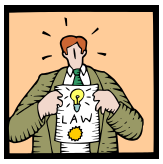
e-MANTSHI

A KZNJETCOM Newsletter

June 2014: Issue 99

Welcome to the ninety ninth 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 back 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 Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Justice and Constitutional Development has under section 15(2A) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), determined the conditions of authorisation of a person in terms of section 15(2)(a) of the said Act in a Schedule which was published in Government Gazette no 37722 dated 13 June 2014.

SCHEDULE
Definition
1. In this Schedule "the Act" means the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).
Application
2. (1) A person must apply to a public body for authorisation in terms of section 15(2)(a) of the Act —
(a) in writing on a form that corresponds substantially with the form in the Annexure to this Schedule; and
*(b)*submit the form to the public body concerned.
(2) The application referred to in paragraph (1) must be accompanied by—
(a) a *curriculum vitae* of the applicant;
(b)a certified copy of the identity document of the applicant;

(c) certified copies of all educational qualifications of the applicant;
(d) certified copies of certificates of service or, if not available, an affidavit by the applicant in respect of previous periods of employment rendered by him or her;
(e) testimonials from previous employers of the applicant, if available;
(f) the nature and history of any past or present business undertaking, occupation or trade of the applicant;
(g) the names, addresses and telephone numbers of two references;
(h) an affidavit regarding previous convictions, admissions of guilt, dismissal from employment, civil judgments, debt review and sequestrations, if any; and
(i) a certified copy of his or her driver's licence, if the applicant has a valid driver's licence.

Disqualifications
3. *No person shall be competent to be authorised by the public body concerned in terms of section 15(2)(a) of the Act if—*
(a) in the preceding 10 years he or she has been convicted of an offence of which violence (including assault, murder and others), dishonesty (including theft, corruption, fraud and others), extortion or intimidation is an element and has been sentenced to a period of imprisonment without the option of a fine;
(b) he or she is of unsound mind and has been so declared or certified by a competent authority;
(c) he or she is under the age of 18 years; or
(d) he or she is an rehabilitated insolvent.

Duties of public body
4. A public body which authorises a person in terms of section 15(2)(a) of the Act must—
(a) ensure that the person receives training relevant to the performance of his or her duties, before authorisation is given;
(b) ensure that the training referred to in paragraph *(a)* includes basic aspects relating to the procedure of service of documents, the Constitution of the Republic of South Africa, 1996, and the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
(c) issue a certificate to the person to be authorised, confirming that training was completed successfully;
(d) keep a register of the personal particulars of every person so authorised by it, including the period for which the person is so authorised by it;
(e) keep a register indicating—
(i) the particulars of every document or process of court handed to an authorized person for service,
(ii) whether the document or process of court referred to in subparagraph (i) has been served or not; and
(iii) if the document or process of court was served, the date, time and address of service; and

(f) issue the authorised person, including a person authorised before this determination came into effect, with a certificate of appointment on which the following information must appear:
(i) The full name of the person;
(ii) his or her identity number;
(iii) his or her signature;
(iv) a photograph of him or her;
(v) full particulars of the public body which made the authorisation;
(vi) the period for which the person is authorised; and
(vii) the signature and official stamp of the public body or responsible person.

Duties of person authorised by public body
5. *A person authorised by a public body in terms of section 15(2)(a) of the Act must at all times when exercising his or her duties in terms of the Act be in possession of the certificate of appointment referred to in paragraph 4(c), which certificate must be produced on demand.*

2. The Rules Board for Courts of Law has, under Section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister of Justice and Constitutional Development, amended the rules of the Magistrates Courts Act 32 of 1944. The notice to this effect was published in Government Gazette no 37769 dated 27 June 2014. The amended rules will come into operation on 28 July 2014. Some of the Rules that have been amended are rules 3, 4, 5,6,9,12,13,18,22,23, 55, and 55A.

Recent Court Cases

1. MULTICHOICE V NPA: In Re S v PISTORIUS 2014 (1) SACR 589 (GP)

In considering the effect of the radio and television broadcast of a criminal trial the court has to balance the interests of open justice, rights of freedom of expression and the accused's right to a fair trial.

Prior to the commencement of a trial in the high court of an international sport icon charged with the murder of his celebrity girlfriend, a number of media

companies approached the court for permission to broadcast the entire trial through audio, audiovisual and photographic means. There had been earlier negotiations between the various media companies and the Director of Public Prosecutions, as well as the accused's legal representatives, which had resulted in the DPP dropping its opposition, to a compromise measure which would allow coverage of parts of the trial under certain conditions. The accused, however, was opposed to any form of coverage sought by the applicants. Although separate applications were brought to court, they were dealt with as a consolidated matter. The applicants contended that it was in the public interest that the trial be covered in detail because of the heightened public attention given to the matter after the death of the deceased, so that the public could be properly informed. The applicants referred in this regard to the near chaotic conditions that had been experienced in the magistrates' court during the accused's bail hearing when the courtroom could not accommodate the scores of journalists from South Africa and abroad, who had been assigned to cover the proceedings. The accused, however, was of the view that the broadcasting of the trial would infringe his rights to a fair trial and that the mere knowledge of the presence of audiovisual equipment, especially cameras, would inhibit him, as well as his witnesses, when they gave evidence. He stated that his counsel might also be inhibited in the questioning of witnesses and the presentation of his case. He was further of the view that coverage of the trial would enable witnesses, who were still to testify, to fabricate and adapt their evidence based on their knowledge of what other witnesses had testified.

In embarking upon the exercise of balancing the opposing rights asserted by the various parties, the court's point of departure was to ensure that each of the rights asserted found proper expression and enjoyment without being unduly limited. The court held that it was not open to it to look at the value of each right and disqualify it in favour of another: its task was to look at each right at stake and permit its enjoyment to achieve the objective for which it was asserted. In this regard the freedom of expression right, which itself was not immune to limitation, went a long way in complementing the open justice principle that was relevant in the context of the matter and also required articulation. (Paragraph [19) at *598e-h.)*

The court held further that it was necessary to keep in mind that, in the open democratic society envisaged by our Constitution and in which the public had a right of access to the workings of the judicial system, the issue was not whether the electronic, broadcast and print media should be allowed to cover court proceedings, but rather how guarantees could be put in place to ensure that the public was well informed about how the courts function. (Paragraph [20) at *599e-f)*

The court was not persuaded that the accused's. objection to the coverage of the trial should be entertained to the extent that he suggested: in such event only a small

segment of the community would be able to be kept informed about what happened in court because of the minority's access to tools such as Twitter. Acceding to his argument would also mean that the community at large would be dependent for their news on the summarised versions provided by the journalists and reporters who followed the proceedings. These versions were correctly categorised as second-hand and liable to be inaccurate, as they depended on the understanding and views of the reporter or journalist concerned. (Paragraph [21] at *599f-h.)*

The court held nonetheless that the objections by the accused regarding the audiovisual recording, as well as the still photography of him and his witnesses, should not be taken lightly. There was merit in his fears and those of his witnesses, that they may be disabled somewhat in giving evidence if this were allowed. (Paragraph [25] at *600h-601b.)*

On the other hand, audio coverage did not carry the same inhibitory or intrusive potential as audiovisual coverage, and whilst there may be no visual image of the accused and his witnesses as they testified, they should, however, be heard on radio. (Paragraph [26] at *601b-c.)*

As regards the other goings-on in the trial, other than the evidence, that it was in the public interest that, within allowable limits, these be covered to ensure that a greater number of persons in the community, who had an interest in the matter, but who were unable to attend the proceedings, were able to follow the proceedings wherever they might be. Moreover, in a country like ours where democracy was still somewhat young and the perceptions that continued to persist in the larger section of South African society, particularly those who were poor and who had found it difficult to access the justice system, that they should have a first-hand account of the proceedings involving a local and international icon. The court had taken judicial notice of the fact that part of that perception was the fact that the justice system was still perceived as treating the rich and famous with kid gloves, whilst being harsh on the poor and vulnerable. Enabling a larger South African society, to follow first-hand the criminal proceedings which involved a celebrity, would go a long way to dispelling these negative and unfounded perceptions about the justice system, and would inform and educate society regarding the conduct of criminal proceedings. (Paragraph [27] at 60lf-i.)

The court accordingly granted an order in terms of which full audio and limited audiovisual and photographic coverage would be permitted, notwithstanding which the presiding judge retained discretion to make a final ruling on these issues.

2. S v NCOKO 2014 (1) SACR 607 (ECG)

In terms of section 81(1) Of Act 51 of 1977 additional charges may only be added before any evidence has been led.

The accused appeared in a magistrates' court on charges of reckless and/or negligent driving in contravention of s 63(1) of the National Road Traffic Act 93 of 1996. The state led the evidence of its first witness who was then cross-examined by the accused's legal representative. The cross-examination could not be finished on that day and the matter had to be postponed for further hearing. At that stage the prosecutor then indicated that she wished to add additional charges based on facts that had emerged from the evidence of the witness. The prosecutor indicated that she could do so 'in terms of the Criminal Procedure Act'. The legal representative made a token protest, but she was overruled by the magistrate who allowed the charge-sheet to be amended. The matter was sent on special review by another magistrate.

Held, that, in terms of s 81(1) of the Criminal Procedure Act 51 of 1977, additional charges could only be added before any evidence was led. The court accordingly held that the addition of the further charges later in the same proceedings is irregular and the matter had to be remitted to the magistrate to continue with the trial from the point at which the further charges were added. (Paragraphs [7] at *608j-609a* and [14] at *609g.)*

3. MINISTER OF SAFETY AND SECURITY v KLEINHANS 2014(1) SACR 613 (WCC)

The arrest of an accused for purposes of issuing a notice in terms of section 56 of Act 51 of 1977 is not unlawful.

The respondent instituted action in a magistrates' court against the appellant for general damages in the sum of R100 000, arising from his alleged unlawful arrest and detention by the police. The action arose from an incident in which the respondent was stopped by the police for having failed to obey a stop sign at an intersection with a national road. He alleged that he had stopped, but the police witnesses claimed that he had not. After stopping him, the police asked him to accompany them to the police station, as they wished to issue him with a fine and they did not have their fine book with them. He refused and made as if to drive away. The police reacted to prevent him from driving away, but he became aggressive and they restrained him and put him into the police van and took him to the police

station where he was released 45 minutes later, after being issued with a fine. The magistrate found on the evidence that the respondent had committed the offence, but held that the trivial nature of the offence did not justify the arrest of the respondent, and found that the arresting officer had not exercised his discretion to arrest the respondent on a rational basis. The magistrate accordingly found in favour of the respondent and awarded him R60 000 in damages. On appeal,

Held, that the intention .and conduct of the arresting officers were clearly aimed at bringing the respondent to justice and there was no room for the suggestion, given the particular circumstances of the case, that it was incumbent upon them to have first considered an alternative method of ensuring the respondent's attendance at court, before effecting the arrest. To view it differently would result in unintended consequences that might be open to serious abuse and possibly unethical behaviour. The standard of rationality was not breached when officers exercised their discretion in a manner other than that deemed optimal by the court. The standard was not perfection or even the optimum, judged with the benefit of hindsight. (Paragraph [21] at *619b-d.)*

Held, further, that the more general purpose of an arrest was to bring the suspect to justice. That could be achieved in more than one way: the issuing of a written notice as contemplated in section 56 of the Criminal Procedure Act 51 of 1977 was one way, but in order for that method to be followed, peace officers needed to have the material to issue a notice in the form prescribed by that section. If, as in the present case, the peace officer did not have the necessary material, it was permissible for him to arrest the offender for the purpose of taking him to a police station so that a section 56 notice could be issued to him. The arrest in such a case still had the purpose of bringing the offender to justice. In the unusual circumstances of the case, the arresting of the respondent for the limited purpose of keeping him in custody until the notice could be issued was not unlawful. (Paragraph [26] at *620h-621c.)* The appeal was upheld and the order of the court a quo was substituted with an order that the claim be dismissed with costs.

From The Legal Journals

Van Niekerk, G J

"The courts revisit polygyny and the Recognition of Customary Marriages Act 120 of 1998"

SAPL 2013 469

Brits, R & Van der Walt, A J

"Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 1)"

TSAR 2014 288

Sissing, S & Prinsloo, J

"Contextualising the phenomenon of cyber stalking and protection from harassment in South Africa"

Acta Criminologica: Southern African Journal of Criminology 26(2) 2013 **15**

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

Contributions from the Law School

Why teaching legal ethics is not the same as teaching the 'law of lawyering'

Introduction

A common conception of legal ethics treats it as synonymous with the rules of professional conduct which govern members of the legal profession; or the 'law of lawyering'. In terms of this approach, legal ethics is conceived of as a body of substantive doctrine, which is to be mastered like any other area of the law. When conceived of in this way, legal ethics is invariably taught in the positivist tradition. By this I mean that a strict separation between the rules and considerations of morality, justice and the social context of lawyering is presupposed.[1]

Where a positivist approach to legal ethics is taken, the rules of the professional code will often be taught in a stand-alone course. Teaching a stand-alone ethics course is itself associated with special difficulties. In the first place, it signals to students that it is a subject that can be partitioned and separated from the law itself. Isolating legal ethics in one course marginalises its significance, and does not develop students' ability to recognise ethical issues in practice.

In addition, such courses are routinely given a lower credit point ratings than other substantive law courses. Compounding the problem is the sheer weight of the other courses in relation to the stand alone ethics course.[2]

Apart from the points set out above, there are a number of other problems associated with the positivist approach. These include the fact that many students perceive such courses to be of low academic or vocational value; that they inevitably take a narrow view of legal ethics; and that they promote an instrumental view of morality. Further, the positivist approach does not equip students to engage in ethical decision making in practice – especially where the rules are vague or ambiguous or do not address the problem at hand. This is because students do not develop an understanding of the values underpinning the rules in terms of the positivist approach. These aspects will be discussed further hereunder.

Critique

Perceived low value

[1] D Markowits 'Legal Ethics from the Lawyers Point of View' (2003) 12 *Yale Journal of Law and Humanities* at 210; HL Hart 'Positivism and the Separation of Law and Morals' (1958) *Harvard Law Review* 593; and R Fuller 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) *Harvard Law Review* 630.

[2] H Brayne, N Duncan and R Grimes *Clinical Legal Education: Active Learning in Your Law School* (1998) at 274.

The positivist approach to legal ethics feeds the belief, commonly held by both legal academics and students, that legal ethics is an undemanding course which requires students just to rote learn 'the rules' of practice in order to pass. Frenkel comments that '[r]esistance on the part of the typical student is legendary . . . Many have the impression that this is soft easy stuff, a few rules to be memorised coupled with opinions as to the right thing to do putting professional role demands against personal or lay conceptions of morality . . .'[3]

This is an entirely inappropriate view of the legal ethics curriculum. Memorising the rules provides very little guidance for a lawyer grappling with real-life ethical dilemmas. At best the rules provide a minimum standard to avoid being formally disciplined. In any event, the rules are the least helpful when guidance is most necessary. For example, when the rules conflict, such as when the lawyer's duty to her client is at odds with her obligations to the justice system, society at large or even her own integrity. While the rules might provide guidance, there are no 'rules' that can resolve these fundamental conflicts. The messy detail is left to the discretion of the lawyer.

Narrow focus

Positivist legal ethics courses fail to consider institutional and structural issues that may be antithetical to ethical lawyering. A bare teaching of the 'law of lawyering' presupposes that the context in which the legal profession works and the manner in which the profession is structured and regulated is beyond criticism. Globally, the status quo of the legal profession is being challenged. In South Africa the imperative to 'transform' to meet the needs of society is perhaps the most important contemporary challenge facing the profession. The failure to teach about the legal profession is a failure to students, to the profession and to society, especially at this time when the profession is facing radical transformation.

Instrumental view

The positivist approach to legal ethics encourages the development of an instrumental view of morality, in terms of which students would learn to view the rules as yet another set of rules to be manipulated.

Burridge and Webb write that a positivist approach to legal ethics conveys the sense that lawyer's behaviour is motivated by the need to avoid disciplinary action, or a damages claim from a client. This creates the impression that legal ethics is essentially a matter of lawyers protecting their narrow self-interest.[4]

---

[3] D Frenkel 'On Trying to Teach Judgement' (2001) 12:1&2 *Legal Education Review* 23.
[4] R Burridge and J Webb 'The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School' (2007) 10 *Legal Ethics* 72 at 149.

Those who adopt an instrumental view of morality are likely to conceive of their ethical obligations as limited to compliance with the formal rules. Thus, they tend to believe that they have acted ethically provided they have not broken any of the formal rules. This reduces the anxiety that usually accompanies ethical decision making.[5]

Rules are ambiguous and limited

Teaching legal ethics in a positivist tradition is misleading in that it creates the false impression that ethical behaviour simply requires following the rules of professional conduct. As Castles says, the notion that rules can adequately address 'complex value-laden decisions with multiple potential consequences simply does not bear scrutiny'.[6]

Even a comprehensive and detailed set of rules:

'. . . remain hostage to the inevitably limited imagination of their framers, the rapidly changing nature of legal practice and society, conflicting rules, and the inherent ambiguity and vagueness of the language in which they are drafted. Moreover, even comprehensive and clear rules can never be sufficiently sophisticated to cope with the contextual nuances and particularities of every unique fact situation'.[7]

Thus, students need to develop an understanding of the values underpinning the rules, so that they can evaluate and re-evaluate the rules as the need arises. This understanding will also enable students to make ethically sound decisions when the rules are silent, or ambiguous.[8]

Values

A positivist approach to legal ethics does not '. . . necessarily impart to students an understanding of the values underlying the legal system or allow them to develop their own value framework that becomes the basis for ethical judgment'.[9]

---

[5] D Nicolson 'Education, Education, Education: Legal, Moral and Clinical' (2008) 41:2 *The Law Teacher* 145 at 153.
[6] M Castles 'Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia' (2001) 1&2 *Legal Education Review* 81 at 90.
[7] D Nicolson 'Education, Education, Education: Legal, Moral and Clinical' (2008) 41:2 *The Law Teacher* 145 at 150.
[8] R Rotunda 'Teaching Professional Responsibility of Ethics' (2007) 51:4 *St Louis University Law Journal* 1223 at 1226.
[9] D Henriss-Andersson 'Teaching legal Ethics to First Year Law Students' (2002) 13:1 *Legal Education Review* 45 at 52.

This is necessary because the 'the law of lawyering is written in ways that presume, and thus require, the ability to make sound moral judgments while providing little or no guidance for those decisions'.[10]

Legal ethics should incorporate an awareness of values and develop in students the ability to exercise sound ethical judgement.[11] The question of which values should inform legal education and legal ethics is of course controversial[12], but a discussion of this aspect falls beyond the scope of this work.

Judgment

Teaching legal ethics in the positivist tradition does not develop the skills required to exercise ethical judgment. Ethical judgment involves the capacity to identify ethical issues when they arise, the ability to evaluate competing principles and rules, the capacity to make the decision as to how to act and finally the strength and courage to act in accordance with the decision made.[13]

Capacity to identify ethical issues

While it is relatively easy to identify ethical dilemmas in dramatic situations, the reality is that most ethical dilemmas are buried in the mundane day-to-day business of lawyering. They are often ignored or even unnoticed.[14]

Thus, an important aspect of teaching legal ethics is developing in the student the predisposition to recognise ethical issues when they are embedded in complex and ambiguous factual scenarios, as they usually are. This capacity is critical because ethical dilemmas cannot be dealt with if they go unnoticed.

Capacity to weigh up and make decision

---

[10] D Frenkel 'On Trying to Teach Judgement' (2001) 12:1&2 *Legal Education Review* 23 at 26.
[11] AT Kronman 'Living in the Law' (1987) 54 *University of Chicago Law Review* 835 at 846; G Postema 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63 at 68; and J Webb 'Taking Values Seriously: The Democratic Intellect and the Place of Values in the Law School Curriculum' in M Robertson, L Corbin, K Tranter and F Bartlett *The Ethics Project in Legal Education* (2011) at 9.
[12] See R Huxley-Binns 'Are We all Going to the Same Place: Pluralism and Values Driven Legal Education', available at www.ukcle.ac.uk/resources/huxleybinns,accessed on 20 January 2012; F Cownie 'Alternative Values in Legal Education' (2003) 6 *Legal Ethics* 159; and WB Wendel 'Value Pluralism in Legal Ethics' (2006) *Washington University Law Quarterly* 116.
[13] CD Cunningham and C Alexander 'Developing Professional Judgement: Law Schools Innovations in Response to the Carnegie Foundation's Critique of American Legal Education' in M Robertson, L Corbin, K Tranter and F Bartlett *The Ethics Project in Legal Education* (2011) at 79.
[14] DB Wilkins 'Everyday Practice is the Troubling Case. Confronting Context in Legal Ethics' in S Austin (ed) *Everyday Practice and Trouble Cases* (1998) at 68.

Exercising ethical judgement requires more than simply identifying the ethical issue, locating the relevant rule and applying it to the facts. It inevitably involves identifying which of the conflicting principles and rules should be prioritised given the unique circumstances of each case.

This is not easy. Very often one is forced to make decisions with imperfect knowledge, based on uncertain contingencies. Sometimes whatever decision is made will have potentially negative consequences.[15]

As Del Mar expresses it:

'An ethical experience is most acute when we come face to face with our limitations; when we face up to the irreducible anxiety and vertigo of the ought; to the infinite array of consequences that our actions may bring; to the irreducible contingency of the good. A contingency is made irreducible not because there is no right or wrong thing to do in a particular situation – clearly there sometimes is – but rather because of the inevitability of our ignorance, and the almost irresistible tendency we feel to justify our actions; to distance ourselves from possible implications; and to cover our tracks with good intentions. Ethical education must offer students the opportunity to experience such difficulties and anxieties, for without that experience the development of the ethical imagination will be radically stunted'.[16]

Del Mar continues to explain that where a person limits his or her ethical decision making to the black-letter rules, that person compromises his or her ability to consider all the possibilities of a situation. He expresses it thus:

'Dwelling in the comfortable house of articulated rules, we do not dare to go outside; we do not dare subject the limits of our categories to the complexity of a situation; we do not dare to imagine – to see the same situation from numerous viewpoints, to see the many diverse consequences of any one action – for the rules do not even create that opportunity, that need, that burden, that difficulty'.[17]

Courage to act

Del Mar goes on to warn that a positivistic approach to legal ethics does not develop in students the moral courage to stand up for what they are committed to in

[15] Del Mar M 'Beyond Text in Legal Education: Art, Ethics and the Carnegie Report' (2010) 56 *Loyola Law Review* 101 and Z Bankowski *Beyond Text in Legal Education*, available at http://projects.beyondtext.ac.uk/legaleducation/index.php, accessed on 23 January 2013.
[16] Del Mar M 'Beyond Text in Legal Education: Art, Ethics and the Carnegie Report' (2010) 56 *Loyola Law Review* 101.
[17] Del Mar M 'Beyond Text in Legal Education: Art, Ethics and the Carnegie Report' (2010) 56 *Loyola Law Review* 101.

pressured situations, nor to resist the temptation to ignore the rules when it is expedient to do so.[18]

Conclusion

Because there is a commitment to teach legal ethics in the LLB degree and because of the dominance of the doctrinal/vocational/corporatist approaches to legal education in South Africa, there is a real danger that the commitment to teaching legal ethics will only translate into teaching it in terms of the positivist approach. This must be avoided in order to teach legal ethics in a meaningful way.

Nicci Whitear-Nel
School of Law
Pietermaritzburg

Matters of Interest to Magistrates

Mogoeng calls for more judicial independence

Cape Town - South Africa's judiciary should not have a politician in the form of a justice minister “hovering” over it, Chief Justice Mogoeng Mogoeng said on Friday.

“Because for as long as you have the executive, in the form of the minister of justice, playing a political oversight role over the judiciary, then you have a problem,” he told a meeting of the SA National Editors' Forum in Cape Town.

“For as long as you have a judiciary that does not have its own board account, does not have its own budget, and has no say in the appointment of the support staff that ought to strengthen its capacity to deliver justice to the people, then you've got a problem.

“And human beings, irrespective of who they are, can be tricky. You just never know how the control... of functions and the control of the budget could be used with a view

[18] D Nicolson ‘Education, Education, Education: Legal, Moral and Clinical’ (2008) 41:2 *The Law Teacher* 145 at 153.

to influencing the judiciary to do things, or some within the judiciary to do things, that they ought not to be doing."

Mogoeng conceded, in reply to a question, that his office was possibly "a bit too aggressive" in championing the cause for institutional independence of the judiciary, but said such pressure was yielding results.

Former justice minister Jeff Radebe had signed a document, in April this year, transferring a host of functions to the office of the chief justice.

And, circumstances permitting, "the office of the chief justice should be having its budget vote... transferred to it".

President Jacob Zuma appeared "very supportive" of an independent judiciary.

Mogoeng said he had told Zuma: "If the executive want to avoid creating the unfortunate impression that your government is anti-judicial independence, then you've got to give practical expression to what Section 165 of the Constitution requires."

This, Mogoeng said, was a judiciary so independent it had its own core administration system in place.

"But it shouldn't end there. This national department mode is not satisfactory because, for as long as it's a national department, you need a political head. And the judiciary cannot have anything to do with a system that has a politician hovering over it.

"The proposals that we have transmitted to the executive, and we're still awaiting a response... propose a model that is similar to the Auditor General, created in terms of legislation.

"That's what we want to see," he said.

Referring to the overhauling of court rules, Mogoeng said if everything went according to plan, "come November, we should be having the first round".

However, "the sad part is we have to go through the same old route", which included the justice ministry.

"And we (have) experienced untold delays and frustrations, particularly at a ministerial level, when rules of court have to be finalised.

"I have just never understood, and I doubt if I'll ever understand, why... the executive has to be involved in making rules about something... in which they do not operate and possibly know little about."

(The above news item appeared on the IOL site on the 20th of June 2014).

A Last Thought

"Chief Justice Mogoeng Mogoeng was admirably honest and transparent about his personal convictions when he stated – quoting that great freedom fighter and anti-colonialist, Lord Denning – that he believed "without religion there can be no morality; and without morality there can be no law".

Judges are not empty vessels, lacking any personal beliefs, values and opinions. Instead, the different life experiences of judges (often focused on their differences in sex, gender, sexual orientation, race, class, religious or non-religious beliefs and other circumstances) may well influence how they view the world and the legal problems they are confronted with and, to some degree, how they will interpret the often open ended provisions of the Constitution in order to solve those legal problems.

Similarly whether a judge is a Pentecostal Christian, an atheist, a cultural Anglican, a Rastafarian, an agnostic, a devout member of the Dutch Reformed Church or a member of the File Sharing Religion may well have some influence on the way in which that judge sees the world and how he or she will resolve the legal problems he or she is called upon to adjudicate on.

Of course, judges need to be impartial. But this does not and – conceptually – cannot mean that a judge is required to have no beliefs or value system on which he or she will inevitably draw to decide complicated constitutional questions raised before him or her.

It only means that a judge must not pre-judge a case and must hear all the arguments before him or her and must consider both the applicable legal text and the relevant binding case law before making a ruling on a specific matter.

I would think it is far better and more honest for a judge to admit to these personal beliefs and to declare them upfront, as the Chief Justice did in his speech. Where judges declare their views openly, it is far easier to engage with the judgments written by that judge and to construct an argument either in support of or critical of the approach taken by a specific judge."

Comments by Prof Pierre de Vos on his blog *Constitutionally Speaking* on 10 June 2014 in a post entitled " The law vs religion: Let's try that again"