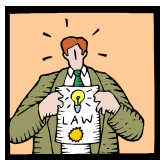
e-MANTSHI

A KZNJETCOM Newsletter

February 2011: Issue 61

Welcome to the sixty first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to gvanrooyen@justice.gov.za .



New Legislation

1**.** A State liability amendment bill has been introduced into Parliament to amend the *State Liability Act, Act 20 of 1957* .The notice in this regard was published in Government Gazette no 33950 dated 21 January 2011. The Bill seeks to give effect to the Constitutional Court's judgment in the *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) , to amend section 3 of the Act accordingly. The objects of the Bill are to create an effective execution process to be used by successful litigants in civil actions against the State in cases where the State has failed to comply with final court orders sounding in money. Provision is, among others, made for the following:

(a) The proposed new section 3 provides that no execution, attachment or like process may be issued against the defendant or respondent in any action or legal proceedings against the State or against any property of the State, except if a final court order sounding in money against the State has not been satisfied in accordance with the remainder of the provisions of that section (see proposed new subsection (1)).

(b) The State Attorney or attorney of record concerned must, within seven days after a court order against a department (national or provincial) becomes final, in writing, inform the executive authority and accounting officer of that department of the final court order (see proposed new subsection (2)).

(c) A final court order against a department for the payment of money must be satisfied within 30 days of the order becoming final, unless an appeal has been lodged against the judgment or that order (see proposed new subsection (3)*(a)*).

(d) The accounting officer of the department concerned must make payment in terms of such order within 30 days of the order becoming final and such payment must be charged against the appropriation account or expenditure budget of the department concerned (see proposed new subsection (3)*(b)*).

(e) If a final court order against a department for the payment of money is not satisfied, and acceptable arrangements have not been made with the judgment creditor for the satisfaction of the judgment debt within the specified time period, the judgment creditor may apply for a writ of execution or a warrant of execution, as the case may be, against certain movable property owned by the State and used by the department concerned (see proposed new subsection (4)).

(f) The sheriff of the court concerned must, pursuant to the writ of execution or warrant of execution, as the case may be, attach, but not remove, the identified movable property (see proposed new subsection (5)).

(g) In the absence of any application contemplated in paragraph *(h)* hereunder, the sheriff of the court concerned may after the expiration of 30 days from the date of attachment, remove and sell the attached movable property in execution of the judgment debt (see proposed new subsection (6)).

(h) A party having a direct and material interest may, during the period referred to in the proposed new subsection (6) (see paragraph *(g)* above), apply to the court which granted the order, for a stay on grounds that the execution of the attached movable property is not in the interests of justice (see proposed new subsection (7)).

2. A draft *Promotion of Access to Information Amendment Bill, 2011* has been published in Government Gazette no 33960 dated 24 January 2010. The draft Bill and a note, explaining the background of the proposed amendments, are also available on the website of the Department of Justice and Constitutional development at the following address: http://www.doj.gov.za . Comments on the Draft Bill can be submitted not later than 28 February 2011, marked for the attention of Ms T Skhosana, and - (a) if it is forwarded by post, be addressed to –

The Director-General: Justice and Constitutional Development
Private Bag X81
Pretoria
0001

(b) if it is delivered by email, be emailed to thskhosana@justice.gov.za

The aim of the Amendment Bill is to -
(a) delete section 86 of the Act, which contains the transitional provisions;
(b) delete the Schedule to the Act; and
(c) provide in section 6 of the Act for access to records of private bodies and public bodies in terms of other legislation.

3. A *Muslim Marriages Bill* has been published for general comment The aim of the Bill is to make provision for the recognition of Muslim marriages; to specify the requirements for a valid Muslim marriage; to regulate the registration of Muslim marriages; to recognise the status and capacity of spouses in Muslim marriages; to regulate the proprietary consequences of Muslim marriages; to regulate the termination of Muslim marriages and the consequences thereof; and to provide for matters connected therewith. Any person wishing to comment on the Bill is invited to submit written comments to the Minister of Justice and Constitutional Development. Comments should kindly be directed for the attention of Mr T N Matibe, Private Bag X81, Pretoria, 0001, or faxed to him at 086 648 7766 not later than 15 March 2011. (Electronic mail address: TMatibe@justice.gov.za)

4. The Minister of Transport, acting in terms of section 75 of the *National Road Traffic Act, 1996 (Act No. 93 of 1996*) has amended regulation 99 of the *National Road Traffic Regulations*. The amendment was published in Government Gazette no 33980 dated 2 January 2011 and also came into operation on the same day. The amendments affect the categories of drivers licenses.

Recent Court Cases

1. S v Nduna 2011 (1) SACR 115 SCA

Similar fact evidence of a modus operandi could be used in order to prove that an accused person was the perpetrator of a crime.

The appellant was convicted on two counts of robbery with aggravating circumstances and sentenced o an effective 20 years' imprisonment. His appeal to the Western Cape High Court failed as far as the convictions were concerned, but his sentence was reduced to an effective 15 years. He was granted leave for a further appeal against his convictions. The two incidents took place nearly eight years apart, and the only evidence linking the appellant to them was that his thumb print was found on a vehicle used in the first robbery, while his palm print was lifted from the vehicle used by the complainant in the second robbery. This evidence was

not contested at trial, and it was accordingly common cause that the prints in question were his. It was argued on appeal, however, that the evidence was not sufficient to sustain the convictions. Firstly, eight years had passed between the date of the first robbery and the date of the appellant's testimony; under the circumstances his inability to explain the presence of his thumb print on the vehicle was equally consonant with innocence as with guilt. Secondly, the probative value of the prints was diminished by the absence of evidence as to their age and probable life span in the particular positions where they had been found on the vehicles. And thirdly, the High Court had erred in using the evidence led on the one count to prove the other count; this was an impermissible form of reasoning.

Held, that while it was settled law that similar fact evidence was admissible to prove the identity of an accused person as a perpetrator; it could not be used to prove the commission of the crime itself. However, this application of the rule was not to be confused with the situation where the rule was invoked to establish the cogency of evidence of a systematic course of wrongful conduct in order to render it more probable that a given offender had committed each of the offences charged in respect of such conduct. The appellant's argument, if it were accepted, would amount to excluding evidence of a modus operandi merely because he had been charged with more than one count of robbery. The ultimate test was the relevance of the similar fact evidence: it would be admissible if it was relevant to an issue in the case. In the present case the evidence relating to the modus operandi of the robberies, supported by the fingerprint evidence, was relevant and admissible. Each offence had been established independently, but the cumulative effect of the evidence of similar conduct weighed heavily against the appellant. It was highly unlikely that two robberies, committed in the same fashion, and where fingerprints of one person were found on a vehicle shown to have been involved in each robbery, were entirely unconnected. The coincidence was explicable only on the basis that the appellant had participated in each robbery.(Paragraphs [17]–[21] at 120*h*–122*c*.) Appeal dismissed.

2. S v Ramabokela 2011 (1) SACR 122 GNP

Dock identification must be evaluated in the same manner as all evidence regarding identification and cannot be equated to an answer to a leading question.

The two appellants were each convicted on three counts of kidnapping, two counts of assault with intent to do grievous bodily harm, and one count of culpable homicide. They were sentenced to an effective eight years' imprisonment. Their appeal against conviction turned mainly on the reliability of the identification evidence against them, and in particular on the admissibility of a dock identification by a witness, R, who had not previously known the appellants. It was contended that a dock identification was analogous to the answer to a leading question, and that it should thus not be admissible. As to sentence, it was argued that the offences had occurred while the appellants were taking part in a legal strike, and that this should have been regarded as a mitigating factor.

Held, that, while a dock identification might not carry the same weight as evidence of identification emanating from a proper identification parade, it could not be equated to the answer to a leading question. It was to be evaluated in the same manner as all evidence regarding identification—with caution. The weight to be attached to such evidence would depend on the circumstances of the individual case, and on an evaluation of the totality of the evidence, with the usual cautionary rule having been applied. The magistrate had correctly found that both witnesses were honest and reliable; what was claimed to have been a contradiction in the evidence of one of them was in fact no more than a correction on a point about which the witness had had no reason to lie. The evidence of R corroborated that of the other witness, who was a colleague of the appellants, and this had correctly been taken into account by the magistrate in his assessment of the totality of the evidence. Accordingly, it had been proved beyond reasonable doubt that the two appellants had been actively involved in the offences, as alleged by the State. (Paragraphs [21]-[29] at 127*b*-130*f*.)

Held, further, regarding sentence, that public order was a central concern to the community and to the State. No citizen should be subjected to disorder and violence when other citizens decided to strike, and whether the strike was legitimate or unlawful was, in this respect, irrelevant. The fact that this strike had been a legal one was not a mitigating factor. The magistrate had taken into account all the relevant and material factors, and had considered non-custodial sentencing options. There had been no misdirection, and the sentence was an appropriate one. Accordingly, there was no basis upon which to interfere with it. (Paragraphs [32]-[39] at 131*e*-132*e*.) Appeals dismissed.

3. Legal Aid Board v The State 2011 (1) SACR 166 SCA

A Court should refrain from exercising executive or legislative functions under the guise of judicial review in matters where an accused wants legal representation at state expense.

The second and third respondents, P and B, together with various companies which they represented, were indicted on a total of 3160 charges of fraud. During the course of their initial appearances and various ‘preliminary legal skirmishes’ they were represented by counsel and attorneys of their own choosing. A sum of around R23 million had been spent on legal fees without the trial proper having commenced, and, before it could do so, P and B applied to the Legal Aid Board (LAB) for representation at State expense. They declined, however, to supply the LAB with certain information relating to their ability to afford private legal representation, which resulted in their application being turned down. They then approached the High Court for an order compelling the LAB to appoint legal representatives for them. At this point the State, frustrated by the lack of progress in the matter, joined the proceedings as an applicant. The High Court, having conducted an investigation in terms of s 3B of the Legal Aid Act 22 of 1969 (the Act), ruled that P and B had shown themselves to be indigent, and thus as qualifying for legal representation at

State expense; and that the LAB was to provide each of them with two legal practitioners, who were to be remunerated at the maximum fee permitted by the Legal Aid Guide. The LAB appealed against these rulings, arguing that the High Court had erred in finding that P and B were entitled to legal representation at State expense; and, secondly, that its order had encroached upon territory reserved for another arm of State, thus violating the doctrine of the separation of powers. The first of these grounds of appeal had, however, been abandoned during the application for leave to appeal; the court therefore dealt first of all with the appellant's attempt to resurrect this ground.

Held, further, that in determining whether or not an accused was entitled to have legal representation appointed at State expense in terms of s 35(3)(g) of the Constitution of the Republic of South Africa, 1996, a court must ask itself two questions: first, whether substantial injustice would ensue if the accused were to proceed to trial without representation; and, if so, second, whether the costs of that representation could be borne by the accused from his or her own resources. In the present matter the first of these questions was uncontroversial. The accuseds' trial was likely to be a complex one; the indictment ran to over 1400 pages; 3000 witnesses were listed; there were approximately one million pages of documentary material; and the trial was expected to last in the region of three years. It could thus hardly be disputed that P and B would require legal representation, or that the trial would be rendered unfair were they to appear in person. (Paragraphs [29] and [30] at 180*e*-*h*.)

Held, further, that the question of the respondents' ability to afford private representation was a more troublesome one. As the court a quo had observed, neither of them presented the usual picture of an indigent person. They were well groomed, used cellular phones, lived in desirable locations, and had recently contemplated overseas travel. Their answers to the court a quo's questions regarding their means revealed a complete lack of candour. Many of their responses had been deliberately evasive and cagey; they had burdened the LAB with the task of ascertaining the extent of their interests in various companies and close corporations and other important disclosures had been qualified by terms such as 'to the best of my recollection'. Yet, in each instance, the information sought by the court a quo had been peculiarly within their knowledge; this ought to have redounded to their discredit. Given the paucity of reliable information contained in the respondents' answers, the court a quo had erred in finding that they were 'indigent' as defined in the Act; accordingly, the appellant must succeed on the first ground of appeal. (Paragraphs [30}-[36] at 180*h*-184*h*.)

Held, further, that the enquiry provided for in s 3B of the Act was clearly the court's enquiry. It would accordingly be wholly inappropriate for a court to saddle an accused person with an onus, and then to decide the matter on the strength of whether or not it had been discharged. However, this did not mean that persons such as the respondents *in casu* were free to adopt a supine attitude. Particularly where the necessary information was peculiarly within their knowledge, they had as much—if not more—of an obligation to assist the court as the State did. Failure to assist the court might well be fatal to their quest for legal assistance, since, if the

court was left unable to complete the enquiry, it must perforce decline to direct that they be provided with legal representation at State expense. As for the observation by the court a quo that it lacked the administrative machinery to investigate the correctness of the information supplied, this ignored its power to subpoena witnesses and documents, and to place witnesses under oath and have them cross-examined. These formidable weapons in the judicial armoury must, where necessary, be employed by a court to enable it to discharge its constitutional mandate. (Paragraph [33] at 183*d*-*h*.)

Held, further, that appeal against the second leg of the court a quo's ruling—that P and B were each to be provided with two counsel, remunerated at the maximum rate allowed by the tariff—was of more than academic interest, and therefore, despite the appellant having succeeded on the first ground of appeal, it was only sensible to consider the correctness of this aspect of the ruling. Since courts derived their power from the Constitution, it followed that they must observe the constitutional limits of their authority; and they should assiduously refrain from exercising executive or legislative functions under the guise of judicial review. The courts did not control the public purse. It was for the other arms of government to ensure that adequate provision was made for legal representation at State expense, and they had chosen to do so through the LAB. Courts should be slow to attribute superior wisdom to themselves in respect of matters entrusted to other branches of government. It followed that the court a quo had plainly lacked the power to order the appellant to provide each of the respondents with two counsel in private practice, to be remunerated at maximum LAB rates; the order to this effect fell, therefore, to be set aside. (Paragraphs [37]-[49] at 184*i*-190*f*.) Appeal upheld.

From The Legal Journals

Louw, A

" Rescission of Adoption orders"

De Jure 2010 328

Van der Bijl,C

"Rape as a materially-defined crime: Could 'any act which causes sexual penetration' include omissions?"

SACJ 2010 224

Rodgers,M B

"The development and operation of negotiated justice in the South African criminal justice system"

SACJ 2010 239

Whitear-Nel, N

" The right of an accused to access to evidence in the possession of the state before the trial: a discussion of *S v Rowand 2009 (2) SACR 450 (W)"*

SACJ 2010 263

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

The 2010 *LLB Curriculum Report*

In November 2010 the *LLB Curriculum Research Report* by Georgina Pickett was completed in cooperation with the Council for Higher Education. The report was a result of continued criticism by legal academics and practitioners about the quality of many of the LLB graduates and their preparedness for their chosen profession; criticism that included accusations that this is a result of the four-year LLB curriculum (13). The Report highlighted the following concerns formulated by the South African Deans Association (and confirmed by other legal professions): one, the quality of law graduates; two, the appropriateness of the new four-year degree for different legal careers; three, the reduced and condensed curriculum in the new four-year degree and the impact on teaching; four, the maturity of students and the lack of a broader world view; and five, the suitability of graduates for academic careers (*ibid*).
In an attempt to assess the extent of the problems the research team conducted "a large-scale survey of legal academics and practitioners as well as a desk-top review of curricula and interviews with selected experts" (9; 15). Surveys were distributed to the Law Society (attorneys), the Bar Associations (advocates), Government Departments, the National Prosecuting Authority, Judicial Officers (Heads of Court, Regional Court Presidents and Chief Magistrates) as well as Deans of Law (20).

The process was limited in the sense that it neither examined the secondary school system nor any post-degree professional training by the various professions (16-17). This limitation is important as much of the criticism of law graduates related to the lack of language and numeracy skills. Although various universities have programmes to assist in this regard, these are varied and not universally successful. Universities argue that they cannot be expected to rectify the inefficiencies created at secondary school level. The report however responds that where a university accepts a student, they must ensure that they have adequate resources to provide all the necessary additional support that a student may require (170).

It was identified that some of the tension about the LLB curriculum lies in the fact that there are many career parts which LLB graduates may follow – each requiring its own specialized skills and knowledge: the attorneys' and advocates' professions (respectively requiring skills to handle a variety of commercial and personal matters versus research and litigation skills); government departments (requiring specialists in legislative drafting), court officials (prosecutors and presiding officers for criminal and civil matters), legal advisors for specialized companies and Chapter Nine Institutions (for example Human Rights Commission); and legal academia to name a few (10). Added to this tension, was the desire to increase access to the various professions by previously disadvantaged individuals resulted in a shortening of the curriculum as the existing programme was regarded as "a luxury that South Africa could ill afford in transitional times" (*ibid*).

The first aspect of the report was to determine what skills all law graduates should possess. The survey shows that there are six competencies rated in the top ten by all the groups: one, the ability to understand, analyse, investigate and solve problems; two, proficiency in reading, writing and speaking English; three, ability to read and interpret statutes and legal documents; four, ability to construct and communicate an argument; five, understanding the principles of SA law and how they apply in practice; and six, research skills, both in general and specific to the profession" (92). An additional three skills-sets was indicated by most groups as very important, namely the ability to draft legal documents; the skill to practically apply the law; and understanding legal ethics (97). The least important attributes were found to be a background in social sciences; knowledge of the historical and jurisprudential development of the law and knowledge of regional issues and international law (*ibid*).

Interestingly the report found that there was not a huge discrepancy between the substantive law curriculum of the law faculties around the country and that "it would not be overstating the matter to say that there is a *de facto* core curriculum in place" (134). There is however a difference between course duration and credit rating even though, *prima facie,* the same topics are covered (*ibid*). The law of contracts and criminal procedure were specifically researched and found to be inconsistently covered by the various tertiary institutions (163).

It was however clear from the research that although graduates are better grounded in the knowledge-based curriculum; the above identified important nine "competencies, particularly the skills sets, are not adequately developed in recent graduates" (162). Although it was acknowledged that tertiary legal education cannot equip all students with all the skills required, there is a need for prioritization and hard choices (*ibid*). It was found that the current content-based curriculum cannot produce the capable and skilled graduates that are expected by the profession (*ibid*).

The report recommends the following: one, that the universities and the representatives of the legal professions should work together to determine a minimum core curriculum of knowledge, skills and attributes that all law graduates should be exposed to (163); two, that the universities should consider the research and findings of the report to re-design their LLB curriculum to meet the concerns and expectations expressed by the various role-players. Specifically, universities should change the "crammed and over-burdened knowledge-based curriculum" with a more reflective-learning skills approach (*ibid*); three, that the current skills training should be increased. It was stated that the various universities demonstrated varied, interesting and creative approaches in this regard and that the sharing of these experiences would benefit both the universities and the law students. Fourthly, it was reiterated that the universities and the professions are "inextricably linked, in the pursuit of a common objective" (166). Although the universities lay the academic ground-work, the training of each of the professions should further build on the LLB degree to develop the knowledge and skills of the graduates (*ibid*). The report finds that there is a real need to address the gap between the current competencies of law graduates and the expectations of the professions as the "professions (and society at large) have a legitimate interest in what happens at universities" (*ibid*). Whether the collaboration is informal or formal as suggested by the Legal Practice Bill is not important. What is important is that there is a mechanism to include all the role-players to bridge the expectation gap (167).

Two last issues are worth noting. The report identified that there is a greater need for the current LLB students to receive career guidance and that this need should be addressed by the universities and the professions together (167). Furthermore, it was found that the duration of the four-year LLB programme is not solely to blame for the decline in preparedness of graduates, but that the decline had been taking place over a longer period of time that does not correspond with the introduction of the four-year LLB (168).

The exact status of the report and how it will be implemented is not known. It is however food for thought – especially for universities. There seems to be clear evidence that all the LLB graduates do not meet the expectations of the various professions.

What is the Faculty of Law at the University of KwaZulu-Natal doing in this regard? The Faculty, within its financial and other source constraints, has identified many of these issues before confirmation thereof by the report and various systems have already been put in place to rectify some of these problems. Additional language and numeracy training have been part of the extended curriculum for many years. Although clearly insufficient, it does go some way in assisting students, mainly second-language English speakers, to overcome their lack of knowledge and skills in this regard. Moreover, a few specialized subjects focus specifically on skills: Legal Research, Writing and Reasoning (aimed at research, reading, understanding and writing logically); Clinical law (practical application of legal principles); and Professional Training including Moots and Professional Ethics. With the Moots the focus is on the students' ability to research a particular legal problem and to construct and communicate an argument before a 'bench'. In addition to these subjects, the LLB programme incorporates additional skills training into the various subjects. Each undergraduate course, in addition to teaching the understanding of the principles of South African law of that subject area, also includes a re-

enforcement of the basic skills whether it is reading and interpreting legal materials as well as understanding, analyzing, and solving legal problems. No doubt the system still remains imperfect and there is and always will be room for improvement. In the spirit of the report, let the dialogue begin!

Prof Marita Carnelley
UKZN Pietermaritzburg

Matters of Interest to Magistrates

Verdict Still Out on South African Judicial Independence Versus Accountability

After years of tense deliberations between the South African judiciary and the government, the process of defining South Africa's first enforceable regulations concerning judicial ethics is slowly nearing its end. On 19 January 2011 interested parties submitted proposals at a public hearing on the draft Judicial Code of Conduct and Register of Financial Interests. However the Register was not tabled at the hearing, as was expected. It appears that contentious issues, including allowing extra-judicial work, especially in the case of retired judges, as well as preventing judges becoming members of political parties, are contributing to stalling the final stages of the process.

The thorny issues around the proposed legislation raise questions about the relationship between the principles of judicial independence and judicial accountability. While these principles are often perceived as being incompatible, it must be recognised that they are inextricably linked. In fact, they are potentially reinforcing, helping to play a critical role in promoting public confidence, an essential building block of democracy.

The importance of the independence of the judiciary is unquestionable. Enshrined in the South African Constitution - the supreme law of the land - under section 165, there is greater responsibility on the judiciary in ensuring the separation of powers between the three arms of government and in serving as the 'checks and balances' on the executive and legislature's power. Furthermore, according to Shamiela Seedat, Senior Researcher, formerly with the Institute for a Democratic South Africa (IDASA),"The judiciary is essentially developing and redefining South African

jurisprudence and is therefore playing an important role in the transformation of the country into an open and inclusive constitutional democracy that guarantees the progressive realisation of social and economic rights".

The rulings of the judiciary carry significant weight because legal precedence during Apartheid has limited relevance today. During Apartheid, the judiciary in South Africa was strongly aligned with the executive, and highly representative of a minority of the country's population. This meant that the majority of citizens had very little confidence in the judiciary providing them protection against government abuse. Today, there is a realisation that the transformation of the judiciary to an independent institution is critical to the reconstruction of South Africa and the consolidation of democracy.

However, the independence of the judiciary is irrelevant unless it facilitates and maintains the public's confidence. The power endowed in the judiciary gives rise to the sentiment that there should be a degree of accountability to uphold at least a minimum standard of ethics, says Seedat in a paper published by IDASA *Judicial Accountability Mechanisms*. The Code and Register are good strides in the direction of creating an open, transparent environment based on ethical standards, which is essential for ensuring accountability. According to Advocate Nichola de Havilland, Director of the Centre for Constitutional Rights, " the Code is critical for ensuring that all judges conform to ethical standards that will promote public confidence in their independence. Likewise, the Register of interests ensures, in an open and transparent manner, that there is no conflict of interest". In section 14 (3), the Code stipulates that "a judge does not directly or indirectly negotiate or accept remuneration, gifts, advantage, or privilege that is incompatible with judicial office or that can reasonably be perceived as being intended to influence the judge in performance of his or her judicial duties, or to serve as reward for them". A practical example is the case of Judge President John Hlope who was found to be receiving remuneration from a private company. While the currently proposed legislation would clearly outlaw this because of the potential danger to lead to a conflicts of interest situation, Hlope argued that he had received permission for his extra-judicial work from then Minister of Justice Dullah Omar, and therefore escaped sanction. Following the example set by legislation (*the Code of Conduct for Assembly and Permanent Council Members of 1997*) for the declaration of politicians' financial interests, the Register may serve as an effective deterrent for potential conflicts of interests which may lead to corruption that undermines, and creates the perception of mistrust in the judiciary. Having to declare one's financial interests puts a spotlight on additional income, which may derive from extra- judicial work.

With this in mind, a process was started in 2000 in which "Guidelines for judges of South Africa" were developed. However, a deficiency in this attempt was that it was not legally binding and did not include sanctions. The Judicial Service Commission Amendment Act was passed on 27 October 2008 and gives effect to section 180 of the Constitution which provides for national legislation that addresses serious yet unimpeachable complaints against judges. According to the Government Gazette, the Act aims to provide clearly defined procedures to deal with complaints against

judges, to establish the Judicial Conduct Committee (a formal mechanism for dealing with such complaints); provides for a Code of Conduct which “serves as the prevailing standard of judicial conduct which judges must adhere to”; to establish and maintain a Register of judges’ financial interests, as well as the establishment of Judicial Conduct Tribunals. Between 2008 and 2010, subordinate legislation (the Code and Register) were drafted by the Chief Justice in consultation with the Minister of Justice with the intention of creating a framework for judicial accountability. In October 2010 the Ad hoc Joint Committee on Code of Judicial Conduct and the Regulations on Judges’ Disclosure of Registrable Interests was established, and held public hearings on the 19th of January 2011.

The timelines from hereon are unclear. The draft Register will still have to be presented, but no dates have been put forward. After taking into consideration the public’s submissions, the Committee will have to go through both the Code and Register on a clause by clause basis, after which it will be submitted to Parliament and then to the President to sign into law. This process must now be expedited. While the milestone of the Amendment Act of 2008 received a great deal of attention, over two years have since passed, and the provisions of the Act have still not been implemented.

While it is acknowledged that there is a delicate balance between judicial independence and accountability, it is possible that the two can be mutually reinforcing, and result in the greater good. How the people of South Africa view the judiciary, whether they trust judges’ rulings and believe that the judiciary serves as a reliable and easily accessible instrument for their protection against the government and the private sector is critical. Both government and the judiciary need to take cognisance that while there may be a lot at stake by the proposed Code and Register, there is much more to gain in terms of advancing transformation and the consolidation of democracy. Ultimately, power can only be legitimized if combined with accountability. It is time this theory was put into practice.

Shireen Mukadam, Researcher, Corruption and Governance, ISS Cape Town Office

A Last Thought

Swim or sink: The shortcomings of the LLB curriculum research report

A wise old man once said ‘nothing is permanent but change’. Another took it further and said ‘change is as good as a holiday’. The current debate on the curriculum of the four-year LLB is bound to bring far reaching changes to the character of the legal profession as a whole. While change is permanent and a welcome phenomenon, it can only bear fruit if its consequences are analysed thoroughly in order to avoid taking on board those changes that might bring negative effects to the legal fraternity as a whole. This submission is an attempt at bringing to the fore some of the issues, which the current report has failed to look at, whether inadvertently or conveniently.

Granted, at the head of the research team was a well-respected Canadian academic, with impeccable credentials in research in general, and the legal fraternity in particular. Perhaps this is the Achilles tendon of the report. The senior researcher was not alive to the historical and geographical challenges still bedeviling the South African society up to this day. Further, the silence of the report on the socio-economic challenges facing a large majority of our learners is deafening.

Often, a lot of our students from poor backgrounds or not so affluent backgrounds are forced by their own circumstances to attend institutions that are in outlying areas, mainly due to the high fees of the other institutions which are more affluent and can be found in affluent areas. More often than not these institutions in outlying areas are not as capacitated as the affluent ones to deal with the evolving and dynamic nature of the society we live in. One can cite here the poor library facilities at previously disadvantaged institutions, as well as inadequate information and communication technology facilities. This hampers the development and production of a well-rounded LLB graduate by the previously disadvantaged institutions, as opposed to a learner who attends at an institution with all the funding power and all the facilities one can think of.

The geographical location of some institutions is also a serious problem hampering the quality of education and knowledge being imparted to our learners. For instance, the close proximity of some institutions to all major courts affords students at such institutions an opportunity to access courts from the first level of their training. Students at previously disadvantaged institutions, which are usually in outlying areas do not have this opportunity. More often than not they will see the inside of a court room during their period of articles, if they are fortunate to serve articles in firms that do not use them only as messengers. Coupled with this is the resource capacity of the previously disadvantaged institutions, which, while they are in outlying areas, may not be in a position to engage in programmes that will assist their students in gaining access to these courts. By the time they are admitted into the profession, they are in no better position than when they started out as first year LLB students at university.

In conclusion, perhaps the challenge for this report was the method used: Conducting a survey. It is for this reason that the call for a national review must gain momentum, in that if it is properly done, it will address and uncover all the issues that will have to be attended to in order to produce well rounded LLB graduates that

society in general, and the legal profession in particular, is yearning for. We must find a way of designing a LLB programme that will put all candidates on an equal footing, and also prepare them thoroughly, so they can compete equally out there in the highly competitive world of the profession.

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