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ABSTRACTS OF RESEARCH OUTPUTS 2015










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1.1.1 Van As, H Legal Aid: Shaping the shoreline, wave by wave

Obiter (2015) 308

ABSTRACT

A study of the global development of legal aid reveals that it developed in five waves and that legal aid schemes are combinations of three variables, namely scope (what is covered), eligibility (matters that qualify for legal aid and financial conditions) and delivery (who provide the services and at what cost). The article argues that there is a sixth wave, namely quality assurance and that the third variable has been extended to include reference to quality. Quality assurance normally has its origin in self-regulation or in requirements set by implementing bodies of the state. It is difficult to determine what constitutes “quality” and it is even more difficult to reach consensus on its meaning. An investigation into quality assurance in two jurisdictions shows that there is not a “one size fits all” template available. The nature and extent of the services rendered and the manner in which quality assurance is applied, depends on the delivery variable (whether it is salaried, judicare or mixed). The philosophy behind it is also important. If it is mere “window dressing” or designed to give effect to a Constitutional or some other legislative requirement, the system will not achieve credibility in the eyes of the beneficiaries thereof. Quality control that is directed towards providing customer satisfaction, and where the user of the service is seen as the ultimate recipient and arbiter of a benefit that is paid for by the state, has a much better prospect of being judged effective and credible. External quality assessment goes a long way towards promoting quality improvement and credibility.

1.2 COMPANY LAW

1.2.1 Coetzee L Deregistration and reinstatement of registration of deregistered companies

Obiter (2015) 36 3 738 – 744.

ABSTRACT

The article considered the retrospective validity of transaction entered into by companies who have been deregistered for failure to lodge annual returns. The article discusses the Supreme Court of Appeal's decision *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* ((086/2014) [2015] ZASCA 25; 2015 (4) SA 34 (SCA) (20 March 2015)) where the court dealt with the validity of transactions entered into by companies while it was deregistered. The article points out that the requirements listed in Practice note 6 of 2012 prevents interested persons like creditors and bona fide third parties to apply for administrative reinstatement through CIPC. It further considers the quality of legislative drafting in the Companies Act and concludes that court cases could have been prevented had the legislature merely added a statutory provision that upon reinstatement of registration the company shall be deemed to have continued in existence as if it had not been registered.

1.3 CONSTITUTIONAL LAW

1.3.1 Tshivhase, AE Institutionalising a military judicial office and improving security of tenure of military judges in South Africa

Law Democracy & Development **(2015) Vol 19 79**

ABSTRACT

Military justice systems are facing some difficult questions in many parts of the world. South Africa is not an exception. The biggest challenge probably relates to the judicial independence of military courts. This article advances the idea of institutionalisation of a military judicial office. It reviews some global trends in the areas of the appointment and tenure of military judges, and weighs up the different options available to the South African military justice system on the question of tenure. It recommends a path which should be followed by South Africa.

1.4 CRIMINAL PROCEDURE

1.4.1 Erasmus, D Ensuring A Fair Trial: Striking The Balance Between Judicial Passivism and Judicial Intervention

Stellenbosch Law Review **(2015) part 3 662 – 677.**

ABSTRACT

In terms of the predominantly accusatorial system of criminal procedure in South Africa, the principle of judicial passivism dictates that presiding officers should play a passive role during trial proceedings. This is in total contrast to presiding officers in the inquisitorial system who play an active role in pre-trial and trial proceedings.

Our courts have held that presiding officers are not mere umpires who have to decide cases on the evidence the parties place before them. In some instances, a presiding officer is expected to play a more active role and intervene judicially in the trial. One instance where judicial intervention, in the form of questioning of witnesses and the accused, often occurs is when either or both the prosecutor and legal representative are inexperienced or even incompetent in placing evidence before the court. Presiding officers should also judicially intervene to assist an undefended accused. The purpose of this intervention is to ensure that a fair trial takes place.

There is a potential tension between the need to fulfill the role of an impartial administrator of justice and ensuring that a fair trial takes place. Presiding officers need to avoid conduct that might tarnish their impartiality and fairness. They should constantly keep in mind that their *bona de* efforts to see that justice is done might be perceived by one or other of the parties as undue partisanship. What is called for is finding the right balance between judicial passivism and judicial intervention in order to ensure that a fair trial takes place.

With reference to the recent decision of *S v Motsagki* it is argued that a practical approach, instead of legislative intervention, should be employed to strike the balance between judicial passivism and judicial intervention.

1.4.2 Erasmus, D Discharge of the Accused at the Close of the Case for the Prosecution: Public Opinion and the Right to a Fair Trial in Terms of the Accusatorial System of Criminal Procedure

***Litnet Akademies (Regte)* (2015) 12 3 857 - 886**

ABSTRACT

According to section 174 of the Criminal Procedure Act 51 of 1977 a court may, at the close of the case for the prosecution, if it is of the opinion that there is no evidence that the accused committed the offence referred to in the charge sheet or any other offence of which the accused may be convicted of, return a verdict of not guilty. This procedure is referred to as a discharge at the end of the case for the prosecution.

On 8 December 2014 the deputy judge president of the Western Cape high court, Traverso DJP, granted an application for the discharge of the accused in the case of Shrien Dewani, who was accused of conspiring to kidnap, rob and murder his wife Anni. The decision of the court to discharge the accused came as a shock to the deceased's family and the public in general. Two public interest groups, the Higher Education Transformation Network and the Justice4ANNI Campaign, subsequently lodged complaints against the decision of the deputy judge president with the judicial conduct committee of the Judicial Services Commission.

In this contribution the application of section 174 of the Criminal Procedure Act, as well as the application thereof in the Dewani case, are set out and discussed. It is trite law that the term *no evidence* does not mean no evidence at all, but that it means no evidence upon which a reasonable court acting carefully might convict the accused. The test was originally interpreted as a two-stage inquiry: first, it should be asked whether there is evidence upon which a reasonable man acting carefully might convict the accused; if not, it should secondly be determined whether there is a reasonable possibility that the defence evidence might supplement the state's case. If the answer to either question is yes, there should be no discharge and the accused should be placed on his defence.

The second leg of this test did not always find favour, even before 1994. The supreme court of appeal held that an accused is entitled to his discharge at the close of the case for the prosecution if there is no possibility of a conviction at that stage, except if the accused enters the witness box and incriminates himself. However, this will indeed infringe upon his constitutional rights to silence and the prohibition against self-incrimination, resulting in the trial being unfair. The credibility of state witnesses plays a very limited role at this stage of the proceedings and their evidence can be ignored only if it is of such poor quality that no reasonable person could possibly accept it.

At this stage it is important to distinguish between the decision of the prosecution to institute a prosecution, the application of the test whether to grant an application to discharge the accused and the general onus resting on the prosecution to prove the guilt of the accused beyond a reasonable doubt.

The application of the accusatorial system of criminal procedure in South Africa is evaluated with specific reference to the question whether certain rules of this system may create the impression in the mind of the public in general that the system does not reveal the truth and is therefore unfair. In terms of the accusatorial system the prosecution and the defence act as opponents who place their respective cases before an impartial presiding officer, who is not expected to descend into the arena. This system leaves it to the parties to unearth the truth. In terms of the inquisitorial system the presiding officer is in charge of the case and takes part and controls the process to find the truth. The control that the parties has over the process in the accusatorial system, the exclusionary evidentiary rules applicable and the accused's right to silence may have the effect that values other than truth-finding are treated as more important. In a democratic order where the protection of human rights is put first and foremost, the playing field between the prosecution and the accused is not always level. There is, for instance, no duty to discover information on the accused and he has a right to silence. These rules may act as barriers to truth-finding. In the Dewani case the prosecution was faced with such barriers, which are set out and discussed.

The complaints levelled against the deputy judge president are discussed and evaluated. The judicial complaints committee of the Judicial Services Commission held that the complaints against the deputy judge president were unfounded, as they were not based on reliable facts or the official court record. The complaints that she was prejudiced against the prosecution were also dismissed. The committee held that a complainant who alleges prejudice had to overcome the presumption of impartiality. The complainant must show that the remarks complained of were of such a number and quality as to go beyond any suggestion of mere irritation. It should establish a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with a reasonable perception of bias.

Although the complaints against Traverso DJP were dismissed, public opinion regarding the criminal justice system cannot be ignored. The courts need public support and institutional legitimacy to function fairly and efficiently. In a recent study it was confirmed that if the courts exercised their duties in an effective and fair manner, it would foster a sense of responsibility and moral support among members of the public. This would enhance compliance with the principle of supremacy of the law.

In instances where a court has to exclude evidence against an accused that was obtained in an unconstitutional manner in terms of section 35(5) of the Constitution, public opinion has a role to play. Public opinion can, however, never dictate to a court how to exercise its discretion in this regard. The court has a duty to educate the public that a fair trial is one that takes place according to constitutional values. In this regard even accused persons qualify as vulnerable minorities who should be protected by the Constitution. The willingness of the courts to protect the constitutional rights of accused persons will enhance confidence in the criminal justice system.

It is submitted that the court in the Dewani case applied the relevant legal principles in a sound manner. The court correctly did not heed public opinion that the accused should have been placed on his defence. The court also correctly held that the state did not adduce sufficient evidence implicating the accused in the commission of the offences he was charged with and that the only

consequence of placing the accused on his defence would be that he would incriminate himself. This would clearly have infringed on his right to silence and the prohibition against self-incrimination.

It is concluded that although public opinion plays a role during the interpretation of the Constitution and the application of the law of criminal procedure, public opinion remains subservient to the long-term values which the Constitution endeavours to foster and protect.

1.4.3 Erasmus D and Hundermark P Access to Justice: Ensuring Quality Legal Aid Representation in Adversarial Systems of Criminal Procedure

(Submitted for publication to the Southern African Development Community Law Journal and paper presented at Annual SACD Law Conference, Cape Town 20 November 2015)

ABSTRACT

Ten out of the fifteen SADC member states follow an adversarial system of criminal procedure. This system of criminal procedure assumes that partisan advocacy and the manipulation of evidentiary material placed before an impartial presiding officer will enable the latter to determine the "truth". Implicit in this model of criminal procedure is the principle of equality of arms.

Undefended accused persons are not competent adversaries in a highly professionalised adversarial system. They lack the legal knowledge, skill and experience to take informed legal decisions, properly test the evidence adduced by the state, challenge the prosecutor's actions and present their case adequately. Inequality of the parties, usually due to indigence and the absence of legal representation, can deny accused persons access to justice and impact on the fairness of the resultant trial.

In most of the SADC countries mechanisms to provide legal aid to indigent accused have been put in place. These methods usually entail that a legal representative is appointed via state funds to assist accused persons who fall within the qualifying criteria for legal aid. Guideline 5(c) of the UN Principles and Guidelines on Criminal Legal Aid refers to 'a competent lawyer (to be) assigned by the court or other legal aid authority'. This implies that an accused person has a right to be represented by a legal representative who will be able to properly, effectively and competently present the case of the accused.

In a recent South African judgment the court commented that the way in which the allegation of rape was investigated, the case for the State was presented and the way in which the defence was conducted left the court with 'a grave sense of

disappointment'. The poor investigation of cases and incompetent legal representation on behalf of both the state and the defence place an immense and unfair burden on presiding officers to fulfil their proper role as impartial arbiters to ensure that a fair trial takes place.

This judgment and others emphasize that mere legal representation is not sufficient to satisfy the proper application of the right to legal representation. What is called for is the provision of quality legal representation of a calibre that meets certain minimum requirements or standards. The South African Supreme Court of Appeal held that the constitutional right to legal representation must be real and not illusory.

In this paper it is argued that entities administering legal aid in SADC countries should employ quality control mechanisms to ensure that quality legal representation is provided, in order to ensure that the cases of accused persons are properly and effectively presented. This will ensure that accused persons receive a fair trial and the need for presiding officers to judicially intervene in the trial will be limited. The quality control mechanisms employed by Legal Aid South Africa are outlined and considered as a successful model to ensure that legal representation of quality is afforded to accused persons making use of legal aid assistance. It is argued that quality legal aid representation will, in turn, facilitate improved access to justice.

In conclusion it is recommended that all SADC countries should be encouraged to consider implementing the measures employed by Legal Aid SA. It is submitted that all SADC states should, as declared in the Johannesburg Declaration, proclaim and demonstrate the political will and commitment to make meaningful legal aid available to the poor and vulnerable. Equally so, legal aid providers should provide meaningful legal aid services by properly monitoring and evaluating the quality of all their services.

1.5 HUMAN RIGHTS

1.5.1 Botha, J and Govindjee, A The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

SAJHR **(2015) vol. 15, no. 2**

ABSTRACT

Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) regulates derogatory and offensive speech as prohibited speech and as a form of hate speech. It limits the expression of insulting opinions and racial slurs, the consequences of which are not included within the harms caused by hate speech, and which a narrowly drafted hate speech regulator aims to prohibit. This has resulted in a situation where the Courts have misclassified prohibited speech as hate speech. The boundaries between the two have become blurred, causing an over-classification of speech as hate speech and a dilution of the prohibition of true hate speech. The issue is complicated and nuanced and requires that a balance be struck between the right to human dignity and the right to freedom of expression. Hate speech, properly defined, impinges upon the human dignity of its victims in an unjustifiable manner; but limiting the right to freedom of expression too easily in legislation may be unconstitutional because of the importance of the right to freedom of expression in a constitutional democracy. The solution is a tightly drafted hate speech regulator in PEPUDA and the insertion therein of a separate provision to regulate the use of racial epithets as an additional type of prohibited speech.

1.5.2 Ndimurwimo, LA and Mbao, MLM Rethinking Violence, Reconciliation and Reconstruction in Burundi

Potchefstroom Electronic Law Journal (2015) 4 18

ABSTRACT

Armed violence and genocide are among the on-going problems that are still facing contemporary Africa and the world. In the aftermath of the outrages, devastation and appalling carnage of the Second World War, member states of the United Nations (UN) undertook radical steps, inter alia, "to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights". Subsequently, the International Bill of Human Rights was proclaimed in order to lay down international human rights norms and standards of conduct and to prevent the recurrence of mass killings. Although Burundi is a State Party to the UN and African Union and is a signatory to a number of international and regional human rights treaties, the post-colonial history of Burundi is an epic tale of indescribable human suffering and misery as a result of systematic mass killings. At least every family or household in Burundi has been negatively affected by the mass killings of the 1960s, 1972, 1988 and 1990s, which have created a significant number of refugees and internally displaced persons (IDPs).This article traces the root causes of Burundi's systemic armed violence and argues that despite several UN Security Council Resolutions and peace agreements aimed at national reconciliation and reconstruction, mass killings and other heinous crimes remain unaddressed. The article recommends that a comprehensive transitional justice model is required in post-conflict Burundi in order to bring about national reconciliation, healing and reconstruction.

1.5.3 Ndimurwimo, LA Protection of Refugees and IDPS' Rights: A Case Study of Post-Conflict Burundi

Obiter (2015) 36 2

ABSTRACT

The number of refugees and internally displaced persons (IDPs) in Burundi have escalated due to on-going human right violations. This article interrogates the protection of refugees and IDPs' rights in post-conflict Burundi. It seeks to trace the root causes of Burundi's sullied human-rights record over 53 years since independence from Belgium in 1962. The post-conflict government has not succeeded in establishing accountability for these violations and reparations to the victims who are refugees and IDPs and in putting an end to impunity which seems to entrenched in Burundian society.

The article critically analyses the results from interviewing 113 Burundians and non-Burundians and argues that there will be no political stability enduring peace and solution to refugee and the IDPs problem without addressing human-rights issues in a comprehensive manner. This article considers the application of "Ceased Circumstances Clauses" under the 1951 UN and OAU Refugee Conventions from the perspective of the South African and Tanzanian refugee laws, policies and case law. Particular attention is given to the tests and criteria that can be designed in cessation of refugee status to ensure the protection of refugee rights as required by international law.

1.6 LABOUR LAW

1.6.1 Olivier, MP and Govindjee, A The inter-relationship between administrative law and labour law: Public sector employment perspectives from South Africa

Accepted for publication in *Southern African Public Law* (2015)
(page and volume numbers being finalised);

ABSTRACT

The legal position of public sector employees who challenge employment decisions taken by the state or organs of state in their capacity as employer in South Africa has long been problematic. Even though at least four decisions of the Constitutional Court of South Africa have considered whether employment-related decisions in the public sector domain do or could amount to administrative action and whether administrative law and/or labour law should be applicable for purposes of dispute resolution, legal uncertainty remains the order of the day due to a combination of factors. The authors assess whether (and to what extent) the rich administrative law jurisprudence of South Africa remains of importance in relation to the public employment relationship, bearing in mind the applicable legal considerations, including the inter-relatedness, interdependence and indivisibility of the range of applicable fundamental constitutional rights. Considering the debate also in other jurisdictions on this matter, the authors develop a paradigm for situating different employment-related disputes as matters to be decided on labour and / or administrative law principles in South Africa. This requires an appreciation of the unique nature, to the extent relevant, of public sector employment relationships and a detailed investigation of the applicable legal sources and precise parameters of the cases already decided in the country. The position of employees deliberately excluded from the scope of labour legislation is analysed, for example, as is the legal position of high-ranking public sector employees. The outcome of the proposed investigation is important for determining the applicable legal principles to be applied in cases involving public sector employees in their employment relationship, and for purposes of

determining the question of jurisdiction. Recent cases, for example where the courts have permitted the state, as employer, to review its own disciplinary decision (via a state-appointed chairperson of a disciplinary hearing) on the basis that this amounts to administrative action which is reviewable, are also examined, given the uncertainty regarding the precise nature and scope of the review.

1.7 LAW OF DELICT

1.7.1 Mukheibir, A "Limitless Liability – Tokoloshe or Real Danger? Country Cloud Trading CC V MEC", Department of Infrastructure Development (2015) SALJ 22 (IBSS Journal).

ABSTRACT

The question of pure economic loss in delict has always been problematic because of the oft-expressed fear of limitless liability. There is a long history of cautious development of this area of the law. In *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) (hereafter '*Administrateur, Natal*'), a claim for pure economic loss arising from a negligent misrepresentation was recognised, although the court (Appellate Division) left open the question of whether a misrepresentation in contrahendo would found such a claim. It would be more than a decade before the Appellate Division allowed a claim in contrahendo in *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A). In both these cases it was held that the limitless liability that was feared could be held at bay by correct application of the elements of a delict, in particular the elements of wrongfulness, negligence and legal causation (*Administrateur, Natal* (supra) at 832H-833B; *Bayer South Africa (Pty) Ltd v Frost* (supra) at 568D-F: for a recent analysis of the history and development of such a claim see Anton Fagan 'Aquilian liability for negligently caused pure economic loss - Its history and doctrinal accommodation' (2014) 131 *SALJ* 288). It is submitted that the fear of limitless liability is unnecessary, because liability can be limited by means of the correct applications of the principles of delict.

1.7.2 Mukheibir A and Marx FE ”Caught in the Crossfire – The Accidental Passenger”

Speculum Juris (2015) 1

SUMMARY

This article addresses the possible remedies an innocent passenger could have if injured in the crossfire between a hijacker and a driver of a car who is defending herself. The factual scenario was taken from a news report on the News24 website. In this instance two hijackers accosted a woman, Mrs H, at an intersection. They attempted to take her car and she fired shots at them. It is not clear from the article whether they had been armed or not. In the process one of the bullets struck a passenger who was travelling in a passing minibus taxi in both arms. She was rushed to hospital. It appears from the article that the intersection in question, as well as other intersections in the area, was notorious for car-jacking and robbery. Mrs H had been the victim of an armed robbery on a previous occasion and it appears that this is the reason why she carried a firearm.

The liability to compensate the victim (bystander) for harm suffered as a result of the shooting of the following three parties is examined: the shooter, the Minister of Police and the Road Accident Fund.

In the first two instances the elements of wrongfulness and legal causation will be difficult to establish, while in the third instance it would be problematic to prove that the damage “arises from the driving of a motor vehicle” as required in terms of section 17(1) of the Road Accident Fund Act. The authors suggest that the State be held liable for its failure to ensure the safety of its citizens. This liability would be direct liability based on an omission (see *F v Minister of Safety and Security*.

1.7.3 Mukheibir, A and Qotoyi, T “Wrongful suspension as a ground for delictual damages”

Industrial Law Journal (2015) 70

ABSTRACT

In the unreported case of *Good Year SA (Pty) Ltd v Weitz* the plaintiff instituted action against the defendants herein in which he claimed damages in the sum of R1 923 272,60 for loss of earning capacity. The plaintiff was previously employed by the first defendant. He alleges that malicious disciplinary proceedings were instituted against him without any reasonable or probable cause and that these events had such an impact upon him that they caused him to develop major depression and post-traumatic stress disorder. This emotional damage, it is alleged, has rendered him unemployable with the consequent loss of earning capacity. The defendants excepted to this claim as being bad in law. The exception was dismissed. At the time the note was submitted the case had not gone to trial. The case note discussed the possibility of succeeding with a claim for wrongful suspension based on the failure of the employer for investigating the veracity of the claims of racism against Mr Weitz before proceeding with disciplinary proceedings against him.

1.8 PRISON LAW

1.8.1 Erasmus, D and Hornigold, A Court Supervised Institutional Transformation in South Africa

Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad (2015) 18 7

ABSTRACT

The traditional adversarial model of litigation in South Africa operates on the basis that two or more parties approach the court, each with its own desired outcome. The court is then obliged to decide in favour of one of the parties.

A different model of litigation is emerging in South African law. This model involves actions against public institutions that are failing to comply with their constitutional mandate. In this type of litigation there is seldom a dispute regarding the eventual outcome that is desired. Both the applicant and the state, in its capacity of the respondent, have a broad consensus about the manner in which the institution should operate or be transformed. There is accordingly agreement regarding the eventual outcome and the shortcomings that should be addressed. The primary issue relates to the details of the implementation of the transformation of the institution in question, in order that the constitutional mandate of the institution in question will be met.

An example of this form of litigation can be seen in litigation concerning the conditions in which prisoners are detained in South African prisons. The constitutional mandate for the imprisonment of offenders is contained in the Correctional Services Act.

Ongoing human rights violations often take place in prisons. These include staff shortages, shortages of medical staff and facilities, prison overcrowding, inadequate staff development, the prevalence of HIV/AIDS, infrastructure defects and maintenance problems, gangsterism, requests for prisoner transfers and problems associated therewith, the ineffectiveness of parole boards, staff

development needs that are not addressed, an excessive focus on security, lack of rehabilitation and vocational training programmes and assaults of prisoners.

The courts have on occasion issued a structured interdict as an appropriate remedy. However, problems arise when violations are widespread and no single order can cause the problems to be properly addressed or where the executive fails to implement or even ignores court orders.

Thus, the wrong which is complained of is not a wrong done to a particular person, but the constitutional wrong is the manner in which the institution executes its mandate vis-a-vis the vulnerable beneficiaries of the public service in question. The transformation thereof is designed to bring the institution within its constitutional duties and bounds. There is usually no dispute about the failures of the organisation and court orders are often taken by consent.

The question which arises is how it can be ensured that a public institution such as a school, welfare department, hospital for the mentally disabled, home for the elderly or prison, which is designed to serve or accommodate the vulnerable may be brought into conformity with its constitutional mandate where there are continual and persistent failures to do so.

Even where court orders are obtained, there are often significant problems with the implementation thereof. In the case of prisons, a possible solution, which has been employed in the United States of America and which may be adapted for use in the South African context, is that of a post-trial special master or court appointed supervisor, who supervises the transformation of the public institution until such time as the non-compliance has been appropriately resolved.

In this article the role and functions of the American special master will be set out. The feasibility of importing such an office into the South African context will be evaluated.

1.9 LEGAL EDUCATION

1.9.1 Biggs, L and Hurter, K Rethinking Legal Skills Education in an LLB Curriculum

Journal for Juridical Science (2015) 391:1-30

ABSTRACT

Over the past decade, there have been growing complaints regarding the low levels of literacy, research and numeracy skills demonstrated by law graduates in practice, and a call for universities to more adequately address these skill gaps. The Faculty of Law at the Nelson Mandela Metropolitan University (NMMU) responded to this call by redesigning their first-year Legal Skills course using a stand-alone skills-based model and a context-based teaching approach. The redesign process is outlined and particular themes in each stage of the process are discussed. This includes identifying contextual factors, defining essential skills; course content analysis; course restructuring; teaching reformulation; adaptation of assessment and feedback; implementing a blended learning approach, and collaboration within the Faculty and across faculties and service providers. The article argues that a stand-alone skills-based model can be effective in developing a minimum level of competence, but that a sense of shared responsibility for skills development across the LLB programme is essential for a higher level of skill attainment. Lessons learned during the redesign process are highlighted, and where possible, recommendations for future considerations are explored.

1.10 SOCIAL SECURITY

1.10.1 Olivier, MP and Govindjee, A A critique of the Unemployment Insurance Amendment Bill, 2015

Accepted for publication in *Potchefstroom Electronic Law Journal (PER)*
(2015) vol. 8, no. 7 2739-2776;

ABSTRACT

The contribution critically reflects on the proposed amendments to the Unemployment Insurance Act, 2001 (Act 63 of 2001) (the UIA / the Act), introduced via the provisions of the Unemployment Insurance Amendment Bill of 2014 (B7-2014). Several shortcomings and deficiencies are addressed and improvements introduced by the proposed amending legislation, including the extension of coverage to a wider range of beneficiaries, the extension of period of benefits (maximum of 365 days), the increase of the rate of maternity benefits of a (female) contributor's earnings, the adjustment of the accrual rate of a contributor's duration of benefits from 1 day for every 6 days of benefits to 1 day for every 4 days of employment, and some attempt to provide for employment retention and the re-entry of unemployed contributors into the labour market.

And yet, despite these important contributions to the development of unemployment insurance in South Africa, several matters appearing from the Bill point towards inconsistent, inadequate and inappropriate treatment of core elements of the unemployment insurance system. Recommendations have been made to address these matters, which among others relate to:

- Insufficient alignment of the UIA with ILO, UN and SADC standards in key areas of concern;
- Unclear or absent provisions in relation to coverage and/or application of the UIA in relation to public servants, migrant workers, and the self- and informally employed;
- Inadequate provision for employment promotion, the prevention, combating and reduction of unemployment, and reintegration into employment;

- Inappropriate provisions relating to benefit rates and periods, among others concerning the Minister's power to set/amend the Income Replacement Rate and to vary the benefit period by regulation;
- Inconsistent and discriminatory provisions requiring a 13 week qualifying period for accessing maternity benefits;
- Inappropriate provisions regarding dependants' benefits, including the strengthening of the existing claims hierarchy in favour of spouses and life partners, at the expense of children;
- Absence of an independent appeal institution; and
- Poorly formulated provisions, with evident discord between the provisions of the Bill and the Memorandum settings out its objectives.

1.11 WHITE PAPER

1.11_.1Tait, AM & Newman, SP: Drafting of the White Paper on Consumer Protection in the Eastern Cape

The draft White Paper was published for public comment in the Provincial Gazette No 3399 on 29 May 2015.

SUMMARY

The White Paper provides the policy rationale for the adoption of new provincial consumer protection legislation so as to align the consumer protection legislation in the province with national legislation, in particular the Consumer Protection Act 68 of 2008 (CPA). This alignment requires the establishment of an Office of the Consumer Protector, as well as the creation of consumer courts, as envisaged by the CPA and the National Credit Act 34 of 2005.

CONFERENCES

2.1 NATIONAL CONFERENCES

2.1.1 Coetzee, L “Sleeping with the enemy” Gender based Violence. Conference theme “Picking up the pieces” 24-24 August 2015.

ABSTRACT

This was a keynote address at a conference attended by Health Care Practitioners attached to health clinics at universities across the country. The paper provided an explanation of the relevant provisions of the Domestic Violence Act. Participants were provided with practical steps to assist a victim of domestic violence in obtaining a protection order.

2.1.2 Kruger, L Transgender: The Process Involved, Issues Faced and Legal Protections

Presented at The Private Law and Social Justice Conference, NMMU, 17-18 August 2015.

ABSTRACT

South Africa has a complex and diverse history regarding LGBT rights. The legal and social status of lesbian, gay, bisexual, and transgender people has been influenced by a combination of traditional South African *mores,* colonialism, and the lingering effects of Apartheid and the human rights movement that contributed to its abolition. South Africa's post-Apartheid constitution was the first in the world to outlaw discrimination based on sexual orientation, and South Africa was the fifth country in the world, and the first in Africa, to legalise same-sex marriage. Same-sex couples can also adopt children jointly, and also arrange IVF and surrogacy treatments. Nevertheless, LGBT South Africans continue to face considerable challenges, including social stigma, homophobic violence (particularly corrective rape), high rates of HIV/AIDS infection, and access to healthcare.

The protection of LGBT rights in South Africa is based on section 9 of the Constitution, which forbids unfair discrimination on the basis of sex, gender or sexual orientation, and applies to the government and to private parties. The Labour Court in two landmark judgments has stated that the section must also be interpreted as prohibiting discrimination against transgender people. These constitutional protections have been reinforced by the jurisprudence of the Constitutional Court and various statutes enacted by Parliament.

This paper will seek to address the status of transgender individuals in South Africa and how the process of a change of gender status takes place, highlight issues faced by such individuals and evaluate protections offered by the various legal mechanisms available to this minority group.

2.1.3 Kruger, L Demanding quality service: An evaluation of WASPA Code of Conduct in light of the Consumer Protection Act 68 of 2008

Paper co-presented at the 10th Annual Eastern & Western Cape Universities Emerging Researchers' Conference, NMMU, 29 - 30 January 2015.

ABSTRACT

The Consumer Protection Act 68 of 2008 grants consumers in South Africa the right to fair value, good quality and safety which entails that consumers can also demand quality service from service providers (sec 54). This right, *inter alia,* includes (i) the timely performance and completion of those services, and timely notice of any unavoidable delay in the performance of the services; (ii) the performance of the services in a manner and quality that persons are generally entitled to expect; (iii) the use, delivery or installation of goods that are free of defects and of a quality that persons are generally entitled to expect, if any such goods are required for performance of the services; and (iv) the return of any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose of performing such services having regard to the circumstances of the supply, and any specific criteria or conditions agreed between the supplier and the consumer before or during the performance of the services. If a supplier fails to perform a service to the aforementioned standards, the consumer may require the supplier to either remedy any defect in the quality of the services performed or goods supplied; or refund to the consumer a reasonable portion of the price paid for the services performed and goods supplied, having regard to the extent of the failure.

Recently the Wireless Application Service Provider's Association published their Code of Conduct to which their members must subscribe. The primary objectives of this code of conduct, is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services as well equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a

framework for impartial, fair and consistent evaluation and response to any complaints made.

The purpose of this paper is to evaluate how this Code of Conduct extends and protects the rights of consumers in terms of the Consumer Protection Act as well as if additional remedies are provided for by the Code of Conduct is members infringe on the rights of consumers and act contrary to it and the Consumer Protection Act.

2.1.4 Kruger, L Transgender: The Legal processes, but what about the practical difficulties in the medical industry?

Paper Presented at the 2nd Annual Forum for Medicine and the Law, University of Johannesburg, 26 November 2015.

ABSTRACT

The Alteration of Sex Description and Sex Status Act (ASDSSA) came into effect on 15 March 2004 and provides that any person whose sexual characteristics have been altered by surgical or medical treatment or by evolution through natural development resulting in gender realignment, or any person who is intersexed, may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description in his or her birth register. If the application is granted, a magistrate must issue an order directing the Director-General to alter the sex description in the birth register of the person named in the order.

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Despite the legal possibilities now available to transgender individuals the prevailing social norms are still a substantial hurdle. In 2012 the Congress of Traditional Leaders of South Africa (Contralesa) filed a draft document calling for the removal of LGBT rights from the Constitution of South Africa. The group submitted a proposal to the Constitutional Review Committee of the National Assembly to amend section 9 of the Constitution; The parliamentary caucus of the ruling African National Congress rejected the proposal. This however is indicative of the severe discrimination still suffered by LGBT and specifically Transgender individuals despite the legal protections afforded.

In The USA the National Center for Transgender Equality and the National Gay and Lesbian Task Force released a report in 2011 entitled Injustice at Every Turn, which confirmed the pervasive and severe discrimination faced by transgender people. Out of a sample of nearly 6,500 transgender people, the report found that transgender people experience high levels of discrimination in employment, housing, health care, education, legal systems, and even in their families

Many transgender people are the targets of hate crimes, especially prevalent in South African informal settlements. They are also the victims of subtle discrimination—which includes everything from glances or glares of disapproval or discomfort to invasive questions about their body parts. People who want to transition are faced with financial constraints. Transitioning is very expensive; the doctors' appointments, hormone replacement therapy, blood tests, psychologists and the costs of surgeries. The costs depend on the route taken and most medical aids are unwilling to fund them. A severe shortage in medical practitioners who are trained in dealing with such cases is also crippling to progress in this field.

This presentation will discuss the legal processes involved in transgender change of identity; thereafter a discussion surrounding the difficulties faced from a medical perspective for such patients will be carried out.

2.1.5 Newman, SP The Enforcement of Consumer Rights: Industry Ombuds And Procedural Challenges

Paper presented 3rd Annual International Mercantile Law Conference,
University of the Free State, Bloemfontein, South Africa, November 2015

ABSTRACT

The Consumer Protection Act 68 of 2008 (CPA) generally came into force in South Africa on 1 April 2011 and contains comprehensive protection for consumers through a number of 'consumer rights'. It provides various methods for enforcing these rights, including methods of alternative dispute resolution to make dispute resolution more accessible for consumers. Section 82 provides for the establishment of industry codes and the Minister may prescribe an industry code for a particular industry on the recommendation of the National Consumer Commission. Section 82(6) specifically allows for the accreditation of an industry ombud. This mechanism allows for self-regulation by a particular industry in resolving consumer protection issues between a consumer and supplier who is subject to the code.

Currently two industry codes have been accredited: the Consumer Goods and Services code and the South African Automotive Industry code. Both of these make provision for an alternative dispute resolution scheme and thus have accredited industry ombuds. The consumer may, in terms of s69(c)(i), refer a dispute to the industry ombud first for resolution. However, although participation is compulsory for all suppliers in the industry, the ombud may only make a recommendation to the parties, which is not binding on them.

This begs the question – What is the consequence of this situation for a consumer? If either of the parties are not satisfied with the recommendation of the ombud or the ombud decides the dispute cannot be resolved what options are then available to the consumer and how much time will this process take before the dispute is resolved? This paper will highlight some of the potential problems of the accredited industry ombuds and advance tentative solutions.

2.2 INTERNATIONAL CONFERENCES

2.2.1 Coetzee, L "The Chicago Seven Trial reloaded: Using the Chicago Seven, Nelson Mandela and Sadam Hussein trials to teach about the role of lawyers, judges and accused persons in the criminal justice system"

Paper presented with Professor David Mc Quoid Mason of the University of KwaZulu Natal at the GAJE (Global Access to Justice) 8th Worldwide Conference 22-26 July 2015, Anadolu University,Eskisehir, Turkey

SUMMARY

The paper used the trials of the 'Chicago Seven', Nelson Mandela and Saddam Hussein to demonstrate to that although lawyers in most jurisdictions, in theory if not practice, are bound by rules of professional conduct regarding their duties to their clients and the court, sometimes their clients insist on a 'power oriented' or 'rebellious lawyering' approach when faced with an illegitimate or unjust court and political system. In such cases, the clients know that they will be convicted and do not want their lawyers to defend them, but rather to help them to use the courts to gain maximum publicity for their cause. In the Chicago Seven Trial the defendants adopted this approach to question the legitimacy of the United States' courts and the legal system in its treatment of opponents of the Vietnam War. Nelson Mandela and his colleagues had used a similar, but less disrespectful, approach seven years previously when confronted by executive-minded courts and a discriminatory criminal justice system under apartheid in South Africa. Similarly, Saddam Hussein and his legal team employed the same tactics when he faced prosecution by the Iraqi government while the country was still occupied by the Coalition forces. Ramsey Clark, who as the US Attorney-General had declined to prosecute the Chicago Seven and others, subsequently became an adviser to the defence team in the Saddam Hussein trial. The paper demonstrated how these trials could be used during the teaching of law students to show how lawyers, judges and defendants in criminal justice systems that operate in seemingly unjust societies may behave when using such an approach.

2.2.2 Mukheibir, A "Mass Redress for Harm Caused by Defective Products"

Paper presented at the 15th International Association of Consumer Law Conference in Amsterdam 29 June – 1 July 2015

SUMMARY

In the Netherlands the *Wet Collectieve Afwikkeling Massaschade* (WCAM) was enacted as a direct result of a drug giving rise to birth defects. The drug Diethylstilbestrol, or DES, was prescribed to pregnant women to reduce the chances of miscarriage. The drug was, however, found to have caused rare vaginal tumours in the case of women who had been exposed to the drug in utero (the so-called DES daughters). Men who had been exposed to the drug in utero had an increased risk of testicular cancer. A number of claimants approached the court to claim compensation. Eventually the Hoge Raad found that the producers of the drug could be held liable for damages on the basis of alternative causation. In November 2005 a settlement was reached between the claimants and the manufacturers and this was declared binding in June 2006 in terms of the WCAM, which had in the meantime been enacted.

Mass redress is not well known in South Africa. The South African Law Commission recommended in 1998 that legislation making provision for class actions, both for constitutional infringements and otherwise, be enacted as a matter of urgency. The legislature did not pay heed to this recommendation. Section 38 of the Constitution of the Republic of South Africa makes provision for class actions for instances of infringements of fundamental rights, but currently there is no legislation for class actions in instances where rights other than those in the Bill of Rights are infringed. The matter of "non-constitutional class actions" has been left to the courts. The Supreme Court of Appeal laid down requirements for an opt-in class action and the Constitutional Court subsequently confirmed these requirements. These cases dealt with price-fixing by bread manufacturers. In the meantime, the courts have now certified a number of other class actions, including one by a group of pensioners against their former employer.

Sections 4(1) and 76(1) of the Consumer Protection Act make provision for the institution of consumer class actions as well as mass redress, but thus far no consumer class action has been instituted. A large majority of the South African population is poor and cannot afford legal representation and furthermore, South African consumers are notoriously apathetic. A consumer class action for product liability could be a solution, because the legal costs are shared among the members of the class, and matters that would otherwise seem too trivial to take to court, could, where appropriate, be the subject matter of such a consumer class action. The fact that the Consumer Protection Act imposes strict liability for product liability will further assist groups in that they would not be required to prove fault. It is submitted that consumer class actions will become more popular in the future as South African consumers become more *au fait* with their rights, particularly in the case of defective products.

2.2.3 Newman, SP Failed Consumer Protection Enforcement In Provincial Cross-Border Disputes In South Africa

15th Annual International Association of Consumer Law Conference
University of Amsterdam, Amsterdam, The Netherlands, July 2015.

SUMMARY

The Consumer Protection Act 68 of 2008 (CPA) came into force in South Africa on the 1 April 2011. This legislation contains comprehensive protection for consumers through a number of 'consumer rights' and has been hailed as one of the best pieces of consumer protection legislation. Due to South Africa's history, many consumers are severely disadvantaged, both through illiteracy and lack of experience as a consumer, and this legislation was seen as a beacon of hope for the protection of these consumers.

Consumer protection in South Africa is an area of 'concurrent jurisdiction' which means that both National and Provincial governments may promulgate legislation. National government has in the form of the CPA and in section 84 indicates the jurisdiction that Provincial Authorities will have. However, it cannot proscribe for the Province to promulgate legislation or establish such Authorities due to it being a concurrent jurisdiction area and any jurisdiction is limited to the Province. The consequence of this is that section 84 specifies jurisdiction for Provincial Authorities over persons (suppliers) 'carrying on business exclusively within that Province'. The consequence of this limitation in jurisdiction has been that consumers are unable to find redress for contraventions of the CPA if it is across a Provincial border.

Most Provincial Authorities would thus refer such matters to the National Consumer Commission (NCC) for resolution. The NCC is established in terms of the CPA and is the National body which deals with contraventions of the CPA. This resulted in the NCC being swamped with complaints from all Provinces and created an impossible situation for the NCC, it never having envisaged performing this role. The response of the NCC was to refer the matter back to the Provinces, indicating that they should mediate or conciliate in terms of section 84. The NCC

relied on section 99(a), which states that the NCC did not have to, ‘intervene in a dispute directly’. In addition, in a draft referral protocol submitted to provinces by the NCC, it again makes reference to the fact that they do not intervene in individual disputes.

This is clearly an untenable situation and leaves the consumer stranded. The various Province’s Consumer Protection Authorities can make an effort to facilitate negotiations between the consumer and supplier. However, they have no jurisdiction over the supplier and if a supplier simply refuses to negotiate, as many have, there is nothing that the Province’s Consumer Protection Authority can do. The provincial Authorities will have to liaise with one another to resolve the dispute. In practise, Provinces are unwilling to do so as it affects the resources that are available and they would prefer to resolve disputes for their own consumers rather than consumers from another province.

There are a number of possible solutions to this predicament and involve, for the most part, legislative amendments. Until such time, Provinces will be unable to solve the dispute and consumers will have to undertake a more cumbersome and potentially expensive route, through the National enforcement body, the National Consumer Tribunal.

2.2.4 Tait, AM "The Consumer Protection Act, 2008 and liability for damage suffered by tourists in South Africa"

Paper presented at the 15th International Association of Consumer Law Conference held at the University of Amsterdam, 29 June – 1 July 2015.

SUMMARY

The purpose of the paper was to consider the impact of the Consumer Protection Act 68 of 2008 (CPA) on the protection of tourists in South Africa where a tourist may suffer loss of, or damage to, property whilst a guest of a supplier of tourist accommodation, such as hotels or Bed-and-Breakfast establishments. Of particular relevance are the common law protection provided by the praetorian edict *de nautilus, cauponibus et stabulariis* , and contractual provisions excluding liability on the part of the supplier for any loss suffered by the consumer of the accommodation service. The reality is that the protection provided by the praetorian edict is excluded routinely by exemption clauses. However, the latter provisions are significantly impacted by section 49 of the CPA in particular, providing the consumer with significant protection. This impact is analysed in the paper. Another potential right provided a tourist consumer who has suffered damage to property as indicated is contained in section 65(2) of the CPA. It is argued that this provision entitles the tourist consumer to protection substantially similar to that provided by the praetorian edict with the added advantage that the right cannot be excluded by agreement.

CONTRIBUTIONS TO BOOKS

3.1 Coetzee L Street Law Practical Law for South Africans Learners' manual 3rd edition "Consumer Law chapter" 2015 Juta & Coetzee L Street Law Practical Law for South Africans Educators' manual 3rd edition "Consumer Law chapter" 2015 Juta.

SUMMARY

The 3rd edition of Street Law Practical law for South Africans consist of two books namely a learners' and an educators' book. The aim of the series of books is to provide material that will demystify the law for the ordinary person without a legal qualification. The aim of the publications is to contribute towards access to justice for all South Africans. Since the publication of the second edition a number of important consumer protection pieces of legislation were promulgated. The consumer law chapter was updated to explain the meaning of the Consumer Protection Act and the National Credit Act. Practical scenarios were given to show the reader where typically the provisions of the two pieces of legislation would be applicable.

3.2 Marx FE Defamation: The Naming and Shaming of Spammers

Ketler Investments CC t/a Ketler Presentations v Internet Service Providers' Association 2014 (2) SA 569 (GJ)

ESSAYS IN HONOUR OF / HULDIGINGSBUNDEL VIR JOHANN NEETHLING
(eds Potgieter, Knobel and Jansen)

ABSTRACT

Every person with an email account is aware of the menace of unsolicited commercial communications (spam). It is estimated that 80% of emails received by the average email user consist of spam. Working through spam is not only inconvenient, but also time consuming and indirectly costly. On the other hand, it is possible that bulk unsolicited electronic communications may have an economic value and may (heavens forbid) even be constitutionally protected under the banner of freedom of expression and freedom of economic activity.

The court in this case had to decide whether it was defamatory to name and shame a company as a spammer. The applicant made use of bulk unsolicited communications in the form of email to advertise its products. The respondent, the Internet Service Providers' Association of South Africa, listed the name of the applicant on a "Hall of shame" which identified spammers, on its website. This article investigates the court's application of the test for a defamatory statement as well as its application of the principles pertaining to grounds of justification and to some ancillary matters such as the right to privacy, the right to freedom of expression and the right to property. The court's approach to the application of the test for defamation as well as its application of the test for wrongfulness and more particularly, the test for truth and public interest, is criticised. In spite of the above, it is concluded that the outcome of the decision is correct.

3.3 Mukheibir, A "Wrongful life claims in South Africa and the Netherlands – similarities and differences" in Essays in Honour of / Huldigingsbundel vir Johann Neethling (eds Potgieter, Knobel and Jansen).

SUMMARY

The Constitutional Court held in the recent decision of *H v Fetal Assessment Centre* that a so-called wrongful life claim can, in principle, be upheld. Previously these claims were not recognised in South African law as the courts regarded them as against public policy because such claims involved a comparison between the child's existence with its handicaps and a situation where the child had not been born. The court held that the damage had to rather rest with the medical practitioner, basing its decision on the best interest of the child. It furthermore circumvented the 'limitless liability' problem on the basis that the child's claim would only be allowed if the parents had not instituted a claim. The Dutch Hoge Raad, on the other hand, allowed the wrongful claim in the 2005 case of Kelly Molenaar, circumventing the issue of comparing existence with non-existence by invoking article 6:97 of the Dutch Civil Code in terms of which the court can assess damage in the most suitable way for a particular claim.

It is submitted that the Constitutional Court erred in allowing the child's claim only in the absence of a claim by the parents. In so doing, it did not recognise the difference between the claim of the child and the parent and the fact that the wrongful life claim is for compensation for the child's own harm.