impression in the international community that we want reverse apartheid'.

In addition to tarnishing the judiciary's image internationally, the Chief Justice warned of other effects closer to home:

'The surest way to weaken and ultimately destroy democracy is to neutralise a country's legal profession, or rather the organised profession, to delegitimise the judicial appointment authorities and, by extension, its judicial officers.'

This was underscored by the importance of the judicial arm of government in a democracy, which is the ultimate guarantor of a democracy, he said.

'I believe that democracy can survive if there are serious issues in the execu-

tive and the legislature, on condition that we have a sound, stable and truly independent judiciary in place,' he said, adding that: 'No judiciary is perfect but, as South Africans, you have to tread gingerly when you deal with issues central to the survival of a judiciary and, by extension, a constitutional democracy.'

In response to media reports of meetings of the Judicial Service Commission (JSC) the week prior to the conference, Chief Justice Mogoeng informed delegates of the composition of the JSC, its processes, mandate and progress to date.

Media reports of the JSC sitting had been dominated by a discussion document on transformation of the judiciary, and the appointment of white males in particular to the Bench, prepared by former General Council of the Bar deputy chairperson Izak Smuts, who was a commissioner of the JSC until his resignation during the sitting.

The Chief Justice referred to s 174 of the Constitution, which provides the criteria for judicial appointments and which has been the subject of much debate and discussion. However, Chief Justice Mogoeng said that, in light of South Africa's past, 'whether or not we need to transform the judiciary does not require a debate' and 'transformation does not need to be defined'.

He said that the JSC was fully aware of its mandate: 'We know what the problem is. We need to address it responsibly. ... So how can we play games, as the JSC, with this enormous responsibility and great privilege?' he asked.

'I wonder, if we have even the slightest measure of confidence in the judiciary, how we can suggest that the leadership of the judiciary and the profession would recklessly subject the South African public to a judicial officer who does not have what it takes to administer justice, especially in circumstances when many South Africans have had to endure the agony of courts being constituted [in a certain way in the past],' the Chief Justice said. In respect of this, he referred to the following 1962 statement in court by former President Nelson Mandela: 'It makes me feel that I am a black man in a white man's court.'

However, the Chief Justice said that a number of white males had been appointed to the judiciary in the past few years and he provided statistics to support this. He added that statistics could be provided to show that any perception that 'there is a hunger to maybe get even with our white male compatriots is unfounded'.

In conclusion, Chief Justice Mogoeng called on the legal profession to support women and black practitioners:

'We need to encourage women and black students to pursue law as a career.

We need to find a way to give them what they need when they qualify because many black people and women who have qualified were forced to fall out of the organised profession because quality work was not forthcoming. Some chauvinism is still there and the inclination to support financially those you know is part of human nature. Our white compatriots are in top structures and this trickles down to those they hire and brief,' he said.

This, he added, was important for the country as a whole:

'We would serve our country well if we develop all South Africans to support black practitioners so that there is a pool out of which transformation can happen - otherwise the pool will dry up and South Africa will be left with no option but to go back to where it was pre-1994. This is an exaggeration, but it is necessary to make the point.'



United Nations High Commissioner for Human Rights, Navi Pillay, addressing the Commonwealth Law Conference.

United Nations High Commissioner for Human Rights

In a keynote address, United Nations (UN) High Commissioner for Human Rights, Navi Pillay, addressed three areas in response to the general theme of the conference, namely:

- The nature of human rights.
- The relationship between the rule of law and human rights and how this affects the administration of justice at the national level.
- Examples of how international human rights standards have been invoked before national courts.

In doing so, Ms Pillay spoke on the judiciary as the core guarantor of human rights and highlighted how ordinary lawyers can 'make a difference'.

The nature of human rights

Ms Pillay focused on the indivisible nature of human rights, with specific reference to political and civil rights and

economic, social and cultural rights. However, she noted that human rights are also inalienable, universal and inter-dependent.

Further, Ms Pillay said that human rights must be applied on the basis of non-discrimination and equality.

In respect of the indivisible nature of human rights, Ms Pillay noted that when the Universal Declaration on Human Rights was adopted, civil and political rights, as well as economic, social and cultural rights, were included, yet when the negotiations in the General Assembly took place for an international treaty on human rights, a 'far-reaching decision' was taken to have two separate international treaties – one on civil and political rights and another on economic, social and cultural rights.

'This subsequently has created a situation in which some states have ratified one of these covenants, but not both. Other states have ratified both covenants, but treat civil and political rights as so-called "hard" rights that are straightforward to apply, while viewing economic, social and cultural rights as "soft" or "aspirational" rights that are only goals to be achieved progressively,' Ms Pillay said.

However, the High Commissioner said that this division of 'indivisible' rights was 'not coherent'. She referred to the right to life to illustrate this. This right not only ensures that no one shall be arbitrarily deprived of his or her life, but the right could equally be understood as being grounded in economic, social and cultural rights.

'Who would argue, for example, with the proposition that the state has an affirmative duty to ... reduce and eliminate unsafe drinking water and malnutrition, which can shorten life?' she asked, noting that there had been cases where national courts recognised that health-related rights were inherently linked to the right to life, and emphasised that this protection was 'just as important as the traditional view of the right to life as a civil and political right'.

Another example she cited was the right to security of the person, which is classically understood as prohibiting the state from engaging in arbitrary arrest and detention and placing a positive duty on the state to provide security, preventing and apprehending those involved in crimes of physical aggression.

'The security of person needs to be addressed both from a point of view of law enforcement, and from the point of view of crime prevention, by addressing the reasons why individuals, and young persons in particular, are often attracted to criminal activity,' Ms Pillay said.

Despite this, she said that some states gave higher priority to economic rights than to civil and political rights, prefer-

ring to focus on the right to economic development than on development in the broader sense.

'The argument, at least as I understand it, is that for rapid economic growth to occur, a country needs what is euphemistically called "stability", which in practice means long periods of one-person rule, with repression of dissent and the opposition. I am profoundly disturbed by such models of development by states that appear to accept violations of civil and political rights as the so-called "price to pay" for rapid economic development,' Ms Pillay said.

She added that a sole focus on economic growth often ignored whether the gains of economic growth were evenly distributed.

'While I strongly support the right to development, it has to embrace not only its important economic component, but also civil and political rights. True "development" includes freedom of expression, the right to protest, freedom of association and the right to uninhibited participation in public debate in politics and in government,' she said.

On this aspect, she concluded: 'So when we talk about the indivisibility of human rights, we cannot separate political and civil rights and economic, social and cultural rights. Experience has taught us that a predominate focus on political and civil rights without taking into account economic, social and cultural rights may penalise a significant part of the population, just as a model that focuses on economic growth at the expense of the protection of civil and political rights may equally lead to political upheaval.'

Relationship between the rule of law and human rights

Ms Pillay noted the importance of the rule of law being anchored in human rights.

'Any approach to the rule of law that does not refer to human rights can enable a state to legitimise a wide range of human rights violations,' Ms Pillay said.

In support of this, she referred to her experience of growing up in apartheid South Africa, when the state was based on the rule of law, but was not anchored in human rights. The result, she said, was a state based on fear, repression and discrimination.

'So the rule of law does not mean simply that the laws governing society should be passed by a democratically elected parliament and interpreted by independent and impartial courts. It also means that laws that are not in conformity with human rights and fundamental freedoms should be declared invalid and struck down.'

Applying human rights and the rule of law to day-to-day professional lives

Under this heading, Ms Pillay focused on three topics, namely –

- pre-trial detention;
- torture or other ill-treatment of detainees; and
- the independence of judges and lawyers.

• Pre-trial detention

Ms Pillay said that abuse of pre-trial detention was 'one of the most fundamentally important issues' for legal professionals where they could 'make a difference', noting that a Brazilian study had found that legally represented defendants were twice as likely to be released pending trial than those without representation.

Ms Pillay said that journalists, human rights defenders, non-governmental organisation representatives and opposition leaders may suffer unlawful or arbitrary arrest and detention and, although international standards provided for a presumption in favour of release pending trial, in many cases this presumption was reversed.

She urged lawyers to support efforts to apply the standards on unlawful or arbitrary arrest and detention set out in the International Covenant on Civil and Political Rights. In addition, lawyers could rely on the principle of *habeas corpus*, which was protected by international human rights law. Another option if national remedies were inadequate was to file a petition with the UN's Working Group on Arbitrary Detention.

• Torture

In this regard, Ms Pillay highlighted some of the human rights mechanisms to facilitate discussion and publicise cases of torture and ill-treatment internationally.

'Lawyers from the Commonwealth should acquaint themselves with these international treaties and international mechanisms, and draw upon them when needed,' she said.

• Independence of the judiciary

On the independence of the judiciary, Ms Pillay said: 'An independent judiciary is at the heart of human rights protection ... Without an independent, impartial and competent judiciary, there is no credible institution to protect human rights.'

She also highlighted a 'dangerous' development of executive power in overriding court decisions it does not agree with or attempting to change the composition of a court or limit its jurisdiction.

'I cannot emphasise enough how dangerous a development this is, because it violates the principle of separation of powers, the pluralistic distribution of

power in a democratic state, and weakens or cripples the core institution that acts as guarantor of human rights,' she said.

Where judicial independence has been compromised, justice is no longer viewed as fair and transparent, but dishonest and biased, and the population loses faith in the courts and the rule of law, Ms Pillay said. However, the High Commissioner added that this was reversible and lawyers 'can make a difference' by staying engaged and advocating for judicial reform when necessary.

Related to judicial independence, Ms Pillay noted the importance of the independence of lawyers and the Bar, and of actively resisting state attempts to control the conduct of lawyers or to bring

Bar associations under the state. In this regard, she highlighted the appointment of a Special Rapporteur on the Independence of Judges and Lawyers, who receives complaints, visits countries and engages in dialogue with states.

'Lawyers in Commonwealth countries should be aware of this human rights procedure and should make full use of it if there is interference with the independence of lawyers, or when national efforts to bring about judicial reform fail,' Ms Pillay said.

End note

In concluding, Ms Pillay referred to a number of 'tremendously inspiring' domestic court decisions where international human rights treaties had been

successfully invoked, including in South Africa.

Further, international human rights standards may assist in interpreting provisions in national constitutions, she added.

'I mention these cases in the hope that they will spark off ideas for your own work when you return to your offices. ... They illustrate how creative and innovative legal arguments can be made on the basis of the universal human rights that have been articulated in international human rights treaties,' Ms Pillay concluded.

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The Constitutional Court 20 years later

Former judge of the South African Constitutional Court, Justice Kate O'Regan, led the second day's plenary session. Justice O'Regan discussed the role and work of the Constitutional Court nearly 20 years after its formation. She opened her address by providing delegates with a brief history of the developments that led to the two-phase process that resulted in the South African Constitution.

Justice O'Regan said that the first phase of the constitution-making process included the development of an interim Constitution in 1993, which was later followed by the country's first democratic elections in 1994. Justice O'Regan added that the second phase included a Constitutional Assembly, which had a public participation programme, with 1,7 million submissions received and 20 000 participants and 717 organisations involved.

She further said that, almost 20 years later, the country was still far from realising the founding provisions of the Constitution. She added that the founding values of the Constitution were cited in the jurisprudence of the Constitutional Court and were rooted in the norms and values of the court.

Appointment of Constitutional Court judges

Justice O'Regan took delegates through the procedure of appointing Constitutional Court judges. She explained that the court employed 11 judges, who were presided over by the Chief Justice and Deputy Chief Justice, who were both appointed by special procedures. She said that the Judicial Service Commission (JSC) called for nominations of Con-



Former judge of the South African Constitutional Court, Justice Kate O'Regan, speaking on the Constitutional Court and its history.

stitutional Court judges and interviewed the shortlisted candidates in a public commission. Justice O'Regan said that the JSC was composed of 23 members, namely -

- the Chief Justice, who is the chairperson of the commission;
- the Minister of Justice;
- the President of the Supreme Court of Appeal;
- one Judge President;
- four practising lawyers;
- one professor of law;
- four presidential nominees; and
- ten members of parliament (four from the upper house and six from the National Assembly, three of whom must be members of the opposition).

Generally, the JSC sends the list of names to the President, which must contain three names more than the number of appointments to be made. The President consults with the Chief Justice and

leaders of political parties represented in the National Assembly before appointing the judges from the list, said Justice O'Regan. She added that the demographic requirement of the judges, which the JSC struggles to meet, must be in accordance with s 174 of the Constitution, which states that the judges be 'appropriately qualified', 'fit and proper' persons and 'reflect broadly the racial and gender composition of South Africa'. In 1994 the Constitutional Court was composed of nine men and two women, seven of whom were white and four were black. Presently, the court is composed of eight men and two women, seven of whom are black and three are white, said Justice O'Regan. (This excludes the latest appointment to the Bench, Mbuyiseli Madlanga, who will take up the post with effect from 1 August 2013.)

Demographics of the Bench

At the time of her presentation, Justice O'Regan said that the Bench consisted of 241 judges (149 black and 92 white), while in 1994 the Bench had 166 judges and all but five were white. She emphasised that the demographics of the Bench were important, as this enhanced the legitimacy and impartiality of the courts and, therefore, 'enables judges to identify their own blind spots and avoid reinforcement of prejudice masquerading as common sense'.

The Constitutional Court building

Justice O'Regan recalled that the location of the Constitutional Court was a former prison, which once housed Mahatma Gandhi and Nelson Mandela. She

said that the idea to transform a prison into a court was to show that 'from our painful past, we can build something new'. She added that the interior of the court ensured that counsel looks eye-to-eye at the judges, to show that the judges do not have a weighty authority over them and to avoid the sense that counsel has to look up at the judges, making it a democratic meeting place.

Jurisdiction of the Constitutional Court

Speaking on the jurisdiction of the court, Justice O'Regan said that the litmus for jurisdiction was whether the case was a 'constitutional matter'.

She said that, initially, determining what constituted a constitutional matter was difficult, given the responsibilities imposed on the court by the Bill of Rights. She said that the court was the

highest court of the land. Further, she said there were three ways in which matters could come before the court, namely by -

- appeal (as of right in rare cases, but generally only if the court grants leave);
- confirmation (it is the only court that may declare a law invalid); and
- direct access.

The court delivered 470 judgments between February 1995 and March 2013, an average of 26 per year, while there have been approximately 130 applications for leave to appeal per year.

Among the cases that were heard by the court, 147 of these were on contestation of legislation. In the field of criminal law and procedure, 22 declarations of invalidity were made, including the declaration that the death penalty was unconstitutional (*S v Makwanyane and Another* 1995 (6) BCLR 665 (CC)), as well

as a declaration that corporal punishment of juveniles in the criminal justice system was unconstitutional.

The court has also heard 20 cases concerned with the right not to be the subject of unfair discrimination, said Justice O'Regan.

In closing, Justice O'Regan said: 'Constitutional democracies are often contested and noisy - South Africa is no different. Although we face tremendous challenges, our Constitution is a robust document that provides a value-based guide for this and future generations. The role of the court is to protect rights and the Constitution, and to ensure that government pursues the vision of our Constitution.'

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Developments in Sri Lanka and Zimbabwe



Executive director of Zimbabwe Lawyers for Human Rights, Irene Petras, provided an update on the situation in Zimbabwe as it approaches national elections.

In a plenary session chaired by Lord Anthony Lester QC; executive director of Zimbabwe Lawyers for Human Rights, Irene Petras; President of the Bar Association of Sri Lanka, Upul Jayasuriya; together with the executive director for the Foundation for Human Rights in South Africa, Yasmin Sooka; spoke on developments in Zimbabwe and Sri Lanka respectively.

In opening the session, Lord Lester noted that Zimbabwe, which is currently outside the Commonwealth, and Sri Lanka were selected for discussion as the situations in these two countries had 'a

particular urgency' about them that required 'close attention'.

Zimbabwe

Ms Petras provided an update on the situation in Zimbabwe as it approaches national elections. She also read a message from Zimbabwean human rights lawyer Beatrice Mtetwa, who did not attend the conference on legal advice after her recent arrest and detention, which attracted international attention.

Ms Petras said that Zimbabwe's Global Political Agreement, which established the current inclusive government, was to provide a new constitutional framework and create conditions for free and fair elections. She reported that the constitutional revision exercise was almost complete and that a draft - although not perfect - had been 'overwhelmingly accepted' by referendum, which indicated citizens were ready for a 'fresh start'.

The next step was to align the country's laws with the new constitutional provisions, especially the electoral laws, which needed to be finalised by 29 June, the date scheduled for parliament's dissolution.

'It is likely that the revisions will be rushed through, with minimal public input or scrutiny. Nevertheless, the general revision of laws on a broader basis must continue beyond elections and be encouraged,' she said.

Although an election date had not yet been set at the time of the conference, Ms Petras said that the country was 'es-

entially in an election period', which resulted in challenges: 'A new challenge resulting from the inclusive government is reduced opposition to the status quo by politicians, many of whom are benefiting from and enjoying the fruits of office. Civil society has essentially had to become a form of opposition to keep the politicians in check and push for reforms. For such reasons, it has been targeted accordingly.'

This included 'selective targeting' of mobilisers, educators, human rights monitors and those providing legal and medical support services.

'Instead of beating or arresting hundreds, key individuals are now targeted to serve as a lesson and warning for others, she said. Recent examples included:

- Raids on 'questionable search warrants' of key non-governmental organisations.
- Arrest and prosecution of key individuals from these organisations to keep them 'hamstrung in court' and away from their core business.
- Criminalisation of their work through suggestions that they are operating unregistered organisations, and are spies and criminals out to defraud the public.

In addition, Ms Petras said that lawyers and select members of the judiciary had been targeted through, for example, vilification in judgments and the media and attempts to deregister human rights organisations considered to be 'a challenge'.

Such attacks had been 'a psychological blow' for some, while others had 'become more determined', she said.

'The effect has been harshest on civil society and human rights defenders, who are concerned and fearful about who will assist them and how safe they will be if lawyers are now being targeted, coupled with ... the targeting of independent-minded judges for removal,' Ms Petras added.

In conclusion, Ms Petras called for support for civil society and the legal profession. She highlighted interventions in the past that had been of assistance, such as scrutiny and public outcry and monitoring court proceedings, as was done in Ms Mtetwa's case. She added that more could be done, including:

- Supporting local law-based organisations and encouraging continued independence in the execution of lawyers' duties.

- Encouraging members of Commonwealth judiciaries and the legal profession to apply pressure on their Zimbabwean peers.

'The message from lawyers back home is simple - we have not given up, and we will continue to do what we can for as long as we must to push for the rule of law, constitutionalism and the opening of space for human rights defenders ahead of elections,' Ms Petras concluded, prior to reading the message from Ms Mtetwa.

Message from Beatrice Mtetwa

In a written message, Ms Mtetwa said that in recent months there had been 'a crackdown on civil society activists', most of whom she had been involved in defending. She noted that these activists were deemed to be involved in election-related advocacy.

'My arrest in the course of the discharge of my mandate as a lawyer is, of course, meant to discourage human rights lawyers from representing their clients in so-called political cases, particularly as we enter the election season. This is, of course, a blatant and unashamed interference with my internationally recognised fundamental right to practise law without undue hindrances and interference,' Ms Mtetwa said.

She said that the legal profession in Zimbabwe was 'extremely grateful' for support from colleagues in the international community and that without such support she would probably 'still be languishing in custody'.

In conclusion, Ms Mtetwa said: 'The observance and maintenance of the rule of law is an international principle that lawyers the world over should fight [for] together without apology.'

Sri Lanka

Mr Jayasuriya said that the legal profession in Sri Lanka was facing 'tremendous challenges' linked to threats to the independence of the judiciary. In particular,

he spoke about the controversial impeachment of the country's former Chief Justice Shirani Bandaranayake.

'The strength of the Bar and the Bench are closely linked and complement each other. We may call ourselves twins - we may stand or fall together. There is thus a critical link between the independence of the judiciary and the legal profession,' he said.

He added that judicial independence was essential to the proper performance of the judicial function in a society dedicated to the rule of law and, 'if confidence in the judiciary evaporates, so does public respect for the judiciary'.

Thus, the Bar had a 'solemn duty to stand up to judges acting according to political dictates and to defend judges who fight political demands at the expense of civil liberties', he said.

This introduction related to the situation in Sri Lanka after what he described as 'doomsday' had arrived a few months previously.

He recounted how Justice Bandaranayake had been removed from office in January after a parliamentary committee found her guilty of 'trumped up charges', which she had denied.

The impeachment followed a Supreme Court ruling against the Divi Neguma Bill proposed by a cabinet minister, the President's brother.

Despite the Supreme Court finding that the parliamentary committee's proceedings were unconstitutional and the Court of Appeal issuing a writ overturning the committee's findings, the Chief Justice was impeached after the government ignored these orders, and a new Chief Justice was sworn in during January, Mr Jayasuriya said.

He also highlighted other developments, including the transfer of a number of judges and magistrates out of stations before the end of their tenure, emphasising that judges must have security of tenure.

In addition, he cited threats of violence, biased state media and vacancies in the judiciary as contributing to an 'unhealthy situation'.

'Other law enforcement-linked agencies, such as the Attorney-General and the police face serious problems due to political institutionalisation and loss of independence,' he added.

Mr Jayasuriya said that the courts were 'symbols of freedom' and the executive should not be able to 'extend an iron fist'. He said that lawyers had to ensure the protection of their clients' right to a fair trial.

'It is the duty of the legal profession to act and restore the independence and confidence in the judiciary. ... We must work in solidarity with the legal community in this global community, as lawyers and judges, to rally around and share

our plight and protect the rule of law and the dignity of the legal profession,' Mr Jayasuriya concluded.

Ms Sooka added to Mr Jayasuriya's presentation by confirming support for the ousted Chief Justice and proposing a suitable response from the Commonwealth community.

'The rule of law is under siege in Sri Lanka. Any voice of dissent is targeted and disappears,' Ms Sooka said.

The response from the Commonwealth legal community should be to stop the Heads of Government meeting taking place in Sri Lanka later this year, Ms Sooka said.

'We should send them a message - you cannot be awarded if you fail to adhere to the standards of your peers,' she said, adding that the community should 'make an example' of the members of parliament who were part of the impeachment of the Chief Justice and should ensure that they could not travel.

'Sri Lanka should not be able to participate in any events of the Commonwealth,' Ms Sooka concluded.

Resolution on Sri Lanka

Following these presentations, Ms Ozo-bia announced a resolution on the situation in Sri Lanka by the Commonwealth Lawyers Association (CLA), the Commonwealth Legal Education Association (CLEA) and the Commonwealth Magistrates' and Judges' Association (CMJA). The resolution was adopted unanimously at the conference.

The resolution notes that membership of the Commonwealth is seen as 'a badge of respectability'; however, this badge was 'being tarnished by repressive actions in Sri Lanka', including -

- the continued erosion of the independence of the judiciary through the impeachment of the Chief Justice and the subsequent relocation of magistrates



President of the Bar Association of Sri Lanka, Upul Jayasuriya, spoke about challenges currently facing the legal profession in Sri Lanka

and judges;

- the executive's failure to abide by court orders; and
- the 'gross and persistent harassment' of members of the legal profession and others.

The resolution calls on members of the Commonwealth, through the Commonwealth Ministerial Action Group, to place Sri Lanka on the agenda of its next meeting, which was to take place on 26 April 2013, and suspend it from the councils of the Commonwealth 'for serious and persistent violations of the Commonwealth fundamental values'.

'This suspension would not preclude the people of Sri Lanka from participating in non-governmental Commonwealth activities,' the resolution notes.

In the resolution, members of the Commonwealth were also urged to re-

consider the holding of the next Heads of Government meeting in Sri Lanka, as doing so would -

- tarnish the reputation of the Commonwealth, especially as the Sri Lankan head of state would thereby assume the role of chair-in-office;
- call into grave question the 'value, credibility and future' of the Commonwealth; and
- be seen as condoning the action of governments that violate its principles and would undermine the moral authority it purports to have in protecting and promoting fundamental values of the rule of law and human rights.

Notwithstanding this, the CLA, CLEA and CMJA affirmed their support to those seeking to uphold the rule of law in the country.



Outgoing Commonwealth Lawyers Association President Boma Ozobia announcing a resolution on the situation in Sri Lanka.

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Closing ceremony

The chair of the closing ceremony, executive governor of the Akwa Ibom State of Nigeria, Obong Godswill Akpabio, thanked the Commonwealth Lawyers Association (CLA) for hosting a 'successful' conference. He added that no venue was more fitting than South Africa to host the Commonwealth Law Conference (CLC).

The closing ceremony's keynote speaker was Lord Chief Justice of England and Wales, Lord Igor Judge, whose address, titled 'Equality before the law', was met with a standing ovation when he concluded.

At the outset, and highlighting one of the main points raised at the conference, Chief Justice Judge said:

'Never take the rule of law for granted. Never, ever. The best of constitutions can be subverted. The democratic process itself can, as it did with Hitler in Nazi Germany, bring an evil dictator to power. As a result, unnumbered millions died - millions in concentration camps, millions fighting to rid the world of the wickedness he had spawned. It all stemmed from the subversion of the democratic process. ... Those brave lawyers from Zimbabwe and Sri Lanka reminded us of the need for eternal vigilance. We, as lawyers, have the trained eyes to see, and the trained lips to voice the alarm signals. We have a particular responsibility to be vigilant.'

Chief Justice Judge said that the location of the conference, South Africa, should not be overlooked, adding: 'This



The closing ceremony's keynote speaker, Lord Chief Justice of England and Wales, Lord Igor Judge, whose speech was met with a standing ovation.

vast group of common lawyers, judges, advocates, academics, researchers, men and women of unimpeachable intellectual quality and professional integrity, has gathered together without reference to the colour of their skins, and we have shared our views and experiences.'

He added that the significance of this was that this happened in South Africa, 'where, not so very long ago, the colour of your skin, not your qualities as a human being, decided everything about the life that you would lead, and the human company that you could keep, in a country where the law itself negated the principle of equality before the law'.

Chief Justice Judge further said: 'Let me give you an example. If I say: "I am a white man", let us be clear that "white" is an adjective. It simply describes the colour of my skin. But, on the level of apartheid, it meant that the colour of my skin defined me. It became the most important thing about me. In apartheid times, that absurd fact defined your very humanity. Yet if I say: "My skin is white", that is a true fact, but it tells you absolutely nothing about the human being I am: All my qualities, all my deficiencies. In fact, described in this way, the colour of my skin is of total irrelevance. ... It would be of no importance if the colour of my skin was white, black, green, red or blue - you might look at me, but you would not judge my humanity. And, if we are to be judged equally before the law, that is how skin colour must be seen, not as a matter of convention or convenience, nor even, valuable as it is, as a right provided by a written constitution, but as a matter of principle so fundamental that it cannot be changed, and, if it is changed, no matter what the pretensions of that state to embrace the rule of law, the rule of law is shattered.'

Chief Justice Judge referred to former South African-born English cricket player, the late Basil D'Oliveira, who was not permitted to play cricket in the South African team because of the colour of his skin.

He said: 'At the time, these events opened the eyes of well-meaning people all over the world about something ... of the realities of apartheid South Africa. Even a number of well-meaning

people never really understood it. But they balked at the astonishing proposition that a man could not play cricket ... in South Africa, against white South Africans, just because of the colour of his skin. He could not even walk onto the pitch with them. ... And, of course, what happened to D'Oliveira was trivial compared to the fate of those who were executed and incarcerated, and those who lived under a law which, in the spurious interests of protecting the public from acts of terrorism, meant that you could be locked up for 90 days in solitary confinement without being charged and, on your release after the 90th day, be rearrested, and again locked up in solitary confinement for a further 90 days, and so on.'

Chief Justice Judge recalled the 'horrors' of apartheid, which also included the torture of men and women. He added: 'Eventually, this horror came to an end' and the Truth and Reconciliation Commission was created, as a product of the new constitutional arrangement. He said that the purpose of the commission was 'to establish the gross violations of human rights, which was too broad a phrase to describe "the whole story", because it failed to capture the daily, repeated instances of man's inhumanity to man ... all committed between 1960 and 1993'.

Also, '[t]he purpose was to ensure that just because the full facts would be made public, the overwhelming public response thereafter would be to reject any system which allowed these events to occur', said Chief Justice Judge.

With regard to the amnesty granted to perpetrators of gross human rights violations, the Chief Justice quoted the judgment of the then Deputy President of the Constitutional Court, Judge Ismail Mahomed:

'Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of law.'

The Chief Justice added that the Truth and Reconciliation Commission 'was a high risk strategy and it was not inevitable that it would have the desired result'. However, he said: 'This conference proves that it did.'

Chief Justice Judge referred former President Nelson Mandela, who he considers to be one of 'the greatest human beings of this, or the last, or ... any previous century'.

He said that Mr Mandela, as early as 1964, emphasised living in harmony and equality, and who said that he cherished an 'ideal of a democratic and free society in which all persons live together in harmony with equal opportunities' - an ideal for which he was prepared to die.

Chief Justice Judge said that South Africa's achievements in respect of a peaceful change in government and the establishment of a new Constitution were both examples provided to the world of the peaceful restoration of equality before the law and the unacceptability of discrimination.

Regarding the phrase 'the rule of law', he said: 'As lawyers, we rather understand when the rule of law is applied, and recognise it, and understand and recognise when it is not. But if we are looking for one crucial ingredient in the rule of law it is that we must live in a society in which every citizen is treated equally by the law. ... Neither money nor wisdom nor strength nor social position nor political or financial power should ever attract special privileges or special treatment from the law. The poor man at his gate is entitled to treatment equal to that of a President or Prime Minister. ... So skin colour, race, gender, religious creed, sexual orientation and family background must be totally excluded from consideration in the judicial process.'

Chief Justice Judge said that judges must aim to do justice according to the judge's oath - 'without fear or favour, affection or ill-will'. He said that the oath meant that the judge must be courageous in facing possible personal threats from individuals or officers of the state. He added that the oath went further to mean that the judge must be blind to

prejudice, impartial, fair, balanced, with a true appreciation of common humanity.

'In that way, we ensure equality before the law,' he said.

He added: 'Ultimately, that is the basis for the achievement of every human right, an issue which has been a major topic of discussion throughout this conference. Let us just examine it. Do we ignore the poisoned river because it is the poor, rather than the middle classes, who live and suffer in proximity to it? Of course not. Do we ignore the unlawful arrest of an individual who has been charged with a dreadful offence, or indeed who has been demonised by society? Of course not. Do we allow freedom of speech only to those who agree with and express views which we share? Of course not. A human right that is not universally available to every citizen in the country is a contradiction in terms. It is equality before the law that underpins the concept and ultimate achievement of the rights bestowed upon us by our common humanity.'

In closing, Chief Justice Judge said that the conference had underlined the many facets of the rule of law.

He added: '[W]e must remain resolved that whatever the colour of our skin, race, creed, gender, or whatever it might be, the starting principle for the rule of law is that, in law, we are equal, and that it is the fundamental obligation of the law to treat us so. Here in Cape Town we have been vividly reminded by the living recent history of South Africa that this indeed must be and must remain our common purpose and that we must be vigilant to maintain it.'

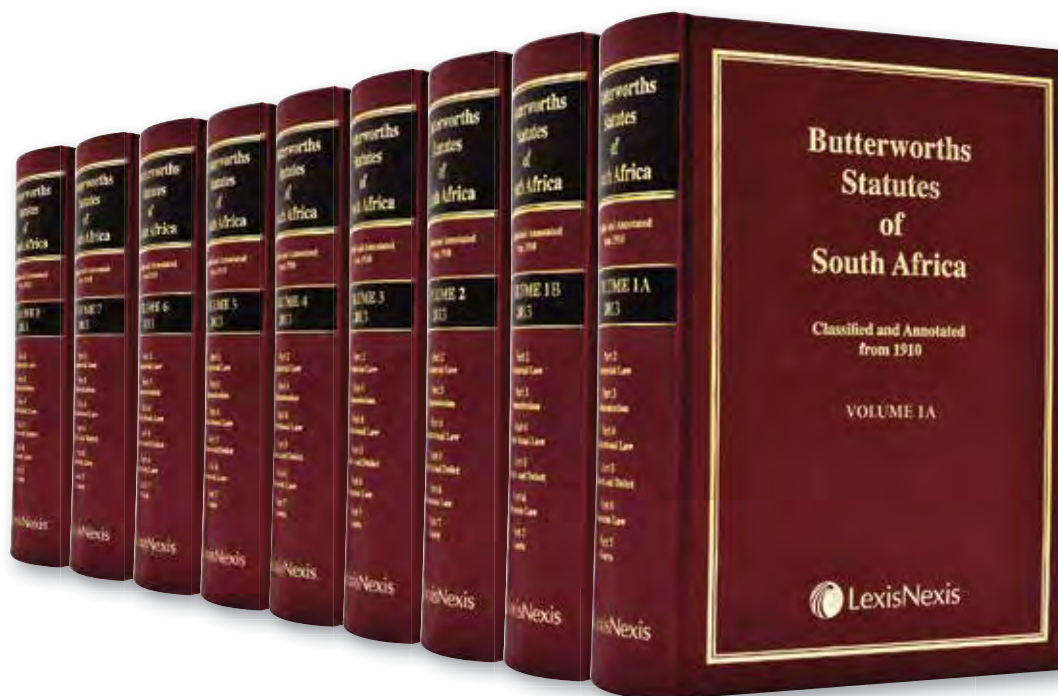
Announcements



Mark Stephens CBE (pictured) was announced as the new President of the Commonwealth Lawyers Association. Other announcements included the first recipient of the Commonwealth Rule of Law Award, Canadian lawyer Robin Sully, and the winners of the 13th Commonwealth Moot competition, the United Kingdom team, Daniele Selmi and Matthew Sellwood.

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CLC Stream A: Corporate and commercial law

Are special commercial courts a bad idea?

Under the topic of corporate and commercial law, a session was held to consider whether special commercial courts were a good or a bad idea.

The chairperson of the session was Nigerian Bar Association council member, Miannaya Essien SAN; while the speakers were English solicitor, David Greene; President of the Ghana Bar Association, Nene Amegatcher; and British Virgin Islands Attorney-General, Dr Christopher Malcolm.

Purpose of commercial courts

Mr Greene said that the purpose of a commercial court was to offer a service to the business community and to, hopefully, have 'a trickle-down effect' in easing the caseload of other courts.

However, Mr Greene questioned –

- whether the trickle-down effect, in fact, existed;
- if investing in commercial courts was 'worth it';
- what effect such a court would have on the domestic attorneys' profession, as it could be exclusionary;
- how such courts would affect the wider justice process;
- whether commercial courts would have a positive impact on the country; and
- whether such a court would lead to further investment in the country.

Jurisdiction

Mr Greene said that the jurisdiction of commercial courts was determined by a mixture of quantum and the nature of the claim. He added that commercial courts needed specialist judges with practice experience in commercial disputes. He suggested that a 'ticketing' system be used, whereby only judges with extensive experience in commercial matters are assigned such cases. He added that commercial courts tended to have a 'free market and World Bank thinking' on enforcement of contracts and became presurised by investors.

African commercial courts

Mr Greene said that a commercial court was established in Tanzania in 1999. He said that the court was a stand-alone court that had a court-users committee, whose role was to appoint mediators for court-annexed mediation. He added that

the jurisdictional limit of the court was 1 million Tanzanian Shillings. Mr Greene spoke about another African commercial court, which was situated in Uganda. He said that the Ugandan commercial court was a busy court that used the ticketing system and which started court-annexed mediation in 2003. He added that, at the time, Uganda did not have trained mediators to fill the role of mediators at the court; therefore, the court used second-year law students as mediators.

European commercial courts

In England and Wales, Mr Greene said that the commercial court was not part of the main court process, while in Ireland the court had jurisdiction and discretion to hear non-commercial matters. Mr Greene added that the commercial court in Ireland was popular with practitioners and was successful.

The Ghana experience

Opening his address, Mr Amegatcher said that the move towards specialist commercial courts in countries such as Uganda and Ghana was largely influenced by delays in the court process and the need for expert handling of commercial matters. He noted that the business sector drives the economy of any country and if governments do not assist the business sector, the economy suffers. In his opinion, commercial courts should be tailored to deal with the different disputes that form part of the commercial community and the court should avoid unnecessary delays in the process.

In Ghana, in 2001, to ease congestion and fast track court matters, the courts were automated. Proceedings were recorded digitally and the recordings were saved on computers. This did not help with commercial matters as few of these were heard by the courts, he said. The migration to digital recording was an expensive exercise for the courts; therefore, the courts gradually reverted to recording proceedings manually, he added.

Mr Amegatcher said that, with the declaration of the 'golden age of business' in 2002, the government saw the need to streamline the judiciary and make it responsive to the needs of the commercial community. He said that, at the time, the courts were congested, which frustrated litigants. He added that another issue

that added to the delay of the court process in Ghana was that the court proceedings were recorded manually and in long hand. Also, judges had little or no expertise in commercial matters and relied on lawyers to arrive at their decisions. Lack of infrastructure and delays in disputes led to less business activity and no business progress in Ghana, he said. To address the needs of the commercial sector, a commercial court was established, said Mr Amegatcher.

Mr Amegatcher added that the objective of the Ghanaian commercial court was to offer speedy, efficient service to the business sector in order to promote trade and investment. He said that the rules of other Ghanaian courts applied in the commercial court. He added that the commercial court had six court rooms, one Judge President, administrative staff, a registrar, a library, an accountant and two standing committees that ensured the efficient functioning of the court.

The pre-trial process was a mandatory alternative dispute resolution (ADR) process to attempt settlement; no case will proceed to be heard by the court until this process is followed. One in five cases was resolved through ADR and disposed of before trial, said Mr Amegatcher.

He added that one negative aspect was that digitised recording by the commercial court made other judges perceive commercial court judges as receiving special treatment, as other courts still recorded manually. Lastly, he said that the main challenge of the commercial court was that no specialist appellate division existed.

The future

In closing, Mr Greene said that the success of commercial courts depended on the ability of litigants to enforce judgments from the court.

Dr Malcolm, in answering the question posed by the title of the session, said: 'The short answer is: "Yes".' He said that a critical element of commercial disputes was time.

'Governments should see courts as their critical arm to ensure that they do not undermine the "goose that lays the golden egg",' he said.

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LABOUR LAW - RETRENCH- MENT AND LABOUR LAW JUDGMENTS

Johannesburg: 4 July
Pretoria: 5 July
East London: 11 July
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Bloemfontein: 26 July

DEBT COLLECTION - THE LITIGATION PROCESS

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Bloemfontein: 2 August

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CLC Stream B: Legal and judicial profession

Who guards the guardians? Regulation of the legal profession

In a session chaired by South African attorney Max Boqwana, the chairperson of the United Kingdom (UK) Bar Standards Board, Baroness Ruth Deech; South African advocate Jeremy Gauntlett SC; and Canadian general counsel Malcolm Mercer spoke on the regulation of the legal profession.

The Canadian experience

Mr Mercer outlined four possible regulators – or selectors of regulators – for the legal profession, namely:

- Government.
- The courts.
- The legal profession.
- A combination of the above.

He then highlighted the advantages and implications of each of these options.

Government as regulator

Mr Mercer said that if the government was well run, it would follow that regulation would be done in the public interest rather than in the interest of lawyers and that there would be a focus on regulating legal services as opposed to lawyers. However, one risk associated with government regulating the profession related to the control of the profession in the political interest of the government.

Courts as regulator

Mr Mercer said that having the courts regulate the profession lessened the risk of regulation being in the interest of the profession rather than in the public interest. However, there was the possibility of a limited perspective, focusing on litigation rather than legal practice generally. There was also limited institutional regulatory ability, he said. One risk associated with this option was a possible compromising of 'zealous representation', as some lawyers may not want to risk offending their regulator.

The legal profession as regulator

Advantages of this option included that the profession had strong expertise and interest, and this would promote professionalism. However, it came with the risk of 'protectionism' and regulation in the interest of the profession rather than in the public interest, as the perspective would be that of the profession rather than clients and society.



In a session chaired by South African attorney Max Boqwana (right), the chairperson of the United Kingdom Bar Standards Board, Baroness Ruth Deech (second from the left); South African advocate Jeremy Gauntlett SC (left); and Canadian general counsel Malcolm Mercer (second from the right) spoke on the regulation of the legal profession.

Canada

Mr Mercer said that regulation was a provincial matter in Canada, with the law societies as regulators in each province.

'The law societies regulate in the public interest rather than in the interest of the profession. Advancing the interests of the profession is not the role of law societies,' he said. He added that the role of the Canadian Bar Association was to advance the interests of the profession, with concern for the public interest.

Mr Mercer said that most directors were elected by the profession, while some non-lawyers were appointed by the government. They are responsible for setting regulatory policy and rules, while the staff is responsible for the regulatory operations, including investigating and prosecuting in relation to disciplinary matters, he said. However, the situations in Quebec and Ontario are different.

Mr Mercer discussed several court cases to illustrate challenges posed by administrative agencies, the courts and government, as well as future challenges in Canada.

Challenge by administrative agencies

Mr Mercer said that the United States had 'substantial regulation' of lawyers by agencies, such as the Securities and

Exchange Commission, before whom lawyers appear, which was not currently the case in Canada. However, Mr Mercer said that this may change and referred to a 2001 case in which the Ontario Court of Appeal rejected the law society's position that the Ontario Securities Commission had no jurisdiction to reprimand a lawyer for misconduct and that the commission's action 'collided' with the law society's authority to discipline lawyers and also infringed the constitutional principle of the rule of law.

Challenge from courts

In respect of the second category of challenges, Mr Mercer referred to several decisions relating to client conflict. He noted a January 2013 Supreme Court of Canada appeal in which judgment had been reserved, where the Canadian Bar Association had intervened and argued that the courts should not regulate lawyers in competition with law societies by establishing rules of professional conduct for lawyers rather than applying principles of fiduciary law.

Challenge from government

Mr Mercer said that the third category of challenge was an indirect one in the form of a series of legislation. He said that the Proceeds of Crime (Money Laundering) and Terrorist Financing Act SC 2000

(c17) imposed a duty on lawyers and law firms to report suspicious transactions to a government agency. The Federation of Law Societies of Canada and the Canadian Bar Association responded with litigation, claiming that the reporting regime was unconstitutional, which was upheld by the British Columbia Court of Appeal earlier this year.

In doing so, the court found that the solicitor/client privilege and the independence of the Bar were principles of fundamental justice, which Mr Mercer described as a 'significant' finding, although he noted that government may still appeal the decision.

Future challenges

In conclusion, Mr Mercer set out some of the challenges Canada was expected to face in the future. He noted that the country did not experience the same difficulties as some countries in respect of a challenge to self-regulation. He said that there was increasing awareness that the regulation of the profession and of legal services were different matters.

He questioned whether the law societies would recognise that not all legal services were best delivered by lawyers and, if they did, that public interest required a principled determination of which legal services should be provided by lawyers only. It was likely to be in the public interest, he added, to allow non-lawyers to compete with lawyers and to increase competition and innovation.

Mr Mercer noted that there were advantages to having legal services regulated by members of the profession 'who care deeply about the rule of law' and the administration of, and access to, justice; although he said that concern for effective competition and innovation was not 'obviously intrinsic' to the profession. He said that the Canadian challenge was thus to develop sufficient support for the latter in order to better achieve the former by continued self-regulation.

The UK experience

Baroness Deech began her presentation by stating: 'One thing that binds the Commonwealth is an understanding of the rule of law, which is extremely important to all of us.' She added that it was essential to the public interest and the rule of law to have advocates who were independent.

In response to Mr Mercer's presentation, she said that the profession was currently 'more under attack' due to cuts in legal aid and fees and an increase in self-representation than in terms of regulation, adding that self-regulation was 'outdated'.

Baroness Deech spoke about the UK's Legal Services Act 2007 (c29) (the Act), under which she operated as chair of the Bar Standards Board, and noted that it bore similarities to South Africa's Legal Practice Bill (B20 of 2012).

The Act created the board to regulate barristers in England and Wales and oversee the legal approved regulators, the Bar Council and solicitors.

The board is responsible for:

- Education and training requirements for becoming a barrister.
- Barristers' continued development.
- Setting standards of conduct for barristers.
- Monitoring the service provided by barristers to assure quality.
- Handling complaints against barristers and taking disciplinary or other action where appropriate.
- Making decisions about the ways barristers may work under the Act.

The Act also established an Office of Legal Complaints, with a new ombud serving as a single-entry point for complaints. However, the board continues to deal with professional misconduct, she said. The Act also facilitates new working structures, legal disciplinary practices and alternative business structures.

'The new Act has added to complications, duplication of regulation and it is expensive [to implement],' Baroness Deech said.

She added that a 'super regulator' was not suitable for a small organisation or profession like the Bar.

She said that there was concern that some would like to see the end of the Bar as a separate profession, but she did not support a fused profession. There was also fear of an increase in the power of government to control the legal profession.

'A separate advocacy profession is essential to the rule of law,' she said. 'We are fighting to save the cab-rank rule and to stop the payment of referral fees. The public should have a free choice. All issues bear in mind the rule of law,' she added.

Also essential was the need for a separate regulator for the Bar, Baroness Deech said, adding that the Bar Standards Board played an important role in guaranteeing the independence of the profession.

The South African experience

In his address, Mr Gauntlett highlighted features of the Legal Practice Bill (the Bill) that he believed would undermine and weaken South Africa's legal profession, which in turn would negatively impact on the independence of the judiciary.

'Without independent courts, there are no rights in the country; without independent lawyers, there are no independent courts,' he said at the outset.

Mr Gauntlett queried how best to strike a balance between the regulation and the independence of the profession, both of which were contemplated by the Constitution.

He said that the Bill failed to strike this balance.

'What is now mooted is, effectively, the profession will pass from being an aspect of civil society, vital to South Africa, like the media,' he said, adding that the profession would thus cease to be a part of civil society and would instead be replaced by an organ of state in the form of a statutory body at the top, with the Justice Minister having the power to appoint members of this body, and regional bodies under this top structure, including what are currently the law societies and Bar councils.

Mr Gauntlett questioned whether such changes to be brought about by the Bill were necessary. He said that, despite the common perception, the profession was not in an unregulated state and had, in fact, been regulated for many years, and had been under both judicial and statutory control.

In addition, he responded to several justifications that had been provided for the Bill. One of these was to promote access to justice; however, he questioned exactly how the Bill would achieve this and for whom. 'There is nothing in the Bill promoting access to justice,' he said.

Another justification provided was to increase access to the profession, he said; however, he did not believe that the Bill would provide the solution:

'The profession has taken a number of steps to promote more women and black people to join the profession. The achievements have been staggering, but are they enough? No. But what will be the talismanic thing in the Bill to achieve this?'

In addition, Mr Gauntlett dismissed the justification that the Bill would result in more affordable legal fees.

'It will not be cheaper to go to court because this Bill goes through,' he said. He added that the 'wedding cake edifice structure' the Bill proposed for the profession had not been costed and 'the reality' was that the cost of implementation would 'bear down heavily' on young members of the profession.

He added that, currently, members of the profession, *inter alia*, sat on committees, funded libraries, provided training and dealt with disciplinary matters voluntarily.

Mr Gauntlett indicated his preference for a regulator similar to that in the UK, with institutional autonomy and which is at 'arm's length with those at the Bar'. He said that economic issues should be dealt with separately.

'It is we who have to do this, not some big brother in Pretoria,' Mr Gauntlett said in conclusion.

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Access to justice: Poverty and legal aid in the Commonwealth

A session with a question and answer format considered legal aid in Kenya, South Africa, England and Malaysia. The session was chaired by Professor of Law at the Centre for Socio-Legal Studies at the University of KwaZulu-Natal, director of Street Law South Africa and President of the Commonwealth Legal Education Association, David McQuoid-Mason, who posed questions to Kenyan consultant on Human Rights and Governance, Violet Mavisi; South African Gauteng Judge President Dunstan Mlambo; President of the Law Society of England and Wales, Lucy Scott-Moncrieff; and Malaysian Chief Justice of Sabah and Sarawak, Richard Malanjum.

Below are some of the questions and responses that emerged from the session.

How is legal aid provided in your country?

Responding to the above question, Ms Mavisi said that legal aid in Kenya was primarily 'provided through faith-based non-governmental organisations' (NGOs). She added that government had also started a pilot project of providing legal aid. However, she said this pilot project had only been implemented in some areas, such as major cities, and not in the poorer parts of the country, and had it few staff members.

In respect of South Africa, Judge Mlambo noted: 'South Africa has a functioning legal aid scheme that ensures that people without means are represented.'

He said that this included the right to have an attorney at the state's expense. He said that Legal Aid South Africa had centres in all nine provinces of the country, with a total of 64 justice centres that employed salaried lawyers. He added that university law clinics and NGOs also formed part of the legal aid system. Legal Aid South Africa is mandated by s 35 of the Constitution and the Legal Aid Act 22 of 1969, he said.

Ms Scott-Moncrieff said that, in the United Kingdom (UK), legal aid had been widely used for the past 60 years due to the application of the means test and its connection to the welfare system. She said that, currently, legal aid was provided for those in the greatest need, and that large law firms also supported legal aid clinics by providing *pro bono* services.

Due to government cuts in funding, students were also providing legal aid services. In other instances, litigants were advised to deal with matters themselves instead of being part of the legal aid system. The UK also has an immigration adviser system that is funded through philanthropic means, said Ms Scott-Moncrieff.

Justice Malanjum said that in Malaysia the National Legal Aid Foundation was 'well utilised' as there was a great need



From left to right: Malaysian Chief Justice of Sabah and Sarawak, Richard Malanjum; President of the Law Society of England and Wales, Lucy Scott-Moncrieff; South African Gauteng Judge President Dunstan Mlambo; and Kenyan consultant on Human Rights and Governance, Violet Mavisi, spoke on legal aid in their jurisdictions.

for it by the poor, and NGOs also provided free legal aid. Government has granted the foundation 5 million Malaysian ringgits, which will, among others, be used to retain lawyers at a cheaper rate, he said.

Justice Malanjum added that legal aid involvement could be seen in the urban areas, but not as much in the rural jungle areas.

What is the role of legal aid in your country?

Ms Mavisi said that, among other things, the role of legal aid in Kenya was to disseminate legal awareness information and give advice to the public; it also conducts prison visits. She added that Kenya does not have a public defender organisation and, therefore, the community relies on NGOs and universities to provide legal aid. A 'huge contributor' to legal aid in the country are faith-based NGOs that have law clinics in churches, she said. She added that there were also federal government bodies in the country that assisted individuals to represent themselves.

Ms Mavisi added that the Legal Aid Bill, 2012 would establish a formalised legal aid scheme funded by the Ministry of Justice. She added that the current pilot legal aid scheme rendered by government had no budget and was running 'on the goodwill of the Minister of Justice'. The Bill also seeks to accredit NGOs that provide legal aid, monitor them and ensure that their work is standardised.

Justice Mlambo said that Legal Aid South Africa assisted the public with criminal and civil matters. He added that Legal Aid South Africa had 13 civil legal units and had established a call centre two years ago, which allows the public to phone in and receive legal advice.

Ms Scott-Moncrieff said that in the UK legal aid incorporated civil and criminal matters.

With regard to the question posed, Justice Malanjum said that legal aid covered criminal and civil matters. He said that a mobile court had been introduced to render legal aid to people who live in the jungle. The judges and officials who service the court do so on a voluntary basis, he added.

How is legal aid funded?

Currently, legal aid in Kenya is mainly funded by donations through NGOs. In future, once the Legal Aid Bill is enacted, government will be able to fund legal aid and render 'much-needed' access to justice for the poor, said Ms Mavisi.

Justice Mlambo said that Legal Aid South Africa was fully state funded by the treasury through the Justice Department. He said that the scheme used a salaried-attorneys model; 'their quest is to cover every court in the country and this model enables them to have a presence in every court'.

'Legal Aid South Africa is accountable to parliament and the Minister of Justice; however, this does not mean it is told what to do; it is functionally independent, Justice Mlambo said.

In terms of who can access legal aid, Justice Mlambo said that Legal Aid South Africa was governed by the Legal Aid Guide, which contained a means test. In terms of the means test, he said that those who have access to legal aid must earn a net monthly salary not exceeding R 5 500. He added: 'There is a category we have termed "the not so poor", meaning they fail the means test yet they cannot afford legal fees. There is a new policy where that category of people will be given legal aid and asked to contribute what they can.'

Ms Scott-Moncrieff said that the UK spent an equivalent of R 28 billion each year on legal aid. She said this amount would drop to a third in the next two years. She added that *pro bono* services and volunteer help by students made a smaller contribution to legal aid in the country. Also, she said, there was no constitutional right to legal aid in the UK.

Justice Malanjum said that legal aid was state funded.

What is the public's perception of the legal aid services offered?

Answering the above question, Ms Mavisi said that an assessment was conducted to gauge how the public perceived the

legal aid they received from NGOs. She said that the assessment showed positive results.

'In future, once the law comes into place, NGOs will be monitored according to the new Act that will ensure that industry standards are kept,' she said.

Justice Mlambo said that, as part of Legal Aid South Africa's strategic plan, it consulted with the public to receive com-

ments and feedback.

He said the public had criticised the quality of work rendered by government attorneys. To combat this, he said, Legal Aid South Africa evaluated all judiciary practitioners and salaried in-house attorneys each year to ensure quality assurance. He added that Legal Aid South Africa also had an accreditation model for attorneys who perform outsourced work.

'Legal Aid South Africa supports the appointment of paralegals, as they cover a lot more work at a lesser amount. This also helps in-house attorneys in that their workload remains sustainable,' said Justice Mlambo.

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Perspectives on legal education and vocational training in the Commonwealth

Aspects of legal education in South Africa, the United Kingdom (UK) and Scotland were discussed in a session chaired by the dean of commerce, law and management at the University of the Witwatersrand, Professor Nqoso Mahao. The session's speakers were Professor of Law at the Centre for Socio-Legal Studies at the University of KwaZulu-Natal, director of Street Law South Africa and President of the Commonwealth Legal Education Association, David McQuoid-Mason; UK Secretary-General of the Chartered Institute of Legal Executives, Diane Burleigh OBE; and Scottish Professor Stewart Brymer of the University of Dundee.

Overview of legal education in the Commonwealth

Giving a statistical overview of legal education in the 54 Commonwealth countries, Professor McQuoid-Mason said that university law schools and law faculties in 35 Commonwealth countries offered the LLB or an equivalent degree, while vocational training is offered in 23 countries. Articles of clerkship or internship placements are required in 23 Commonwealth countries, while graduates have to pass the Bar examination in addition to their law degree in 13 countries.

Ms Burleigh said that work-based learning at the Chartered Institute of Legal Executives looked at the legal landscape and its impact in order to determine what form of training was needed in the market, both currently and in the future. She said that there had been debates in the UK on the professional law qualification. She added that the debates had gone as far as questioning if one needed a qualification to be a lawyer.

Professor Brymer said legal practice had evolved and, therefore, 'so must its teaching'. He added that legal education needed to adapt and embrace new growth areas. However, he said that there should not be change 'for the sake of change'.

Legal education regulation

Ms Burleigh said that legal education businesses were regulated in the UK and a wide range of business models, as well as alternative business structures, were regu-

lated. She added that the regulatory objectives included protecting and promoting the public interest; supporting the constitutional principle of the rule of law; improving access to justice; protecting and promoting the interests of consumers; and encouraging an independent, strong, diverse and effective legal profession.

Challenges of legal education

Professor McQuoid-Mason said that the South African schooling system was not delivering students who were ready for university: 'Law students need to be taught how to communicate efficiently, orally and through writing,' he said, adding that law students must be taught 'lawyering skills' at university before they undergo practical legal training.

Adding to the above challenges, Professor McQuoid-Mason said that constraints on legal education and vocational training in developing Commonwealth countries included:

- Limited spaces available for legal education in state-funded universities.
- Too many private universities offering law degrees, causing bottlenecks at vocational training schools.
- Limited places for vocational training, with too many students in vocational training programmes.
- Outdated curricula.
- A lack of –
 - effective teaching methods;
 - training in interactive teaching methods;
 - training in e-teaching methods; and
 - skills training for students.

Ms Burleigh said that legal educators should bear in mind that attorneys were 'products to be sold' and were at the retail end of the business of law. She added that firms employ attorneys with the skills that enable them to compete in the market currently and in the future. Therefore, attorneys need to have the skills that the law firm requires and also need to develop skills for services the law firm may provide in future.

Adding to the challenges, Professor Brymer said that legal educators needed to have a broader perspective in legal education, while meeting the demands of the legal profession. Legal educators need to 'produce trainees with commercial per-

spective and awareness of other areas of business', he said.

Effective teaching methods

Professor McQuoid-Mason said that, in Nigeria, a class can have as many as 1 500 law students. To address the issue of overcrowding in law classes and to offer students a better chance of understanding study material, he said that examples of effective e-learning methods that could be used were e-tutorials, chat rooms, virtual worlds (computer-based simulated environments), wikis (websites that allow users to add, modify or delete content), blogs and social networks. He said that providing free short courses involving thousands of students in discussion forums was another e-learning method that could be used. The only challenge would be to establish an electronic connection, said Professor McQuoid-Mason.

Curriculum development

According to Professor McQuoid-Mason, law faculties must develop curricula that reflect the rapid changes in the Commonwealth legal landscape by recognising 'the richness of the Commonwealth jurisprudence'. In addition, faculties should add courses that are relevant to the contemporary legal practice of their specific countries, which are also relevant to lawyers' interaction with the global village, said Professor McQuoid-Mason.

Perspectives on legal education

Professor Brymer said that, in Scottish universities, the public and the profession had different perspectives on the role legal education should fulfil. In terms of the universities' perspective, he said:

'Universities want students to have a broader understanding of legal methods and jurisprudence, while promoting a more rounded graduate and, hopefully, [one] who is more employable in law and elsewhere. However, universities are not a training ground for the profession.'

With regard to the profession's perspective, he said that the profession required graduates to be proficient in core disciplines. He added that the profession also required graduates who were ready for the challenge of modern business life.

He said that the public's perspective was that there were too many lawyers in the market.

Conclusion

In closing, Professor McQuoid-Mason said: 'The production of increasing numbers of law graduates, particularly in the private sector, is putting pressure on vocational training institutions to teach large numbers. The artificial dichotomy between legal theory and legal skills should be addressed by introducing in-

teractive clinical law methods of teaching. Measures should be taken by Commonwealth law faculties and law schools to update their teaching methods by embracing the digital revolution. Curricula in the universities and vocational law schools should be updated to make them relevant to contemporary legal practice at home and abroad.'

Ms Burleigh said an attorney's core knowledge needs to demonstrate competency in writing and drafting. She added that attorneys also needed to demon-

strate the ability to apply values and to have the necessary commercial skills, including networking, managing and leading an organisation.

Finally, Professor Brymer said that the practice of law was about 'more than making money'. He added: 'It is essential for attorneys to be aware of social pressure and the many opportunities that exist.'

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Junior lawyers: Business as usual – an inconvenient truth

The challenges younger members of the legal profession face are in some instances shared by their colleagues in other countries, while some are country specific, as was revealed in a session on junior lawyers.

The session, which took a question and answer format, was chaired by South African advocate Steve Budlender. The panel was made up of Ajit Sharma, counsel at the Supreme Court of India; Hannah Kinch, the chairperson of the Young Barristers' Committee of the Bar Council of England and Wales; and Chigozie Anyanwu, a senior associate in Nigeria.

General challenges

On the major challenges junior lawyers face once they have entered the profession, Mr Budlender asked each panel member to briefly discuss the situation in their country in respect of whether they received enough work to sustain themselves and whether there was sufficient work in different areas for junior lawyers to get adequate exposure. Further, he asked to what extent training was provided to junior lawyers.

Ms Kinch said that the main challenge as a junior lawyer in her jurisdiction was

largely dependent on the area of law in which he or she practised.

A particular challenge for those at the publicly funded Bar, Ms Kinch said, was in respect of the fees they were paid: 'Many students entering the profession are saddled with enormous amounts of debt and, if they are not earning much because fees are constantly being reduced by government, their ability to meet debts and sustain themselves financially is certainly difficult.'

Another challenge was that an increasing number of solicitors were doing advocacy work, often at a level where young barristers would usually be taking

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Prof Frans Viljoen, Faculty of Law, University of Pretoria

Over the last decade or so, international acceptance of 'sexual minorities' has increased significantly, reflected in the consensus that a person's sexual orientation or gender identity should not be a basis for denying him or her the equal protection of the law. In most of the African continent, a conflicting trend of formally stigmatising homosexuality has manifested itself, leading to three questions that will be discussed by Prof Viljoen in this lecture.

Prof Frans Viljoen holds a master's degree in Afrikaans, LLB and LLD degrees from the University of Pretoria and an LLM from the University of Cambridge. He is professor and Director of the Centre for Human Rights in the Faculty of Law at the University of Pretoria. His research area is international human rights law, with a focus on the African regional human rights system, which has been established under the auspices of the African Union.

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on work in the Crown Court. 'This would previously have been the main diet of many young lawyers,' she said.

Ms Kinch added that the recent relaxation of the prohibition on taking instructions from lay clients, which now allows direct access to clients, was a positive development for younger attorneys as it provided them with more opportunities.

In terms of training, Ms Kinch said that young lawyers had 'lots to be pleased about'. She said that continuing professional development (CPD) was a requirement and there were plenty of programmes to support this.

Ms Anyanwu said that the main challenge for young lawyers in Nigeria was that the money they earned was insufficient to sustain them. Further, the ability to attract work was dependent on their location and the specialisation/expertise of the firm for which they worked.

However, she emphasised that younger members of the profession had a duty in respect of their own development.

'Young lawyers should be proactive and get work on their own for their self-development,' she said.

In terms of training, Ms Anyanwu said that training opportunities were limited as there was a perception by some that, by providing training, they were training competitors in the profession. She added that this perception was, however, changing.

She added that a young lawyers' forum had been established with the mandate to deal with the welfare and development of young lawyers.

Mr Sharma said that a large challenge for young lawyers in India was a lack of institutional support. 'Effectively, a young law graduate would have to approach several lawyers to check where he could be accommodated as a junior lawyer. It is not clear how he should get into the advocates' chambers he wants to be in, for example,' he said.

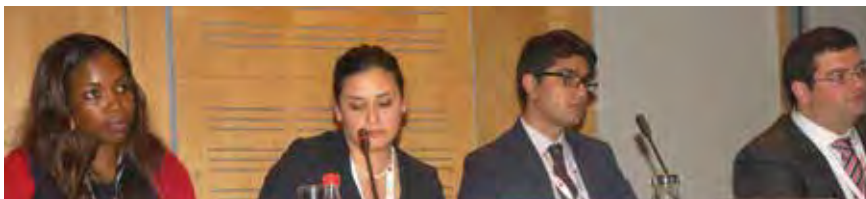
Adding to this, Mr Sharma said that there was a lack of institutional support in terms of what a junior lawyer could expect after entering the profession.

In terms of monetary benefits, he said that there was previously a view that young lawyers 'should not expect too much' in terms of earnings if they were getting good training; however, there had been an improvement.

'We are more outspoken about financial support than we were in past,' he added.

On the topic of training, Mr Sharma said that this was not institutionalised or consistent in India and there was no mandatory CPD requirement. However, senior lawyers did spend significant time on training their younger counterparts. In particular, when a junior member joined a chamber, he would receive training from seniors in the chamber, adding that lawyers were often identified according to the chamber in which they were trained.

In conclusion on this point, Mr Sharma



South African advocate Steve Budlender (right) chaired a panel on junior lawyers, which was made up of Ajit Sharma (second from right), counsel at the Supreme Court of India; Hannah Kinch (second from left), the chairperson of the Young Barristers' Committee of the Bar Council of England and Wales; and Chigozie Anyanwu (left), a senior associate in Nigeria.

suggested a possible solution to the unpredictability that law students face in India in terms of where they could start their careers:

'I suggest that, because there is no predictability for junior lawyers, the state Bar councils should act as intermediaries between advocates and students,' he said, adding that what was envisaged was that the Bar councils approach senior advocates to ascertain how many junior attorneys they planned to train and if there were any monetary benefits attached to this training, with such information being passed on to students, who could then apply accordingly.

Gender and race challenges

Mr Budlender asked the panel to highlight any challenges in their countries that junior lawyers faced in terms of race and gender. He asked panel members to elaborate on issues related to access to the profession; whether the distribution of work was skewed in terms of race and/or gender; whether there was any bias on the part of judges along these lines; as well as what arrangements were in place in their countries for maternity and paternity leave, and whether parents could easily be integrated back into practice after having children.

Ms Anyanwu said that race was not a barrier to accessing the profession in Nigeria; however, the same could not be said of gender.

Ms Anyanwu added that the situation in terms of gender was improving, as children of both genders now had an equal opportunity to receive education. This had resulted in an increasing number of women being admitted to the legal profession, she said.

'Gender issues are gradually dissipating and we have more females at the top rank of the legal profession,' she said.

Ms Anyanwu said that, although paternity leave was not recognised in Nigeria, she supported the notion. She added that maternity leave was provided for and that there was 'no bias against new parents'.

Mr Sharma said that, similarly, race was not a major issue in India, but gender was – both in law firms and in litigation.

He said that his country had no gender or diversity requirements and that firms 'by and large hired on merit'.

On gender, Mr Sharma said: 'Gender is an issue in that the statistics indicate that there are very few senior counsel and judges in India who are female. There is, however, increasing awareness about this.'

Ms Kinch said that in her jurisdiction 'significant strides' had been made in terms of gender and race representivity in the profession over the last 20 years. 'There is more that can be done, but great strides have been made. Gender is not a barrier to entry and neither is race,' Ms Kinch said.

However, she added that 'the question becomes more complicated' in terms of representivity in various practice areas and there was a need to encourage more applications to chambers that do commercial and chancery law, which were 'traditionally done by white males'.

In terms of gender, Ms Kinch highlighted that an area of concern was that after approximately ten years in practice the number of women practitioners decreased. 'Retention is an issue being considered for some time now to ensure that the best candidates stay in the profession,' she said. She added that a recent development supporting this was the establishment of a nursery for barristers and others at the Inns of Court, which allowed parents to 'balance their child care and professional commitments'.

'I hope that such developments will help particularly women, but men too, to be able to stay in the profession; otherwise we lose highly trained and skilled people because they have parental responsibilities,' Ms Kinch concluded on this aspect.

In response to a question from the floor on whether quota systems should be implemented in order to advance minority groups in terms of race and gender, Ms Anyanwu said that she had 'mixed feelings' about quota systems, while Ms Kinch was against their implementation and Mr Sharma believed they were 'absolutely imperative'.

In closing the session, Mr Budlender said that issues related to junior lawyers raised 'real challenges' and the legal fraternity needed to come up with proactive measures to address these.

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Managing modern law firms: Ensuring transparency and accountability

David Barnard, founding partner of law firm Blaqwell Inc in the United States (US), was the main speaker in a session focused on managing modern law firms.

The chairperson of the session was the chief executive officer of South African law firm ENS, Piet Faber; while other speakers were senior partner at Nigerian law firm Prime Solicitors and council member on the Nigerian Bar Association's section on legal practice, Oluseun Abimbola; and chief executive officer of South African law firm Cliffe Dekker Hofmeyr, Brent Williams.

Evolution of the legal industry

In opening his address, Mr Barnard said: 'In order to understand the context of small and large law firms, we need to understand what law firm managers are concerned about. We need to ask ourselves: Why do law firms grow and develop? Also, what is the new competition about? There is a dramatic change in the market in which law firms are fighting to be the most competitive.'

Mr Barnard said that modern law firms were 'palaces' on which firms' names appear and which employ hundreds of lawyers who aspire to be partners. He paraphrased a quote by 1991 Nobel Peace Prize winner in Economic Sciences, Ronald Coase, and said:

'Generally, the distribution of resources in a market is organised by the price mechanism. Organisations such as firms come to exist where the cost of arranging transactions in the market (via the price mechanism) can be reduced by directing activities, instead, within a firm. A firm becomes larger as additional transactions (which could be exchange transactions co-ordinated through the price mechanism market) are organised by the entrepreneur, and becomes smaller as he abandons the organisation of such transactions.'

He added that it was more economical to bring the services into the control of the organisation than it was to purchase them in the outside market. Therefore, law firms should employ more in-house specialists. He said that, as soon as the reverse happened, law firms would shrink 'because firms rise and fall according to laws of economy'.

Mr Barnard said that the evolutionary trajectory of modern law firms began as what he termed a 'cottage industry'. As the law firm becomes richer, it enters the 'rich get richer phase' and starts to resemble other law firms at the same stage. This then leads to the 'differentiated' phase, which leads to an 'oligopoly'.



David Barnard, founding partner of law firm Blaqwell Inc in the United States, speaking on managing modern law firms.

'The law firms that do not evolve in this manner do not disappear; they just do not become part of the top small number of law firms that are highly paid, which is where money in the law market is concentrated. The firms that do not evolve compete for what little money is left in the law market and do not make the most money,' said Mr Barnard.

Globalisation of law

Mr Barnard presented a graph to delegates that represented the concentration of profits in United Kingdom (UK) markets in the past 15 years. He said that, in 1996, 60% of profit in the market was concentrated in the top 25 firms, compared to 80% in 2011. He said the graph also showed that the growth in profit of the top 25 law firms was interrelated with the growth of the real gross domestic product of the UK. He said that this was 'a clear indication of how the market works'.

Mr Barnard said that, in the past, law used to be a local business and attorneys could only practise in their own countries. With the advent of the information age, attorneys can use the internet to apply solutions from one jurisdiction to another. This levelled the playing field, he said, adding that the law was moving from a local to a global market.

He added that the global landscape had a 'huge disadvantage' for law firms still at the cottage stage, as the oligopolies that drove the initial stage of law globalisation had dominated the international law cross-border landscape.

Mr Barnard said that 33 of the top 50 global law firms were situated in the US while 11 were in the UK. He added that Chinese law firms were making inroads in the law market and were emerging as the new 'super power' and rival of firms in the US and the UK.

He advised attorneys to ensure that they had good networking skills, as he believed the global market could be conquered through referral mechanisms.

Options for local firms

In view of globalisation and its effects on domestic law firms, Mr Barnard said that, in his view, local firms had three options:

- **Opt out of cross-border work:**

Attorneys need to believe that there is sufficient domestic work available to sustain their firms. The quality of work produced by the firm should be sufficient and lucrative enough to attract and retain the best talent. Importantly, the work should sustain the firm beyond a single generation.

- **Become a national champion:**

Attorneys need to believe that they possess the expertise and services to compete against global firms and that they can attract high quality work to generate value and retain talent. Also, attorneys need to believe that they can sustain the fabric of the firm while doing what is necessary to compete.

- **Join a global network:**

Firms that select this path can either join a referral network or an exclusive network with no shared profit pool, or they can integrate fully with a single global pool.

Challenges facing law firms

Mr Barnard said firms that are part of the oligopoly needed to constantly regenerate to continue to attract the best clients and the best talent. They need to find new avenues for growth because they need to replace their engines for growth. He added that they also needed to identify existing services that could be obtained more cheaply in the market. Other firms needed to identify a niche market that would last and sustain their firms, he said.

What all law firms need to do

Mr Barnard said that attorneys practising in the private sector needed to be transparent with their clients. He added that, to empower themselves, attorneys needed to be aware of what was going on in their firms, as well as their strengths and their vulnerabilities.

He said that firms needed to set goals, while assessing the firm's current market position and tracking the progress of their competitors. Firms should also have a closer look at the advantages the

firm has in order to leverage the bridge between their current position and the goals they wish to achieve, said Mr Barnard.

Mr Abimbola said that attorneys needed to identify management models that could be adopted to best suit their firms. He added that all attorneys should benefit from the volume of legal work that was available. He said that attorneys needed to formulate a strategy to enable them to 'chase' work because, if they do not know that the work exists or know where it is, they will not benefit from it.

He added that, with visionary management and a focused strategy, small law firms could achieve great profitability and sustain it. He added that small law firms had an advantage in that they were able to have better client management and maintain client relationships. Mr Abimbola said that lawyers should always keep in mind that a good lawyer

does not necessarily make a good manager; sometimes it is better for firms to employ professional managers. A law firm could also outsource management. 'Lack of proper firm management often causes partners to slide further to being administrators. Partners should be more concerned with strategic issues on management and with driving the business forward,' said Mr Abimbola.

Failure to trust other attorneys in a firm had led to many firms not performing succession planning, which could be detrimental to the future of any law firm, said Mr Abimbola.

Law firm size

In respect of large firms, Mr Abimbola said: 'Large firms have a robust capacity to deploy resources for large transactions; they domicile a wider skills set in the firm and generally overwhelm with their market presence. However, they

compete over a broader practice area and they need to have an ability to raise substantial financing for operations.'

On mergers, Mr Williams said that the firms Cliffe Dekker and Hofmeyr Herbstein & Gihwala had merged as 'it made more sense for the two firms to work together as one firm and remain sustainable'. Both firms employed in excess of 100 people, he said, adding: 'This enables us to attract larger clients and have better sustainability and profitability.'

Mr Williams said that smaller firms do not need to attract big clients, but medium firms compete with big firms and struggle to attract clients. 'The real pressure is in the middle of the market,' he said.

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Judicial appointments

South African attorney and member of the Judicial Service Commission (JSC), CP Fourie, chaired a panel discussion on judicial appointments. The panel was made up of Ugandan Chief Justice Benjamin Odoki; Dr Karen Brewer, the Secretary-General of the Commonwealth Magistrates' and Judges' Association; and Krish Govender, former JSC commissioner, outgoing co-chairperson of the Law Society of South Africa and KwaZulu-Natal state attorney.

In opening the session, Mr Fourie spoke about the 'natural tension' between the executive and the judiciary, noting that the absence of this should 'start setting off the alarm bells', as the tension was an indication of an independent judiciary.

Mr Fourie said that the most important phase in ensuring an independent judiciary was the appointment process of judicial officers. He referred to the Latimer House Principles on the Three Branches of Government, which require an independent, impartial, honest and competent judiciary, integral to upholding the rule of law, engendering public confidence and dispensing justice.

'To secure these aims, judicial appointments should be on clearly defined processes,' Mr Fourie said, adding that there should be equality of opportunity for those eligible for appointment, as well as provision for appointment on merit, the progressive attainment of gender equity and the removal of discrimination.

The Latimer House Principles

Dr Brewer spoke on the need for independent functioning appointment systems for



South African attorney and member of the Judicial Service Commission, CP Fourie (right), chaired a panel discussion on judicial appointments. He is pictured with Dr Karen Brewer, the Secretary-General of the Commonwealth Magistrates' and Judges' Association.

judicial officers. In doing so, she spoke about key elements for an independent and transparent system of judicial appointments.

Dr Brewer started her presentation with the words: 'We live in a world where respect for the separation of powers is slowly being eroded and respect for the independence of the judiciary is suffering.'

She said that the Latimer House Principles called for the relevant institutions to exercise responsibility and restraint in the exercise of power in their respective constitutional sphere, so as not to encroach on the legitimate discharge of the constitutional functions of the other institutions. She noted that the principles set out the overall criteria for judicial selection committees and left the detail up to the individual committees.

In respect of the judiciary, she said that the appointment process was a 'key element' and that there was an increasing number of instances of this process be-

ing used to exert control over the judiciary. This could, for example, take the form of the unconstitutional removal of judges from posts and/or the deliberate appointment or promotion of judges through improper means.

Dr Brewer said that, although most modern constitutions contained provisions related to judicial appointments, they were not consistent.

'Currently, there is no harmonised view of what a judicial appointment process should be,' she said.

Dr Brewer referred to a project that was scrutinising judicial appointments in the Commonwealth, in which she was involved, and noted that there had been debate about the best method for making such appointments. She added that not all Commonwealth countries were in favour of an institutionalised system.

Dr Brewer said that the principles provided that an appropriate independent process should be in place for judicial ap-

pointments. Where no independent system exists, appointments should be made by a judicial services commission (established by the constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission.

Dr Brewer emphasised that it was important that judicial appointments were made on 'clearly defined criteria' and that the process provided for equality of opportunity for all, merit, gender equity and the removal of discrimination. She said that an appeal process should also be provided for in all appointments.

Further, Dr Brewer said that the clearly defined judicial appointment system should be provided for in a statutory provision. She added that most constitutional provisions in this regard related to senior judicial appointments, but should apply to all judicial appointments, including magistrates, which was often not the case.

'A holistic approach is recommended. Although the appointment of the Chief Justice may require a special procedure,' Dr Brewer added.

In terms of the body responsible for making judicial appointments, Dr Brewer said that the composition of judicial selection committees varied among the Commonwealth countries, and that transparency was key in such institutions.

'It is important to have a transparent system for the appointment onto the panel of decision-makers who decide who should be judicial officers,' she said.

In addition, the executive should have no role in the committee's resources, and the committee should have an independent secretariat.

She added that, ideally, the executive and parliament should have no role in selection committees for judicial officers, which should rather include lay persons, law teachers and representatives of the legal profession. It had been proposed that the latter be nominated via the relevant law society and/or Bar council to ensure the 'best representation', Dr Brewer said.

'Each commissioner is appointed in his or her own right and his or her loyalties do not lie outside,' she added.

In conclusion, Dr Brewer said: 'It is impossible to have a one-size-fits-all approach for judicial appointments in the Commonwealth. It is high time governments recognised that democracy can only be achieved if the right people are selected for the jobs. The Latimer House Principles are not aspirational, but they are the basic requirements for membership of this club. Judicial independence is the right of every citizen, [exercised] by a judge independently selected.'

Judicial appointments in the Commonwealth

Chief Justice Odoki reflected on judicial appointments in the Commonwealth in general and also spoke about the process for

such appointments in his home country.

Chief Justice Odoki said that the judiciary was 'an organ to be reckoned with' and it held the power to ensure that the other two branches of government were in check and peoples' rights were protected.

He said that at the heart of an independent, accountable judiciary was the process of appointing judges and magistrates.

'The independence of the judiciary is promoted by ensuring judges can be relied on to impart impartial decisions,' he added.

The Chief Justice said that Uganda had reformed its processes to make the appointment of judicial officers more transparent and equitable. 'The process is working well. ... I think we have done a good job,' he said.

Chief Justice Odoki said that previously the country's Judicial Service Commission (JSC) had the Chief Justice acting as 'investigator, prosecutor and judge'; however, the amended composition of the JSC now reflected an independent commission, which was not headed by the Chief Justice or his deputy.

He said that there were currently three judges on the commission and, while he believed this number should be higher, there were also two lawyers on the commission, which was a composition he could 'live with'.

The Chief Justice said that the commission was independent and its functions included recommending judicial candidates for appointment, disciplinary matters and the terms and conditions for judges.

In conclusion, the Chief Justice highlighted a dilemma the commission faced in the form of how to balance merit with issues of diversity in respect of religion and gender, for example, as the Ugandan constitution requires that all institutions should reflect the national character of the country.

No crisis in the South African JSC

Mr Govender began his presentation by highlighting the important role of the judiciary, which necessitated appropriate protection.

'Simply put, in my opinion, the judiciary is often the last line of defence between a turn to anarchy, civil war or military rule. The judiciary should be given its proper place; it needs to be protected, promoted and treated with dignity at every level of society,' he said.

Mr Govender said that a credible judiciary depended on a number of factors, including having 'good judges' and an appointment process that was respected and understood.

He said that in South Africa it was necessary to review 'the whole process of appointing judges'.

'The dream of the rainbow nation has to be sustained; we need to be progressive, be revolutionaries, and look at our Consti-

tution and see whether some of the constitutional provisions need to be further addressed,' he said.

Mr Govender referred to s 174 of the South African Constitution, which he said 'essentially' gave the country's President the power to appoint the Chief Justice, Deputy Chief Justice and the President and Deputy President of the Supreme Court of Appeal, after consultation with the JSC.

'A lot of controversy flows from these key appointments and Constitutional Court appointments,' Mr Govender said, noting that the President was required by the Constitution to appoint a Constitutional Court judge from a list containing a minimum of four names prepared by the JSC.

He said that the Constitution provided for the President to appoint all other judges on the advice of the JSC and there had never been an instance where such a recommendation by the JSC had not been followed.

However, Mr Govender said that s 174 of the Constitution was 'a problem' and the 'President should not be in a position to make decisions that should not be in the preserve of the President'.

In response to a question from the floor about what lessons could be learnt from South Africa in relation to 'the crisis in the JSC' as indicated in recent media reports, Mr Govender said that there was no such crisis.

He said that South Africa had a 'young and restless democracy', and citizens should not 'be afraid to confront issues. It is about recognising that the revolutionary spirit that took us to 1994 will be with us for a while. We should be able to ask questions and challenge institutions and old legal ideas and the manner the legal profession projects itself,' he said, adding that 'the legal profession and law are both conservative'.

Mr Govender said that since becoming a democracy, the country had 'moved a lot and fast', but that there was 'a sense of impatience', including in respect of 'a few people not getting to where people should be at the top of the pile in judicial leadership'.

'The JSC is not in crisis. There is political tension in this country; everyone has an axe to grind and the media are very powerful and a very important aspect of our democracy. They are a very important component, even if we do not agree with what they are reporting on.'

In conclusion, Mr Govender said: 'The JSC has been subjected to many difficulties because the people appointed to the JSC are part of this restless, vibrant democracy. It is subject to all of these tensions.'

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CLC Stream C:

Constitutionalism, human rights and the rule of law

The challenges of modern constitutions

In a session chaired by Dr Sam Amadi, the chair of the Nigerian Electricity Regulatory Commission; former South African Constitutional Court Justice Kate O'Regan, Indian advocate Jaideep Gupta QC and Law Society of Zimbabwe President Lloyd Mhishi spoke on the challenges of modern constitutions.

Five challenges for modern constitution-makers

Justice O'Regan addressed the topic of the session primarily from the perspective of South Africa's experience of constitution-making.

Justice O'Regan noted that more than half of the world's constitutions had been adopted since 1974 and that the average life of a constitution was 19 years. Only eight constitutions that are still in force have lasted more than 100 years, including those of the United States of America (221 years), Norway (196 years) and Belgium (179 years), she said, adding:

'There is a positive correlation between constitutional endurance and stability and prosperity.'

Justice O'Regan highlighted the following aspects that constitution-makers should consider:

- Whether to opt for a parliamentary or a presidential system.
- Whether to provide for constitutional amendability.
- Whether to have a federal or a unitary system, or a hybrid.
- Whether to have parliamentary sovereignty or constitutional supremacy.
- If the constitution should include a Bill of Rights and, if so, what it should contain.
- The appointment of judges.

Following this, Justice O'Regan spoke on five related challenges, namely:

- Political will.
- Money and politics.
- 'Constituting' citizens: Accommodating difference.
- Dealing with past injustice and exclusion.
- Fostering independent institutions.

Political will

Justice O'Regan said that comparative constitutional lawyers and political scientists often explained the durability of



Former South African Constitutional Court Judge Kate O'Regan addressing delegates on the challenges of modern constitutions.

constitutions by referring to the support for them by the elites in society.

However, she said that this support needed to be broader than that of one dominant political party or interest group.

'In assessing support, it is necessary to consider not only political parties, but corporations, trade unions, civil society and other powerful sectors,' she said in this regard.

Justice O'Regan added that without reasonably broad support, a constitution-making process was not likely to survive 'no matter how fine the constitutional text may be'.

Referring to the South African experience, she said that the country had been 'fortunate' to have widespread support for the constitution-making process and broad support for its product.

'People bought into the project,' she said.

Money and politics

Justice O'Regan noted that 'very few constitutions' carefully regulated the relationship between money and politics.

'The key issue in "money and politics" is the regulation of funding for political parties, especially in relation to electoral campaigns. Failure to regulate political party funding can increase opportunities for corruption and contribute to public distrust of democracy,' she said.

As a solution, Justice O'Regan suggested that, when drafting constitutions, the following should be considered:

- Disclosure of political parties' funding.

- Prohibiting the funding of political parties by foreign governments and other foreign interests (nearly 75% of countries worldwide do so, she said).

- Imposing spending or donation limits.

'Constituting' citizens:

Accommodating difference and disadvantage

Few democracies are both homogenous and egalitarian, Justice O'Regan said. Therefore, addressing challenges of 'difference' and 'disadvantage' may be key issues in 21st century constitution-making, which would require a conception of 'citizen', she said.

Justice O'Regan referred to the acknowledgment in the South African Constitution of the 'deep pattern of disadvantage' as a result of the country's history and patterns of difference based on language, culture and religion.

However, while the Constitution asserted the importance of cultural, religious and linguistic diversity, this came with the rider that related rights were not to be exercised inconsistently with the Bill of Rights. The recognition in the Constitution of the institution, status and role of traditional leaders and customary law was subject to the same limitation, she added, noting that there were 'ongoing controversies' in this area relating to the Traditional Courts Bill and the Communal Land Rights Act 11 of 2004.

'The premise of the "constitution" of citizens is equality - citizens are of equal worth. The challenge in dealing with patterns of deep social inequality is to create a system of affirmative action or restitutionary equality that is not seen as destructive of the project of constituting citizens as equals,' Justice O'Regan said.

Dealing with past injustice

Justice O'Regan said that a 'great challenge' facing South Africa and many democracies in transition from authoritarian and unjust histories was how to address the injustice of the past.

'Generally, this needs to be resolved politically and then given legal form,' she said. However, since the establishment of the International Criminal Court (ICC), this may depend on whether the Rome Statute governs, she added.

Justice O'Regan used the example of South Africa's Truth and Reconciliation Commission (TRC) as a mechanism to address past injustices. She said that the TRC, which was a political solution adopted prior to the ICC system, had both strengths and weaknesses. Included in the former were the process of investigating gross human rights violations and making amnesty dependent on perpetrators acknowledging their actions, while the latter included that the definition of 'gross human rights violations' tended to exclude the 'daily evil of apartheid', and that victim redress failed to happen, without an explanation for this.

Fostering independent institutions

Justice O'Regan highlighted the need to foster independent institutions, including the courts, electoral commissions, auditors/monitors of public spending, ombuds and human rights commissions.

'This is largely a matter of institutional culture, although constitutional design is important,' she said, adding that the constitutional design needed to address aspects, such as tenure of office bearers, terms of appointment, jurisdiction and reporting, and institutional independence.

Conclusion

In conclusion, Justice O'Regan said: 'Making an enduring constitution is not easy, and it is necessary to have broad-based political will. But skill in drafting and attention to the implications of structural design can assist in creating enduring constitutions. Yet a constitution remains in force because each new generation chooses to keep it in force, not because drafters cement it in place.'

Constitutional protection for group rights

Mr Gupta emphasised the importance of constitutional protection for group rights in his discussion on the challenges involved in protecting the rights of ethnic groups in multi-ethnic and multicultural societies.

Mr Gupta said that democracy meant 'the rule of the majority for the time being' and it was therefore necessary to safeguard the rights of those in both majority and minority groups.

He said that the survival of cultures was not guaranteed and, therefore, they required protection, citing international methods of protecting cultural rights, such as conventions.

Mr Gupta spoke about the nature of the rights conferred by the Indian constitution, which identified and protected group rights to ethnic groups, and referred to religious and linguistic rights in particular.

Noting that religious rights were individual rights, he questioned how it was possible to 'draw a line between religious rights and related rights'.



Indian advocate Jaideep Gupta QC speaking on protecting the rights of ethnic groups in multi-ethnic and multicultural societies.

Mr Gupta also discussed key decisions of the Indian courts in which they had 'grappled with' some of the problems presented in the past few decades. He said that Indian courts tended to afford protection 'narrowly' in respect of religious rights. 'Only practices essential to the religion get protection,' he said, adding that this posed the following questions:

- How do you decide what is essential and what is not?
- What does the adherent of the religion believe is essential?

'If a judge decides what is essential, then the possibility of conflict arises,' he added.

Mr Gupta also highlighted certain limitations that had come into existence, for example in respect of minority institutions providing education.

In conclusion, Mr Gupta said that group rights must be capable of being exercised and emphasised that they require protection.

The road to Zimbabwe's new constitution

Mr Mhishi spoke on the proposed Zimbabwean constitution, which he said was 'about to become law'. In doing so, he highlighted some of the provisions that were the result of a compromise, noting that he was voicing his personal views and acknowledging that others may have differing opinions.

Mr Mhishi provided some background to constitution-making in the country, noting that since independence in 1980, the Zimbabwean constitution, 'which was a compromise in itself', came after protracted war to end colonialism. He said the document had certain provisions entrenched in it, for example reserving seats for minority colonial rulers. He said that the last amendment to this constitution was the one that led to the inclusive government in Zimbabwe.

Mr Mhishi said that the new constitution-drafting process was intended to be completed in an 18-month period; however, so far it had taken four years.

'Everyone insisted that the process must be people driven, but some were

opposed to the process from the outset,' he said, adding: 'Because it was not going to be a people-driven process, the process of coming up with the constitution was a difficult one. It took four years and more than \$ 45 million was spent on the process.'

He said that there were many challenges during the process, including economic constraints and 'physical disturbances'.

'The political influence was clear throughout the process - instead of parties campaigning, they pushed supporters on what to say. In most instances, there was no direct contribution by the people to the process,' he added.

He said that there were also complaints that civil society had been excluded from the process.

However, he said that there were some positive aspects to the process, including that 'the principals finally supported the processes and denounced the disruptions', although some had been disowned by the political parties to which they belonged 'for coming up with contrary views', he added.

He said that the Law Society of Zimbabwe had participated in the process and had engaged experts and undertaken an outreach programme. He said that the society had drawn up a model constitution and that 'most of the recommendations appear in the constitution proposed for adoption'.



Law Society of Zimbabwe President Lloyd Mhishi spoke about the proposed Zimbabwean constitution in a session on the challenges of modern constitutions.

In conclusion, he said: 'We now have a constitution; this will be presented to parliament and we expect parliament to rubber-stamp it, as there is broad consensus.'

The challenge in Zimbabwe is: Will the politicians adhere to the good things in this constitution? Is it also not going to be amended? All the parties have said: "When we come to power, we will amend it." Is constitution-making therefore ever finished in Zimbabwe?

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Marikana and the implications for employment law

The topic of conflict resolution was discussed in a session that unpacked the Lonmin Mine tragedy.

Speakers of the session were alternative dispute resolution specialist and South African attorney, John Brand; and Henry Msimang, who is part of the legal team representing the mineworkers at the Marikana Commission of Inquiry.

Mr Brand gave insight into the complexities of the situation that led to a strike by Lonmin mineworkers in the area of Marikana in August 2012, which led to the widely reported Marikana tragedy, where 44 people died. Following the tragic events that took place in Marikana, President Jacob Zuma appointed a commission of inquiry to investigate the matters arising from the incident. Mr Brand provided delegates with a tentative analysis, in his opinion, of what triggered the tragedy, the manifestations, the aggravating factors that led to it and what moderated it. Mr Brand also placed the tragedy in the broader industrial relations context. In addition, he provided delegates with facts that he said needed to be considered to view the tragedy holistically and also gave an indication of what employers can influence to avoid similar tragedies.

The conflict dynamic

• Causes

Mr Brand said that the alleged cause of the conflict was poverty combined with mineworkers wanting to receive more pay. In his view, however, money was a small portion of what caused the conflict.

He went on to cite some of what he believed were the causes of the conflict, namely:

Working conditions: Rock drill operators work under harsh conditions. The rock drill operators are viewed as unskilled labourers and are not paid sufficiently. Labour brokers abuse them and can take up to R 5 000 from their wages. Generally, rock drill operators tend to be migrant workers, who have a home in the rural areas and another home near where they work. This means their income is thinly spent, which presents an opportunity for moneylenders to take advantage of them. Also, many of them have garnishee orders against their wages.

The social wage: The rock drill operators live in informal settlements that have no refuse removal; they do not have electricity; there is no security for their property; the area does not have a proper sewerage system; there are no schools in the area; there is no clinic or health facility in the area; they have to rely on dilapidated

taxis as a form of transport; there is no running water; and the area has no roads.

The National Union of Mineworkers (NUM): The union was complacent and the Association of Mineworkers and Construction Union (AMCU) filled the vacuum that rock drill operators were feeling. They had a remote ideological approach to the situation. Also, they were not strategic, as their bureaucratic ways led to rock drill operators not trusting them.

Bargaining skills and structures: Bargaining skills in the labour context in South Africa are very adversarial and not interest-based. All parties during the bargaining process were not prepared and were ill-informed. The bargaining structures, on the other hand, were undemocratic and over-centralised.

• Trigger

Mr Brand said that the trigger of the situation was that the Lonmin Mine offered to pay rock drill operators a premium and give them an increase. NUM responded by stating that every worker across the board must receive the same increase, as this was its policy. When the rock drill operators discovered that NUM was hindering their chances to receive an increase, they joined AMCU. AMCU enticed the drill operators as they told them that they did not have the same policy as NUM.

• Manifestations

Mr Brand said: 'The manifestations of the complex, multifaceted situation in Marikana took the form of disregard for the law, and procedures pre- and post the events that took place.'

'Why is it that, 20 years into democracy, the Labour Relations Act [66 of 1995] was ignored by all parties involved - employees, employers and the unions. The strike action was not protected because the right procedures were not followed,' said Mr Brand.

He added: 'The mineworkers were filled with hostility and were defiant towards the authority of management and the state. They armed themselves - every shop in the area of Marikana was sold out of knives and axes. There was an orgy of violence. The emergence of a new union, AMCU, workers' committees that were not formally constituted and the action of the police also added to the catalysts that fuelled the Marikana tragedy,' said Mr Brand. He added that there were also allegations that arrested mineworkers were tortured.

• Aggravators and moderators

Mr Brand said that factors that worsened the situation included poor mediation and policing, weak negotiation skills, illiteracy, divided constituents, mistrust,



Alternative dispute resolution specialist and South African attorney, John Brand, unpacking the Lonmin Mine tragedy.

unrealistic expectations and past unresolved conflicts. He said moderators of the situation were church leaders and the mineworkers' need for pay.

Some important factors

Mr Brand said that rock drill operators earned R 10 000 per month, while the average South African worker earned R 3 000 per month. He added: 'Rock drill operators earn more than entry-level teachers in South Africa.'

The strike

Mr Msimang said that, during the strike, the employer refused to engage with the rock drill operators and wished to speak to the unions rather. He said that, at that point, the rock drill operators retreated to a hill, where they held a further meeting. 'When they saw that the police were about to cordon them off with barbed wire, they moved from the [hill]. When they made their way towards the police, the police say they retaliated in self-defence and opened fire.'

He added: 'The evidence that is unfolding at the commission shows that the police had a six-stage plan that included dialogue, crowd control, disarming and dispensing the crowd and [taking in] others for questioning.'

Mr Msimang said that the tactical teams deployed at Marikana and the amount of force used were contrary to the approach the police claimed they were going to take.

Consequences

On the consequences of the situation, Mr Brand said: 'The consequences of the tragedy were that a total of 44 people died and hundreds of people were injured. Contrary to media reports, the Lonmin mineworkers did not receive the 22% increase they were striking for. The second part of the 2010 wage agreements

was due to kick in, which meant that the workers would receive a 10% increase anyway. Actually, the maximum increase workers received was 7,7% to the lowest grade worker. Media reports were not corrected as it suited both management and unions; this was not in fact the truth. If the figures are calculated correctly, they will show that the miners lost approximately 12% of their annual wage in the strike due to the “no work, no pay policy”. The workers lost more in their wages than what they received. Some workers received a R 2 000 bonus to return to work; however, this did not apply to the approximately 9 000 contract workers.’

The direct loss in the gold and platinum industry, Mr Brand said, amounted to R 10 billion, which resulted in a R 12,5 billion reduction in export revenue in 2012. He added that the loss brought down the gross domestic product forecast for South Africa from 3% to 2,5%. He said that attorneys should ask themselves what could be done about this “lose-lose” situation.

What should have happened

Mr Brand said that all the issues that led to the conflict in Marikana could be better regulated by the law. He said that what could be learned from the tragedy is that the situation should have been viewed holistically and the focus should not have



Henry Msimang, who is part of the legal team that is representing the mine workers at the Marikana Commission of Inquiry.

been on the manifestations of the conflict exclusively. Underlying causes that may have triggered the situation should have been addressed. Appropriate moderators should have been put in place and not those ‘who wanted to take advantage of the situation’, said Mr Brand.

Marikana Commission of Inquiry

In respect of the commission investigating the tragedy, Mr Msimang said: ‘The commission’s terms of reference are to investigate the conduct of Lonmin Mine, AMCU, NUM, individuals and loose groupings in fermenting and/or

otherwise promoting a situation of conflict and confrontation, which may have given rise to the tragic incident, whether directly or indirectly, as well as the role played by the Department of Mineral Resources or any other government department or agency in relation to the incident and whether this was appropriate in the circumstances and consistent with their duties and obligations according to law.’

He added that the commission was looking at the conduct of the South African Police Services (SAPS), in particular: The nature, extent and application of any standing orders, policy considerations, legislation or other instructions in dealing with the situation that gave rise to the incident; the precise facts and circumstances that gave rise to the use of all and any force and whether this was reasonable and justifiable in the particular circumstances; to examine the role played by SAPS through its respective units, individually and collectively, in dealing with the incident; and whether, by act or omission, it directly or indirectly caused loss of life or harm to persons or property.

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By
Kim Hawkey
and
Mapula Sedutla

CLC Stream D: Contemporary legal topics

Information, secrecy and WikiLeaks



From left to right: Legal director of the Bertha Foundation in England, Jennifer Robinson; advocate of the Supreme Court of India, Madhavi Divan; head of international advocacy at Privacy International in the United Kingdom (UK), Carly Nyst; and Jan Clements from the legal department of The Guardian and The Observer publications in the UK.

Media freedom and access to information were discussed in a session titled 'Information, secrecy and WikiLeaks'.

Dr Barbara Lauriat, lecturer at the Dickson Poon School of Law at King's College in England, was the session's chairperson, while speakers were legal director of the Bertha Foundation in England, Jennifer Robinson; advocate of the Supreme Court of India, Madhavi Divan; head of international advocacy at Privacy International in the United Kingdom (UK), Carly Nyst; and Jan Clements from the legal department of *The Guardian* and *The Observer* publications in the UK.

Ms Robinson opened the session by saying that Julian Assange, founder of whistle-blowing website WikiLeaks, had sparked an information revolution, which had implications for freedom of speech around the world. She added that the WikiLeaks website had also opened debates on journalistic ethics in many Commonwealth countries, especially with regard to journalists being forced to reveal their sources. She said that the website provided sources with anonymity. 'The site has a Dropbox where information can be submitted anonymously,' she said.

Ms Robinson referred to one of the biggest leaks of United States (US) government material, known as 'Cablegate', which was published by WikiLeaks. According to the WikiLeaks website: 'WikiLeaks began, on Sunday, November 28th 2010, publishing 251 287 leaked

United States embassy cables, the largest set of confidential documents ever to be released into the public domain. The documents will give people around the world an unprecedented insight into US government foreign activities' (<http://WikiLeaks.org/cablegate.html>, accessed 11-5-2013).

She added that WikiLeaks had also sparked political revolutions, such as the Arab Spring in 2010.

In addition, documents leaked via WikiLeaks have been used as evidence in the courts of many jurisdictions, said Ms Robinson.

Ms Robinson added that the role of the media as the fourth estate was to have a 'confrontational' relationship with those in power and to be a whistle-blower. She added that the truth had the power to bring greater respect for human rights. She also questioned the implications of the South African Protection of State Information Bill (B6D of 2010) on the media and its sources.

Ms Clements highlighted the importance of freedom of expression and access to information in the context of journalists' duty to disseminate information. She quoted s 1 of the UK's Freedom of Information Act 2000 (c36), which states:

'General right of access to information held by public authorities

(1) Any person making a request for information held to a public authority is entitled –

(a) to be informed in writing ... whether it holds information of the description specified ... ; and

(b) if that is the case, to have that information communicated to him.'

Ms Clements added that WikiLeaks had led to a new style of journalism, whereby the audience became involved in helping journalists to release sensitive information. However, she said that this was not a substitute for journalists' work.

'Journalists take reasonable steps to verify information and ensure what is printed is truthful,' said Ms Clements.

Ms Divan said this new era of journalism made governments 'emperors without clothes' in that governments could no longer hide what they were doing from the public.

Ms Nyst said that charity organisation Privacy International had been raising discussions around the right to information in the last decade. She added that the nature of information had changed during the period, in terms of the type of information that could be collected. She said: 'We are moving towards a situation where the media can record all sorts of information. ... The change means there is a huge revolution in information gathering, which can be attributed to the declining costs in storing data and the increase of publically available data in social networks.'

Ms Nyst said that the impending Protection of State Information Bill was an example of governments wanting to hide information 'in the name of secrecy and national security'. She added that 'better, standardised laws' would assist with the impact of technology.

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Defamation law reform: Thresholds, defences and the value of free speech

In a session on the reform of the law of defamation, which was chaired by Justice Vasheist Kokaram from the Supreme Court in Trinidad and Tobago, South African advocate Gilbert Marcus SC and incoming Commonwealth Lawyers Association President Mark Stephens CBE responded to a presentation by the session's main speaker, Lord Anthony Lester QC from England.

In opening the session, Justice Kokaram said: 'In defamation law, the main signpost is the need to balance the right to expression and the right to protect your reputation.'

He added that any discussion on free speech would lead to a discussion on the history and social context, as well as on the responsible use of speech. He said that the aim of the session was to explore the conflict between free speech and protecting reputation and to examine the balancing of freedoms and responsibilities in defamation law and where the tensions between freedom and responsibility often collide.

Free speech and its limits

Lord Lester spoke about the reform of defamation law in the United Kingdom (UK), which he said may be of interest to other Commonwealth countries.

At the outset, Lord Lester said that 'Commonwealth law reform is much needed' and noted that many Commonwealth countries had embraced UK laws relating to defamation, including many unnecessarily vague and restrictive criminal and civil interferences with free speech. And, while many of these 'archaic restrictions' had been abolished in the UK, such as the recently abolished common law speech offences of criminal libel, seditious libel, blasphemous libel and obscene libel, they still applied in some Commonwealth countries.

One of the outdated laws he referred to was that of scandalising the judiciary, in respect of which he said:

'I am glad to report that last year the coalition government accepted a proposal by Lord Pannick QC and I to abolish the archaic offence of scandalising the judiciary, following a failed threat by the Attorney-General of Northern Ireland to commit a former Cabinet Minister for criticising a judge.'

In addition, 'insulting' had been removed from the offence to use 'threatening, abusive or insulting words or behaviour' in the Public Order Act 1986 (c64), as had been done in relation to religious hate speech and homophobic hate speech, he said.

In respect of the current parliamentary reform of civil defamation law in the UK, Lord Lester said that in the past



The main speaker on a session titled 'Defamation law reform: Thresholds, defences and the value of free speech', Lord Anthony Lester QC from England.

the English law of libel had been largely fashioned by the courts, with parliament 'having very little to do with it' until recently. He added that the UK civil defamation law had 'become a disgrace'.

'The unsatisfactory state of English defamation law is notorious and well recognised. It led [United States] President Barack Obama to approve a law preventing English libel judgments from being enforced in United States' courts,' Lord Lester said.

He said that the country's Defamation Bill, which at the time of his presentation was in its final stages of passage through parliament, aimed to reform defamation law to redress the balance between free speech and reputation, which was not currently being achieved.

Lord Lester said that the Bill was necessary to give better protection to free expression, while ensuring fairness and responsibility in journalism, and necessary protection of the right to a good reputation, as well as access to justice by the weak against the powerful.

The Bill came about after concerns were raised that the English law of libel served to discourage critical media reporting on matters of serious public interest and that it had a negative impact on freedom of expression, both in the UK and around the world, by imposing unnecessary and disproportionate restrictions on free speech.

Lord Lester said that he, together with the assistance of libel experts and free speech groups, prepared a private member's Bill, which took more than a year to prepare and which aimed to strike a better balance between the right to reputation and the right to freedom of expression.

After the Bill was given a second reading in the House of Lords in July 2010, the coalition government introduced its own Bill.

'After pre-legislative scrutiny of my Bill and the draft Bill by a joint parliamentary committee, and a public consul-

tation, the actual Bill was scrutinised in the House of Commons and the House of Lords,' he said.

Lord Lester said that the aim of the reforms included requiring claimants to demonstrate that they had suffered or were likely to suffer real harm as a result of the alleged defamatory publication, and the Bill introduced a 'serious harm' test to enable the courts to eliminate trivial claims.

In respect of defences, he said that the Bill replaced the defences of 'justification' and 'fair comment' with the defences of 'truth' and 'honest opinion'.

One of the most important features of the Bill, he added, was the new public interest defence, which was broad and would be interpreted and applied by the courts on a case-by-case basis.

The Bill also introduces a single publication rule, which will prevent perpetual liability for internet publications, avoiding a new claim arising each time an internet page is opened. In addition, the Bill contains provisions discouraging 'libel tourism'.

The draft legislation also restricts the use of juries, abolishing the presumption of a trial by jury, he said.

Lord Lester said that there had been 'long and hard' debates about the ability of companies to bring defamation claims. 'They have reputations, although they do not have feelings – should they be able to sue?' was one of the questions considered, together with: 'Should big corporations be restricted in bringing such suits?'

'As it currently stands, the Bill ... restricts the ability of companies and public authorities to bring defamation claims. Companies may sue but must prove serious financial harm or the likelihood of such harm,' he said, adding that a related aspect was whether a governing body could sue to vindicate its 'governing reputation'. He referred to a House of Lords decision in which the court had been persuaded that it was contrary to the public interest for institutions of central or local government to be able to sue for libel to vindicate their 'governing reputation'.

In conclusion, Lord Lester noted that the reform was taking place at a time when the British media were mired in controversy in the wake of the Leveson inquiry into the culture, practice and ethics of the press following the revelations of the 'phone hacking scandal', when it emerged that the *News of the World* had engaged in illegal 'phone hacking'. However, he said that this 'should not be allowed to overtake the Defamation Bill'.

He said that the 'politics' of the inquiry and subsequent report had led to 'a number of colleagues deciding to hijack the Defamation Bill' and supporting

amendments to coerce the government into giving statutory effect to the Leveson report, which risked 'killing' the Bill.

However, he said that during the period of the Commonwealth Law Conference, the 'obnoxious amendments that took the Bill hostage were repealed' and the Bill would 'be able to become law'. 'This Bill will be on the statute books by June,' Lord Lester said.

'The Bill will make major progress and is worthy of being looked at in other countries,' he concluded.



South African advocate Gilbert Marcus SC addressing delegates on the topic of defamation law in South Africa.

The position in South Africa

Mr Marcus commended the UK for its 'far-reaching and much-needed reform in this area of law'.

'It will inevitably have reverberations throughout the Commonwealth and is a highly significant development,' he said before discussing the law of defamation in South Africa.

Mr Marcus said that defamation was a common law, not a statutory, crime in South Africa, with its origins in Roman Dutch law. He highlighted two other distinguishing features of the country's law of defamation, namely that South Africa has no jury system and the awards for defamation have historically been very low, with 'little incentive for an applicant wishing to get rich', he said, noting that the highest award had been in the region of R 200 000.

Mr Marcus said that the 'impetus' for his presentation was that, 'almost without exception, people who believe their reputation has been injured want the record set straight – quickly and with prominence'.

He said that under the Constitution, the courts were obliged when developing the common law to promote the spirit, purport and objects of the Bill of Rights.

There was thus scope for judicial reform for the law of defamation, he said, adding that 'the courts equally recognised that it was the legislature, not the judiciary, that should be the engine for reform'.

Mr Marcus said that previously an apology was traditionally aimed at miti-

gating damages, and that the Constitutional Court had 'given the nod' to an apology and had recognised its importance in terms of the possibility of restoring dignity without curtailing freedom of speech.

He said that the role of an apology engaged the following three questions:

- Should it operate as a complete defence to a claim for defamation?

Mr Marcus said, in his view, he could see a plausible argument that, in an appropriate case, an apology could operate as a defence, especially if the purpose of the suit is vindication. 'There ought not to be a barrier to apology as a defence,' he added.

- If a defendant apologised, should that be relevant to the quantum of damages? Mr Marcus said that this was 'clearly in the affirmative', but it was difficult to adopt a one-size-fits-all approach.

- Should a court be capable of compelling a defendant to apologise? Mr Marcus noted that a compelled apology may have negative implications for freedom of expression and may be considered to be an 'unjustified interference'.

In respect of the latter point, Mr Marcus said that the defendant should be given a choice whether or not to apologise, failing which he or she could pay damages.

In addition, he said that a plaintiff ought to be able to sue for an apology as an alternative to damages.

'An apology will largely be welcome, some may even be happy with a correction and retraction,' he said, adding that most editors, when asked to publish a right of reply, did so.

'This raises questions of whether a plaintiff could sue for a retraction. This may, too, imperil freedom of expression, but there is no reason not to, again, provide a selection,' he said.

One final area of reform Mr Marcus mentioned briefly related to a declaration of falsity. 'The law may develop in this area,' he noted.

In conclusion, Mr Marcus said: 'These are all plausible developments of our common law. ... These are mechanisms that address the overwhelming concern of defamation claimants, which is simply to put the record straight.'

Defamation in the age of the internet

Mr Stephens commended Lord Lester's advocacy before he began his presentation, in which he focused on the impact of the internet on the balance between free speech and reputation, noting that 'a lie can make its way around the world rapidly with the internet'.

In doing so, he focused on the following three areas:

- Law reform and the need for it.
- Types of reform that may be useful.
- How this plays into 'internationalised' media.

Mr Stephens referred to offences that predated the internet, citing this as a motivation for the need for reform. 'The



Incoming Commonwealth Lawyers Association President Mark Stephens CBE speaking on law reform in the area of defamation.

laws are clearly out of date; this has been recognised,' he said.

He also cited research that indicated that there was a strong correlation with economic investment in countries with better, progressive libel laws that allow the media to be a watchdog.

In terms of corporations being able to sue for libel, Mr Stephens said that he did not support this: 'Why should corporations sue for libel? What is a corporation? It is a piece of paper; it has no feelings; it can suffer no harm. If it suffers financial loss, it should be able to sue, but otherwise, I believe quite strongly it should not,' he said.

He added that it was important to recognise that non-governmental organisations were often the subject of 'reasonably meritless' defamation claims by large organisations, which attempted to divert their resources away from, for example, investigations and to obtain their sources. Another reason he was against corporations being able to sue for defamation was that there may be a disparity of means between corporations and vulnerable groups.

In terms of libel matters being determined by juries, he said: 'I am not sanguine about leaving matters to a judge. ... The jury is an important bulwark in the libel courts.'

On the topic of apologies and rights of reply, Mr Stephens noted that both had been used 'quite effectively' in some matters, especially if made on a newspaper's 'most valuable asset' – its front page.

In conclusion, Mr Stephens said that Mauritius was currently looking at reforming its libel and media law, noting that its current proposal was 'interesting' and, if enacted, would lead to Mauritius having 'the most progressive media and libel laws in the Commonwealth'. 'We may want to look at how things develop there,' he said.

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THE LAW REPORTS

April 2013 (2) The South African Law Reports (pp 325 – 642);
[2013] 1 The All South African Law Reports March no 1 (pp 511 – 631)
and no 2 (pp 633 – 713)

This column discusses judgments as and when they are published in the South African Law Reports, the All South African Law Reports and the South African Criminal Law Reports. Readers should note that some reported judgments may have been overruled or overturned on appeal or have an appeal pending against them: Readers should not rely on a judgment discussed here without checking on that possibility – Editor.

ABBREVIATIONS:

CC: Constitutional Court
GSJ: South Gauteng High Court
NWM: North West High Court, Mafikeng
SCA: Supreme Court of Appeal

Companies

Conduct that is oppressive, unfairly prejudicial or that unfairly disregards another's interest: Section 163(1)(a) of the Companies Act 71 of 2008 (the Act) provides that a shareholder or a director of a company may apply to court for relief if any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards, the interest of the applicant. The remedies that may be granted are specified in subs (2).

In *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) the applicants, Peel and others, were shareholders and/or directors of the first respondent, Hamon J&C, a joint venture company formed by the applicants' group and the respondents' group, being Hamon and others. The company relied on government, public entities and large non-governmental companies for business and was awarded an Eskom Holdings contract because of its favourable black economic empowerment (BEE) status. That favourable BEE status was necessary for the continuation of the Eskom Holdings contract and possible future contracts. It was not long before the applicants established that the favoura-

ble BEE status of the company had been inappropriately obtained, which was prejudicial to the company as it survived on contracts that were awarded on that basis. The respondents had represented that 26% of their company's shares in Hamon SA, which owned 60% of the J&C shares, were held by black people. Those shareholders were two black women, one a cleaner and the other a driver and messenger, who acquired that stake in the company at a price of R 1. The contract in terms of which they acquired the shares provided that the shares could be repurchased at any time on 'simple request'. Within two months after finalisation of the creation of the joint venture company that repurchase was done and the apparent BEE compliance disappeared. Because of the inappropriate conduct of the respondents relating to the company's BEE status, the applicants wanted to leave the joint venture company, seeking a number of remedies in terms of s 163(2) of the Act. It was alleged that what the respondents had done was oppressive, unfairly prejudicial or had unfairly disregarded the applicants' interests. As a result, they sought a number of remedies against the respondents, the main ones being that the Hamon group should transfer the shares it held in the joint venture company to them in return for payment for the value of those shares by them, subject to deduction of wasted expenditure; that is, the costs of implementation of

the joint venture agreement and creation of the joint venture company.

The court, per Moshidi J, granted the orders sought, save that the issues of the price for the shares and wasted expenditure were referred to trial, as evidence was required to establish same.

The court held that the fact that the respondents engaged in an inappropriate BEE exercise, which the applicants viewed in a very serious light, and had not sought to take appropriate measures to remedy their conduct, was oppressive. The conclusion of that BEE transaction, which was never disclosed to the applicants, meant that the conduct of the respondents was unfairly prejudicial to the applicants and unfairly disregarded their interests. The transaction exposed the applicants to serious business risks, particularly if the Department of Trade and Industry, being in charge of Eskom Holdings, was to discover that the whole BEE exercise was a sham. Moreover, the possibility of criminal prosecution could not be ruled out. Therefore, it was more than plain that the applicants, as directors and shareholders, were being prejudiced. Their interests were being unfairly disregarded by the respondents. The fact that the BEE issue was not being resolved made the conduct oppressive towards the applicants.

Institution of legal proceedings for loss suffered by majority shareholders: Briefly, the rule in *Foss v Harbottle* (1843) 67 ER 189 pro-

vides that the proper plaintiff in an action in respect of a wrong alleged to be done to a company is *prima facie* the company itself. No individual member of the company is allowed to maintain an action in respect of the claim, in that if the majority confirms the wrongdoing, the matter is laid to rest. An exception to the rule is allowed if what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In that case, the rule is relaxed in favour of the aggrieved minority, which is allowed to bring a minority shareholders' action on behalf of it and all others.

In *Roestorf and Another NNO v Johns* 2013 (2) SA 459 (KZD) R and W, as trustees of two trusts, held a 75% majority shareholding in a company, Two Wheel Investments. They sued for damages suffered by them when their shares and loan accounts were destroyed as a result of the conduct of the manager, Johns, who ran the company in a manner alleged to have been *mala fide*, fraudulent or negligent. As a result of the alleged conduct of the manager, the company's contracts with suppliers were cancelled and the company was liquidated. Far from passing a resolution authorising the company to institute proceedings against the manager or communicating with the liquidator to do so, the plaintiffs instituted the claim against the manager. At the close of the plaintiffs' case, the defendant applied for absolute from the instance, which was granted with costs.

Lopes J held that there was no reason why the plaintiffs, as holders of 75% of the shares, could not pass a resolution authorising the action on behalf of the company to recover the losses sustained by it as a result of the actions of the defendant. It was incumbent on the plaintiffs to demonstrate that they were the proper plaintiffs in the action. Their bringing of the action was in breach of the rule in the *Foss* case. The fact that their shareholding was affected by the conduct of the defendant did not give them a right of action *per se* against the defendant. The plaintiffs did not demonstrate that their action fell within the rule or was within any of the exceptions envisaged in the *Foss* case. Moreover, the company was in liquidation and there was no evidence as to progress made in this regard. Therefore, as the action lay in the first instance in the hands of the company, if all the creditors had not been paid, any amount recovered by the company would have gone to the creditors who suffered a shortfall. To allow the plaintiffs' present action would circumvent the liquidation process in its entirety and award a dividend to shareholders – a course that was not warranted.

Security for costs: Section 13 of the repealed Companies Act 61 of 1973 provided, among others, that a plaintiff company could be required to provide security for the defendant's costs. The present Companies Act 71 of 2008 does not have a similar provision. However, r 47(3) of the Uniform Rules of Court provides that if the party from whom security is demanded contests liability to give security, or if he or she fails or refuses to furnish security in the amount demanded or fixed by the registrar of the court within ten days of the demand or the registrar's decision, the other party may apply to court for an order that such security be given and that proceedings be stayed until compliance with such order.

In *Hennie Lambrechts Architects v Bombenero Investments (Pty) Ltd* 2013 (2) SA 477 (FB) the respondent instituted proceedings against the applicant, claiming damages for breach

of contract. In response, the applicant demanded that security be furnished for its costs in case it successfully contested the main claim. When such security was not forthcoming, the applicant launched the present application in terms of r 47 of the Uniform Rules of Court. The application was dismissed with costs.

Thamagae AJ held that the main emphasis in the instant application was on the inability of the respondent to pay costs; there being no substantial indication that the respondent's litigation was vexatious, reckless or amounted to an abuse of the process of the court. There was therefore nothing more than the respondent's solvency. Although the court had an inherent duty to guard against abuse of its process, it should nevertheless not close the door to a genuine *incola* plaintiff who has a sustainable case but is impecunious. Each case had to be decided on its own merits and circumstances, with an emphasis on legitimate litigation and the interests of justice. Access to courts should thus not be technically denied simply because a litigant with a meritorious claim could not provide security. As stated by Van der Merwe AJ in *Ngwenda Gold (Pty) Ltd and Another v Precious Prospect Trading 80 (Pty) Ltd and Another* (GSJ) (unreported case no 2011/31664, 14-12-2011) (LJ van der Merwe AJ), the absence of an equivalent to s 13 of the 1973 Act suggested that the legislature placed greater emphasis on the entitlement of even impecunious or insolvent corporate entities to recover what was due to them in courts without the obstacle of having to provide security in advance for the costs of the litigation.

Note: A similar decision was reached in *Maignet (Pty) Ltd (In Liquidation) v Command Holdings Ltd and Others* 2013 (2) SA 481 (WCC), in which the court emphasised that the power to order security had to be exercised with caution and that 'something more', such as vexatious or reckless litigation or abuse of the process of the court, was required to be established by a defendant than

just the prospect of the plaintiff not being able to meet an adverse costs order. Therefore, the 'woeful insolvency' of the plaintiff alone would not justify an insistence on furnishing security.

Contract

Breach of contract – repudiation and specific performance: In *Sandown Travel (Pty) Ltd v Cricket South Africa* 2013 (2) SA 502 (GSJ) the plaintiff, Sandown Travel, had a contract with the defendant, Cricket South Africa, in terms of which it rendered travel services to the latter. The contract was to run for two years but contained a provision to the effect that it would be automatically renewed for one more year unless either party gave notice of termination more than six months before the automatic renewal provision was activated. No such notice of termination was given by either party and, as a result, the contract was automatically renewed for one year. However, although it was too late to do so, the defendant nevertheless repudiated the contract by giving notice of termination inside the last six months. The plaintiff rejected the late notice of termination and advised the defendant that it regarded the contract as still running. The defendant persisted with its repudiation and proceeded to obtain the services of another supplier. Eventually the plaintiff conceded that the defendant was no longer interested in the contract, accepted repudiation of the contract and sued for damages. The defendant resisted the claim for damages on the basis that the plaintiff could not both approbate and reprobate at the same time, meaning that the plaintiff was not allowed to both reject and accept repudiation of the contract at the same time. The parties agreed on the amount of damages to be awarded if the plaintiff succeeded; the only issue remaining for determination being the existence of liability.

Wepener J held that the defendant was liable to the plaintiff in the amount of damages as agreed; the claim being upheld with costs. It was held that, based on the assumption that

the plaintiff was bound by its initial election to keep the contract alive, and shorn of its ineffective belated change of mind, the plaintiff's particulars of claim nevertheless disclosed a cause of action for damages as a surrogate for specific performance due to the defendant's repudiation of the contract. The principle that the innocent party (such as the plaintiff in the present case), when the defaulting party committed an anticipatory breach, could change his or her mind if the defaulting party persisted with its repudiation when the date for performance arrived, had been applied since 1910 but was limited to cases of anticipatory breach of an agreement; that is, breach of the agreement before the date on which performance was due. The principle of repentance – that is, the principle that an innocent party should be afforded the opportunity to reconsider his or her position – was well established and had become part of South African law. In the instant case, the plaintiff relied on the doctrine of repentance in order to exercise its rights and was entitled to succeed with its claim against the defendant. Although a claim for damages based on keeping the contract in existence had to be coupled with the plaintiff's tender to perform its obligations, in the present case the plaintiff was excused from tendering performance in its particulars of claim as the defendant had made it clear that it was terminating the contract.

Conveyancers

Liability of conveyancer for delay in transferring property: In *Margalit v Standard Bank of South Africa and Another* 2013 (2) SA 466 (SCA) the appellant, Margalit, was the owner of immovable property over which the first respondent, Standard Bank, held two mortgage bonds. After selling the property in 2007, the appellant had to pass transfer of ownership to the purchaser. However, before transfer could take place the two bonds had to be cancelled and, as the purchaser had also obtained financing from his bank, a new mortgage bond had to be registered. A delay took place from the end

of May 2008 to the middle of July 2008 when the two mortgage bonds were cancelled, the property was transferred to the purchaser and a new mortgage bond was registered to secure the purchaser's loan. The delay was caused by the second respondent, a firm of attorneys acting for the first respondent, after its conveyancer failed to lodge the cancellation of bond and transfer documents properly, as a result of which they were rejected by the deeds office three times. Eventually, the documents were properly lodged and the registrations effected on 16 July 2008, whereas that could have been done by 29 May 2008 had the correct documentation been properly submitted. As a result of the late cancellation of the bonds and transfer of the property to the purchaser, it being the stage at which the appellant received the proceeds of the sale, the appellant sued the respondents for damages in the form of interest lost due to the delay. The magistrate's court held the respondents liable, which decision was overturned by the GJ, per Mbha J and Levenberg AJ.

A further appeal to the SCA was upheld with costs but counsel's fees were limited to one instead of two counsel, as the court was of the view that the employment of two counsel was not warranted in view of the small amount involved (some R 42 700); the law being settled and the facts being straightforward.

The SCA, per Leach JA (Nugent, Pillay JJA, Southwood and Erasmus AJJA concurring), held that a conveyancer was an attorney who specialised in the preparation of deeds and documents that, by law or custom, were registrable in a deeds office and who was permitted to do so after practical examination and admission. Like any other professional, a conveyancer could make mistakes. In a claim against a conveyancer based on negligence, it had to be shown that the conveyancer's mistake resulted from a failure to exercise that degree of skill and care that would have been exercised by a reasonable conveyancer in the same position. The gravity and likelihood of potential

harm would determine the steps, if any, that a reasonable person should take to prevent such harm occurring. Moreover, the more likely the harm, the greater the obligation to take such steps. In the case of a conveyancer, it was necessary to bear in mind that any mistakes made that could lead to a transaction in the deeds office being delayed would almost inevitably cause adverse financial consequences for one or other of the parties to the transaction. To avoid causing such harm, conveyancers should be fastidious in their work and take care in the preparation of their documents. In the instant case the conveyancer failed to check the documents to see if they would pass muster before lodging them, which omission was evidence of a 'slothful approach' to the important task of ensuring that the documents were in accordance with the deeds office's practices and requirements. The conveyancer's failure in that regard also fell short of the high standard of care expected of a prudent practitioner.

Fundamental rights

Right to housing – 'eviction' includes 'attenuation' or 'obliteration' of the incidents of occupation: Section 26(3) of the Constitution provides, among others, that no one may be evicted from their home or have their home demolished without an order of court made after considering all the relevant circumstances.

In *Motswagae and Others v Rustenburg Local Municipality and Another* 2013 (2) SA 613 (CC) the appellants, Motswagae and others, were occupants of dilapidated buildings that the respondent, the Rustenburg Local Municipality, wanted to demolish to make way for new housing. Negotiations were held with the occupants of the buildings for their relocation and, as no agreement could be reached, the respondent, without obtaining a court order, commenced bulldozing and excavation work, which exposed the foundation of the buildings. As a result, the appellants approached the NWM for an interdict restraining the respondent from interfering with the peaceful and undisturbed possession of their

homes. The application was dismissed and the respondents were granted a counter-application to proceed with the bulldozing and excavation work. The High Court and the SCA having denied the appellants leave to appeal, such leave was granted by the CC and the appeal was upheld with costs. The first and second respondents were interdicted and restrained from performing or causing to be performed any construction work on the properties on which the applicants' homes were situated, without the applicants' written consent or a court order.

Delivering a unanimous judgment of the CC, Yacoob J held that s 26(3) of the Constitution was sufficiently wide to ensure protection of the appellants in the occupation of their homes. Its provisions would be pointless and afford no protection if municipalities and other owners were permitted to disturb occupiers in peaceful and undisturbed occupation of their homes, unless a court order authorised interference. The idea that owners were able to do so without offending the provisions of s 26(3) had to be rejected. The underlying point was that an eviction did not have to consist solely in the expulsion of someone from their home. It could also consist of the attenuation or obliteration of the incidents of occupation. The work authorised by the respondent municipality interfered with the appellants' peaceful and undisturbed occupation of their homes. The course of action adopted was to secure the eviction of the appellants from their homes before carrying on with intrusive and objectionable construction work on the property on which the appellants' homes were situated.

Interest

Mora interest on unliquidated debt: Section 2A(5) of the Prescribed Rate of Interest Act 55 of 1975 (the Act) provides, among others, that a court may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue

and the date from which interest shall run.

In *Du Plooy v Venter Joubert Inc and Another* 2013 (2) SA 522 (NCK) the plaintiff, Du Plooy, sustained injuries in a shooting incident involving the police. As a result, she instructed the first defendant, Venter Joubert Inc, a firm of attorneys that acted through a professional assistant, the second defendant, to institute legal proceedings against the Minister of Safety and Security for the recovery of damages. The defendants duly served a letter of demand on the Minister on 3 August 2006 but did not institute legal proceedings before the claim prescribed. As a result, on 12 January 2010 the plaintiff instituted a claim against the defendants for professional negligence but failed to first serve a letter of demand. On 11 September 2011 the defendants delivered a tender to the plaintiff for settlement of the claim in a certain amount and party and party costs as taxed or agreed. The offer of settlement did not provide for payment of interest and the parties could not agree on costs. The trial proceeded on the issues of interest and costs, as the capital amount had been settled.

Coetzee AJ held that before the introduction of s 2A of the Act in 1997 no common law principle or statutory enactment provided for the award of pre-judgment interest on unliquidated damages. The purpose of the section was not to compensate a creditor for his patrimonial loss but to compensate his patrimonial loss in real monetary value and not in depreciated currency. There was no indication that the legislator intended to limit the court's discretion to the provisions or ambit of s 2A(2)(a) to service on the debtor a demand or summons that was otherwise overridden by the discretion given to the court. The date from which interest was to run had to be a date that was, in the exercise of the court's discretion, just. In exercising its discretion, the court could order interest to run from a date prior to the

date of demand or service of summons, or from a date subsequent to either date, and to such date or dates as could be considered just, having regard to the circumstances of each case. In the instant case it would not be just to pay the plaintiff in depreciated currency and thus deprive her of being paid in real monetary value. Accordingly, it was found to be just to order payment of interest to run from 3 September 2006 (being 30 days after the letter of demand was served on the Minister in the prescribed claim) at the rate of 15,5% to date of payment and costs.

Motor vehicle accidents

Determination of 'serious injuries' by the Road Accident Fund, not the court: As a result of the amendment introduced by the Road Accident Fund Amendment Act 19 of 2005, which came into effect on 1 August 2008, s 17(1) of the Road Accident Fund Act 56 of 1996 (the Act) limits the liability of the Road Accident Fund (the fund) to compensate the victim of a road accident, a third party, for non-pecuniary loss – that is, general damages – to instances where such person has suffered 'serious injuries' as contemplated in s 17(1A) of the Act.

Section 17(1A) provides that the assessment of whether or not an injury is 'serious' shall be carried out by a person registered as a medical practitioner under the Health Professions Act 56 of 1974 and on the basis of a 'prescribed method'. The prescribed method is found in reg 3 of the Road Accident Fund Regulations of 2008, which requires the third party to submit to an assessment by a medical practitioner.

In *Road Accident Fund v Duma and Three Other Related Cases (Health Professions Council of South Africa as amicus curiae)* [2013] 1 All SA 543 (SCA) the respondents, Duma and three others, suffered injuries in motor vehicle collisions in circumstances in which the fund would be liable. As a result, the fund accepted liability, except in re-

spect of general damages – it contended that the respondents did not suffer 'serious injuries' as required by s 17(1).

In all four matters the fund, through its legal representatives, rejected the respondents' 'serious injury assessment reports', being the RAF 4 forms, very late – it being more than a year since they were submitted – contending that the injuries had not been correctly assessed as serious. The main problem with the RAF 4 forms was that they had been completed by a 'health practitioner', namely an occupational therapist, and signed by a psychiatrist instead of a 'medical practitioner', who had also failed to physically examine the respondents. The psychiatrist only signed the forms after looking at hospital records. In view of the rejection of the RAF 4 forms by the fund, the respondents were supposed to have referred the dispute to the Health Professions Council within 90 days, whereafter an appeal tribunal would be set up to take a final and binding decision. Instead, the respondents proceeded to trial. The GSJ held that the respondents had suffered 'serious injury' and their claim was successful, hence the present appeal to the SCA, which was upheld with no order as to costs; the court being of the view that reg 3, dealing with assessment of serious injury, raised a challengeable constitutional issue. The issue of general damages was postponed *sine die* and the respondents were given 90 days to refer the dispute to the Health Professions Council for determination as to whether the injuries suffered by the respondents were serious.

Brand JA (Mhlantla, Leach JJA, Plasket and Saldulker AJJA concurring) held that, in accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party was serious enough to meet the threshold requirement for an award of general damages was conferred on the fund and not the court. That much appeared from the stipulation in reg 3(3)(c) that the fund would only be obliged to pay general damages if it – and not

the court – was satisfied that the injury had correctly been assessed as serious in accordance with the RAF 4 form. Unless the fund was so satisfied, the court had no jurisdiction to entertain the claim for general damages. Stated differently, in order for the court to consider a claim for general damages, the third party had to satisfy the fund, not the court, that his or her injury was serious. Moreover, the fund's decision to reject the respondents' RAF 4 forms constituted an administrative action, which could be reviewed under the Promotion of Administrative Justice Act 3 of 2000, which meant that, until that decision was set aside by a court on review or overturned in an internal appeal, it remained valid and binding. The fact that the fund gave no reasons for the rejection or that the reasons given were found to be unpersuasive or were not based on proper medical or legal grounds could not detract from that principle. Whether the fund's decisions were right or wrong was of no consequence as they existed as a fact until set aside, reviewed or overturned in an internal appeal. It was therefore not open to the High Court to disregard the fund's rejection of the RAF 4 forms on the basis that the reasons given were insufficient or that they were given without any medical or legal basis or that that they were proved to be wrong by expert evidence at the trial. The appeals were thus upheld with no order as to costs.

Undertaking by the Road Accident Fund in respect of future medical costs: Briefly, s 17(4) of the Road Accident Fund Act 56 of 1996 (the Act) provides that the fund shall, in an appropriate case, provide the plaintiff with an undertaking for the costs of future accommodation in a hospital or nursing home or treatment of or rendering a service or supplying of goods to him or her arising out of injuries suffered in a motor vehicle collision. The section must be read together with s 36 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), which provides that an employee who

suffers occupational injuries in the course of employment may claim compensation in terms of COIDA and may also institute action for damages against a third party (such as the fund). In awarding damages in a third party claim, the court is required to have regard to the compensation paid to the plaintiff in terms of COIDA.

In *Paterson NO v Road Accident Fund and Another* 2013 (2) SA 455 (ECP) N was injured in a motor vehicle collision in the course of his employment and, as a result, qualified for compensation under both the Act and COIDA. His claim against the first respondent, the Road Accident Fund (the fund), which was instituted by a *curator ad litem*, was settled by agreement 100% in his favour on the merits and an undertaking was furnished to him. The settlement was made a court order. However, the undertaking the fund provided in due course contained a condition to the effect that it was subject to the provisions of s 36 of COIDA. In other words, the undertaking certificate provided that the fund would pay future medical costs on condition that N proved that they had not been paid in terms of COIDA. This condition was not, however, provided for in the court order.

Malusi AJ granted an order, with costs on a punitive scale, directing the fund to furnish a proper undertaking in compliance with the court order that was not subject to s 36 of COIDA. It was held that, at best for the fund, s 36 of COIDA would be relevant where an employee had concurrent claims for compensation in terms of COIDA and damages against a third party. The trial court would then consider compensation already received by the employee from the compensation commissioner. It was therefore the trial court that was compelled to have regard to the compensation already paid, and not the employee. It was thus not necessary for an undertaking certificate that was for the benefit of the employee to include a reference to what the trial court had to consider. The proviso in the

undertaking required the employee to do more than simply prove the costs he incurred as provided for in s 17(4) of the Act and therefore amounted to a qualification beyond the scope of the section. It was not for the employee to prove what compensation had been made by the commissioner when he proved costs incurred as provided in s 17(4). On the question of punitive costs, the court held that it was trite that a party that failed to comply with a court order was visited with a costs order on a punitive scale unless exceptional circumstances existed, that not being the position in the instant case.

Restitutio in integrum

Party seeking *restitutio in integrum* must tender restoration of benefits received:

In *Mkhwanazi v Quarterback Investment (Pty) Ltd and Another* 2013 (2) SA 549 (GSJ) the applicant, Mkhwanazi, needed funds to bring her motor vehicle and mortgage bond instalments up to date to avoid steps being taken against her by the relevant creditors. To this end, the first respondent, Quarterback Investment, represented by its agent, M, concluded a loan agreement with her. At the first consultation M explained how the system worked and told the applicant that the first respondent would provide the funds to bring the motor vehicle instalments up to date and could pay mortgage bond instalments directly to the bank. At the second consultation M brought papers for the applicant to sign and indicated that, as everything had already been explained, there was no need for the applicant to be taken through the papers or to read them. All that the applicant was required to do was to sign, which she did. A few days later the promised funds of some R 12 000 were deposited into the applicant's bank account, which she used to bring the motor vehicle instalments up to date. Thereafter the applicant started paying monthly instalments of R 3 000 to repay the loan (although sometimes more was paid and other times only

R 2 500 was paid). However, some two years later the applicant established that the agreement signed was not a loan agreement. It was a contract for the sale of her house, as well as one in terms of which she leased it from the new owner, the first respondent. The monthly payment she was making was therefore not to repay the loan but rental for occupation of her house, which, by then, had been transferred to the first respondent after settlement of the balance and cancellation of the bond. Briefly, the first respondent was running a fraudulent scam in terms of which needy homeowners sold their houses to it without knowing what they were doing. As a result, the applicant approached the GSJ by way of notice of motion for an order setting aside the transfer of her house to the first respondent and declaring the underlying agreement null and void. She also sought an order directing the Registrar of Deeds to transfer the property back into her name, as well as an interdict restraining the first respondent and M from selling or transferring the property to anyone other than herself. Finally, she also sought costs on an attorney and own client scale. The first respondent did not deny the facts but was content to raise the defence that, as the applicant had not tendered restoration of the benefits received from it, *restitutio in integrum* was not available to her. The court granted the orders sought by the applicant with costs on a punitive scale, as requested.

Spilg J held that the main elements of the *restitutio in integrum* remedy were the entitlement of the aggrieved party to set aside the legal consequences of an event (or a previously valid transaction) and the obligation to restore to the person from whom they were received any property or benefits given and received in consequence of the original legal relations. In the instant case the applicant was entitled to have the agreements set aside as null and void *ab initio* by reason of the material fraudulent misrepresentation and non-disclosure by the first respondent's representative. The effect was that

the performance rendered by the parties no longer found legitimacy and the parties were entitled to be restored, *vis-à-vis* each other, to their respective positions immediately prior to the impugned agreements. Despite a finding that the applicant was entitled to have the agreements set aside by reason of fraud, the purpose of the remedy of *restitutio in integrum* would be seriously impeded, if not effectively frustrated, if the first respondent could insist on a prior determination of whether the applicant derived a net benefit from the transactions. Moreover, if such a finding were made, the applicant would have to find the money to be refunded before she could obtain transfer of the property. As the case was on motion, the main concern was to provide an effective remedy to undo the fraud. Having regard to the provisions of ss 40(4), 89(1)(d) and 89(5)(c) of the National Credit Act 34 of 2005, equity and justice dictated that the applicant was excused from being obliged to restore any benefits before the property could be transferred back into her name. That did not, however, mean that the first respondent was not entitled to sue separately for repayment of any net benefits received, but only that

transfer of the property would not be denied to the applicant because she had not tendered return of any benefits she might have received.

Other cases

Apart from the cases and material referred to above, the material under review also contained cases dealing with admission policy of a public school, amendment of particulars of claim, application for water licence, consumer credit agreement, contingency fee agreement, duty of shareholder to prevent loss to company, enforceability of contractual undertaking, extinctive prescription, injurious posting on Facebook, liquidation of a close corporation for inability to pay debts, meaning of administrative action, removal of delinquent director from a company, requirements for class action, right of *amicus curiae* to adduce evidence, right of journalist not to reveal name of a source, right to legal representation at the Commission for Conciliation, Mediation and Arbitration, suretyship contract, unjust enrichment and vicarious liability of the Minister of Defence.



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NEW LEGISLATION

Legislation published during the period 18 March 2013 – 19 April 2013

Philip Stoop *BCom LLM (UP) LL.D (Unisa)* is an associate professor in the department of mercantile law at Unisa.

* Items marked with an asterisk will be discussed later in the column.

BILLS INTRODUCED

Judicial Matters Amendment Bill B7 of 2013.
Protection of Traditional Knowledge (Private Member Bill) B300P of 2013.

National Environmental Management: Integrated Coastal Management Amendment Bill B8 of 2013.

Electoral Amendment Bill (Private Member Bill) B200P of 2013.

PROMULGATION OF ACTS

Further Education and Training Colleges Amendment Act 1 of 2013. *Commencement:* To be proclaimed. GN209 GG36271/19-3-2013.

COMMENCEMENT OF ACTS

Further Education and Training Colleges Amendment Act 3 of 2012, s 14. *Commencement:* 1 April 2013. GN205 GG36263/18-3-2013.

Further Education and Training Colleges Amendment Act 3 of 2012, ss 11 and 12. *Commencement:* 1 April 2013. GN244 GG36322/28-3-2013.

National Environmental Management Protected Areas Amendment Act 15 of 2009, ss 1 and 8. *Commencement:* 1 April 2013. Proc7 GG36296/27-3-2013.

Credit Rating Services Act 24 of 2012. *Commencement:* 15 April 2013 (general commencement date). GN271 GG36337/12-4-2013.

Prevention of and Treatment of Substance Abuse Act 70 of 2008. *Commencement:* 31 March 2013. Proc8 GG36304/28-3-2013.

Protection from Harassment Act 17 of 2011. *Commencement:* 27 April 2013. Proc R9 GG36357/12-4-2013.

SELECTED LIST OF DELEGATED LEGISLATION

Agricultural Product Standards Act 119 of 1990

Amendment of regulations regarding inspections and appeals: Export. GN R199 GG36258/22-3-2013.

Amendment of regulations regarding inspections and appeals: Local. GN R200 GG36258/22-3-2013.

Allied Health Professions Act 63 of 1982

Notice to increase fees payable to the Allied Health Professions Council of South Africa (AHPCSA) by students, interns and practitioners, as approved by the AHPCSA on 13 February 2013. BN36 GG36257/22-3-2013.

Architectural Profession Act 44 of 2000
South African Council for the Architectural Profession (SACAP): Annual fees for the financial year 1 April 2013 – 31 March 2014. BN38 GG36278/28-3-2013.

Auditing Profession Act 26 of 2005
Independent Regulatory Board for Auditors (IRBA): Fees payable to IRBA with effect from 1 April 2013. BN37 GG36278/28-3-2013.

Civil Aviation Act 13 of 2009
Civil Aviation Regulations, 2011. GN R258 GG36343/5-4-2013.

Compensation for Occupational Injuries and Diseases Act 130 of 1993
Increase of maximum amount of earnings on which the assessment of an employer shall be calculated. GN210 GG36273/20-3-2013.

Increase in monthly pensions. GN211 and GN213 GG36273/20-3-2013.
Amendment of sch 4 to the Act. GN212 GG36273/20-3-2013.

Annual increase in medical tariffs for medical services providers, pharmacies, ambulances and hospital groups. GenN391 and GenN392 GG36377/19-4-2013.

Consumer Protection Act 68 of 2008
Labelling of goods originating from East Jerusalem, Gaza or West Bank wrongly labelled as originating from Israel. GenN380 GG36364/12-4-2013.

Deeds Registries Act 47 of 1937
Amendment of regulations. GN241 GG36306/2-4-2013.

Electronic Communications Act 36 of 2005
General Licence Fees Regulations, 2012. GenN299 GG36323/28-3-2013.

Labelling regulations in terms of the Act and the Independent Communications Authority of South Africa Act 13 of 2000. GenN393 GG36380/16-4-2013.

Employment of Educators Act 76 of 1998
Improvement in conditions of service: Annual cost-of-living adjustment for

educators employed in terms of the Act. GN237 GG36298/28-3-2013.

Fertilizers, Farm Feed, Agricultural Remedies and Stock Remedies Act 36 of 1947

Amendment of the regulations relating to the registration of fertilizers, farm feeds, agricultural remedies, stock remedies, sterilizing plants and pest control operators, appeals and imports. GN R259 GG36345/5-4-2013.

Financial Advisory and Intermediary Services Act 37 of 2002

Exemption of burial societies and stokvels. BN43 GG36316/2-4-2013.

Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

Regulations relating to the reduction of sodium in certain foodstuffs and related matters. GN R214 GG36274/20-3-2013.

Health Professions Act 56 of 1974

Health Professions Council of South Africa: Rules relating to fees payable to council. BN61 GG36348/5-4-2013.

Labour Relations Act 66 of 1995

Commission for Conciliation, Mediation and Arbitration tariff or fees. GN R220 GG36279/28-3-2013.

Landscape Architectural Profession Act 45 of 2000

South African Council for the Landscape Architectural Profession: Guideline for professional fees. BN47 GG36307/5-4-2013.

Local Government: Municipal Finance Management Act 56 of 2003

Effective date (1 July 2013) for electricity tariff determination for municipalities and municipal entities. GenN286 GG36315/28-3-2013

Long-Term Insurance Act 52 of 1998

Prescribed long-term insurance fees. BN39 and BN40 GG36303/28-3-2013.

Magistrates Act 90 of 1993

Remuneration of magistrates. Proc6 GG 36283/22-3-2013 and GenN285 GG36314/27-3-2013.

Magistrates' Courts Act 32 of 1944

Creation of sub-districts and the appointment of a place within the sub-district for the holding of a court. GN290 GG36369/12-4-2012.

Medicines and Related Substances Act 101 of 1965

Regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fee for pharmacists. GN R218 GG36287/22-3-2013.

National Environmental Management: Protected Areas Act 57 of 2003

Amendment of sch 2 to the National Environmental Management: Protected Areas Act. GN236 GG36295/27-3-2013.

National Environmental Management: Biodiversity Act 10 of 2004

Threatened or protected species regulations. GenN388 GG36375/16-4-2013.

Publication of lists of species that are threatened or protected, activities that are prohibited and exemption from restriction. GenN389 GG36375/16-4-2013.

National Railway Safety Regulator Act 16 of 2002

Penalty Fee Amendment Regulations, 2013. GN R208 GG36270/20-3-2013.

Perishable Products Export Control Act 9 of 1983

Imposition of levies on perishable products. GenN245 GG36278/28-3-2013 and BN63 GG36371/19-4-2013.

Prevention of and Treatment for Substance Abuse Act 70 of 2008

Regulations for prevention of and treatment for substance abuse. GenN283 GG36305/2-4-2013.

Protection from Harassment Act 17 of 2011

Regulations. GN R274 GG36357/12-4-2013.

Tariff of compensation payable to electronic communications service providers in terms of s 4(8) of the Act. GN R275 GG36357/12-4-2013.

Directives in terms of s 20(3) of the Act. GN R276 GG36357/12-4-2013.

Public Finance Management Act 1 of 1999

Borrowing powers of waterboards listed under sch 3, part B of the Act. GN256 GG36307/5-4-2013.

Rules Board for Courts of Law Act 107 of 1985

Amendment of the rules (r 43) regulating the conduct of the proceedings of several provincial and local divisions of the High Court of South Africa. GN R262 GG36338/12-4-2013.

Magistrates' Courts: Amendment of the rules of court. GN R263 GG36338/12-4-2013.

Small Claims Courts Act 61 of 1984

Establishment of a small claims court for the area of Msinga. GN285 GG36368/15-4-2013.

Establishment of small claims courts for the areas of Vryheid and Ngotshe. GN286 GG36368/15-4-2013.

Establishment of a small claims court for the area of Elliot. GN287 GG36368/15-4-2013.

Alteration of the area for which the small claims court for Rustenburg was established, and establishment of a small claims court for the area of Madikwe. GN288 GG36368/15-4-2013.

Establishment of a small claims court for the area of Peddie. GN289 GG36368/15-4-2013.

Social Assistance Act 13 of 2004

Increase in respect of social grants. GN219 GG36292/25-3-2013.

South African Weather Service Act 8 of 2001

Regulations regarding fees for the provision of aviation meteorological services. GN R307 GG36391/19-4-2013.

Veterinary and Para-Veterinary Professions Act 19 of 1982

Rules relating to the practising of veterinary professions. GenN374 GG36337/12-4-2013.

DRAFT LEGISLATION

Proposed industry code of the Advertising Standards Authority of South Africa and an ombud scheme for alternative dispute resolution of complaints in terms of the Consumer Protection Act 68 of 2008 for comment. GenN224 GG36253/22-3-2013.

Draft Licensing of Businesses Bill for comment. GenN231 GG36265/18-3-2013.

Draft Electoral Amendment Bill for comment. GenN233 GG36267/18-3-2013.

Draft determination of safety permit fees in terms of s 23(2)(a) of the National Railway Safety Regulator Act 16 of 2002. GN207 GG36268/19-3-2013.

* Draft Expropriation Bill for comment. GenN234 GG36269/20-3-2013.

Proposed categories of goods (meat) that are required to have a trade description applied to them in terms of the Consumer Protection Act 68 of 2008. GenN238 GG36285/22-3-2013.

Draft Agricultural Produce Marketing Agencies Bill, 2013 for comment. GenN282 GG36302/28-3-2013.

Proposed abattoir rating scheme in terms of the Meat Safety Act 40 of 2000 for comment. GenN341 GG36307/5-4-2013.

Draft Merchant Shipping Amendment Bill, 2013 for comment. GenN349 GG36329/3-4-2013.

Draft South African Maritime Draft Ballast Water Management Bill, 2013 for comment. GenN340 GG36330/3-4-2013.

Draft regulations for the type approval of electronic communications equipment and electronic communications facilities and the certification of type approved equipment in terms of the Electronic Communications Act 36 of 2005. GenN394 GG36381/16-4-2013.

National Animal Pounds Bill for comment. GenN398 GG36385/18-4-2013.



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SELECTED ASPECTS OF THE DRAFT EXPROPRIATION BILL

The draft Expropriation Bill was published for comment in GenN234 GG36269/20-3-2013. The aim of the Bill is to ensure the Expropriation Act 63 of 1975 is consistent with the spirit and provisions of the Constitution.

General power to expropriate property (ss 3 and 4)

The Minister of Public Works may expropriate property for a public purpose or in the public interest subject to the obligation to pay compensation.

The Minister may also, subject to s 4, expropriate property on behalf of a juristic person if he or she is satisfied that the juristic person –

- requires the property for a public purpose or in the public interest;
- has failed to reach an agreement with the owner in attempting to purchase the property on the open market;
- is able to give effect to the purpose for which the property is required; and
- accepted in writing the conditions imposed by the Minister.

What is 'public interest' or 'public purpose'? (s 1)

'Public interest' is defined in s 1 to include the nation's commitment to land reform, and to reforms to bring about equitable access to all of South Africa's natural resources and other related reforms in order to redress the results of past racial discriminatory laws or practices.

'Public purpose' is defined in s 1 to include any purposes connected with the administration of the provisions of any law by an organ of state.

Vesting of expropriated property (s 10(1))

Expropriation of property has the following effect:

- Ownership of the property vests in the expropriating authority on the date of expropriation.

- All unregistered rights in such property are simultaneously expropriated on the date of expropriation unless otherwise stated in the notice of expropriation.

- In the case of a taking of a right to use a property temporarily –

- the owner's right to use the property is suspended;
- all registered rights in the property, other than the right of use, are not suspended, unless or until the registered rights are temporarily expropriated from the holder thereof in accordance with the Act; and

- all unregistered rights in such property are suspended for the period of such temporary use.

- The property remains subject to all registered rights, with the exception of mortgage bonds, in favour of third parties with which the property has been burdened prior to expropriation, unless or until such registered rights are expropriated from the holder thereof in accordance with the provisions of the Act.

Duty to take care of and maintain the property (s 10(3))

The expropriated owner or holder of a registered or unregistered right, who is in possession of the property, must from the date of expropriation to the date on which the expropriating authority takes possession of the property, take care of and maintain the property. If the person who is in possession of the property wilfully or negligently fails to take care of and maintain the property and, as a result thereof, the property depreciates in value, the expropriating authority may recover the amount of the depreciation from the expropriated owner or the holder of a registered or unregistered right concerned. However, the expropriating authority must compensate the expropriated owner or holder of a registered or unregistered right, as the case may be, for unusual maintenance costs incurred after the date of expropriation as agreed on between the expropriated owner or the holder of a registered or unreg-

istered right and the expropriating authority.

Determination of compensation (s 13)

The compensation to be paid to an expropriated owner or holder of an expropriated right must be just and equitable. It must also reflect an equitable balance between the public interest and the interest of the expropriated owner or holder. All relevant circumstances must be considered, including –

- the current use of the property;
- the history of acquisition;
- the history of the use of the property;
- the market value of the property;
- the extent of direct state investment and subsidy in acquisition and beneficial capital improvement of the property; and
- the purpose of the expropriation.

The following factors must not be taken into account –

- the fact that the property has been taken without the consent of the expropriated owner or expropriated holder;
- the special suitability or usefulness of the property for the purpose for which it is required by the expropriating authority, if it is unlikely that the property would have been purchased for that purpose in the open market;

- any enhancement in the value of the property, if it is a consequence of the use of the property in a manner that is unlawful;

- improvements made on the property in question after the date on which the notice of expropriation was served on the claimant, except where they were agreed to by the expropriating authority in terms of s 10(3);
- anything done with the object of obtaining compensation therefor; and

- any enhancement or depreciation, before or after the date of service of the notice of expropriation, in the value of the property in question, which can be directly attributed to the scheme or purpose in connection with which the property was expropriated.

Access to court (s 22)

A party to an expropriation may, failing agreement, approach a court to decide or approve –

- the amount of compensation;
- the time of payment of compensation; or
- the manner of payment of compensation.

Section 22 does not, however, preclude a person from approaching a court on any other matter relating to the application of the Act.



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- Verseker regsnaakoming deurgaans die GWK Groep;
- Opstel en instandhouding van regsdokumentasie;
- Bestuur kliëntediens en verhoudinge;
- Bestuur van finansies/begroting;
- Bestuur van strategiese doelwitte van die afdeling.

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Bewese ervaring in kommersiële en kontraktereg.

Goeie onderhandelingsvaardighede.

Indien jy die geskikte kandidaat is wat 'n verskil kan maak in hierdie uitnemende besigheid, stuur asb jou CV na die Menslike Hulpbronne Besigheid per faks: 086 675 5957 of epos: indiensneming@gwk.co.za. Aansoekers wat nie binne 14 dae na die sluitingsdatum van ons verneem nie, kan aanvaar dat hul aansoek nie suksesvol was nie.

GWK streef na gelyke geleenthede ooreenkomstig sy diensbillikheidsriglyne.

MENSLIKE HULPBRONNE

Employment law update



Talita Laubscher *Blur LLB (UFS) LLM (Emory University USA)* is an attorney at Bowman Gilfillan in Johannesburg.



Monique Jefferson *BA (Wits) LLB (Rhodes)* is an attorney at Bowman Gilfillan in Johannesburg.

Retrenchments

The employment of the two respondent employees in *Super Group Supply Chain Partners v Dlamini and Another* [2013] 3 BLLR 255 (LAC) was terminated for operational requirements on 30 April 2008. The respondents contended that their dismissals were procedurally and substantively unfair. On 18 August 2010 the Labour Court, per Molahlehi J, held that the dismissals of the respondents were substantively unfair, and he ordered the appellant to reinstate them.

The appellant carries on the business of Fast Moving Consumer Goods (FMCG) and at the time provided warehousing and distribution services to three entities. All resources were allocated to all three entities and were not dedicated to a specific contract. In about January 2008 two of these contracts were cancelled. The loss of these contracts had the effect that the appellant lost about 80% of its business and, consequently, the appellant required only about 100 out of its 700 employees. The appellant accordingly contemplated a restructuring of its operations and on 1 April 2008 it issued a notice of termination of service to employees who were to be retrenched, including the respondents. In terms of this notice, the appellant recorded as follows:

"The new FMCG structure at Super Park will be much smaller with limited positions. The company considered making use of, amongst others, the LIFO (last in, first out) principle, but in order to ensure that the process is substantively and procedurally fair it was agreed that the filling of the new structure's positions will be done by "open competition", ie allowing everybody to have an equal chance to apply and to be considered for the positions in the new FMCG Super Park structure. In terms of the process all applications were reviewed and shortlisted applicants was

[sic] invited to attend interviews towards the end of March 2008. Unfortunately your application as part of the open competition process was not successful."

The appellant further informed the employees that, should it not be able to find alternative employment for them, their services would be terminated by 30 April 2008. In a letter dated 18 April 2008, the appellant informed the respondents that, 'as agreed', their employment was being terminated with effect from 30 April 2008.

As regards the 'open competition process', the appellant's evidence was that the appellant embarked on this process in order to retain the best skills. The respondents were invited to apply for positions, but the appellant had no record that they had in fact done so. As regards consultation with the employees, the appellant's human resources executive testified that consultation sessions were held with certain groups of people and, after these consultations, the appellant issued letters in which it invited the employees to consult with it. As far as he was concerned, the onus was on the individual employees to engage with the appellant. The human resources executive estimated that there was a minimum of two consultation sessions per group, but he was not aware if meetings were also held for night shift employees, which included the respondents. He could not dispute the respondents' version that there was only one 'mass meeting' that lasted five minutes, in which they were informed that the appellant had lost the two contracts and that there would be structural changes within the appellant. The human resources executive also could not comment on the respondents' version that they did not know that they had to consult – he emphasised that it was for the

employees to initiate meetings for further consultation.

The first respondent testified, *inter alia*, that he had attended a meeting in January 2008 during which the employees were informed about the loss of the contracts and that there would be restructuring. Thereafter, he was not called to any further meetings. During one of his night shifts, the warehouse manager told him that he had to apply for his job or any other suitable position, and he subsequently submitted a form to the appellant. He said that he received the letter dated 18 April on 30 April. His letter was one of many in a box that the employees were told to search through for the one bearing their name. He did not know why he was selected for retrenchment. The second respondent's evidence was similar in that he, too, did not know why he was selected for retrenchment.

The Labour Court held that, because s 189A of the Labour Relations Act 66 of 1995 (LRA) applied, it was precluded from determining the procedural fairness of the dismissals. However, the dismissals were held to be substantively unfair because there was no evidence that the selection criteria applied were fair and objective, as required by s 189(7).

On appeal to the Labour Appeal Court (LAC), Tlaletsi JA, with Ndlovu JA and Murphy AJA concurring, confirmed the decision of the Labour Court.

The court emphasised that an employer should not approach the consultation process with a predisposition to a particular solution but should approach the process with a mind open to alternatives that are practical and rational. Importantly, it held that it was not fair for an employer 'to shirk its statutory duty' to consult and create an onus on an employee to ensure that he or she chases the employer to ensure that consultation takes place. In this case, there was no evidence that there was consultation on selection criteria; that the employees knew and understood the selection criteria to be applied; that the criteria were fair and objective; that the respondents were fairly identified for retrenchment; that they did not apply for positions; or that those appointed had better or more appropriate skills.

As regards the remedy of reinstatement, the appellant argued that the respondents' positions no longer existed and, as such, it was impossible for the appellant to reinstate them. The LAC noted, however, that there was no evidence before the court to support this claim. The evidence on record suggested, instead, that the first respondent's position was taken by another employee even before the retrenchment was finalised; both the first and second respondents had been pickers and had moved

up the ranks; the second respondent was multi-skilled and had worked primarily on the contract that was not cancelled; the appellant retained several

employees who were junior to the respondents; and the respondents' positions still remained, and may only have changed in title. In the circumstances,

the LAC held that the order of reinstatement was correct.

The appeal was accordingly dismissed with costs.



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Union's liability to members for negligence

Food and Allied Workers Union v Ngcobo NO and Another (SCA) (unreported case no 353/12, 28-3-2013) (Ponnan JA and Plasket AJA)

This was an appeal from a judgment of the KwaZulu-Natal High Court in which Swain J, in the matter of *Ngcobo NO and Another v Food and Allied Workers Union* [2012] 10 BLLR 1035 (KZD), ordered the appellant to pay damages in the amount of R 107 232 to each respondent, with interest at the prescribed rate running from 28 August 2004 to date of final payment. The respondents cross-appealed, arguing that the quantum awarded should have been doubled.

Background

At the time the respondents were retrenched by their employer, Nestlé, they were members of the appellant trade union, the Food and Allied Workers Union (FAWU).

Subsequent to their dismissals, FAWU, on behalf of the employees, referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration. An official from FAWU attended the conciliation process set for 18 June 2002, but the matter could not be settled and a certificate of non-resolution was issued. It is trite that, in terms of the Labour Relations Act 66 of 1995 (LRA), FAWU had 90 days from such time to refer the dispute to the Labour Court for adjudication.

After the conciliation process, the respondents visited the offices of FAWU on numerous occasions inquiring about the progress of their matter and on each occasion were informed that the matter was lodged and pending before the Labour Court. In May 2003 the respondents sought the assistance of a university law

clinic, which, having inquired into the respondents' matter, advised them that their dispute had not, to date, been referred to the Labour Court.

It was only in November 2003 that FAWU wrote a letter to the respondents informing them of this fact and further advising that a condonation application needed to be made. In April 2004, having consulted its attorney, FAWU advised the respondents that they had weak prospects of success in their case and two months later advised them that it would not proceed with their matter in the Labour Court.

In response to this, the respondents sought legal advice, and a letter on behalf of the respondents was sent to FAWU demanding that it, within two weeks, bring a condonation application on behalf of the respondents, failing which the respondents would institute a claim for damages against it.

FAWU failed to comply with the demand, resulting in the respondents filing a claim against the union.

The SCA

In the majority judgment, the Supreme Court of Appeal (SCA) noted that the respondents' claim was one based in contract and not delict. It therefore became necessary for the court to establish what contractual obligation, if any, FAWU had failed to discharge.

The SCA held that the contract between the parties was one of mandate. Once FAWU accepted its mandate, which was to take the necessary steps to have the respondents' labour dispute determined in accordance with the LRA, it was obliged to act faithfully, honestly and with care and diligence.

Once this was established, the SCA addressed the contention advanced by FAWU that, being a trade union, 'a less exacting standard' was expected of it as compared to that of an attorney. In dispelling this notion, the SCA approved and followed the dictum in *Mead v Clarke* 1922 EDL 49, which reads:

'Voet (XVII.1.9.) points out that, where a man has expressly or tacitly professed to have business capability, he ought not to have undertaken an affair for which he was not qualified and in which he knew or ought to have known that his own lack of skill would be damaging to the interests of his principal.'

On the merits, the court held, at para 47: 'In our view, the mandate given to FAWU was a relatively simple one - it was to take such steps as were necessary

to have the respondents' labour dispute with their employer determined in accordance with the provisions of the LRA. That it could easily have done. FAWU committed breaches of its mandate. It did so, in the first place, by failing to timeously refer the respondents' dispute with Nestlé to the Labour Court and, in the second place, by failing to secure condonation for that failure. In both instances it failed to act honestly or diligently.'

This, according to the court, altered the respondents' unconditional right to have their dispute adjudicated to a right that was subject to the Labour Court first having to grant condonation before their matter could be heard.

In confirming the legal principle that 'a contracting party cannot liberate himself from a contract by reason of his own breach', the SCA further rejected the argument that the respondents' failure to themselves apply for condonation placed a bar on instituting civil action against FAWU.

In deciding the quantum of damages to award, the SCA had to further consider whether or not the respondents would have been successful in their claim at the Labour Court.

The court examined the evidence of a Nestlé employee who was at the time 'intimately involved in' the restructuring process. Among the concessions he made were:

- He did not know whether the respondents were consulted as part of the retrenchment process.
- The respondents were not offered vacant positions as alternatives to their dismissals.

On these and other grounds, the SCA upheld the court *a quo's* findings that the respondents' dismissals would have been both substantively and procedurally unfair.

In deciding how to quantify the damages, the SCA took various factors into account when determining what was just and equitable for both parties under these circumstances, and confirmed the quantum ordered by the court *a quo*.

Both the appeal and cross-appeal were dismissed, with the appellant ordered to pay the respondents' costs.

Note: Unreported cases at date of publication may have subsequently been reported. □

By
Henk
Delpont

Recent articles and research

ABBREVIATIONS:

AHRLJ: African Human Rights Law Journal (Juta)

PLD: Property Law Digest (LexisNexis)

SA Merc LJ: SA Mercantile Law Journal (Juta)

TSAR: Tydskrif vir die Suid-Afrikaanse Reg (Juta)

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Scott, S 'Security cessions and beneficiary appointments: A belated but necessary footnote to Nienaber's analysis?' 2012 24.3 *SA Merc LJ* 323.

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By: **Graham Bradfield and Karin Lehmann**

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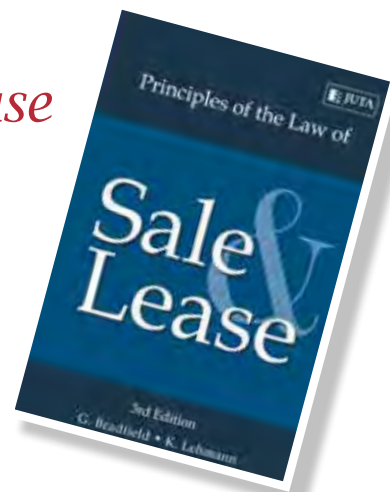
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Paul Crosland is an attorney at Webber Wentzel in Johannesburg.

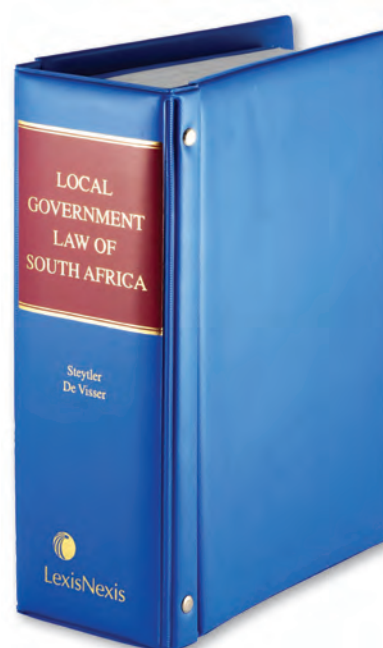
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