NELSON MANDELA UNIVERSITY

RESEARCH OUTPUTS

2021

Faculty of Law

Editor: Dr R Denson

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ARTICLES

1.1 CONSTITUTIONAL LAW

1.1.1 Du Plessis, M & Naidoo, C "COVID-19 and International Law: The Continuing Importance of International Law Obligations during Public Emergencies"

South African Yearbook of International Law 2021 Vol 45 1-14

ABSTRACT

The current COVID-19 pandemic has brought with it a number of growing global concerns, apart from its more apparent impact on human lives, economies and health systems across the world. Particularly concerning is an increase in military response to the pandemic, employed by countries as a means of enforcing lockdown regulations and curbing the spread of the virus. This increase in state power, through countries' armed forces, has seen alarming reports of alleged state abuses during both declared and de facto public emergencies, with alleged abuses ranging from more palpable assaults on human rights to the less obvious. In light of this complexity, this comment reflects on the importance of local responses to COVID-19 in upholding global human rights and humanitarian standards, as a guide to state responses to the pandemic. It does so by highlighting prominent examples from current global affairs, with at least two from South Africa, and extrapolating critical lessons using an international law perspective. The comment aims to serve as a reminder of the importance of human rights in times of crisis, both for South Africa and the world at large.

1.1.2 Du Plessis, M & Suleman, M "*eThekwini Municipality & Others v Westwood Insurance Brokers (Pty) Ltd*: Personal Costs Against Public Officials through the Lens of Westwood"

South African Law Journal 2021 Vol 138 (4) 731-748

ABSTRACT

eThekwini Municipality & others v Westwood Insurance Brokers (Pty) Ltd concerns personal costs orders against public officials. The high court sought to extend itself beyond the merits of a tender dispute in its main judgment by engaging in an inquiry about the officials implicated and whether they should be penalised by way of a personal costs order. In its costs judgment, certain individuals within the eThekwini Municipality were mulcted with personal costs orders. On appeal, a full bench cautioned against a court reaching conclusions about officials too quickly and drawing adverse inferences from facts that are not properly pleaded. This is a judgment that has mapped out the procedural steps necessary to make personal costs orders against public officials.

1.2 COMPETITION LAW

1.2.1 Van Tonder, J "Predatory Pricing: Single-firm Dominance, Exclusionary Abuse and Predatory Prices (Part 2)"

Obiter 2021 Vol 42 (2) 194-209

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 1 has critically evaluated the law on the determination of single-firm dominance under section 7 of the Competition Act. Part 2 starts to focus on the abuse analysis and discusses the basic forms of abuse, the meaning of abuse, tests that have been developed to identify exclusionary abuse, the criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. Part 3 then specifically deals with the law of predatory prices under section 8(c) and (d)(iv) of the Competition Act. Pursuant to section 1(3) of the Competition Act, when interpreting or applying the Competition Act, appropriate foreign and international law may be considered. 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 gives effect to the purposes set out in section 2. In light hereof, where appropriate, the South African position is mainly compared with the position in the European Union and the United States.

1.2.2 Van Tonder, J "Predatory Pricing: Single-firm Dominance, Exclusionary Abuse and Predatory Prices (Part 3)"

Obiter 2021 Vol 42 (3) 470-485

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 the Competition Amendment Act 18 of 2018. In light of these developments, this three-part series of articles evaluate the law relating to the economic concept of predatory pricing under the Competition Act. In this context, the crucial elements of dominance and abuse are also discussed. The first in this series of three articles critically evaluated the law on the determination of single-firm dominance under section 7 of the Competition Act. The second article discussed the basic forms of abuse, the meaning of abuse, tests that have been developed to identify exclusionary conduct, the criticism of the traditional theory of predatory pricing, the main strategic economic theories of predatory pricing and non-pricing theories of predation. This article focuses on the law of predatory prices under section 8(1)(c) and 8(1)(d)(iv) of the Competition Act. Pursuant to section 1(3) of the Competition Act, when interpreting or applying the Competition Act, appropriate foreign and international law may be considered. 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 which gives effect to the purposes set out in section 2. In light hereof and where appropriate, the South African position is mainly compared with the position in the European Union and the United States.

1.3 CRIMINAL LAW

1.3.1 Schrage, EJH "Human is Destined to Die Once: Assisted Suicide in a Recent Decision of the Dutch Supreme Court of Appeal"

Journal for the Law of Human Life 2021 Vol 30 167-182

Abstract

Within Europe there is nothing like a sort of consent to be found in the area of euthanasia, In the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) are Art. 2 (right to life) and Art. 8 (respect for the right to self-determination in personal life) relevant for the question of euthanasia. The European Court of Human Rights in Strasbourg states in its case law on these articles that the contracting states have a wide discretion as to the way in which the protection of the lives of patients in a desperate situation finds its legal form. Consequently, there is legislation in Europe in the field of euthanasia of different nature. In the Netherlands, on April 1, 2002, a new Article 293 of the Criminal Code came into force, as a result of which euthanasia is nowadays considered to be subject to the medical exception, that is to say that in general euthanasia still counts as a criminal offence but in the Netherlands, it loses its criminal nature on the condition that certain due diligence criteria are met. The act should be performed by a registered medical doctor and his (or her) acts are subject to an assessment by a review committee. Among the due care criteria which come to the test, the request and the well-informed consent of the patient (along with a few others) play a decisive role. In recent practice, the question of the legal situation arose if the patient had clearly documented his will to die in the past, but actually is found to in a state of advanced disease (dementia, Alzheimer's) in which neither of an independent will formation nor (even more) of a reliable expression of will can be talked about. Can the doctor, provided that the other conditions of care are sufficiently observed, still comply with a previously specified written request for the end of life? The Dutch Supreme Court has this question cautiously answered in the affirmative in a judgment of April 21, 2020. This judgment is discussed, as are the first comments in the press and in specialist literature.

1.3.2 Spies, A "The Continued Criminality of Selling Sex: A Trajectory of South African Sex Work Law Reform"

Journal of African Law 2021 Vol 65 (3) 327-349

ABSTRACT

This article explores the regulation of sex work in South Africa and follows the trajectory of the South African Law Reform Commission (SALRC) in investigating whether sex work should be decriminalized. The legal regulation of sex work is a hotly contested topic. South Africa currently criminalizes the selling and buying of sex, but policy reform has been on the cards since the SALRC launched its project on the topic in the early 2000s. As most sex work policy responses are grounded in feminist theory, the article analyses the main theoretical ideologies and questions the influence of these ideologies in structuring sex work law reform in the South African context. The author calls for a more inclusive understanding of feminism and sex work, and the need to acknowledge the importance of rights discourse in furthering political growth and protecting sex workers' constitutional rights.

1.4 FAMILY LAW

1.4.1 Denson, R "A Comparative Exposition of the Dissolution of a Marriage in terms of Islamic Law, South African Law and the Law of England and Wales"

Obiter 2021 Vol 42 (2) 352-393

ABSTRACT

The article discusses and compares the dissolution of a marriage as well as the legal consequences thereof in terms of Islamic law, South African law and English law. This is done in order to demonstrate that despite the similarities, there are vast differences existing between the three legal systems and this impacts on how Muslim Personal Law (MPL) can be recognised and regulated in South Africa and England and Wales as constitutional democracies. South Africa and England and Wales share a commitment to human rights and have adopted various approaches in respect of accommodating the application of Islamic law. Internal pluralism also exists within the Muslim communities in South Africa, England and Wales as the majority of Muslims in these countries have to varying degrees developed diverse strategies to ensure compliance with Islamic law, and as well as South African and English law. Notwithstanding the accommodation of MPL in terms of South African and English law, the differences between these legal systems have resulted in decisions which, whilst providing relief to the lived realities of Muslims, are in fact contrary to the teachings and principles of Islam and therefore problematic for Muslims.

1.4.2 Nel, E "Some Clarity on the Accrual of Living Annuities at Death or Divorce: *CM v EM* (1086/2018) [2020] ZASCA 48; [2020] 3 ALL SA 1 (SCA); 2020(5) SA 49 (SCA) (5 May 2020)"

Obiter 2021 Vol 42 (3) 734-743

ABSTRACT

In *CM v EM* ((1086/2018) [2020] ZASCA 48; [2020] 3 All SA 1 (SCA); 2020 (5) SA 49 (SCA) (5 May 2020)), the Supreme Court of Appeal, in an appeal from the full court of the Gauteng Division of the High Court, sitting as court of appeal, had the opportunity to determine where the ownership of capital invested in the form of a living annuity vests, as well as whether the value of an annuitant spouse's right to future annuity payments is an asset in his or her estate and therefore subject to accrual. It is submitted that some implications of the accrual dispensation, particularly within the context of certain pension and financial products, are still in their discovery phase, nearly 40 years after their introduction. In the absence of any reference to a living annuity in an antenuptial contract, the question was always whether such an investment is subject to the accrual system at divorce or death. In the context of a life assurance policy, the surrender value of the policy was taken into account in the event of divorce, but in the event of death, the question was whether, for accrual purposes, the factor taken into account should be the surrender value or the policy proceeds. It has been submitted in the past that in the case of a marriage out of community of property that is subject to accrual, the policy benefits must be valued at the moment of death, which approach will be consistent with the result achieved in the case of a marriage in community of property. As only assets that form part of the estate of a spouse can be considered for accrual purposes, the very nature of a living annuity had to be investigated in the matter of *CM v EM* (*supra*). It is submitted that this case came as a relief and a balancing agent in a legal system of strict testamentary freedom, where the election of an appropriate marital property regime and the right to maintenance are the two most important protection mechanisms for the spouse who has less opportunity to grow his or her estate. The case will also result in a fairer treatment of financially vulnerable spouses where life annuities have previously been deliberately used to exclude a spouse from an inheritance. The development brought

about by the *CM v EM* case should be welcomed by everyone in support of substantive justice between spouses.

1.5 GENDER LAW

1.5.1 Mokone, MGB "The Constitutional Role of the Judiciary in Cases of Sexual GBV: An Analysis of *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC)"

Obiter 2021 Vol 42 (2) 406-420

ABSTRACT

The Constitution of the Republic of South Africa is the supreme law, and it imposes obligations on all arms of the State, including the judiciary. In performing their functions and exercising their powers, all three arms of the State are obliged to fulfil the obligations imposed by the Constitution. In particular, all three arms of the State are bound by the provisions of the Bill of Rights. The Bill of Rights, provided for in the Constitution, is a cornerstone of democracy in the country. The Bill of Rights provides for fundamental human rights, which must be respected, protected, promoted and fulfilled by the State. Different legal systems recognised in the Republic also have to comply with the provisions of the Bill of Rights. In particular, section 39(2) of the Constitution provides that whenever legislation is interpreted and when the common law and customary law are being developed, the spirit, purport and objects of the Bill of Rights must be promoted. Therefore, even when a case before a court calls for the application of common law and all the principles applicable under common law, such application must comply with the provisions of the Constitution, including in cases of common-law rape. Gender-based violence has reached alarming rates in South Africa. The country is referred to as the "femicide nation" and the "rape capital of the world". With a Constitution that is supreme and entrenched, a Bill of Rights that provides for the protection and promotion of fundamental human rights, and obligations incurred in terms of international and African human-rights treaties, there are particular obligations placed on all three arms of the State, including the judiciary. All three arms of the State are obliged to comply with these provisions when addressing the scourge of gender-based violence in the country. This article conducts a critical analysis of the constitutional role of the judiciary in cases of sexual gender-based violence, with a focus on section 39(2) of the Constitution. The analysis is based primarily on the case of *Tshabalala v S; Ntuli v S* 2020 (5) SA 1 (CC).

1.6 HUMAN RIGHTS LAW

1.6.1 Bellinkx, V, Casalin, D, Erdem Türkelli, G, Scholtz, W & Vandenhole, W "Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind"

Transnational Environmental Law 2021 First View 1-25

ABSTRACT

International human rights law (IHRL) offers potential responses to the consequences of climate change. However, the focus of IHRL on territorial jurisdiction and the causation-based allocation of obligations does not match the global nature of climate change impacts and their indirect causation. The primary aim of this article is to respond to the jurisdictional challenge of IHRL in the context of climate change, including its indirect, slow-onset consequences such as climate change migration. It does so by suggesting a departure from (extra)territoriality and an embrace of global international cooperation obligations in IHRL. The notion of common concern of humankind (CCH) in international environmental law offers conceptual inspiration for the manner in which burden sharing between states may facilitate international cooperation in response to global problems. Such a reconfiguration of the jurisdictional tenets of IHRL is central to enabling a meaningful human rights response to the harmful consequences of climate change.

1.6.2 Christoffels-Du Plessis, A "Fishers' Rights are Human Rights': *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297"

South African Journal on Human Rights, 2021 Vol 3 (1) 126-139
Special Issue Class Action Litigation in South Africa
https://www.tandfonline.com/doi/pdf/10.1080/02587203.2021.1987155?needAccess=true

ABSTRACT

In 2004, artisanal fishers, community-based and non-governmental organisations representing ~5,000 artisanal fishers from various fishing communities sought relief inter alia under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 as a result of the unfair discrimination against them because of the fisheries legal framework. This case note focuses on this unique class action brought by the fishers in the Equality Court and the decisions resulting from the case. The relief sought by the fishers to remedy the discrimination and inequity was to compel the then Minister of Environmental Affairs and Tourism to make proper and adequate provision for artisanal fishers in terms of the fisheries legal framework, giving them equitable access to marine resources alongside other marine resource users. This note evaluates the impact of the order of the Equality Court, as it served as the trigger to transform small-scale fisheries in South Africa. The note also discusses the human-rights-centred themes reflected in the South African Small-Scale Fisheries Policy and considers the extent to which this policy is aligned to the United Nations Food and Agriculture Organisation's Small-Scale Fisheries Guidelines of 2015.

1.6.3 Ndimurwimo, LA and Vundamina, MND "The Protection of Refugee Children in Africa: Post-Convention on the Rights of the Child"

Fundamina 2021 Vol 27 (1) 33-66
https://journals.co.za/doi/full/10.47348/FUND/v27/i1a2 OR
https://hdl.handle.net/10520/ejc-funda_v27_n1_a2

ABSTRACT

The plight of refugees is currently one of the concerning global human rights issues. The refugee population is largely comprised of women and children who become displaced during armed conflicts; this is because the majority of persons killed or who become victims of forced disappearance are men. Forcibly displaced children face direct physical threats, as well as a variety of health-related problems. Although forcibly displaced children generally include those who are not refugees, this contribution is only concerned with refugee children. Refugee children are vulnerable to different types of abuse and exploitation, and often become the target of discrimination, sexual exploitation and social marginalisation in the refugee transit camps and countries of exile.

Although the Convention on the Rights of Child, 1989 was adopted to protect children's rights worldwide, the true impact of these provisions remains uncertain. This contribution examines the extent to which the adherence to the Convention on the Rights of the Child is promoted in Africa. This study compares the situation in South Africa, Tanzania and Zambia to pinpoint the legal and practical challenges that face refugee children in those countries. The contribution concludes with recommended solutions for effectively protecting and promoting refugee children's rights in Africa.

1.7 LAW OF DELICT

1.7.1 Mukheibir, A "Barking up the Wrong Tree – The *Actio de Pauperie* Revisited *Van Meyeren v Cloete* (636/2019) [2020] ZASCA 100 (11 September 2020)"

Obiter 2021 Vol 42 (3) 703-713

ABSTRACT

The SCA recently confirmed the continued existence of the action in South African law in the case of *Van Meyeren v Cloete* ((636/2019)[2020] ZASCA 100 (11 September 2020)40). In this case, the SCA had to decide whether to extend the defences against liability in terms of the *actio de pauperie* to the negligence of a third party that was not in control of the animal. The defendant held that the court should develop the common law in this regard. Considering both case law and the requirements for the development of the common law, the SCA held that such an extension could not be justified.

1.8 LAW OF SUCCESSION

1.8.1 Nel, E "Estate Planning and Wills Across Borders: Sometimes a Quagmire in the Making"

Potchefstroom Electronic Law Journal 2021 Vol 24 1-31

ABSTRACT

A synoptic evaluation is made in respect of estate planning and wills of South African nationals working, investing or living in foreign jurisdictions, within the broader context of globalisation and internationalisation. The importance of international wills, the role of testamentary trusts, and the potential impact and reciprocity of international instruments are considered. The most applicable Hague Conventions, as well as the EU Succession and Matrimonial Property Regulations, are discussed, in an attempt to give an overview of the current legal position. In discussing the role of international private law, its practical application is illustrated by way of reference to a few jurisdictions popular among South Africans with multi-jurisdictional estates, namely Malta, Portugal, the Netherlands and the United Kingdom. It is clear that not all attempts to harmonise wills, deceased estates, succession and matrimonial property regimes have been met with the same levels of enthusiasm by the international community. It is argued that not only fiduciary advisers and will drafters, but also attorneys and notaries involved with prenuptial agreements, should be proficient in the workings and implications of the applicable international instruments. An argument is made for more pragmatic and commercial-like thinking in the arena of fiduciary law.

1.9 LAW OF THE SEA

1.9.1 Pittaway, D, Hurst, A, Botha, J & Snow, B "Ocean Governance and the Aporias of 'Accounting' and 'Accountability'"

Interdisciplinary Journal for the Study of the Arts and Humanities in Southern Africa 2021 Vol 38 (5) 138-164

SUMMARY

This article assesses the Ocean Accounts Framework developed by The Global Ocean's Accounts Partnership for Sustainable Development, which follows a 'blue economy model', and includes social and ecological value in its framework of accounts. It is hoped that this novel mode of accounting will improve ocean governance, which should contribute optimally (with the greatest possible justice) to ethical accountability, understood as sustainable human engagement with the ocean. As a work in progress, the OAF drafters acknowledge that more needs to be done to enhance its principles and, particularly its social accounts. In this paper we aim for a philosophical critique of this laudable aim in the Kantian sense of an appraisal of its limits. Drawing primarily from Jacques Derrida's conception of aporias in his essay 'Force of Law' we argue that the limits (restrictions and 'chances') of the OAF are due to the aporetic complexity of key, interrelated fundamental commitments to: 'production and resources' 'inclusivity', 'optimal and just governance' and 'sustainable development'.

1.10 MARINE LAW

1.10.1 Vrancken, PHG, Chasakara, R & Maseka, N "Fishing for Administrative Justice in Marine Spatial Planning: Small-scale Fishers' Right to Written Reasons"

Journal of Ocean Governance in Africa 2021 122-146

ABSTRACT

The emergence of marine spatial planning (MSP) has been ascribed to the inability of the ocean spaces to meet all demands simultaneously. With increasing uses and users of the ocean comes a rise in conflicts. Studies that sought to reduce those conflicts have shown the benefits of zoning the ocean in space and time. In South Africa, the Department of Environment, Forestry and Fisheries, which functions through a national working group (NWG) on MSP, is responsible for the implementation of MSP, which includes ocean zoning in South Africa's ocean spaces. In the implementation of MSP, the NWG will make decisions which, this article argues, constitute administrative action triggering the constitutional right to written reasons. This article examines the small-scale fishers' right to written reasons following a decision by the NWG. It concludes that the NWG does have an obligation to fulfil this right and that the MSP instruments are drafted in a manner that supports this duty.

1.10.2 Vrancken, PHG & Metuge, D "The Impact of Marine Spatial Planning Legislation on Environmental Authorisation, Permit and Licence Requirements in Algoa Bay",

Journal of Ocean Governance in Africa 2021 79-121

ABSTRACT

With a focus on Algoa Bay, this article considers the potential conflicts that may arise between South Africa's marine spatial planning (MSP) legislation and the environmental authorisations, permits and licencing requirements provided under specific environmental management Acts (SEMAs). The legislation for MSP in South Africa is the Marine Spatial Planning Act, 2018 (MSPA). It provides that '[a]ny right, permit, permission, licence or any other authorisation issued in terms of any other law must be consistent with the approved marine area plans'. What is more, where there is a conflict between the MSPA and any other legislation 'specifically relating to marine spatial planning', the provisions of the MSPA prevail. Particular attention is given to the principle of sustainability that the MSPA incorporates into MSP and its impact on environmental authorisation, permit and licence requirements issued in terms of three SEMAs: the National Environmental Management: Biodiversity Act, 2004 (NEM:BA), the National Environmental Management: Protected Areas Act, 2003 (NEM:PAA) and the National Environmental Management: Air Quality Act, 2004 (NEM:AQA). The article concludes by summarising the potential impact the MSPA will have on the discussed SEMAs when it comes into operation and makes recommendations to prevent the occurrence of potential conflicts.

1.10.3 Vrancken, PHG & Nkomadu, OE "Maritime Piracy Law of Kenya - Gaps and Remedy"

Kenya Law Review 2021 Vol 8 154-176

ABSTRACT

A major maritime security problem in Africa is widespread proliferation of incidents of piracy attacks. One reason cited is the lack of adequate domestic legislation and regional agreements to support and facilitate the apprehension and prosecution of suspected pirates. In order to effectively address the threats from legislative perspective, this work analyses the piracy law of Kenya to ascertain how Kenya has attempted to incorporate their international obligations into their domestic laws. The study shows the gaps in the Kenya piracy law and provide solutions for those gaps.

1.11 MINERAL LAW

1.11.1 Badenhorst, JP "Priority Disputes between Holders Old Order Mineral Rights and Holders of Prospecting Rights or Mining Rights under the MPRDA in South Africa: The Eagle has Landed (Continued)"

Colorado Natural Resources, Energy & Environmental Law Review 2021 Vol 32 (2) 195-220

SUMMARY

As part of the radical transformation of the mineral regime of South Africa, the African National Congress government introduced the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA ") on May 1, 2004. In a previous contribution, the transitional provisions of the MPRDA were discussed within the context of the rights of holders of old order rights ("OORs") to convert their transitional rights to, or to apply for, new prospecting rights or mining rights under the MPRDA during different periods of transition. It was shown that due to poor administration by the state, as custodian of the mineral resources of South Africa, in post-apartheid South Africa, competing rights were granted to land that was subject to transitional rights. Also indicated were how priority rules have evolved to deal with competing prospecting or mining rights and transitional rights. In the category of priority disputes between holders of so-called unused old order rights ("UOORs") and holders of prospecting or mining rights, the Supreme Court of Appeal set out the applicable priority rule in Pan African Mineral Dev. Co. v. Aquila Steel Ltd. 2017 (5) SA 124 (SCA) (S. Afr.) (discussed in the previous contribution). However, in the decision of Aquila Steel Ltd v. Minister of Mineral Resources 2018 (3) SA 621 (CC) (S. Afr.), the priority rule received the attention of the Constitutional Court of South Africa ("CC'). This Article examines the CC's interpretation and application of the said priority rule. It also deals with the substitution of the Minister's decision with an order granting an application for a mining right to an applicant who applied without notice (of prior rights) for prospecting and mining rights that were inconsistent with the rights of the holder

of the UOORs. The nature of rights that are created under the MPRDA are examined with reference to the different legal acts that take place during applications for and granting of rights. The Article advocates for a private law approach to determine the nature of these rights. The problems associated with the public law style state custodian construction of the MPRDA are again discussed and highlighted with reference to the facts of the Aquila Steel decision.

1.11.2 Badenhorst, PJ "The Nature and Features of "Unused Old Order Rights' under the MPRDA Revisited: The Story of Gouws' Farm"

South African law Journal 2021 Vol 138 (3) 599-616

SUMMARY

This article examines the nature and features of 'unused old order rights' ('UOORs') under item 8 of Schedule II of the Mineral and Petroleum Resources Development Act 28 of 2002 in light of the recent decision by the Constitutional court in Magnificent Mile Trading 30 (Pty) Ltd v Celliers 2020 (4) SA 375 (CC). At issue was: (a) whether an UOOR was transmissible to heirs upon the death of its holder; and (b) the applicability of the Oudekraal principle to the award of an unlawful prospecting right to an applicant, contrary to the rights enjoyed by the holder of an UOOR. The article analyses the constituent elements of an UOOR, rights ancillary to the UOOR's and the nature and features of UOORs and ancillary rights. The article also considers the possible loss of an UOOR by application of the Oudekraal principle due to the unlawful grant of a prospecting right by the state, as custodian of mineral resources. The article illustrates that the CC ensured in Magnificent Mile that the Oudekraal principle does not undermine the security of tenure and statutory priority afforded to holders of UOORs by ultra vires grants of inconsistent rights to opportunistic applicants. Concern is also expressed about the poor administration of mineral resources by the Department of Mineral Resources and Energy.

1.12 PROPERTY LAW

1.12.1 Badenhorst, PJ "The Distinction between Real rights and Personal Rights in the Deeds Registration System of South Africa: - Part One: Statutory and Theoretical Distinctions between Real Rights and Personal Rights"

African Journal of International and Comparative Law 2021 Vol 29 (3) 450-462

SUMMARY

The focus of this article in two parts is on the recognition of new categories of real rights by the courts. These new real rights can be initiated either in terms of an agreement between parties to create a real right or a bequest in a will. It then becomes the task of the Registrar of Deeds to determine the nature of and registrability of a right and/or the courts to determine: (1) the nature of the right if the Registrar has refused to register such a right because it is not regarded to be a real right; or (2) the enforceability of the right against successors in title. The registration provisions of the DRA are introduced in the first part of this article. The theoretical distinction between real rights and personal rights, which focuses on the features of and characteristics of such rights, is discussed in the first part of this article.

1.13 TRUST LAW

1.13.1 Nel, E "Beneficial Ownership of Trust Assets in an International Reality: An Intersection between Trust Law, Tax and Crime Prevention"

Speculum Juris 2021 Vol 35 (2) 169-181

ABSTRACT

In this article different definitions and concepts are compared in the quest to determine who qualifies as beneficial owners of trust assets. The phrase "beneficial owners" is found in trust and tax law, as well as in various pieces of legislation aimed at the combatting and prevention of the financing of terrorism and international money-laundering. Worldwide, there are civil, criminal and tax courts charged with the task of determining who qualifies as beneficial owners of a particular legal entity or trust. The application of the beneficial-ownership concept by the courts in certain jurisdictions, as well as the appropriation thereof within the European Union's money-laundering prevention initiatives, are considered in this contribution. Beneficial ownership has featured locally in various contexts, such as trust law, tax legislation and divorce. In an apparent absence of any attempt to coordinate the different definitions and descriptions of the concept of beneficial ownership, the question is whether any synergy exists between the manner in which the concept has developed in South African trust law, compared to the different definitions and applications thereof in international instruments and the courts. In this article the underlying motivations for the concept in various forms – be it legislation, conventions, treaties, or courts of law – are identified. The author concludes that the various role-players are not pursuing the same goals, resulting in unnecessary confusion regarding the concept.

OTHER PUBLICATIONS

2.1 Dhunpath, R, Biggs, L, Dippenaar, H, Friedrich-Nel, H, Joubert, D, Nell, I & Yeats, J "Unveiling the Professional Attributes of University Teachers"

CriSTAL (CRITICAL STUDIES IN TEACHING & LEARNING)
2021 Vol 9 Special Issue 126-144

ABSTRACT

This article derives from a collaborative higher education project, conceptualised, and implemented by academics from seven South African universities. These academics are members of the South African Teaching Advancement at University (TAU) Fellowship. The project has its roots in the Department of Higher Education's National Framework for Enhancing Academics as University Teachers, which identifies six leverage points or 'imperatives for action', one of which is the imperative to develop expectations (attributes) of academics in their role as university teachers. TAU Fellows engaged in the collaborative enquiry over a period of three years, appropriating a conceptual framework posited by Henry Giroux, of teachers as transformative intellectuals. In this article, each author reflects on his/her own scholarship of teaching and learning (SoTL) endeavours, which provided the conceptual tools to illuminate what for them and the group, are valuable professional attributes. The metaphor of the Baobab tree is appropriated to signify 'rhizomatic thinking', which portrays teaching as subconscious, subversive, non-linear, multi-directional, serendipitous, esoteric, dynamic, unbounded, unpredictable, adaptive, and non-hierarchical. This SoTL enquiry enabled the TAU group to unveil and declare their professional attributes as they made public their praxis. The attributes include academics as imbued with the capacity for critical thinking and actively promoting critical thinking amongst their students; as active learning mediators; as responsive, innovative, and relevant curriculum designers; and as engaged professionals. Appreciation of the article is enhanced when the reader first views this video https://youtu.be/yoA9guMut-8.

2.2 Kruger, P, Moyo, K, Mudau, P, Pieterse, M & Spies, A "Republic of South Africa: Legal Response to Covid-19"

Oxford University Press Online 2021
DOI: 10.1093/law-occ19/e6.013.6

ABSTRACT

The Oxford Compendium of National Legal Responses to Covid-19 is a global academic collaboration mapping legal responses to Covid-19 in dozens of participating countries and territories. Each entry is structured identically and explores the role of public law, institutional adaptation, public health measures, social and labour policy, and human rights measures introduced or applied as a response to the Covid-19 pandemic. The entries are updated periodically across 2021.

CONFERENCES

3.1 NATIONAL CONFERENCES

3.1.1 Ndimurwimo, LA "Personal Reflections and Experience as a Non-South African Citizen Residing in South Africa", A webinar on the Legal Practice Act challenge organised by LSC (UCT) and BLASC (NMU), 6 September 2021.

3.1.2 Vrancken, PHG & Sanni, T "African Union and the Challenge of Sustainable Marine Tourism", International, Law and Development Network Conference hosted by Nelson Mandela University Faculty of Law, 24-26 November 2021.

https://lawdev.org/annual-conference-of-the-law-and-development-research-network

ABSTRACT

This conference contribution underlines how sustainable marine tourism which considers the cultural, environmental, and economic contexts can help deal with concerns such as marine litter and erosion of local cultures. The paper further examined the extent to which relevant African continental instruments such as the 2016 African Charter for Maritime Safety, and Security, and Development and the 2014 African Integrated Maritime Strategy contain provisions that can facilitate realisation of sustainable tourism and contribute to the realisation of cultural, environmental, and economic objectives of Agenda 2063 in African Union member countries. To that end, the role of human rights in helping to realise sustainable tourism will be explored with reference to relevant human rights instruments particularly at the continental level.

3.2 INTERNATIONAL CONFERENCES

3.2.1 Botha, J "Labelling Hate: Emotion, Morality and the Law" Private Law & Social Justice Conference hosted by Nelson Mandela University, August 2021.

ABSTRACT

This paper interrogates the meaning of the term "hate", as an emotion, and compares it to bias, intolerance, prejudice and discrimination. The paper addresses the issue of whether the law should sanction conduct and speech motivated by hatred of others, particularly those who belong to societal out-groups.

3.2.2 Casalin, D "The Role of International and Regional (Quasi-) Judicial Human Rights Mechanisms in Ensuring Reparation for Arbitrary Displacement: Case Studies from Suriname, Kenya & Spain" 5th Annual Conference of the Law and Development Network: "Beyond the Crisis: Challenges and Opportunities for Law and Development" hosted by Nelson Mandela University Law Faculty, 24-26 November 2021.

ABSTRACT

Taking a law in context approach, this paper presents three desk-based case studies on the implementation of prominent decisions of international or regional (quasi-)judicial human rights mechanisms which required states to make reparation for arbitrary displacement. The decisions examined are Moiwana v. Suriname (Inter-American Court on Human Rights, 2005); MRG / CEMIRIDE (Endorois) v. Kenya (African Commission on Human and Peoples' Rights, 2010); and I.D.G. v. Spain (Committee on Economic, Social and Cultural Rights, 2015). The case studies explore the compliance and extra-compliance effects of these decisions (as documented in academic and 'grey' literature, official sources, and by stakeholders themselves); as well as the contextual factors (legal, political, social and economic) which may have contributed to these effects.

3.2.3 Ndimurwimo, LA and Vundamina, MND "Regression of Refugee Law in South Africa" 5th Annual Conference of the Law and Development Network: "Beyond the Crisis: Challenges and Opportunities for Law and Development" hosted by Nelson Mandela University, 24-26 November 2021.

https://lawdev.org/event/fifth-annual-ldrn-conference-nelson-mandela-university-port-elizabeth-south-africa-november-2021

ABSTRACT

The Refugees Act in South Africa has undergone several amendments since its promulgation in 1998. Over the last decade only, the South African government implemented a steady curtailment of refugee rights and freedoms. The limitations were codified through the Refugees Amendment Act of 2017, which came into effect on 1 January 2020 and introduced sections and regulations that have been viewed as *prima facie* unconstitutional and conflict with international refugee laws.

The Amendment Act introduced strict rules of refugee protection such as entering the country illegally and fraudulently obtaining identity documents (IDs), which conflicts with international refugee law prohibiting the penalization of refugees for irregular entry into the refugee-hosting state. Also, persons who do not apply for asylum within five days of entering South Africa are excluded from refugee protection. Ultimately, these changes conflict with the fundamental principle of *non-refoulment*. The refugee determination processes have proven to be time-consuming. Also, they have significant financial implications that make the lawful processing of the documentation of refugees and asylum-seekers practically impossible. Hence, refugees and asylum-seekers constantly fear expulsion from the Republic, which goes against the principle of *non-refoulement* and the Constitution.

This paper underscores the practical challenges resulting from the 2017 Amendments and concludes that refugees and asylum seekers face difficulties in obtaining legal documentation and the consequences thereof. It recommends

measures that may be put in place to improve the refugee and asylum-seeker determination processes in line with international refugee laws.

COLLOQUIUMS AND SEMINARS

4.1 Welgemoed, M "NMU Law Clinic Online Consultations" NMU Learning and Teaching Innovation Symposium hosted at North Campus, Nelson Mandela University, 17 November 2021.

SUMMARY

The presentation concerned online consultations between students and clients of the NMU Law Clinic. Such consultations had been made possible by way of funding obtained from NMU Teaching Development and Innovation Fund during 2021. Online consultations, inter alia, will enable the law clinic, as part of the NMU Law Faculty, to expand its training in accordance with the demands of the Fourth Industrial Revolution. Online consultations will also facilitate transformative legal education, of which learning and teaching by making use of digital technology, forms an essential part.

4.2 Erasmus, D "Prague Summer School on Crime, Law and Psychology" NGO Schola Empirica, 28 August 2021 - 2 September 2021.

BOOKS AND CONTRIBTIONS TO BOOKS

5.1 Casalin, D “Humanitarian Crisis” in De Feyter K, Erdem Türkelli G, de Moerloose, S (eds) Encyclopedia of Law and Development, 2021 118-120.

ABSTRACT

This contribution examines the concept of humanitarian crises afresh from a law and development perspective. It situates humanitarian crises within potentially applicable international legal frameworks, highlights their connections to development, and proposes that a stronger understanding of underlying interconnected legal frameworks may better underpin the interrelationship between humanitarian action, disaster risk reduction and development that is needed to address humanitarian crises in a durable way.

5.2 Casalin, D "Legal obligations of Non-state Armed Groups and Sustainable Development Goal 16" Leal Filho, W *et al* (eds) *Peace, Justice and Strong Institutions*, 2021 1-10.

ABSTRACT

This chapter examines the international legal obligations of non-state armed groups in the context of Sustainable Development Goal 16 (peace, justice and strong institutions). It considers the impact of armed groups on SDG 16; which SDG16 targets correlate with their obligations under international humanitarian law, and how compliance could be promoted in line with international law.

5.3 Botha, J "Education" in De Feyter, K, Türkelli, G and de Moerloose, S (eds) *Encyclopaedia of Law and Development,* 2021.

5.4 Botha, J & Mokone, G "Gender equality" in De Feyter, K, Türkelli, G and de Moerloose, S (eds) *Encyclopaedia of Law and Development,* 2021.

ABSTRACT

The *Encyclopedia of Law and Development* is a comprehensive and indispensable resource in the area of law and development. Bringing together more than 80 entries, the Encyclopedia spans a variety of approaches, contextualised histories, recent developments and forward-looking insights into the role of law in development. These two contributions focus specifically on the role of education to achieve development and the meaning and promotion of gender equality.

5.5 Vrancken, PHG "Life Below Water" in De Feyter, K, Turkelli, GE and de Moerloose, S (eds) *Encyclopedia of Law and Development*, 2021, 723-738. DOI: 10.4337/9781788117975.

ABSTRACT

The chapter engages with SDG 14 by focusing on its place within the 2030 Agenda for Sustainable Development and the ocean governance framework. It concludes that, if we are to overcome the social threats that are likely to destroy us quicker than the impending changes in our natural environment, it is necessary to approach SDG 14 as part of the whole 2030 Agenda and within the context of the wider ocean governance framework. This requires having also due regard to factors other than life below water that ought to influence the decision-making processes in order to arrive at decisions as widely acceptable as possible.

5.6 Vrancken, PHG, Sanni, T & Celik, S "African Union and Transboundary Maritime Disputes" in Limon, O, Güneş, Ü & Karagöz, S (eds) *Yüzyilda Bölgesel Sorunlar (Dispute Resolution)*, published in Turkish.

One of the legacies of colonialism in Africa is disputes between different countries over maritime and land boundaries. Maritime boundary disputes involving a number of African countries have been the subject of litigation in international courts. Such disputes have been the cause of political, economic, and diplomatic spats in all regions of the African continent. One example is the dispute over maritime boundaries between Cameroon and Nigeria that came before the International Court of Justice (ICJ) and was resolved by the court in favor of the former. Another example is the case between Kenya and Somalia over their maritime boundaries specifically concerning the limits of their respective continental shelf - currently a subject of contention before the ICJ. It is noteworthy that many of the disputes are being taken to international forums outside continental mechanisms at the global level for resolution as the cases of Cameroon v Nigeria and Somalia v Kenya indicate. One important issue is whether there are mechanisms within the African Union through which such maritime boundary disputes may be resolved particularly in view of the fact that a major objective of the continental body is to promote cordial relationships among African countries. To that end, the objective of this paper is to examine the extent to which judicial and non-judicial mechanisms within the Africa Union may help in the resolution of maritime boundary disputes. The paper generally analyzes instruments of general relevance such as the Constituent Act of the continental body with a view to expounding on relevant provisions of such instruments for dispute resolution and their relevance in the context of maritime boundary disputes. In particular, the paper examines continental instruments specifically dealing with maritime and marine issues and the extent to which they deal with maritime boundary dispute resolution.

5.7 Vrancken, PHG, Sanni, T "SDG 14: Life below water" in Ralf Michaels, Verónica Ruiz Abou-Nigm and Hans van Loon (eds) *The Private Side of Transforming our World - UN Sustainable Development Goals 2030 and the Role of Private International Law*, 2021, 441-462. ISBN: 978-625-417-178-9; e-ISBN: 978-625-417-177-2.

A new report by the UN Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES) published on May 6, 2019 warns that human actions continue to pose an existential threat to biodiversity on land and water with 40% of sea and 50 % of other water bodies around the world being severely degraded. The panel notes that a million species will become extinct within decades. This finding definitely signals a threat to the realization of the Sustainable Development Goal (SDG) relating to the protection of lives under water more so when, according to the report, 400 million tons of waste is dumped into water bodies yearly. In view of the accessibility of new areas such as the high seas and the greater use of technology to explore the seas by private actors' particularly multinational companies, the situation is likely to get worse if no radical measures are urgently taken. While humanity in general will be seriously affected due to the dependence on biodiversity for survival, poor people and communities will face the greatest danger and will have the least means of accessing justice to remedy the situation. For example, fishing communities around the world will face a dire situation with only 7% of global fish stock not affected by the degradation of marine environment. Against the above background, the objective of this paper is to examine the utility of private international law in protecting the marine space in line with SDG 14. The paper will examine previous attempts at holding multinational companies responsible in a foreign jurisdiction for actions committed in another country. The paper further explores the challenges posed by existing international legal order to local communities in accessing justice in the face of continuous degradation of the marine space affects communities, for example those engaged in fishing who are unable to seek justice at the national level. This will require engaging with legal norms and make proposals that put communities in a better position to overcome these challenges and successfully hold polluters of the marine space responsible by way of private legal actions at the transnational levels.

5.8 **Papadopoulos, S and Snail Ka Mtuze, S (eds.) *Cyberlaw @ SA4* (2021) ISBN: 9780627039775.**

5.9 **Snail Ka Mtuze, S "Electronic Contracts (E-contracts) and e-Commerce" in Papadopoulos, S and Snail Ka Mtuze, S (eds) *Cyberlaw @ SA4,* 2021. ISBN: 9780627039775.**

5.10 **Snail Ka Mtuze, S and Papadopulous, S "Privacy and Data Protection" in Papadopoulos, S and Snail Ka Mtuze, S (eds) *Cyberlaw @ SA4*, 2021. ISBN: 9780627039775.**

5.11 **Snail Ka Mtuze, S and Swales, L "Freedom of Expression and the Internet" in Papadopoulos, S and Snail Ka Mtuze, S (eds) *Cyberlaw @ SA4*, 2021. ISBN: 9780627039775.**

REPORTS AND POLICY DOCUMENTS

6.1 **Botha, J, Chasakara, R & Danisa, D "Comments on the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Amendment Bill B-2021" submitted to the Department of Justice and Constitutional Development, 11 May 2021.**

6.2 **Botha, J "Comments on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9-2018]" submitted to the Department of Justice and Constitutional Development, 1 October 2021.**

6.3 **Botha, J "Presented the findings of the inter-sessional expert consultation, and the report of the 10th session of the Ad Hoc Committee on Complementary Standards (A/HRC/42/58), in respect of Module 5, The Dissemination of Hate Speech, at the 11th session of the *Ad Hoc* Committee on Complementary Standards, Convention on all forms of Racial Discrimination, United Nations, Geneva" 6-17 December 2021.**

INAUGURAL LECTURES

7.1 Erasmus, D "Corruption, State Capture and the Betrayal of South Africa's Vulnerable"

25 October 2021 – Conference centre NMU

ABSTRACT

It is generally accepted that corruption in South Africa has become endemic. The report of the Public Protector entitled *State of Capture* of 2016 sets out the way in which former President Jacob Zuma and senior government officials colluded with the Gupta family in the appointment and dismissal of cabinet ministers and directors of SOE's, which led to the improper and corrupt awarding of state contracts. The revelations by witnesses at the Judicial Commission of Inquiry into Allegations of State Capture made it clear that South Africa entered a phase of state capture under the presidency of former president Jacob Zuma and is still in a state of capture.

The state has a legal duty to address social inequalities and to oversee a fair and equitable distribution of state resources to all members of society. In terms of the Constitution the state is compelled to respect, protect, promote and fulfil a broad range of socio-economic rights. Our courts have recognized these positive obligations of the state and issued orders compelling the state to give effect to its obligations.

More than 60% of children in South Africa are multidimensionally poor. Nearly half of the adult population live in poverty and women are generally more vulnerable to poverty. When the Covid-19 pandemic hit South Africa, emergency measures were put in place to address the pandemic. Relief packages introduced to assist the poor led to corruption on a grand scale. The looting of state resources designated for the poor involved politicians, government officials and corrupt operators in the private sector.

With reference to Fineman's vulnerability theory, it is argued that government failed to protect the poor in terms of its constitutional duties. It also did not act in a way that is responsive to the vulnerability of its citizens. Our government institutions have

become captured and corrupted and failed to ensure that state resources are allocated for the common benefit of all and not just for a select few.

South Africa has a large arsenal of anticorruption instruments, which criminalises corrupt behaviour, targets the proceeds of corrupt activities and provides for severe criminal sanctions to be imposed on perpetrators. It is submitted that what is called for now, is the institution of criminal prosecutions against public officials, corrupt operators in the private sector and politicians involved in corrupt activities. In this lecture practical suggestions and recommendations for the conduct of such prosecutions will be explored and advanced.

Keywords: Corruption, state capture, state duties regarding socio-economic rights, distribution of government resources, poverty and vulnerability, governmental responsiveness to vulnerability, criminal prosecution of corruption

AWARDS AND ACHIEVEMENTS

8.1 Botha, J Researcher of the Year, Faculty of Law

NEWSPAPER ARTICLES AND NEWSLETTERS

9.1 Casalin, D "New Rights Tracker Survey Data on IDP Rights Maps COVID-19 Pressures: Highlighting Less Visible Internal Displacement Situations"

Refugee Law Initiative Blog, 17 June 2021

ABSTRACT

This piece gives an overview of the Human Rights Measurement Initiative's data on internally displaced people's rights, which was specifically included in its global 2021 Rights Tracker index for the first time and drawn from its survey of primarily locally based human rights experts in 39 countries. This new data provides a snapshot of pressures on IDPs' rights during the spread of the COVID-19 pandemic in the countries covered, as well as a window into a number of displacement situations which have remained under the global radar.

9.2 Casalin, D "Sustainable Development Goal 16: Can Armed Non-State Actors Act, or only Obstruct?"

Armed Groups and International Law, 23 February 2021

ABSTRACT

This post addresses the situation of people living under armed group control from the perspective of Sustainable Development Goal (SDG) 16 (Just, Peaceful and Inclusive Societies / Peace, Justice and Strong Institutions). The aim is to explore which targets within SDG 16 could still be promoted in favour of people living under the de facto control of armed groups, pending conflict resolution. Firstly, it maps some of the impacts of armed conflict on SDG 16 targets. Secondly, it examines which of these impacts can be addressed by armed groups. Thirdly, it outlines the legal bases for potentially engaging armed groups towards these goals. In concluding, it suggests how the SDGs might support promotion of the well-being of civilians living under armed group control.

9.3 Casalin, D "Georgia v Russia (II): Zooming in on Conflict Displacement"

Strasbourg Observers, 17 February 2021

ABSTRACT

This post delves further into the European Court of Human Rights' Georgia v. Russia (II) judgment by zooming in specifically on the aspects relating to displaced people. Considering the ongoing and serious consequences of conflict-related displacement in Georgia, as well as in other countries within and beyond the Council of Europe, the Court's position on the issue has potentially broad resonance and so merits further analysis. While the Court's approach to the causes of displacement in this judgment still leaves some rather large gaps, its tried and tested findings on prevention of return are the element which is likely to offer perspective for most people who still remain displaced over a decade later.

9.4 Du Plessis, M, Cohen, E & Woolaver, H "OP-ED, Trivial, Shameful, Desperate: The Ironies in the Zuma Campaign's Efforts to Approach the International Criminal Court"

https://www.dailymaverick.co.za/article/2021-08-12-trivial-shameful-desperate-the-ironies-in-the-zuma-campaigns-efforts-to-approach-the-international-criminal-court/

Daily Maverick, 12 August 2021

ABSTRACT

On 4 August 2021, the #FreeJacobZuma campaign announced that it would approach the International Criminal Court to complain of international crimes allegedly committed by President Cyril Ramaphosa's government. This announcement is a mockery of the ICC, its purpose and the imperative to punish those guilty of international crimes.

MEDIA COVERAGE

10.1 Du Plessis, M

See https://www.news24.com/news24/southafrica/news/zuma-made-his-prison-bed-and-must-now-lie-in-it-lawyer-says-20210706

“Former president Jacob Zuma has made his prison bed and must now lie in it, the KwaZulu-Natal High Court in Pietermaritzburg has heard. Zuma is in the high court to apply to have the execution of the Constitutional Court order stayed. Max du Plessis, for the Helen Suzman Foundation, argued on Tuesday that Zuma was asking the high court to interfere with the highest court's order. He said Zuma was not a victim, adding the case was about past and ongoing defiance of the rule of law. He said the former president left the Constitutional Court no choice but to treat him as a man guilty of contempt, adding: The Constitutional Court did not make Mr Zuma's prison bed, my lord, Mr Zuma made his own prison bed, and after carefully weighing his dignity and his liberty, the court ordered that he must now lie in it.

10.2 Du Plessis, M

See High court to rule next week on application delaying Hlophe matter (https://mg.co.za/news/2021-11-15-high-court-to-rule-next-week-on-application-delaying-hlophe-matter/)

"… But advocate Max du Plessis SC, for FUL, pointed out that the organisation had been involved in complaints against Hlophe and the handling of those since 2009, and that Hlophe conspicuously relied on a court ruling that flowed from one of its earlier interventions in his present review application. In 2011, the supreme court of appeal found in favour of FUL when it challenged a decision two years earlier by the Judicial Service Commission (JSC) that the evidence against Hlophe did not justify a finding of gross misconduct. In his founding papers for the review application, filed in September, Hlophe recalled that the appellate court found then that the absence of cross-examination meant the JSC had irrationally failed to properly investigate the complaint against him. This was relevant, he argued, because nothing in the evidence this year, after the complaint was reopened, changed the nature of the evidence considered in 2009. Du Plessis said it was disingenuous of Hlophe to now seek to exclude FUL. "We know that Freedom Under Law has a legal interest in this case because of what Judge Hlophe himself says in his founding review papers . . . A central feature of Judge Hlophe's review in this case is, he says, that the 2009 finding of the JSC is correct and that there is no basis for the 2021 JSC decision."

SUPERVISION OF LLM TREATISES/DISSERTATION/THESES

11.1 APRIL 2021 GRADUATION

11.1.1 Erasmus, D supervised Africa, NK "Giving Effect to the Rights of Remand Detainees" completed for graduation April 2021.

11.1.2 Erasmus, D supervised Darries, SL "A Review of Rehabilitation and Integration of Offenders" completed for graduation April 2021.

11.1.3 Erasmus, D supervised Khunou, L "The Protection of Children during the Asset Forfeiture Proceedings" completed for graduation April 2021.

11.1.4 Erasmus, D supervised Landman, JA "The Application of the Prevention and Combating of Corrupt Activities Act" completed for graduation April 2021.

11.1.5 Erasmus, D supervised Mpofu, M "Prospects of an Acquisitorial Criminal Justice System" completed for graduation April 2021.

11.1.6 Erasmus, D supervised Ngodwana, G "The Rights of Children in Child Youth Care Centres" completed for graduation April 2021.

11.1.7 Gumboh, E supervised Mnono, Z "The Application of the Doctrine of Common Purpose to the Joint Possession of Firearms" completed for graduation April 2021.

11.1.8 Keith-Bandath, RE supervised Beyleveld, DL "The Concurrent Jurisdiction of the Labour and the High Courts" completed for graduation April 2021.

11.1.9 Keith-Bandath, RE supervised Vollgraaff, C "Retrenchment for Profitability" completed for graduation April 2021.

11.1.10 Ncume, A supervised Mnisi, DS "The Dismissal of Employees for a Group or Team Misconduct" completed for graduation April 2021.

11.1.11 Ncume, A supervised Tshete, VVN "Minimum Wage: A Comparative Study Between Germany and South Africa" completed for graduation April 2021.

11.1.12 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 April 2021.

11.1.13 Qotoyi, T supervised Mtshemla, N "The Substantive Fairness of Dismissal for Operational Requirements in the Context of Collective Bargaining" completed for graduation April 2021.

11.1.14 Qotoyi, T supervised Silo, JZ "Workplace Forums and the Enhancement of Collective Bargaining" completed for graduation April 2021.

11.1.15 Van der Walt, JA supervised Brown, CK (cum laude) "The Impact of the Minimum Wage in South Africa" completed for graduation April 2021.

11.1.16 Vrancken, PHG with co-supervisor Metuge, DN supervised Kekana, LC "The Regulation of Renewable Ocean Energy" completed for April 2021 graduation

11.2 DECEMBER 2021 GRADUATION

11.2.1 **Apollos, D supervised Kakaza, NM "The Impact of Section 35(3) of the Road Traffic Act on Sentencing Charge" completed for December 2021 graduation.**

11.2.2 **Apollos, D supervised Nzama, WL "The Impact of Tshabalala V S; Ntuli V S [2019] ZACC 48 on the Application of the Doctrine of Common Purpose in Common Law Rape Cases" completed for December 2021 graduation.**

11.2.3 **Gathongo, JK supervised Mahlomuza, ABP "Section 197 of the Labour Relations Act and Insourcing at Tertiary Institutions" completed for December 2021 graduation.**

11.2.4 **Hokwana, TM supervised Jooste, TA "An Analysis of the Motor Industry Bargaining Council Main Agreement" completed for December 2021 graduation.**

11.2.5 **Ndimurwimo, LA supervised Vundamina, MND "An Empirical Study of Unfair Discrimination against Female Asylum-Seekers" completed for December 2021 graduation.**

11.2.6 **Nel, E with co-supervisor Tait AM supervised Du Toit CM "The Protection of Beneficiaries of *Inter Vivos* Discretionary Family Trusts in the Event of Divorce" completed for December 2021 graduation.**

11.2.7 **van As, HJ with co-supervisor Snijman, PJ supervised Ngcanga, O "The Marine Living Resources Act: Fishery Control Officers and the Protection of Marine Living Resources" completed for December 2021 graduation.**

11.2.8 **Vrancken, PHG with co-supervisor Wagenaar T, supervised Vilakazi, BTU "Marine Plastic Pollution" completed for December 2021 graduation.**

SUPERVISION OF LLD THESES

12.1 APRIL 2021 GRADUATION

12.1.1 Van As, H supervised Phorego, M "Presidential Accountability for Cabinet Appointments in South Africa" completed for graduation April 2021.

12.2 DECEMBER 2021 GRADUATION

12.2.1 Erasmus, D supervised Welgemoed, M "Integration of Clinical Legal Education with Procedural Law Modules" completed for graduation December 2021.

12.2.2 Siebenhüener, B with co-supervisor Vrancken, PHG supervised Tembo, DJ "Sustainable strategies for improved implementation of South Africa's marine living resources legislation" completed for graduation December 2021.

12.2.3 Vrancken, PHG with co-supervisors Metuge, DN, and Qotoyi, T supervised Hlazo, NIP "The Work in Fishing Convention as an Instrument to Combat Forced Labour on Fishing Vessels: A South African Perspective" completed for graduation December 2021.

FACULTY OF LAW STAFF MEMBERS GRADUATING

13.1 Welgemoed, M "Integration of Clinical Legal Education with Procedural Law Modules" graduated 15 December 2021.

SUMMARY

This research evaluates the role that Clinical Legal Education (CLE) can and should play in the teaching and learning of procedural law modules, *ie* Civil Procedure, Criminal Procedure and the Law of Evidence. It is argued that the doctrine of transformative constitutionalism provides a sound theoretical basis for the integration of CLE in the teaching and learning of procedural law modules in that there is a constitutional imperative on law schools to train law graduates, who are ready for entry into legal practice, as far as adequate theoretical knowledge and practical skills are concerned. This research provides an indication of how the integration of CLE with procedural law modules can improve the appreciation of the values of the Constitution of the Republic of South Africa 108 of 1996 by law graduates. Graduates will learn the importance of advancing social and procedural justice when rendering legal services to members of the public. Furthermore, graduates will be equipped with valuable graduate attributes required for legal practice. The conclusion of this research is that an integrated teaching and learning methodology, in relation to procedural law modules, will result in producing better law graduates for legal practice. The result of this will be that future legal practitioners, who can serve the public in a professional, ethical and accountable manner as envisaged by the Legal Practice Act 28 of 2014, immediately after graduating from law schools, will be produced.

CONFERENCES AND COLLOQUIUMS HOSTED BY THE NELSON MANDELA FACULTY OF LAW

14.1 International Conference: Private Law and Social Justice Conference hosted by Nelson Mandela University, August 2021.

14.2 International Conference: 5th Annual Conference of the Law and Development Research Network – "Beyond the Crisis: Challenges and Opportunities for Law and Development", hosted by Nelson Mandela University, 24-26 November 2021.

BOOK LAUNCHES

15.1 **Olivier, M "Bilateral Labour Migration Arrangements in Two Southern African Development Community Corridors" (IOM, 2021,**

15.2 **Olivier, M "Social security: Framework" in LAWSA (The Law of South Africa, 3**

15.3 **Olivier, M "Labour Law and Social Security Law" Vol 13, Part 2**

15.4 **Olivier, M "Core Elements" in LAWSA**

15.5 **Olivier, M "Labour Law and Social Security Law" Vol 13, Part 3**

FACULTY OF LAW GUEST LECTURES

16.1 **Erasmus, D Invited by the Faculty of Law, Maribor University, Slovenia to teach on an EU exchange programme from 01 April 2021 – 30 Junie 2021. Due to COVID19 I taught online from 01 April to 20 May.**

16.2 **Erasmus, D Delivered 11 lectures as well as workshops to LLM students from 21 May 2021-25 June 2021 at the Maribor University, Slovenia.**