

# NELSON MANDELA UNIVERSITY

RESEARCH OUTPUTS

2020



**Faculty of Law**

**Editor: Dr R Denson**

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# ARTICLES

## 1.1 ADMINISTRATIVE LAW

### 1.1.1 Botha, JC, de Villiers, N & Van As, HJ “The enforceability of the by-laws of district municipalities on local municipalities: The case of solid waste disposal”

*Stell LR* 2020 Vol 31 (2) 315-343

#### ABSTRACT

When waste disposal services are regionalised, the result is that waste management services are not the principal responsibility of local municipalities. Instead, they are shared between local and district municipalities. The regionalisation and regulation of solid waste disposal is a contentious issue and raises numerous questions. These include the issue of whether a district municipality may adopt by-laws in order to regulate regional waste disposal services, and also whether a local municipality benefitting from the service is bound thereby. A significant challenge for the regionalisation process is the lack of constitutional and legislative guidance on the implementation procedures needed and the overarching nature of the functions and powers of the impacted local and district municipalities. This article claims that district municipal by-laws may standardise the regional waste disposal function and that these by-laws, although not without limitations, should be enforceable on local municipalities, provided that the principles of cooperative governance and public participation are promoted.

### **1.1.2 Erasmus, D & Van As, HJ “AARTO: Beregtiging van verkeersmisdrywe of ontsegging van toegang tot die reg?”**

*Litnet Akademies 2020 Vol 17 (2) 704-734*

#### **ABSTRACT**

The Administrative Adjudication of Road Traffic Offences that was approved on 11 September 1998, has been implemented for at least 10 years in the metropolitan jurisdictions of Tshwane and Johannesburg. AARTO's main objectives are the promotion of the quality of road transport by discouraging the commission of road traffic offenses, the adjudication of traffic offenses as part of an administrative process, the implementation of a penalty point system and the establishment of a Road Traffic Infringement Agency which is responsible for the administration of the Act.

In March 2019 the President approved the Administrative Adjudication of Road Traffic Offences Amendment Act (Amendment). The amendment deviates substantially from AARTO. In terms of AARTO alleged road traffic offenders had the choice to appear in court instead of following the administrative procedures of AARTO. The amendment removed the option to be tried by a court and makes the provisions of AARTO applicable nationally. Although the effective date has not been determined, it raises a number of questions. The article investigated the constitutionality of AARTO by establishing whether local authorities are not deprived of certain powers and whether certain of its processes do not amount to a denial of the right of access to the courts (and therefore access to justice) and the right to a fair hearing. It is concluded that a number of the provisions of AARTO, especially the Amendment, are unconstitutional. It is also found that AARTO will amount to massive losses of income from traffic fines and that the proposed administrative adjudication process will collapse.



## **1.2 CLINICAL LEGAL EDUCATION**

### **1.2.1 Welgemoed, M “Clinical legal education during a global pandemic - suggestions from the trenches: The perspective of the Nelson Mandela University”**

*PER/PELJ 2020 (23) 2-30*

#### **ABSTRACT**

The Covid-19 pandemic has plunged the world into turmoil and uncertainty. The academic world is no exception. In South Africa, due to a nationwide lockdown imposed by government, universities had to suspend all academic activities, but very quickly explored online teaching and learning options in order to ensure continued education to students. As far as Clinical Legal Education, or CLE, is concerned, such online options of teaching and learning could present problems to university law faculties, university law clinics and law students in general, as CLE is a practical methodology, usually following a live-client or simulation model, depending on the particular university and law clinic.

This article provides insight into the online methodology followed by the Nelson Mandela University, or NMU. The NMU presents CLE as part of its Legal Practice-module and conventionally follows the live-client model. As the national lockdown in South Africa required inter alia social distancing, the live-client model had been temporarily suspended by the NMU Law Faculty Management Committee and replaced with an online methodology. The aim of this was an attempt to complete the first semester of the academic year in 2020. This online methodology is structured so as to provide practical-oriented training to students relating to a wide variety of topics, including the drafting of legal documents, divorce matters, medico-legal practice, labour legal practice, criminal legal practice, and professional ethics. The online training took place in two staggered teaching and learning pathways in line with the strategy of the NMU, underpinned by the principle of "no student will be left behind." In this way, provision had been made for students with online connectivity and access to electronic devices, students with online connectivity only after return to campus or another venue where

connectivity is possible and electronic devices are available, and for students who do not have access to online connectivity and electronic devices at all.

The reworked CLE-programme of the NMU, planned for the second semester of the 2020-academic year, will also be discussed in this article. The online methodology followed by the NMU should however not be viewed as definitive or cast in stone in any way. There might be – and there surely are – alternative methodologies, both online and otherwise, that may provide equally good or even better training to CLE students during a global pandemic. Alternative suggestions in this regard will also be discussed in this article.

It is hoped that this article will provide inspiration and assistance to university law faculties and law clinics that are struggling to engage with continued practical legal education during the testing and uncertain times brought about by the Covid-19 pandemic. It is further hoped that this article may provide guidance in other difficult and unforeseen future instances that may await CLE. In this regard, it is important to remember that the Fourth Industrial Revolution is rapidly increasing its grip on the world and that CLE will have to adapt to the demands thereof.

## 1.3 CONSUMER PROTECTION LAW

### 1.3.1 Tait, AM “Accommodation establishments and the cancellation of advance bookings: The challenge of determining a reasonable cancellation fee”

*SA Mercantile Law Journal* 2020 Vol 32 (2) 277-294

#### ABSTRACT

The economic impact of the COVID-19 pandemic on the economies of countries and businesses has been disastrous, none more so than in the case of the tourism industry. The suspension of travel and the lockdown of countries have brought this industry to a virtual halt. Tourists were forced to cancel trips, flights, and accommodation as well as other bookings, such as car rentals. These (forced) cancellations placed the spotlight on the cancellation policies of service providers in the tourism industry. This analysis is not about cancellation policies during the time of COVID-19, but rather its application during ‘normal’ times. Hopefully, the pandemic is of a relatively short duration, and life and the tourism industry will return to some normalcy soon. In the meantime, this hiatus does allow for reflection on the use of cancellation clauses within the accommodation segment of the tourism industry—an often controversial issue in the industry.

This analysis considers the application of section 17 of the Consumer Protection Act 68 of 2008 (‘CPA’) in the context of the accommodation segment of the tourism industry. De Stadler (‘Section 17’ in Naudé & Eiselen (eds), *Commentary on the Consumer Protection Act* (Juta revision service 5 2014) 17–3) warns that section 17 will affect the travel industry specifically. The section grants a consumer the right to cancel an advance reservation, booking, or order. In turn, the section permits the supplier with whom the advance reservation, booking, or order has been made and subsequently cancelled, to impose a reasonable cancellation fee. This all seems very simple. However, giving effect to these provisions in practice may not be as simple as it appears at first blush. Here, I analyse section 17 of the CPA with an ultimate focus on how to determine a reasonable cancellation fee when a booking made in advance, is cancelled. A better understanding of the

section should facilitate compliance and prevent disputes when advance bookings are cancelled. Of course, an accommodation establishment may for various reasons opt not to charge a cancellation fee, as is its right. For the sake of completeness, a brief explanation is provided on the cancellation of advance bookings in the time of COVID-19.

**1.3.2 Tait, AM “Judicial guidance on the application of section 49 of the Consumer Protection Act 68 of 2008: *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa (Pty) Ltd* [2020] 1 All SA 857 (WCC)”**

*Obiter* 2020 Vol 41 (4) 948-960

**ABSTRACT**

In South Africa, the legislature’s response to the negative consequences resulting from the pervasive use of disclaimers by suppliers has been to regulate the use of these terms through the enactment of a number of provisions in the Consumer Protection Act 68 of 2008 (CPA), including sections 48, 49 and 51. A number of publications have considered the meaning of these provisions and the impact they may have on the use of disclaimers in consumer contracts. (See, for instance, Naudé “The Consumer’s ‘Right to Fair, Reasonable and Just Terms’ Under the New Consumer Protection Act in Comparative Perspective” 2009 *SALJ* 505; Mupangavanhu “Fairness as a Slippery Concept: The Common Law of Contract and the Consumer Protection Act 68 of 2008” 2015 *De Jure* 116; Mupangavanhu “Exemption Clauses and the Consumer Protection Act 68 of 2008: An Assessment of *Naidoo v Birchwood Hotel* 2012 6 SA 170 (GSJ)” 2014 *PELJ* 1168; Tait and Newman “Exemption Provisions and the Consumer Protection Act, 2008: Some Preliminary Comments” 2014 35(3) *Obiter* 629.) As a consequence of the widespread use of disclaimers and the adverse consequences they may hold for consumers, any judicial pronouncement on the impact of the CPA on these clauses is significant. In *Van Wyk t/a Skydive Mossel Bay v UPS SCS South Africa* ([2020] 1 All SA 857 (WCC) (*Skydive v UPS*)), the Western Cape High Court was afforded the opportunity to consider the impact of aspects of section 49 specifically on the use of a clause in a consumer agreement excluding the risk or liability of suppliers (referred to as an “exemption clause” in this note).

Section 49 of the CPA applies to four distinct types of clause enumerated in section 49(1) – namely, clauses limiting the risk or liability of suppliers in respect of any other person; clauses constituting an assumption of risk or liability by the consumer; clauses imposing an obligation on the consumer to indemnify the supplier for any cause; and clauses requiring a consumer to acknowledge a particular fact. As indicated, in



*Skydive v UPS*, the contentious clause was one excluding the risk or liability of the supplier. The focus of this note then is on the interpretation and application by the court in *Skydive v UPS* of the relevant provisions of section 49 of the CPA to an exemption clause.

## **1.4 CRIMINAL LAW**

### **1.4.1 Botha, JC, Cordell, C & Van As, HJ “Formulating a new conception of corruption through historical analysis”**

*THRHR* 2020 (83) 562-581

#### **ABSTRACT**

Corruption in South Africa has reached endemic levels at every level of government. While the Prevention and Combatting of Corrupt Activities Act exists to combat the crime of corruption, its existence has done little to curb commissions of the crime. A new approach is needed to improve the means through which corruption is treated, and this can be done initially via the formulation of a South African conception of corruption that currently does not exist. As South Africa’s unique constitutional dispensation is the result of centuries of legal history and practice, the best way to do this is via historical analysis of the manner in which corruption has been addressed, in order to determine the unique nature of corruption within a domestic context. The result of this examination of the historical treatment of corruption in both Western and African jurisdictions will be a working definition that can be used either in the interpretation of existing anticorruption frameworks or the development of new methods of combatting corruption going forward.

**1.4.2 Erasmus, D & Bowden, S “A critical analysis of South African anti-money laundering legislation with regard to cryptocurrency”**

*Obiter* 2020 Vol 41 (2) 309-327

**ABSTRACT**

Cryptocurrencies are decentralised virtual currencies, using blockchain technology to process peer-to-peer electronic payments. In 2009, the first successful cryptocurrency, Bitcoin, was established. This article discusses concepts of cryptocurrency, its relevance in the financial sector, its associated risks and establishes whether regulatory interference is necessary in order to combat money laundering using cryptocurrency. Currently, cryptocurrencies remain unregulated in South Africa. The article concludes that regulatory intervention is necessary and that cryptocurrencies should be integrated into relevant existing legislation.

### 1.4.3 Van As, HJ & Erasmus, D “Admission of guilt fine: A legal shortcut with delayed shock?”

*SA Crime Quarterly 2-67*

#### **ABSTRACT**

A popular perception shared by peace officers and the public alike is that the payment of an admission of guilt fine finalizes the judicial process and no criminal record will result. This perception is not correct, as the paying of an admission of guilt fine in terms of section 56 of the Criminal Procedure Act has the result the person who pays the fine is deemed to have been convicted and sentenced in a court of law. The current situation has the effect that persons who paid admission of guilt fines later discover with shock that they in fact have a criminal record, which has severe consequences in many respects. Often costly High Court applications will have to be instituted to set aside the resultant previous conviction and sentence. Peace officers do have a duty to inform a person of the consequences of paying an admission of guilt fine, but often do not do so and even abuse the admission of guilt system to finalize matters speedily. This contribution will examine the consequences for a person who pays an admission of guilt fine. It will further investigate whether there is a duty on Legal Aid South Africa to provide some form of legal aid and assistance in these matters and whether an administrative infringement process should be investigated.

## **1.5 FAMILY LAW**

### **1.5.1 Denson, R “A comparative exposition of the law of husband and wife in terms of Islamic law, South African law and the law of England and Wales”**

*Obiter* 2020 Vol 41 (4) 703-749

#### **ABSTRACT**

The primary concern of this article is a comparative analysis of marriage law in three legal systems – namely, Islamic law, South African law and English law. The similarities and differences between these legal systems are highlighted. The comparative analysis demonstrates that although there are similarities in the three legal systems, the differences outweigh the similarities. This begs the question whether Islamic law (Muslim personal law in general and family law in particular) can be recognised and accommodated and implemented in the South African and English legal systems (both constitutional democracies) without compromising the principles of Islamic law, while at the same time upholding the rights contained in the Bill of Rights. To this end, a comparative analysis is undertaken of the law of marriage that entails a discussion, inter alia, of betrothal (engagement), the legal requirements for a marriage, as well as the personal and proprietary consequences of a marriage as applicable in Islamic law, South African law and English law.



**1.5.2 Van der Walt, G “Consideration of sections 249, 250 and 259 of the Proposed Third Amendment Bill to the Children’s Act in light of the best interests’ principle”**

*Obiter* 2020 Vol 41 (4) 934-947

**ABSTRACT**

When Nelson Mandela was elected as the President of the Republic of South Africa in 1994, no one doubted that he was concerned about the children of South Africa and especially those in need of care. He stated:

“There can be no keener revelation of a society’s soul than the way in which it treats its children” (Abrahams and Matthews Promoting Children’s Rights in South Africa: A Handbook for Members of Parliament (2011) 3)

With the promulgation of the Constitution in 1996, national legislative recognition was given to the principle that a child’s best interests are of paramount importance in every matter concerning the child (s 28(2) of the Constitution of the Republic of South Africa, 1996). Section 28(1)(b) expressly provides for the right of a child to family care, parental care or appropriate alternative care. Based on economic and other factors, developing countries like South Africa experience difficulties in meeting the constitutional right of a child to have his or her best interests met and the placement of an orphaned or abandoned child (OAC) in appropriate alternative care is no exception. In light hereof, the current note considers whether the proposed amendments to the Children’s Act (CA, Act 38 of 2005 as amended) introduced by the Third Amendment Bill (GG 42005 of 201902-25), with particular reference to sections 249, 250 and 259 comply with this constitutional right. These three sections are of particular relevance to placing a child in permanent care in the form of both national and intercountry adoption. In particular, section 249 makes provision that no consideration may be given in respect to adoption, section 250 limits the persons who are allowed to provide adoption services and section 259 makes provision for the accreditation for the provision of intercountry adoption services. All three sections are relevant to the adoption process of an OAC. Alternative care options available and the basis for determining which placement

decided upon is deemed to be the most appropriate for the child concerned, are considered in light of the proposed amendments. A consideration of the current status of the child welfare system in South Africa as well as the statistics of the many children in need of alternative care, serves to provide a background in determining whether the proposed amendments meet and further the vulnerable OAC's best interests.

## **1.6 GENDER AND THE LAW.**

### **1.6.1 Nxumalo, N & Fagbayibo, B “An evaluation of South Africa’s gender norms on governance and leadership within the context of Aspiration 6 of Agenda 2063”**

*Agenda 2020 Vol 34 (4) 90-97*

#### **ABSTRACT**

At both national and international levels, various efforts have been geared towards ensuring gender equality and increasing the participation of women in political and developmental goals. The African Union (AU) adopted Agenda 2063 in 2015. The Agenda sets a blueprint for the holistic development of Africa’s people, with its Aspiration 6 specifically directed at uplifting women and youth. In terms of Aspiration 6, the goal is to achieve holistic empowerment of women within the next 50 years. As a first step in realising this goal, it mandates AU member states to obtain a 50/50 gender representation in decision-making capacity at governance and leadership levels by 2023. This profile aims to evaluate the feasibility of this goal in the South African context. It argues that its realisation in South Africa will require deliberate normative and institutional interventions that enhance both quantitative and qualitative representation of women in critical decision-making capacities.

**1.6.2 Nxumalo, N, Stone, L & Mooki, M “She who would be king: Identity, dignity and women’s narrative”**

*Agenda* 2020 Vol 34 (4) 3-11

**ABSTRACT**

The feminist movement is often described as a political movement that advocates radical social change. Consistent with this description, this issue of *Agenda* is intended to tap into those “hidden sources of power from where true knowledge and therefore, lasting action comes” (Lorde, 1984:37). Our aim is to eradicate those spaces that stifle and suppress women. As portrayed in the title, there is no reason why women cannot be “kings” (Needham and Aidoo, 1995). We wish to tell the stories of prolific women throughout Africa, both those in the limelight and those working diligently in the background locating the contribution of women within collective movements for social justice in their respective spheres. The purpose is to credit women as innovators, pioneers and history makers with agency, autonomy and determination. Accordingly, the narratives of these phenomenal women are addressed through the following main themes: oppression and suppression of women activists; feminism; sexual minorities; and women’s participation in government and governance structures.

## 1.7 HUMAN RIGHTS LAW

### 1.7.1 Botha, JC “‘Swartman’: Racial descriptor or racial slur? *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13; 2018 (5) SA 78 (CC)”

*Constitutional Court Review* 2020 (10) 353-377

#### ABSTRACT

This article uses speech theory to assess the harm constituted by the speech acts in two Constitutional Court cases, namely *Rustenburg Platinum Mine v SAEWA obo Bester* and *Duncanmec (Pty) Ltd v Gaylard NO*. I argue that racist speech should be treated as a subordinating and oppressive speech act, with illocutionary force, where the speaker enacts harm through the words used. In the context of the factual matrix in *Rustenburg Platinum Mine* and with reference to the racial descriptor, ‘swartman’, I show that such speech can perpetuate structural inequality, and has the capacity to perpetuate unjust social hierarchies. In comparison, the struggle song at issue in *Duncanmec (Pty) Ltd*, when assessed in context and with reference to the hierarchy of the actors involved, did not have the ability to enact subordination. The analysis demonstrates that an appreciation of the illocutionary force of racist speech and its capacity to enact identity-oppression enhances the balancing of the benefits of the promotion of free speech against the need to regulate and censor harmful speech.



### **1.7.2 Ndimurwimo, LA & Opara, LC “Access to justice for internally displaced persons (IDPs): The global legal order”**

*Journal of Law, Society and Development* 2020 Vol 6 (1) 1-26

#### **ABSTRACT**

Internally displaced persons are people who are uprooted from their social, economic, cultural and educational environment and made squatters or homeless within the jurisdiction of their own country. They consequently have no permanent place of abode. Internal displacement therefore becomes a situation that deprives individuals of access to justice and leads to violations of the human rights of categories of citizens. For example, women, children and the elderly are more vulnerable and lack social-economic assistance from their loved ones and family support because of their internal displacement. Their situation denies them access to justice from several perspectives, such as being in a state of despair, instability and uncertainty. This article examines the ways in which the domestication of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 2009 (the Kampala Convention) and clinical legal education can be used to promote access for internally displaced persons to justice and basic human rights. In this regard, the article further analyses access to justice for internally displaced persons through the teaching methodology of clinical legal education in African legal jurisprudence. Finally, the article recommends the involvement of legal clinicians and other practitioners as advocates of internally displaced persons' access to justice, respect for human rights and the rule of law as a requirement for the domestication of the Kampala Convention by Member States in Africa.

**1.7.3 Ndimurwimo, LA & Opara, LC “A critical appraisal of the legal and institutional framework for the protection of internally displaced persons (IDPs)”**

*Nigerian Bar Association (NBA) Asaba Law Journal 2020 (1) 102-114*

**ABSTRACT**

Globally and in Africa in particular, millions of people have been displaced due to conflicts or armed conflicts resulting to human rights abuses. The challenges of domestic displacement and refugees in context of transitional justice are of great concern. Conflict transformation and transitional justice in post conflict situations remains a continuous process. In essence, there should be a careful consideration in policy making at national and international levels in order to provide solution to the internally displaced persons and have lasting peace and human security in post conflict societies. Thus, all the stakeholders should be engaged to address the root causes of conflicts, aim to transform violence into sustainable peace. This paper analyses and examines the implication and violations of the internal displaced persons' (IDPs) rights and justification in judiciary adjudication. The article seeks to develop a minimum standard of inviolable human rights to protect the IDPs using Nigeria, though not expressly stated under Chapter 4 of the 1999 Constitution of Federal Republic of Nigeria as amended 2011. In view of this, the article examines the rights of the IDPs and investigates as to what extent these rights are protected in Nigeria. It appraises the status of IDPs in Nigeria and broadly advocates for the non-discrimination thereof during displacements. It argues that the states have a primary responsibility to prevent arbitrary displacements while humanitarian law or services do not need to look at the social and legal status of an individual before such an individual can be given protection and assistance in Nigeria.

## 1.8 LABOUR LAW

### 1.8.1 Gathongo, JK “Towards a fair hearing for all employees: A case of probationary employee’s in Kenya and the right to be heard prior to dismissal”

*Obiter* 2020 Vol 41 (3) 555-572

#### ABSTRACT

An employer may require a newly hired employee to serve a reasonable period of probation to establish whether or not his or her performance is of an acceptable standard before permanently engaging the employee. Even so, the current provisions relating to termination of probationary employees under the Employment Act, 2007 (EA) remains a source of concern. Currently, an employer may terminate the employment of a probationary employee at will and without affording such employee an opportunity to be heard. The status quo has received firm approval by the Employment and Labour Relations Court accentuating that employers are immune from claims of unfair termination of a probationary employee. This article argues that for termination to be considered procedurally fair whether during a probation period or not, it should be preceded by an opportunity for an employee to state a case in response to the charges levelled against him or her. This article highlights that all laws in Kenya, including the EA are subject to the Constitution, particularly article 41(1) of the Constitution which guarantees “every person” the right to fair labour practice. Equally, article 27 of the Constitution states that everyone is equal before the law and has a right to equal protection and benefit of the law. Allowing employers’ the freedom to terminate employment without following due process certainly open up the floodgates for abuse of the primary purpose of probation. The mere fact that a contract of employment is labelled as “probationary contract” should not be used as a licence by employers to erode the constitutionally entrenched labour rights. The primary purpose of any good law is to advance the achievement of equity and fairness at the workplace. This can only be achieved by protecting vulnerable and marginalised employees such as probationary employees who participate in

unpredictable forms of employment. This article maintains that prominence should be on the existence of an employment relationship and fair labour practice as opposed to the existence of a conditional contract of employment. The existence of an employment relationship should serve as the main “port of entry” through which all employees access the rights and protection guaranteed by labour legislation.

**1.8.2 Gathongo, JK & Ndimurwimo, LA “Strikes in essential services in Kenya: The doctors, nurses and clinical officers' strikes revisited and lessons from South Africa”**

*PER/PELJ* 2020 Vol 23 (1) 1-25

**ABSTRACT**

The right to strike is one of the fundamental rights enshrined in the *Kenyan Constitution*, 2010. Any limitation to the right involves the danger of collective bargaining. The right to strike is derived from the *Right to Organise and Collective Bargaining Convention*, 1949 that Kenya ratified on 18 July 1951. Article 2(4) of the *Constitution* emphasises that any law inconsistent with it is void.

The *Labour Relations Act*, 2007 gives effect to the constitutional right to strike but is also subject to a number of limitations. Such limitations include the prohibition of strikes for employees who are engaged in essential services. Although the limitations to the right to strike may be justified, a number of bottlenecks exists in the current scope and application of the *Labour Relations Act*. For example, the *Labour Relations Act* does not provide mechanisms in terms of which essential service employees can lawfully embark on strikes. Unlike disputes in South Africa, those about essential services in Kenya are not preceded by consensus-seeking processes such as conciliation, mediation and arbitration. Instead, essential service disputes are referred directly to the Employment and Labour Relations Court for litigation. Consequently, the rights of employees who are employed in essential services like hospitals and patients' right to access health care services can easily be violated. Due to the lacunae in the *Labour Relations Act*, an increase in the number of strikes in essential services has been witnessed in Kenya.

This article argues that the litigation of disputes in essential services should be the option of last resort. In addition, to date, more than 11 years after the *Labour Relations Act* came into effect, no provisions have been incorporated or even suggested that employer and trade unions need to conclude minimum service agreements and designate employees to perform the minimum services. This article suggests that, trade unions and government can work together through adopting consultative and

more inclusive approaches in order to establish an effective statutory framework that regulates the right to strike in essential services in Kenya.

### **1.8.3 Govindjee, A “Extending social protection in the digital age: The case of transportation network company drivers in South Africa”**

*THRHR* 2020 Vol 83 (1) 48

#### **ABSTRACT**

This article considers the legal position of drivers engaged to transport people in South Africa via an application downloaded by a user to a mobile device (transportation network company (TNC) drivers) from a social protection perspective, with particular reference to labour and social security law. The position of “vulnerable” drivers is a specific focus, referring to those drivers earning below the threshold stipulated by the Minister of Employment and Labour (presently R205 433,30). The contribution deals with two main questions. The first question concerns whether such workers are “employees” in terms of South African law, and the contribution to some extent responds to literature suggesting that this is the case. On the assumption that such workers may fall outside of this definition for the purposes of labour law protection, the second question is whether there are possible social security benefits that could be made available to these drivers even in the absence of them enjoying the status of “employees”. In addressing these issues, the article considers the social protection position of such workers internationally and reflects on applicable case authority. The author submits that there has been an over-emphasis in respect of trying to fit all TNC drivers into the definition of “employee”, in order to afford them labour law protection, and an under-emphasis on approaching the matter from a broader social protection perspective. As such, a hybrid approach that considers TNC drivers to be better described as “independent workers” is favoured and it is suggested that special protection should be reserved for those who are in fact vulnerable. It is also submitted that a flexible approach to existing social security schemes should enable vulnerable TNC drivers to contribute and benefit from protection presently the preserve of workers who are employees. This approach is supported in light of the various applicable constitutional rights, in particular the right of everyone to fair labour practices and to access social security.

**1.8.4 Grogan, J & Govindjee, A “The devil in the deemed: Novel takes on sections 198B and D”**

*Obiter* 2020 Vol 41 (3) 608-621

**ABSTRACT**

Section 198 of the Labour Relations Act is designed to protect vulnerable employees of labour brokers or those on fixed term contracts. The authors examine some judgments which make obtaining that protection more complicated.



**1.8.5 Keith-Bandath, RE “The evasion of section 187(1)(c) of the Labour Relations Act – *National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd)* (JA25/18) [2019] ZALAC 36; (2019) 40 ILJ 2024 (LAC); [2019] 9 BLLR 899 (LAC)”**

*Obiter* 2020 Vol 41 (3) 642-650

**ABSTRACT**

Section 187(1)(c) of the Labour Relations Act 66 of 1995 (LRA), has over the years proven to be a controversial section. At the heart of the controversy is the question as to whether an employer may terminate employees’ contracts of employment based on operational requirements in circumstances where they refuse to accept changes to terms and conditions of employment. This question came before the courts on a number of occasions and answered in the affirmative by the Labour Appeal Court in *Fry’s Metals (Pty) Ltd v National Union of Metalworkers of SA* ((2003) 21 ILJ 133 (LAC)), and confirmed on appeal by the Supreme Court of Appeal in *National Union of Metalworkers of SA v Fry’s Metals (Pty) Ltd* (2005 (5) SA 433 (SCA)). However, the LRA has since been amended with the Labour Relations Amendment Act 6 of 2014 (LRAA). Whether an employer may, in light of the amendments, adopt this approach, was recently considered by the Labour Appeal Court in *National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa Proprietary Ltd)* ((JA25/18) [2019] ZALAC 36; (2019) 40 ILJ 2024 (LAC); [2019] 9 BLLR 899 (LAC) (13 June 2019) (*Aveng case* (LAC)). The judgment is noteworthy as it is the first time that the Labour Appeal Court (LAC) delivered judgment relating to section 187(1)(c) of the LRA post-amendment, thus providing a degree of judicial certainty on the interpretation to be accorded to the amended section.

**1.8.6 Leppan, F, Govindjee, A & Sive, J “Majoritarianism and the right to be consulted before being retrenched”**

*International Labor Rights Case Law 2020 Vol 6 (2) 126-132*

**ABSTRACT**

A large-scale retrenchment took place on a South African platinum mine operated by the respondent, Royal Bafokeng Platinum Ltd. Under law, the retrenchment required consultation with designated parties. A collective agreement concluded by the majority trade union outlined the consultation process to be followed and was then extended to apply to minority unions despite excluding them from the consultation process. Several members of the minority union were retrenched and thus excluded. The central challenge was whether the exclusion unjustifiably limited the constitutional right to fair labor practices. The issue made its way to the country’s Constitutional Court, South Africa’s highest. In a 5–4 majority split, the Court held that the principle of majoritarianism did not in fact unjustifiably limit the right to fair labor practices.

**1.8.7 Van Niekerk, L, Castelejin, D, Govindjee, A, Holness, W, Oberholster, J & Grobler, C “Conceptualising disability: Health and legal perspectives related to psycho-social disability and work”**

*South African Journal of Bioethics and Law* 2020 Vol 13 (1) 43-51

**ABSTRACT**

Work has been found to improve health outcomes and increase quality of life. It is also a vehicle through which people develop personally, earn an income and meet other needs, as it is recognised as a social determinant of health. However, persons with psychosocial disability face many barriers in their quest to achieve equality, experiencing ongoing marginalisation and exclusion from full participation in work.

**Objectives.** To explore the nexus between South Africa’s progressive Constitutional and legislative context, employers and the provision of health- and law-related services facilitating participation of persons with psychosocial disability in work.

**Methods.** The authors, with diverse professional backgrounds, namely law, psychiatry and occupational therapy, developed a synthesised perspective to highlight issues that require consideration and to develop guiding principles from which practitioners can draw to support the participation of persons with psychosocial disability in work.

**Results.** A perspective is shared to provide direction and inform practice aimed at promoting participation of persons with disability in work.

**Conclusion.** Health professionals are reminded of their ethical duty to support persons with psychosocial disability to either stay at work or return to work as soon as possible. The potential dangers of sick leave in the absence of a return to work plan are highlighted, and the need for a multi-professional approach is emphasised.

## **1.9 LAW OF COMPETITION**

### **1.9.1 Van Tonder, JL “Predatory pricing: Single-firm dominance exclusionary abuse and predatory prices” (Part 1)**

*Obiter* 2020 Vol 41 (4) 831-849

#### **ABSTRACT**

Important pronouncements of legal principle were recently made by the Competition Appeal Court and Constitutional Court on the determination of predatory pricing under section 8 of the Competition Act 89 of 1998. These pronouncements must now be seen in the context of the subsequent commencement of certain provisions of the Competition Amendment Act 18 of 2018, which affect predatory pricing cases under section 8 of the Act. In light of these developments, the main aim of this series of three articles is to evaluate the law relating to the economic concept of predatory pricing under the Competition Act. In this context, the main constituent elements of a predatory pricing case – namely, dominance, identifying an exclusionary abuse and predatory prices – are discussed in three parts. Part One critically evaluates the law on the determination of single-firm dominance under section 7 of the Competition Act. Part Two starts to focus on abuse analysis and discusses the basic forms of abuse, the meaning of abuse, tests that have been developed to identify exclusionary abuse, criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Part Three then specifically deals with the law of predatory prices under section 8(c) and 8(d)(iv) of the Competition Act. Pursuant to section 1(3) of the Competition Act, appropriate foreign and international law may be considered when interpreting or applying the Competition Act. This is complementary to section 1(2)(a), which directs that the Competition Act must be interpreted in a manner that is consistent with the Constitution and that gives effect to the purposes set out in section 2. In light hereof, where appropriate, the South African position is compared, mainly with the position in the European Union and the United States.

## **1.10 LAW OF DELICT**

### **1.10.1 Mukheibir, A & Van As, HJ “Deliktuele aanspreeklikheid van plaaslike owerhede vir die versuim om infrastruktuur te onderhou/Delictual liability of local authorities to maintain infrastructure”**

*Litnet Akademies 2020 17 (3) 965-998*

#### **ABSTRACT**

The global population is becoming more and more urbanised. South Africa is no exception to this phenomenon. The pressure resulting from the influx into towns is exacerbated by aging infrastructure. At the same time there is a constitutional duty to deliver services and to take legislative steps to give effect to the rights contained in the Bill of Rights. This has had the result that there are two forces of simultaneous pressure on municipalities, namely the delivery of services with regard to the establishment of new infrastructure and the maintenance of existing infrastructure.

Delictual claims against municipalities as a result of failure to maintain infrastructure are not a new phenomenon. Over the past century the test for wrongful omissions has seen much development, often in the context of municipalities, and specifically the failure to maintain infrastructure. The question raised in this article is whether this development has kept up with the constitutional imperative to develop the common law to promote the “spirit, object and purport” of the Bill of Rights. Apart from the constitutional imperative to develop the common law, the Constitution, as well as legislation, impose a duty on municipalities to provide basic services. The development of liability for omissions is discussed against the background of municipal legislation as well as the Constitution.

## **1.11 MARINE LAW**

### **1.11.1 Van As, HJ “Poaching of marine living resources: Can the tide be turned?”**

*SA Crime Quarterly 2-34*

#### **ABSTRACT**

The marine living resources of South Africa are under severe threat from international organised crime syndicates in conjunction with local fishers. These criminal activities erode respect for the rule of law, lead to socio-economic degradation and result in the proliferation of gangsterism. The current approach of the government custodian of the resources, at least as far as abalone is concerned, is based on the maximisation of returns from confiscations. SAPS, on the other hand, does not consider the poaching of MLRs as a priority crime and therefore it does not allocate the resources commensurate with the value of the fishery commodity. As a country that is beleaguered by fisheries crime, overfishing and exploitation, South Africa must take a tough stance. It should go after criminal organisations with the full force of the law and all the power that the state can muster. At the same time, it must ensure that national fisheries resource management is improved extensively so that local communities can benefit. The implementation of a conforming strategy would be socially and politically unpopular. In South Africa, it will almost certainly elicit a violent public response. However, even though the costs will be arduous and the strain will be felt in the present, the future benefits will outweigh the outlay.

## **1.12 MEDICO-LEGAL LAW**

### **1.12.1 Welgemoed, M & Lerm, H “Palliative care as a form of relief for the dying: A South African perspective”**

*Obiter* 2020 Vol 41 (2) 348-370

#### **ABSTRACT**

This article has a critical look at the current state of affairs in palliative care in South Africa. While euthanasia remains unlawful in South Africa, there is only one alternative – namely, palliative care – to mitigate pain and symptoms, make life tolerable, and ease the emotional stress of dying for patients and their families. Palliative care, unlike euthanasia, has always been regarded as a sound medical practice, ethically, morally and legally. The practice the world over includes family, friends and community. However, no system or legislation has been put in place in South Africa to serve as a guideline for end-of-life practices. The focus of this article is to try to establish guidelines through a multidisciplinary approach that includes the family and makes use of community resources to improve the quality of life of patients and families facing the problems associated with life-threatening illness, through the prevention and relief of suffering.

## **1.13 PROPERTY LAW**

### **1.13.1 Badenhorst, P “Registrability of burdens to develop land and reversionary rights in terms of the Deeds Registries Act 47 of 1937”**

*TSAR/Journal of South African Law 2020 Vol 12 (3) 460-479*

#### **ABSTRACT**

It is common practice for property developers or local authorities to sell land to purchasers subject to the following types of conditions, which are registered against their titles, namely, firstly a duty is imposed upon a purchaser to build or complete a building on the land to a certain value within a limited period of time ( “burden to build), and secondly, a right that entitles the seller to claim re-transfer of the land, upon the failure of the purchaser to comply with the burden to build on the land, against return of the original purchase price (“the right to claim re-transfer ” or a “reversionary right). For registration of such conditions of title in the deeds office it becomes the task of the registrar of deeds (“registrar”) or the courts to determine: (a) the nature and registrability of such rights<sup>4</sup> in terms of the Deeds Registries Act 47 of 1937; and (b) the enforceability of such rights against successors in title. This article deals with the registrability of burdens to build and reversionary rights.



## OTHER PUBLICATIONS

- 2.1 Christoffels-Du Plessis, A and Sunde, J “Unlocking legal and policy frameworks for small-scale fisheries in South Africa” in Kerezi, V, Nakamura, J, El Halimi, M and Chuenpagdee, R (eds) *Unlocking Legal and Policy Frameworks for Small-Scale Fisheries* (2020) Global Illustrations. TBTI Global Publication Series, St. John's, NL, Canada. [http://toobigtoignore.net/wp-content/uploads/2021/05/South-Africa\\_01.pdf](http://toobigtoignore.net/wp-content/uploads/2021/05/South-Africa_01.pdf)
- 2.2 Govindjee, A & Biggs, L “Human dignity principle: South Africa” *Global Human Dignity Project* (by invitation) accessible at <https://wp.ufpel.edu.br/ghdp/files/2020/08/Human-Dignity-Principle.South-Africa.GovindjeeBiggs.pdf> (2020).
- 2.3 Grogan, J & Govindjee, A “BEE during Covid-19” Juta Covid-19 Talking Points (Issue 12) accessible at [https://juta.co.za/documents/865/Issue\\_12\\_-\\_Talking\\_Points\\_-\\_BEEE\\_during\\_Covid-19.pdf](https://juta.co.za/documents/865/Issue_12_-_Talking_Points_-_BEEE_during_Covid-19.pdf) (June 2020).
- 2.4 Grogan, J & Govindjee, A “Disrobed – digital labour proceedings during the lockdown” Juta Covid-19 Taking Points (Issue 13) accessible at [https://juta.co.za/documents/866/Issue\\_13\\_-\\_Talking\\_Points\\_-\\_Accessing\\_labour\\_courts\\_and\\_tribunals\\_during\\_Covid\\_FA.pdf](https://juta.co.za/documents/866/Issue_13_-_Talking_Points_-_Accessing_labour_courts_and_tribunals_during_Covid_FA.pdf) (June 2020).
- 2.5 Grogan, J & Govindjee, A “Labour and employment” Juta Covid-19 Talking Points (Issue 4) accessible at <https://juta.co.za/press-room/2020/04/24/juta-covid-19-talking-ponts-labour-and-employment-issue-4/> (May 2020).

- 2.6 Grogan, J & Govindjee, A “Unlocking the workplace: Safety first” Juta Covid-19 Talking Points (Issue 10) accessible at <https://juta.co.za/press-room/2020/05/25/juta-covid-19-unlocking-the-workplace-safety-first-issue-10/> (May 2020).
- 2.7 Grogan, J & Govindjee, A “Juta’s Quarterly Review” 2020 (Vol 2 and 3).
- 2.8 Grogan, J, Govindjee, A & Willcock, R “Lockdown: Covid-19’s effect on employment” *Employment Law* 2020 Vol 36 (3).

**2.9 Swanepoel, E & Van As, HJ “Port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU Fishing): A report on the requirements and country readiness to be compliant with the PSMA”**

*Nelson Mandela University 2020*

**ABSTRACT**

It is recognised that the major responsibility for curbing Illegal, Unreported and Unregulated (IUU)-fishing and fisheries crime lies with the governments in the SADC and Western Indian Ocean region. They should develop proactive policies that reduce the need for law enforcement. Research found that, within enforcement, States should prioritise regional port state measures and monitoring and surveillance supported by intelligence that can guide the use of limited enforcement resources. A review of the FishFORCE project at Nelson Mandela University also reported that the use of South African ports by distant water fleets who are engaged in IUU fishing, points to the need for stronger implementation of port state measures. These should be a priority, as inspections in port, undertaken as multi-agency efforts, are key for addressing illicit activities in fishing in a cost-efficient manner. The number of port inspections and their effectiveness are too low in the region. The best results will be achieved if many States collaborate. According to the report, States could:

- Campaign for Angola, Tanzania and Comores to become parties to the Food and Agricultural Organization’s (FAO’s) Port State Measures Agreement (PSMA), as these are the only remaining States in Southern Africa that are not.
- Develop regional arrangements for training and collaboration on port state measures, for instance modelled on relevant elements of the Paris and Tokyo MOU Agreements
- Make joint plans for the implementation of the PSMA and other relevant international instruments, such as International Labour Organization (ILO) instruments on working conditions on fishing vessels.

Being aware that various training interventions have been offered by a number of organisations, and to ensure that the correct people (target audience) are trained in the implementation of the PSMA, FishFORCE elected to prepare a report on the readiness of countries (South Africa, Namibia, Mozambique, Tanzania, Kenya, Seychelles, Madagascar, Mauritius) to implement the PSMA Agreement, with a focus on the following questions:

- What are the requirements for a country to be compliant with the PSMA?
- What training has been offered, to which country?
- What are the gaps and what should be done to get the countries up to speed?

**2.10 Van As, HJ & Cordell, CGT “Fisheries law enforcement in South Africa:  
A baseline study of the protection of marine living resources”**

*Nelson Mandela University 2020*

**ABSTRACT**

FishFORCE Fisheries Law Enforcement Academy (FishFORCE) was established in order to improve knowledge and intelligence-led investigations and prosecutions of fisheries crime in Africa and globally. The baseline report aims to provide a situational analysis of fisheries law enforcement in South Africa as at 2016, the start of the FishFORCE project. This analysis includes a description of the South African fisheries sector, the fisheries law enforcement framework applicable in South Africa, the agencies involved in the protection of marine living resources, as well as the efficacy of measures adopted to combat fisheries crime and illegal, unreported and unregulated fishing (IUU). In order to address the issues this analysis highlights, proposed interventions with intended objectives, each with specified outcomes and indicators, were identified. These will be used to measure and evaluate any changes which may occur during the period of the project, whether positive or negative.

**2.11 Widjaja, S, Wirajuda, H, Long, T, Van As, HJ, Bergh, PE, Brett, A, Copeland, D, Fernandez, M, Gusman, A, Juwana, S, Ruchimat, T, Trent, S & Wilcox, C “High level panel for sustainable oceans economy: Blue Paper 15 - Illegal, unreported and unregulated fishing and associated drivers”**

*Washington, DC: World Resources Institute 2020*

Available online at [www.oceanpanel.org/iuu-fishing-and-associated-drivers](http://www.oceanpanel.org/iuu-fishing-and-associated-drivers).

**ABSTRACT**

In September 2018, the High Level Panel for a Sustainable Ocean Economy (HLP) was established as a unique initiative of 14 serving heads of government committed to catalysing bold, pragmatic solutions for ocean health and wealth that support the Sustainable Development Goals (SDGs) and build a better future for people and the planet. By working with governments, experts and stakeholders from around the world, the HLP aims to develop a roadmap for rapidly transitioning to a sustainable ocean economy, and to trigger, amplify and accelerate responsive action worldwide. The Panel consists of the presidents or prime ministers of Australia, Canada, Chile, Fiji, Ghana, Indonesia, Jamaica, Japan, Kenya, Mexico, Namibia, Norway, Palau and Portugal, and is supported by an Expert Group, Advisory Network and Secretariat that assist with analytical work, communications and stakeholder engagement. The HLP, through the Expert Group, has commissioned a series of peer-reviewed Blue Papers to explore pressing challenges at the nexus of the ocean and the economy. These Blue Papers summarise the latest science and state-of-the-art thinking about innovative ocean solutions in technology, policy, governance and finance realms that can help to accelerate a move into a more sustainable and prosperous relationship with the ocean. This paper is part of a series of 16 Blue Papers to be published between November 2019 and June 2020. It considers the state of knowledge and trends on illegal, unreported and unregulated (IUU) fishing and how it contributes to overfishing; if and how climate change contributes to IUU fishing; and if there are particular challenges with IUU fishing on the high seas in areas beyond national jurisdiction.

## **REPORTS, STUDIES AND POLICY DOCUMENTS**

- 3.1 Olivier, M & Diwan, I "A strategic framework for an immediate socio-economic response to COVID-19 in Yemen (2020-2021)" submitted to the UNDP Yemen, 2020.**
- 3.2 Olivier, M "Extending social protection to Vietnamese workers abroad" submitted to the ILO Viet Nam, 2020.**
- 3.3 Olivier, M "Extending social security to informal economy workers and informal employees in Viet Nam" submitted to the ILO Viet Nam, 2020.**
- 3.4 Olivier, M "Extending the scope of social security to internal migrants in the informal economy: An analysis for Myanmar" submitted to the ILO Myanmar, 2020.**
- 3.5 Olivier, M "Lessons Learned Report: Social Protection for Community Resilience Project (SPCRP) – Yemen" submitted to the UNDP Yemen, 2020.**
- 3.6 Olivier, M "Social protection in Yemen: Lessons learned from the SPCR and the way forward" submitted to the UNDP Yemen, 2020.**
- 3.7 Olivier, M "Viet Nam social security law reform: An integrated framework" submitted to the ILO Viet Nam, 2020.**
- 3.8 Olivier, M "Draft Policy on the Prevention of Trafficking of Persons in Africa and its Five-year Plan of Action" submitted to the IOM and the AUC, 2020.**

## CONFERENCES

- 4.1 Botha, JC “Go back to Europe: The Battle of Senekal” paper presented at the International Network for Hate Studies: Biennial Conference - Hate Democracy and Human Rights hosted by the University of Plymouth, December 2020 (virtual conference).**

### **ABSTRACT**

This paper explores the basis for the vitriolic manifestations of racial hatred between white farmers (the boers) and the members of an anti-white political party, the Economic Freedom Fighters, in Senekal, a farming community, in October 2020. Factors leading to the clashes include: the land reform agenda in South Africa; the murder of and violent acts committed against white farmers (labelled the new genocide, but denied by the government and many others); recurring social media posts inciting hatred of white people; abuse of black workers at farms; and the call to account for historic patterns of migration and land grabs from indigenous communities. The paper demonstrates how these tensions, coupled with out-group silencing and government apathy, inevitably culminate in racial violence. In turn, democratic processes, social identity and the transformative constitutional vision are undermined. How should a democracy, like South Africa, address this problem? The paper proposes solutions to overcome the challenge of ongoing and acrimonious racial divisions and mistrust – the “ism” for the South African context.



- 4.2 **Casalin, D “International Humanitarian and Human Rights Law norms on displacement: Potential implications for the protection of displaced persons” paper presented at the Migration Asylum Policies Systems (MAPS) Conference titled Conflicting Responses to Refugees and Migrants in Covid-19 Europe, Queen Mary University of London, United Kingdom, 11 December 2020 (virtual conference).**

### **ABSTRACT**

This intervention outlined and examined a number of legal gaps and overlaps in international humanitarian law (IHL) and international human rights law (IHRL) norms that seek to protect people against or during displacement from their homes, as well as their implications. While few of these gaps and overlaps have a bearing on international protection in the sense of recognition of refugee status in third countries, they are relevant for all actors involved in protection in the broad sense – i.e. ensuring that duty-bearers respect their obligations towards (potentially) displaced people. Regarding protection from displacement, the concurrent application and generally complementary interaction between IHL and IHRL has reinforced protection by progressively shifting the onus of justification to the duty-bearer, as well as opening up new avenues for access to remedy. However, in situations where a specific IHL prohibition exists, *lex specialis* may have its place in securing the reinforced civilian protection which IHL offers and countering overly broad (and impermissible) justifications for unlawful displacement. As for protection during displacement, IHL offers basic minimum guarantees for displaced persons in the emergency phase, which have now been extended to non-conflict emergencies via the Guiding Principles on Internal Displacement. However, this basic minimum will need to be supplemented by IHRL-based standards, and protection actors will need take complementary action to ensure protection beyond the emergency paradigm.

**4.3 Denson, R “The best interests of the child versus the interests of the family: A South African perspective” paper presented as the keynote speaker at 11th Putrajaya International Conference on Children, Women, the Elderly and Persons with Disabilities 2020 (PiCCWED11) in Malaysia, 22 August 2020 (virtual conference).**

**ABSTRACT**

At common law the high court, through the exercise of its inherent jurisdiction as upper guardian of all minor children, has always been charged with the task of determining what is the best for children in all matters concerning them. With the promulgation of the Constitution of the Republic of South Africa, 1996, the paramountcy of children’s interests was taken a step further and firmly entrenched as a right.

Section 28 of the Constitution grants recognition to the fact that children are especially vulnerable to violation of their rights and that they are in need of special protection especially in the relation to South African legal past, where children’s rights were often neglected and unlawfully infringed. It is for this reason that although children can invoke rights conferred upon everyone in terms of the Constitution, they are afforded special protection by virtue of section 28. Moreover, section 28(2) specifically prescribes that a child’s best interests are of paramount importance in every matter relating to the child. Section 28(2) constitutionalizes both the South African common law rule of the child’s best interests and its recognition in international law. Of particular relevance, is article 3 of the United Nations Convention on the Rights of the Child (hereafter Children’s Convention) which reads as follows: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The African Charter on the Rights and Welfare of the Child (hereafter the African Charter) is even more compelling, in that the best interests of the Child are deemed “the” primary consideration as opposed to “a” primary consideration.

In present day South Africa, the law of parent and child is regulated by the Children's Act 38 of 2005, the Constitution, common law and the international treaties mentioned above. Before the enactment of the Children's Act 38 of 2005, there were various pieces of legislation regulating the law of parent and child. The promulgation of the Children's Act has codified the law relating to children and in essence provides a comprehensive framework for the care, welfare and protection of children until they reach the age of eighteen. It is important to mention that the Children's Act has not replaced the common law rules governing the parent-child relationship but the act rather serves as the legislative mechanism by which South African law gives effect to the rights of the child as contained for in terms of the Constitution and the international treaties to which South Arica is a signatory. A discussion of the child's best interests versus that of the interests of the family in terms of the Children's Act will be undertaken and included in this discussion is the judicial interpretation of the child's best interest before the enactment of the Children's Act.

- 4.4 Govindjee, A “Covid-19 and the labour market: South Africa” paper presented at a webinar on Covid-19 and experiences from Columbia, Hong Kong and South Africa organized by the LLRN, 21 July 2020.
- 4.5 Govindjee, A “Research ethics and publication” seminar presented to the doctoral seminar group at the National Law School of India University, 8 December 2020 (virtual conference).
- 4.6 Govindjee, A “Role of Legal Aid Clinics during and after the pandemic” paper presented at the Global Virtual Conference hosted by the Jindal Global Law School, 25-27 November 2020 (virtual conference).
- 4.7 Govindjee, A “The future of the legal profession and the next generation lawyer” paper presented at the Legal Innovation & Tech Fest, 3 November 2020 (virtual conference).
- 4.8 Ndimurwimo, LA “Education as the main cause of youth unemployment in Africa: Using education to create jobs” paper presented to the Firdaous Integrated Services Ltd (FIS) Education, 7 November 2020 (virtual conference).

## **BOOKS AND CONTRIBUTIONS TO BOOKS**

### **5.1 CONTRIBUTIONS TO PEER REVIEWED BOOKS**

- 5.1.1 Botha, JC & Mokone, G “Gender Equality” in Koen De Feyter, Gamze Erdem Türkelli and Stéphanie de Moerloose (eds) *Encyclopaedia of Law and Development* (2020).
- 5.1.2 Botha, JC “Education” in Koen De Feyter, Gamze Erdem Türkelli and Stéphanie de Moerloose (eds) *Encyclopaedia of Law and Development* (2020).
- 5.1.3 Botha, JC “A hate-crime model for the South African context” in Strydom, H and Botha, JC (eds) *Select essays on governance and accountability issues in Public Law* (2020) DOI: <https://doi.org/10.18820/9781928480792/02>.
- 5.1.4 Erasmus, D “Life of Esidimeni: A terrible tale of death, torture and disappearance of utterly vulnerable mental health care users” in Strydom, H and Botha, JC (eds) *Select essays on governance and accountability issues in Public Law* (2020) DOI: <https://doi.org/10.18820/9781928480792/02>.
- 5.1.5 Govindjee, A “Transformative constitutionalism as a framework for law and policy integration in the global South” in Pellissery, S. Mathew, B Govindjee, A & Narain, A (eds) *Transformative Law and Public Policy* (2020).
- 5.1.6 Govindjee, A “Access to social security for refugees and asylum seekers in South Africa: An analysis of recent developments” in Olivier, MP, Kalula, E and Mpedi, LG (eds) *Liber Amicorum: Essays in honour of Professor Edwin Kaseke and Dr Mathias Nyenti* (2020).

- 5.1.7 Ndimurwimo, LA “Law, development and responsible governance in Africa: A case study of the presidential term limits in post-conflict Burundi” in Strydom, H and Botha, JC (eds) *Essays on Governance and Accountability Issues in Public Law* (2020). <http://doi.org/10.18820/9781928480792>
- 5.1.8 Ndimurwimo, LA *Post-conflict reconciliation and transitional justice: A case study of human rights violations in Burundi* (2020) Panamaline Books Distributors Limited, Kampala Uganda.
- 5.1.9 Olivier, M & Diwan, I "A strategic framework for an immediate socio-economic response to COVID-19 in Yemen (2020-2021)" UNDP (2020). <https://www.arabstates.undp.org/content/rbas/en/home/library/crisis-response0/a-strategic-framework-for-and-immediate-socio-economic-response-.html>
- 5.1.10 Olivier, M "Climate change and social protection – the need for an enhanced legal framework" in Olivier, M, Mpedi, L & Kalula, E (eds) *Liber Amicorum in honour of Professor Edwell Kaseke and Dr Matthias Nyenti* (2020).
- 5.1.11 Olivier, M "Extending the scope of social security to internal migrants in the informal economy: An analysis for Myanmar" (2020). [https://www.ilo.org/yangon/publications/WCMS\\_763350/lang--en/index.htm](https://www.ilo.org/yangon/publications/WCMS_763350/lang--en/index.htm)
- 5.1.12 Olivier, M "Selected constitutional and legal perspectives on social security in South Africa" in Motala, S, Ngandu, S & Hart, T (eds) *Social Security Review 2020 – Evolution of Social Security in South Africa: An Agenda for Action* HSRC, South Africa (2020).

5.1.13 Van As, HJ & Cordell, CGT, “Slipping through the net: Reforming South African fisheries law enforcement” in Vrancken, P and Hugo, C (eds) *African perspectives on selected marine, maritime and international trade law topics* (2020). DOI: <https://doi.org/10.18820/9781928536079>

## **5.2 CONTRIBUTIONS TO TEXTBOOKS**

- 5.2.1 Botha, JC in “The law of insurance” in Fouché (ed) *Legal Principles of Contracts and Negotiable Instruments* (2020).**
- 5.2.2 Botha, JC in “Competition law” in Fouché (ed) *Legal Principles of Contracts and Negotiable Instruments* (2020).**
- 5.2.3 Botha, JC in “Surety and other forms of security” in Fouché (ed) *Legal Principles of Contracts and Negotiable Instruments* (2020).**
- 5.2.4 Coetzee, L "Business entities" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).**
- 5.2.5 Mukheibir, A & Chamberlain, L "Law of delict" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).**
- 5.2.6 Newman, S "E-commence and forms of payment" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).**
- 5.2.7 Olivier, M "Labour relations in the public service" in van Jaarsveld, SR, Belink, B, le Roux, R, Olivier, MP, Prinsloo, C, Smit, N & van Niekerk, A (eds) *Principles and Practice of Labour Law* (2020).**
- 5.2.8 Olivier, M "Public service employment: General framework and principles" in van Jaarsveld, SR, Belink, B, le Roux, R, Olivier, MP, Prinsloo, C, Smit, N & van Niekerk, A (eds) *Principles and Practice of Labour Law* (2020).**
- 5.2.9 Olivier, M "Special categories of civil servants: Security services and public education" in van Jaarsveld, SR, Belink, B, le Roux, R, Olivier, MP, Prinsloo, C, Smit, N & van Niekerk, A (eds) *Principles and Practice of Labour Law* (2020).**
- 5.2.10 Qotoyi, T "Labour law" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).**



- 5.2.11 Tait, AM "Law of Contract" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).
- 5.2.12 Van As, HJ "The law of agency" in Fouché (ed) *Legal Principles of Contracts and Negotiable Instruments* (2020).
- 5.2.13 Vrancken, PHG, Marx, F & Tait, AM "Introduction to law" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).
- 5.2.14 Vrancken, PHG "Public law" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).
- 5.2.15 Vrancken, PHG "Public and Private International law" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).
- 5.2.16 Vrancken, PHG "Tourism organisations and regulation" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).
- 5.2.17 Vrancken, PHG "Travel law" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).
- 5.2.18 Vrancken, PHG "Hospitality law" in Vrancken, PHG & Tait, AM *Tourism and the law in South Africa* (2020).

## **NEWSPAPER ARTICLES AND NEWSLETTERS**

- 6.1 Casalin, D “First UN human rights decision on climate migration—a modest step forward” OpenGlobalRights, 26 March 2020.**

## **MEDIA COVERAGE**

- 7.1 Govindjee, A “Covid and the Courts” webinar hosted by Nelson Mandela University, Faculty of Law (2020).**
- 7.2 Govindjee, A “Interview with Justice Dikgang Moseneke based on his book *All Rise: A Judicial Memoir*” webinar hosted by Nelson Mandela University, Faculty of Law (2020).**
- 7.3 Govindjee, A “Meet the Masters” participated in the webinar hosted by Juta (2020).**

## SUMMER SCHOOL

- 8.1 Erasmus, D lectured on *Law, Crime and Psychology* in the *Schola Empirica* Prague Summer School, 8-9July 2020 (lectures presented virtually).

## **SUPERVISION OF LLM THESES/TREATISES/DISSERTATIONS**

### **9.1 APRIL 2020 GRADUATION**

- 9.1.1 Apollos, D supervised Ntelwa, N “The impact of section 2 of the Prevention of Organised Crime Act” completed for graduation in April 2020.**
- 9.1.2 Biggs, L supervised Skosana, H “Unfair discrimination relating to mental illness” completed for graduation in April 2020.**
- 9.1.3 Erasmus, D supervised Babalola, AT “Bail applications in Nigeria and South Africa” completed for graduation in April 2020.**
- 9.1.4 Erasmus, D supervised Goliath, AA (*cum laude*) “Rethinking minimum sentence legislation” completed for graduation in April 2020.**
- 9.1.5 Gathongo, JK supervised Makina, TA “Sexual misconduct by educators against learners” completed for graduation in April 2020.**
- 9.1.6 Keith-Bandath, RE supervised Bosch, L “The validity of dismissals for refusing to accept changes to terms and conditions of employment” completed for graduation in April 2020.**
- 9.1.7 Keith-Bandath, RE supervised Oberem, SL “The regulation of the use of cannabis in the workplace” completed for graduation in April 2020.**
- 9.1.8 Lerm, HW supervised Mroxé, S “Sentencing of child offenders convicted of serious crimes” completed for graduation in April 2020.**

- 9.1.9 Newman, SP supervised Conjwa, S “The African continental free trade agreement in context” (*cum laude*) completed for graduation in April 2020.**
- 9.1.10 Qotoyi, T supervised Mahlali, NM “The application of section 197 of the Labour Relations Act in an insourcing context” completed for graduation in April 2020.**
- 9.1.11 Van der Walt, JA supervised Du Plessis, A “Dismissal for racist remarks and racism” completed for graduation in April 2020.**
- 9.1.12 Van der Walt, JA supervised Marala, M “Challenges in enforcing the Employment Equity Act” completed for graduation in April 2020.**
- 9.1.13 Van der Walt, JA supervised Roelofse, CJ “Disputes about the interpretation, application and breach of collective agreements” completed for graduation in April 2020.**
- 9.1.14 Van der Walt, JA supervised Seshoka, LJ “Essential services in light of the 2014 Labour Law Amendments” completed for graduation in April 2020.**
- 9.1.15 Vrancken, PHG supervised Karomo, AA “Noise pollution at sea” completed for graduation in April 2020.**
- 9.1.16 Welgemoed, M supervised Madzika, K “Audio-visual and cyber evidence in the context of criminal law” completed for graduation in April 2020.**

## **9.2 DECEMBER 2020 GRADUATION**

- 9.2.1** Abrahams, D supervised Govender, N (*cum laude*) “Domestication of the international-law prohibition of child soldiering” completed for graduation in December 2020.
- 9.2.2** Botha, JC (supervisor) with Govindjee, A (co-supervisor) supervised Moyo, PT (*cum laude*) “The National Health Insurance Bill: A measure to realise the right to access care services” completed for graduation in December 2020.
- 9.2.3** Keith-Bandath, RE (supervisor) with Qotoyi, T (co-supervisor) supervised Mbewana, NE “The legality and enforceability of an automatic termination clause in a contract of employment” completed for graduation in December 2020.
- 9.2.4** Keith-Bandath, RE supervised Tatchell, VCS (*cum laude*) “Non-standard employment in terms of the Labour Relations Act” completed for graduation in December 2020.
- 9.2.5** Ndimurwimo, LA supervised Lande, S “The combating of gang activities in terms of The Prevention of Organised Crime Act 121 of 1998” completed for graduation in December 2020.
- 9.2.6** Ndimurwimo, LA supervised Mutesi, M “An assessment of the socio-economic rights of refugees in Uganda” completed for graduation in December 2020.
- 9.2.7** Newman, SP supervised Mkorongo, M “The International Arbitration Act and dispute resolution” completed for graduation in December 2020.
- 9.2.8** Qotoyi, T supervised Bebula, VL “A trade union’s right to strike to acquire organisational rights” completed for graduation in December 2020.

- 9.2.9 Qotoyi, T supervised Coetzee, MN “The ground of discrimination in equal pay for work of equal value disputes” completed for graduation in December 2020.**
- 9.2.10 Van Der Walt, JA (supervisor) with Ndimurwimo, LA (co-supervisor) supervised Chabo, G “Labour dispute resolution in Uganda” completed for graduation in December 2020.**