

THE ADMINISTRATION OF JUSTICE

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THE JUDICIARY

The passing of two Chief Justices

South Africa lost two Chief Justices in late 2012 and mid-2013. Arthur Chaskalson, who served as President of the Constitutional Court from 1994 to 2001 and Chief Justice from 2001 to 2005, passed away on 1 December 2012. Among many achievements and accolades, he was a member of the defence team in the Rivonia Trial of 1963 and was one of the founders of the Legal Resources Centre in 1979. (G Budlender 'In Memoriam: The late former Chief Justice Arthur Chaskalson' (2013) 26 part 1 April *Advocate* 8–10).

Pius Nkondo Langa succeeded Arthur Chaskalson as Chief Justice in 2005, having served as Deputy Chief Justice from 2001. He retired in October 2009 and passed away on 24 July 2013. Justice Langa was a founding member of the National Association of Democratic Lawyers (NADEL). He was among the first judges appointed to the newly created Constitutional Court and served with great distinction. (Moseneke 'Public power on behalf of the people' (2013) 26 part 3 December *Advocate* 27–8).

Judicial appointments

In this section, we note one judicial appointment to the highest court in 2013 before discussing a case that dealt with the criteria for appointment to the magistrates' courts. During the year under review, Justice Mbuyiseli Madlanga was appointed to the Consti-

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tutional Court. Shortly before his appointment, Justice Madlanga was acting as one of the Evidence Leaders in the Marikana Commission of Inquiry, discussed in greater detail elsewhere in the chapter. He had also previously served as a judge but resigned for personal reasons.

The appointment criteria for magistrates were considered in *Singh v Minister of Justice and Constitutional Development and Others* 2013 (3) SA 66 (EqC) where the complainant was a vision-impaired Indian female who applied unsuccessfully for a number of posts as a magistrate. She challenged the criteria and process applicable to the appointment of magistrates on the basis that they discriminated unfairly on the ground of disability. Ledwaba J upheld the challenge and made an urgent, interim order at the time of the hearing in January 2012. This judgment provides his reasons for that order.

The applicant argued that the selection criteria used to short-list candidates were unfairly discriminatory and based on inflexible racial and gender-based preferences. Her disability was not taken into account and neither was the need to redress the legacy of discrimination against persons with disabilities (para [10]). She also initially complained that the criteria for appointment included a driver's licence, but this complaint fell away during the proceedings. The respondents contended that the absence of disability in the selection criteria was justified by the inclusion of a general reference to section 174(2) of the Constitution, in terms of which '(t)he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed'.

Ledwaba J, sitting as the Equality Court in Pretoria, held that section 9(2) of the Constitution and section 4(2)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('the Equality Act') place a complementary duty on the state to take active measures to promote the equality of people with disabilities (para [24]). While section 174(2) referred to race and gender only, it used these as indicators of diversity, not as an exhaustive list of factors. It was vital that disabled persons were properly represented in the magistracy so that their unique perspective could be properly articulated (para [30]).

Ledwaba J found on the facts that it was clear that the appointment committees did not take the applicant's disability into account (para [32]). Although the respondents were entitled to apply guidelines to assist them in making decisions, these

were not to be applied rigidly or inflexibly (para [37]). In addition, the court held that it was not acceptable that the policy of the Magistrates' Commission was silent as far as people with disabilities were concerned (para [46]). Ledwaba J commented that the magistracy would not be diverse or legitimate if it represented only the racial and gender composition of the country without proper and proportionate representation of people with disabilities (para [53]).

Ledwaba J thus confirmed his earlier order, which had directed the Magistrates Commission to reconsider the shortlisting of magistrates for the relevant vacant positions having regard to disability, among other factors. The respondents had been ordered to revise their policies to make express provision for disability as a criterion (the order appears at para [1]). While there has been considerable discussion and even litigation regarding the criteria of race and gender in relation to judicial appointments, *Singh* is an important reminder that disability and other forms of disadvantage also require attention.

Judicial commissions of inquiry

The use of judges, whether sitting or retired, to chair commissions of inquiry is no recent phenomenon. Their use is widespread in South Africa and abroad but they are controversial. This chapter has had occasion to comment on the inappropriate use of judges to chair commissions of inquiry for overt political purposes (see 1987 *Annual Survey* 493–5). At issue then was the funding of an advertisement calling for the unbanning of the African National Congress. The State President, Mr P W Botha, had asserted in Parliament that Chris Ball, the Managing Director of Barclays Bank (as it was then called) had been mentioned in 'leftist circles' as the person who had financed the advertisement. This was denied by Ball and generated protests from the business community. Thereafter, and in apparent response to the outcry, the State President appointed a Commission of Inquiry under the chairmanship of Mr Justice GGA Munnik, Judge President of the Cape, to investigate and report on, inter alia, by whom the advertisements had been placed, how and by whom the newspapers had been paid, the source of the funds used to pay for the advertisements, and whether Mr Ball was in any way involved in the financial arrangements concerning the payment for the placing of the advertisements. It was suggested that for the State President to make a controversial statement in Parlia-

ment and then to appoint a commission of inquiry into the truth of his own statement was regrettable, and inappropriate.

There were other controversial uses of judicial commissions of inquiry under apartheid. One of the more notorious instances was the appointment of Mr Justice PJ Rabie in 1979 to chair the inquiry into the necessity, adequacy, fairness and efficacy of the legislation relating to the protection of internal security. Annexed to his report, published in 1982, was draft legislation which was swiftly enacted in the guise of the Internal Security Act 74 of 1982, the Protection of Information Act 84 of 1982, the Intimidation Act 72 of 1982 and the Demonstrations in or Near Court Buildings Prohibition Act 71 of 1982. The Internal Security Act, in particular, was a hostile measure in keeping with the 'total onslaught' mentality prevalent at the time. It sanctioned detention without trial for purposes of interrogation and the banning of individuals and organisations. (See John Dugard 'A triumph for executive power — An examination of the Rabie Report and the Internal Security Act 74 of 1982' (1982) 99 *SALJ* 589 and 'Any hope for detainees? The Agget inquest and the Rabie Report compared' (1983) 2 June *Lawyers for Human Rights Bulletin*). Mr Justice Rabie was a Judge of Appeal when he produced the report. He was later to become Chief Justice in 1982, the year his report was tabled and the Internal Security Act was passed. He sat in and presided over numerous cases concerning offences under the Internal Security Act and matters of state security generally. His role in these decisions, and the clear indications of handpicked panels to hear these matters, wrought untold damage to the administration of justice in South Africa. (See generally, Stephen Ellmann *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (1992) and N Haysom and C Plasket 'The war against law: Judicial activism and the Appellate Division' (1988) 4 *SAJHR* 303.)

But what of judicial commissions of inquiry under a democratic dispensation? There have been a number of commissions of inquiry in post-apartheid South Africa and their use continues to be controversial. Of the post-apartheid judicial commissions of inquiry, perhaps the most controversial is the (Seriti) Commission of Inquiry into 'Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package' (GN R926, GG 34731 of 4 November 2011). This Commission was appointed by President Zuma in terms of section 84(2)(f) of the Constitution. Although appointed in 2011, its first sitting took

place in August 2013. It concerns the multi-billion rand arms deal which has cast a shadow over South African political life for the better part of a decade. It is not simply the magnitude of the procurement that has been controversial but the widespread allegations of bribery and corruption surrounding the process. At the centre of these allegations is President Zuma himself. The allegations emerged in acute form in the indictment against Schabir Shaik, who was convicted on two counts of corruption under section 1(1)(a) of the Corruption Act 94 of 1992 and one of fraud. He was sentenced to fifteen years' imprisonment. The details that follow emerge from the appeal judgment in *S v Shaik and Others* 2007 (1) SA 240 (SCA). A further application for leave to appeal to the Constitutional Court on conviction and sentence failed (*S v Shaik and Others* 2008 (2) SA 208 (CC)).

It was alleged that Shaik and various corporate entities with which he was associated had made some 238 payments, either directly to, or for the benefit of, Jacob Zuma. These payments had been made as an inducement to Jacob Zuma to use his name and political influence for the benefit of Shaik's business (the Nkobi Group) or as an ongoing reward for having done so. Shaik's defence included that the payments had been made out of the friendship between him and Jacob Zuma, or that they were loans to the latter. These defences were rejected. There was a strong inference that the acknowledgements of debt had been contrived to be held in readiness should Shaik's beneficence be queried. Shaik had never sought repayment of the amounts paid to Jacob Zuma, nor had he asserted a right to such repayment. The amounts paid by Shaik to Jacob Zuma were in the vicinity of R1,2 million. On this issue, the Supreme Court of Appeal stated

Making full allowance for the personal bonds of friendship there would understandably have been between them arising out of their relationship and their mutual interests prior to 1994, it is nevertheless clear that Shaik was keenly aware of the many business opportunities that the new political era offered and anxious not to miss them. For his part Zuma was seen by Shaik and by others in the know as destined for very high political office and possessed of the potent influence appropriate to that situation. Added to that there was Zuma's almost crippling financial vulnerability. He had heavy family commitments but wanted a smart and publicly visible lifestyle (para [102]).

One of the counts of corruption on which Shaik was convicted concerned his participation in a consortium that had acquired a stake in the provision of an armaments suite for naval corvettes as part of the arms deal. It was alleged that at a time when it

appeared that an inquiry would be held into aspects of the arms deal, Shaik had arranged for the payment of a bribe by a French company, Thomson-CSF, to Jacob Zuma in return for which he would shield Thomson from the inquiry and thereafter would promote its interests in South Africa. It was common cause that Shaik had requested an amount of money to be paid by Thomson to Jacob Zuma. His defence, however, was that the request had nothing to do with an inquiry into the arms deal. He contended that he had asked for a donation to be made to the Jacob Zuma Education Trust. This evidence was rejected by the trial court as clearly false and was not questioned on appeal (para [186]). The Supreme Court of Appeal found that it had been proved beyond reasonable doubt that 'what Shaik described as a request for a donation to the Jacob Zuma Education Trust was in fact a request for the payment of a bribe to Zuma' (para [203]). The court found further, however, that it was not necessary for the state to prove that Zuma was aware of the request by Shaik and that he agreed to accept the bribe (para [205]).

That Jacob Zuma was not charged together with Schabir Shaik was a matter of major controversy at the time. Later, in 2005, the NDPP decided to prosecute him on corruption charges related to monies received from Shaik and his companies. These charges were later withdrawn. The decision to withdraw the charges is the subject of ongoing litigation (see *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) and *Democratic Alliance v Acting National Director of Public Prosecutions* 2012 (3) SA 486 (SCA)). It is against this background, therefore, that President Zuma's decision to appoint a commission of inquiry into a matter in which he is personally implicated must be assessed. This will be discussed below.

In August 2012 a tragic incident occurred at the Marikana Mine in Rustenburg in the midst of an industrial dispute. Police intervention resulted in the deaths of approximately 44 people and injuries to 70 others. The incident was likened to the massacre at Sharpeville in 1960. It attracted national and international publicity. In consequence, President Zuma established a judicial commission of inquiry chaired by retired Supreme Court of Appeal Judge, Ian Farlam, to conduct a wide-ranging investigation. Five areas of investigation were identified. These were the conduct of Lonmin Plc, the owner of the mine; the conduct of the South African Police Service; the conduct of the Association of Mineworkers and Construction Union (AMCU); the conduct of

the National Union of Mineworkers (NUM); the role played by the Department of Mineral Resources; and 'the conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident, whether directly or indirectly' (Proclamation 50 of 2012, GG 35680 of 12 September 2012). By subsequent amendment, the Proclamation of the Commission of Inquiry was deemed to have come into operation on 11 January 2013 (Proclamation 4 of 2013, GG 36154 of 12 February 2013). In terms of this amendment, the Commission was directed to complete its work by no later than 31 May 2013. That deadline has been exceeded by more than a year, and has precipitated amendments further extending the deadline for completion. The most recent amendment set 31 July 2014 as the deadline (Proclamation 30 of 2014, GG 37611 of 5 May 2014), which too will not be met.

The events at Marikana shocked the nation. Vivid images of the shootings were broadcast on all major domestic and international television networks. What was required was a swift and incisive investigation into what occurred. The report of the Commission is unlikely to see the light of day within two years of the incident. This is the product of two problems. First, the terms of reference are hopelessly wide and require the investigation of a diversity of factual and sociological issues. Second, the manner in which the proceedings have been conducted has resulted in the inquiry dragging on interminably. It is long settled that proceedings before commissions of inquiry are inquisitorial and that there is a wide discretion in how they are conducted. The chairman, Mr Justice Farlam, has allowed the Marikana Commission at times to degenerate into an uncontrolled and rambling free-for-all, much like an insufficiently managed adversarial trial with little control, certainly at the initial stages, over cross-examination and selection of witnesses. This may be contrasted with the Commission of Inquiry into Policing in Khayelitsha established by the Premier of the Western Cape which proceeded only after the Constitutional Court rejected a challenge to it by national government (*Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC)), and which is chaired by former Constitutional Court Justice, Kate O'Regan. It has issued taut guidelines for evidence and cross-examination, and it has kept all parties on an impressively tight leash, attracting admiring public comment. (See, generally, the reports on GroundUp (www.groundup.org.za).

This Commission enjoys unparalleled political legitimacy, not only because of the known independence and integrity of its presiding members (which include former National Director of Public Prosecutions, Vusi Pikoli), but because it was established in response to sustained pressure on the Premier by an impressively diverse range of civil society organisations with knowledge of the appalling policing conditions in Khayelitsha.

The Seriti and Farlam Commissions, both far from completion, raise important questions concerning judicial commissions of inquiry. In a seminal article, Jack Beatson critically analyses the use of judges to head public inquiries ('Should judges conduct public inquiries?' 2005 *LQR* 221). Drawing on experiences in the United Kingdom and Israel, he discusses five arguments that are traditionally advanced in support of the use of judges to chair public inquiries: skills and availability; independence and impartiality; authority; structure and formality without the constraints of litigation; and achievement of closure.

The argument most frequently advanced in favour of judicial inquiries is that 'judges are experienced and skilled in the sifting and evaluation of evidence and in analysing material in a rational way' (230). Most fundamentally, judges 'are independent in the sense of being absent from direction and generally seen . . . as institutionally apolitical' (234). Acknowledging the legitimacy of this claim in general terms, Beatson suggests that this argument is strongest 'where the task of the inquiry is solely to find facts' but 'less compelling where issues of social or economic policy with political implications are involved' (230). He points out that the paradox of the independence and impartiality arguments is also seen as the reason for not allowing judges to conduct inquiries as '[t]here are political dangers for judicial independence when matters of acute political controversy are referred to a judge for an impartial opinion' (236). Expanding on the potential to compromise the reputation of the judiciary, he argues that 'the involvement of a judge will not depoliticise an inherently controversial matter, and it is a mistake to raise false expectations that it will do so. Political issues cannot be resolved by the application of judicial standards and court-like procedures' (235). In addition, there is the risk of subjecting the judge to strident public criticism.

Where a topic is politically controversial and the report is neither a binding enforceable decision nor correctable by an appeal, those disagreeing with it may be unable to resist the temptation of seeking to discredit its findings by fierce criticism of the judge. If the Government

or institution has been cleared, the dissenters will describe the judge as an establishment lackey. . . . If Government or the institution is criticised, the judge will be described as naïve and unfamiliar with the reality of Government. . . . (236).

Judicial independence and impartiality can also be endangered in that 'the initiative in setting up and proposing the terms of reference of such inquiries lies with Government'. This may be seen as undermining independence 'because the appointment in a sense "links" the judge with the Government which made the appointment', and 'often Government is deeply involved in the subject of the inquiry and it is not usual for one of the players to select the referee' (238).

In assessing these (and other arguments), Beatson does not place a great deal of weight on the threat of adverse criticism because this arises in controversial cases which judges deal with in the ordinary course (241–2). An important point Beatson makes, however, is that merely because judges have the necessary fact-finding skills is unpersuasive since senior lawyers and retired judges have the same skills (230).

In the context of South African commissions of inquiry, Beatson's discussion has a particular resonance. The choice of Mr Justice Rabie to chair the inquiry into security legislation — a topic heavily laden with political ideology and policy — not only spawned inevitable criticism following his recommendations, but thereafter tainted him as a judge with an ideological agenda who headed the 'emergency team' of handpicked appellate judges during the successive states of emergency (Ellmann, above 57–138). It is submitted that the Seriti Commission into the arms deal is destined to suffer a similar fate. It has already been mired in controversy with the resignations of Justice Legodi (who was originally appointed as a member of the Commission), and evidence leader, Mr Norman Moabi, who alleged in his letter of resignation that there was a perception that the Commission, particularly Justice Seriti, had a secret agenda not compatible with its mandate to establish the truth (see, inter alia, 'Cloud Over Seriti Arms Deal Probe' *The Witness Online*, 17 January 2013, and 'Investigator Quits Arms Probe, Questions Integrity — Report' *City Press Online*, 17 January 2013). The Commission has taken to issuing media statements in response to criticism. These are all available on the Commission's website (www.armscomm.org.za).

Justice Seriti took it upon himself to respond to Moabi's criticism. In the course of a lengthy statement, he speculated that

Moabi made 'these false allegations to deliberately tarnish the image and credibility of the Commission probably because of a personal grudge he harbours against me based on reasons he has not disclosed'. Dealing with statements by unidentified individuals upon which Moabi relied for his contention that there was a secret agenda, Justice Seriti stated that he did not recall making such utterances. However, even if he 'may have uttered words similar to those' attributed to him, this would not show the existence of a secret agenda. He drew attention to certain factors 'which strongly militate against the existence of a secret agenda' including the fact that he is a 'senior judge' and is 'fully conscious of the oath of office' that he took. Moreover, he is assisted by two other senior judges 'whose integrity is beyond reproach' (press statement by Justice Seriti, 22 January 2013). In a display of solidarity, the remaining evidence leaders issued a memorandum on the same day. They noted that 'the Chairperson and the Commissioners are respected judges of the Superior Courts' and that they, as evidence leaders, 'are all independent legal practitioners in private practice and are not employed by the Arms Commission'. They stated that 'at no time have we gained the impression that matters are being hidden from us', and that none of them had received any 'instructions' in any form. They concluded by expressing their 'confidence in the leadership of the Honourable Chairperson and the Commissioners in the execution of their mandate' (memorandum by evidence leaders, 22 January 2013). The need for self-justification does not augur well for the Commission. As Lord Denning aptly pointed out in the context of contempt of court, judges must 'rely on (their) conduct itself to be its own vindication' (*R v Commissioner of Police of the Metropolis: Ex parte Blackburn* (2) [1968] 2 QB 150 (CA) 155).

The second reason identified by Beatson in support of judicial inquiries turns on the authority of the report that 'comes from the office of the Judge and his or her individual and institutional reputation for independence' (243). But, as Beatson rightly points out, the fact that an inquiry report 'is not dispositive means that it can be rejected by the Government or by the court of public opinion' (243). The rejection of a report by a judicial commission of inquiry acquires significance where the rejection is based upon 'a finding of primary fact or a recommendation as to personal responsibility' (245). In these instances, the authority of the particular judge may well be undermined. Again this resonates with the South African experience.

With regard to the advantage of structure and formality without the constraints of litigation, Beatson points out that it is sometimes argued that the use of a judge brings 'dignity' to the proceedings and that an inquiry may be particularly appropriate 'where there is no possibility of recourse to litigation and no ready political response' (247). He nevertheless points out that generally judges have a discretion regarding the procedure adopted at an inquiry. However, 'the way the discretion is exercised may reflect but also mask differences of view as to the nature of inquiries and the extent to which adversarial elements should be allowed to shape procedure' (247).

In the South African context there is the ever present danger of judicialising an inquiry and effectively turning it into a trial. This is plainly what has occurred at the Marikana Commission resulting in major delays where expedition was called for. Of course, inquisitorial procedures must be fair. This, however, ought to be creatively used having particular regard to the ultimate purposes sought to be achieved by the inquiry. In Marikana, for example, six witnesses have each testified for seventeen or more days. This is indicative of insufficient control over the proceedings, turning the inquiry into a lengthy and extensive trial.

As to the achievement of closure, Beatson points out that the capacity of a judicial inquiry to draw a line under a crisis depends on a number of factors. These include the extent to which the authority, independence and impartiality of the judge conducting the inquiry remain unimpaired, the extent to which the findings and recommendations are publicly accepted, as well as the terms of reference (250). It remains to be seen whether either the Seriti or Farlam Commissions will bring closure to the matters under investigation.

Whether or not the use of judges in commissions of inquiry breaches the separation of powers has been given a qualified answer by the Constitutional Court. In *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC), the court noted that the tradition of using judges to preside over commissions of inquiry comes from the era of parliamentary sovereignty, and that what is now permissible must be determined in the light of the Constitution and not past practices. With regard to the question of judges presiding over commissions of inquiry, the court noted that 'much may depend on the subject-matter of the Commission'. In appropriate circumstances, 'judicial officers can no doubt preside over commissions of inquiry

without infringing the separation of powers', since the performance of such functions 'ordinarily calls for the qualities and skills required for the performance of judicial functions — independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information' (para [34]). It seems clear that the court envisaged situations in which the use of judges to preside over commissions of inquiry would be inappropriate and in breach of the separation of powers.

It is submitted that practice under the Constitution in relation to commissions of inquiry is not markedly different from the prior regime. This is undesirable in principle. A great deal of care ought to be required before judges enter the inevitable terrain of controversy and politics. Judges are not obliged to accept appointments to chair inquiries. Beatson points out that in the Australian State of Victoria, judges have refused to serve on commissions of inquiry since 1923 following the view of the then Chief Justice (222–3). Governments sometimes appoint commissions of inquiry as a means of diverting criticism or shifting responsibility from particular individuals and institutions. Judges should be wary of lending their credibility to such processes.

Judicial accountability

In the 2012 *Annual Survey*, we concluded this section of the review by predicting that the proceedings of three tribunals enquiring into alleged judicial misconduct 'ought to be underway, and perhaps concluded, by the end of 2013, barring further court challenges to their operations.' We experience little pleasure in the accuracy of the implicit prediction that such challenges would arise, delaying the completion of two very long-running inquiries into alleged judicial indiscipline, as well as a more recent one. The primary source of the further drawing-out of these proceedings is, however, particularly disquieting.

Any observer of the South African legal system of the past ten years will be familiar with a series of allegations and court challenges surrounding the seemingly reluctant attempts by the Judicial Service Commission ('JSC') to deal with complaints about the conduct of the Judge President of the Western Cape High Court, John Hlophe. The issue, which remains alive at this stage, stems from a complaint lodged against him by all the serving justices of the Constitutional Court in late May 2008, alleging attempted interference with two of their members, Justice Nka-

binde and (then) Acting Justice Jafta, now a full member of that court, regarding a case before them at the time. After much back and forth and several rounds of litigation, details of which are recorded in the *Annual Surveys* of the past five years, this complaint, as well as those relating to the drunk-driving conviction of Judge Motata, and the complaint about tardy execution of their work against Judges Mavundla, Poswa, Preller and Webster of the Gauteng North High Court, were referred by the full JSC in late 2012 to a Judicial Conduct Tribunal ('JCT').

Such tribunals were duly composed by the Chief Justice, as required by Chapter 3 of the JSC Amendment Act of 2008, which came into force on 10 June 2010. The first to sit was that dealing with Judge Hlophe on 30 September 2013, and it was faced from the outset with a jurisdictional challenge from a totally unanticipated quarter. Its president, retired Judge Labuschagne and his colleagues heard from Justices Nkabinde and Jafta that they objected to the Tribunal's jurisdiction because no formal complaint had been laid before it in the manner required by the amended Act. Judge Hlophe associated himself with this objection. Of course the amendments only occurred after the formal laying of the original complaint by then Chief Justice Langa, on behalf of the Constitutional Court, and the justices had at no stage indicated that they would so object. When the JCT duly overruled this objection, Justices Nkabinde and Jafta launched review proceedings in the High Court, adding a further ground of objection, to the effect that it was an unlawful contravention of the separation of powers for section 24(1) of the Act to authorise the president of the JCT to appoint a public prosecutor to lead the evidence at such a tribunal.

This application for judicial review has effectively stopped the Hlophe JCT in its tracks and, predictably, the JCT appointed to hear the Motata matter, as well as the tribunal to hear the complaints about slow execution of judicial work, have not proceeded with their work pending the outcome of the review. In fact, the last JCT has also been challenged directly in review proceedings by Judge Poswa, accusing the JSC itself of dilatory and obstructionist behaviour, while the other judges have argued that the delays in producing their judgments were due to 'systemic' problems in the High Court.

The net result of all this is that the disciplinary mechanisms, so long anticipated and designed with such care to seek to deliver the JSC from its many failings in this aspect of its work, have been

stalled in their tracks, and an outcome (with the possibility of appeals to higher courts) is unlikely for at least another year. Once again, therefore, untested allegations besmirch the reputations of at least six senior judges, and the reputation of the entire superior court judiciary is sullied. Given the increasing evidence of maladministration and professional malpractice which has begun to feature in this chapter of the *Annual Survey* and which is reflected, sometimes alarmingly, below, alarm bells must necessarily be sounding in the corridors of the Office of the Chief Justice.

This bleak picture is strongly accentuated by the JSC's continued inability to steer clear of controversy and even unlawfulness in its other function, that of appointing judges. The potential tension between the requirements of section 174(1) and (2) of the Constitution has from the outset created difficulty for the JSC, because it 'must' satisfy itself as to a judicial appointee's appropriate qualification, fitness and propriety to hold judicial office, while at the same time it is obliged to 'consider' the 'need for the judiciary to reflect broadly the racial and gender composition' of the country. In April 2011, the JSC interviewed seven short-listed candidates for possible appointment to three vacancies in the Western Cape High Court, but recommended the appointment of the only black candidate, leaving two vacancies to be filled later. The Cape Bar Council ('CBC') challenged this decision as invalid and unconstitutional, relying broadly on two arguments: that the JSC had been improperly constituted when reaching that decision, as neither the President nor Deputy President of the SCA was present at the meeting; and because the JSC had no reason not to fill the vacancies, and that its failure to do so made its decision irrational and unconstitutional. The court *a quo* (Koen and Mokgohloa JJ, brought in from outside the division to hear the case) found in favour of this challenge (*Cape Bar Council v JSC* 2012 (4) BCLR 406 (WCC)), but also gave the JSC leave to appeal its decision.

The JSC duly appealed to the Supreme Court of Appeal — the judgment is reported as *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA). The JSC initially raised two points *in limine*: that the decision was effectively not amenable to review at all as such decisions were excluded from the definition of 'administrative action' by section 1 of the Promotion of Administrative Justice Act ('PAJA') of 2000; and that the CBC should from the outset have joined Judge Henney (the successful applicant for

appointment) in its review application as he was clearly an interested party. Only the latter point was pursued by the JSC on appeal, and the CBC anticipated it by seeking at that stage to join both Henney and the six other candidates. This aspect of the appeal proceedings drew some differences of opinion from among the parties and the candidates, and an opportunistic accused convicted of criminal conduct by Judge Henney sought to make his status as a judge a matter for appeal (paras [8], [9]). Therefore, there were five issues which had to be decided (para [10]), three related to process, while two focused on the substance of the JSC's conduct. We shall concentrate on the latter.

Before turning to the substantial questions, the Supreme Court of Appeal (Brand JA, with whom Cloete, Snyders, Mhlantla and Petse JJA concurred) saw fit to emphasise that decisions of the JSC relating to the appointment of judges, while clearly excluded from review under section 1(*gg*) of the PAJA, remained reviewable like any other exercise of public power under the principle of legality (paras [19]–[22]). As to the composition of the JSC when it decided not to fill the vacancies, the JSC argued that the fact that Mpati P had been present until the day before the decision was taken and that not all the members of the JSC had to be present at all times, meant that the decision was validly taken. The judges did not agree: the President of the Supreme Court of Appeal was named in the Constitution as one of its *ex officio* members, as was the Chief Justice, and so his presence was mandatory, and his Deputy had not even been invited to attend. There was also precedent to rely on in the form of *Acting Chairperson: JSC v Premier of the Western Cape Province* 2011 (3) SA 538 (SCA), one of the several Hlophe-related legal challenges (paras [26]–[33]). The mandatory requirement of the presence of the *ex officio* members of the JSC also implied that no decision taken in their absence could stand (paras [34]–[36]).

The appeal court then moved to consider the rationality of the JSC's decision to leave two vacancies on the Cape Bench, despite there being at least sufficient interviewed candidates who were appropriately qualified and fit and proper for appointment. The CBC had asked the JSC for reasons for its decision, to which the JSC had responded that none of the candidates had received sufficient votes for recommendation. It was not denied that the three candidates proposed by the CBC satisfied the requirements of section 174(1), nor was it said that race or gender

considerations had played a role in the decision, only that they had not received support of the majority of the JSC (paras [38], [39]). Essentially, the JSC argued that it had no duty to give reasons; that it had in fact given such a reason, being non-majority support; and that the secret voting practice adopted by the JSC did not allow it to provide reasons (para [42]). While acknowledging that there was no express obligation to give reasons, the Supreme Court of Appeal responded that this was clearly implied, founded in the constitutional duties to act in a rational, non-arbitrary, transparent and accountable manner (para [43]). On this basis, there was no other way to prove rational action without giving reasons; how could anyone rebut the sort of response provided by the JSC in this case: 'Trust me, I have good reasons, but I am not prepared to provide them?' (para [44]). Once it was accepted that such an obligation existed in law, the JSC could not plead that its current way of operating was not conducive to the provision of reasons — it could not argue that practice determined the legal principles, rather that legal principle determined practice (paras [45]–[50]). The court was careful to add that this obligation did not exist in each and every circumstance in which the JSC decided matters, but it certainly applied in the context of the appeal. Consequently, the failure to comply with the request to give reasons meant that the JSC's decision not to fill the vacancies was irrational and unlawful (para [51]).

Finally, the Supreme Court of Appeal considered the question of the validity in law of the voting procedure adopted by the JSC, which the Cape court had declared to be unconstitutional, an argument pursued on appeal by the *amicus curiae*, the Centre for Constitutional Rights. Although this procedure was 'shrouded in obscurity', and although the JSC had given two conflicting versions of how its members voted, the appeal court declined to consider and rule on this question, as any finding would be both 'redundant and based on uncertain facts' (para [53]). The appeal was dismissed with costs.

The outcome of this case adds another stinging rebuff to the high-handed and opaque manner in which the JSC operates when recommending the appointment of judges, which courts have ruled on repeatedly over the past five years. Given the vital role ascribed to the JSC by the Constitution, and the fact that it is chaired by the Chief Justice and has many leading figures in the administration of justice among its members, this woeful record is

at least embarrassing, if not an indictment of its own sense of fairness. There has been much comment on this record in the media and more litigation is anticipated. Unless there is a shift in the approach of the 'party political' element within the ranks of the JSC, its popular image and the lack of respect accorded to it by the legal profession, are likely to decline further, and the Constitution itself will be undermined.

Judicial recusal

The duty to be aware of the perceptions of both the parties and the public as to potential bias in a judicial officer is an onerous one. Challenges to judicial decisions — either at the outset or during a trial, or afterwards as a means of upsetting the decision — based on perceptions of favouring one side in litigation because of past associations, are not uncommon, and two such matters fall to be commented on in the past year.

In *Minister of Safety and Security v Jongwa and Another* 2013 (3) SA 455 (ECG), a decision in the Queenstown Magistrate's Court, was challenged in the Eastern Cape High Court, on the basis that the magistrate concerned had been involved in an intimate relationship with the attorney who appeared for the plaintiff in a successful claim for damages against the police for wrongful arrest and detention. It appeared that several months after the judgment had been handed down, the legal advisor to the police service in Queenstown (Von Papendorp) had approached the magistrate concerned to apprise him of his concerns on this score, stating that in his view recusal would have been appropriate. The magistrate was taken aback, and asked Von Papendorp whether the latter thought that his judgment had been wrong, to which Von Papendorp responded that he thought it had been correct, but that the *quantum* of damages awarded had been too high and that the amount awarded as to costs had also been excessive. Von Papendorp then met the attorney herself, and tried to persuade her to advise her client, the successful plaintiff, to abandon the judgment, after which the two parties could pursue a settlement of the matter. He followed this up with a letter to the attorney essentially repeating the above. The proposals proved fruitless: the plaintiff, now respondent, was unwilling to forego her success, and the attorney and magistrate both claimed that their relationship, out of which a child had been born, had in fact ended before the matter in question served before the magistrate so that there was no

reasonable basis for alleging bias. Von Papendorp persisted in alleging bias (paras [7]–[25]).

When the matter came before Pickering J on review, he noted that, despite the irreconcilable differences which existed on the papers, counsel for the Minister had specifically declined to refer the dispute for oral evidence, with the result that it had to be accepted that the relationship had in fact ended by the time that the magistrate heard the matter. As the applicant's entire argument had been built solely on the alleged existence of a relationship at the time the matter was heard, much of its thrust fell away. The applicant, however, argued further that the admission that there had been an intimate relationship between the magistrate and the attorney beforehand, was enough to found a reasonable apprehension of bias in the mind of those who appeared before the magistrate (paras [29]–[32]). Before considering the merit of this submission, the judge felt constrained to comment on the length of time it had taken Von Papendorp to raise his concerns — a full nine months after the handing down of judgment. The only explanation was that Von Papendorp had been redeployed to other duties during the Soccer World Cup in 2010, which in the judge's view was 'woefully inadequate'. Despite this, however, he felt it necessary to deal with the merits of the arguments (para [33]). A further aspect which called for judicial censure was Von Papendorp's conduct in approaching both the magistrate and the attorney in his attempts to settle the matter without an appeal or review. Pickering J described this as 'entirely improper and unprofessional' (para [34]).

On the merits, the judgment provides an excellent summary of the existing law on recusal, in which the right to a fair trial in section 34 of the Constitution and the seminal judgment in *President of the RSA v South African Rugby Football Union* 1999 (4) SA 137 (CC) provide the founding principles (paras [36]–[41]). Pickering J refers to several thorny examples of these principles being applied in practice, such as the appearances as counsel of his wife before Mogoeng J (as he then was, in *S v Dube* 2009 (2) SACR 99 (SCA)), of the elder son of Chaskalson P in the *SARFU* case, and in the same case a reference to the fact that Trengove SC had appeared before his father, Trengove JA, then on the Supreme Court of Appeal (paras [43]–[46]). He then refers to an article written by Wallis JA, who advances, by reference to developments in the United Kingdom, the view that the application of the rule may be shifting in practice to exclude

such appearances by close family members (para [47]). Nevertheless, in the current case, Pickering J decided that such issues were a matter of degree, and that the relationship such as had existed between the magistrate and attorney did not fall foul of the rule against bias, necessitating recusal, and so the application was dismissed with costs (paras [51], [52]).

One can imagine that the type of situation which gave rise to the dispute in *Jongwa* might arise with a degree of frequency in smaller towns where the group of legal professionals is relatively small, and where social intercourse may well occur mostly within its ranks: in the circumstances, Judge Pickering's decision seems a realistically wise one. The next reported case which raises conflicts of interest as its central argument, however, lies almost at the opposite extreme of the spectrum: here we have applicants in a high-value commercial dispute throwing the book, so to speak, at almost everyone else associated with the trial, to an extent which appears far-fetched. It is appropriate to consider this case under the heading of professional practice, which follows after the next section.

Enforcement of regional decisions

The *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) (SA) 325 (CC) involved the expropriation of the respondent farmers' land by the government of Zimbabwe (Zimbabwe) pursuant to its constitutionally authorised land-reform policy. The farmers approached the Southern African Development Community Tribunal ('Tribunal') for relief and the Tribunal decided in their favour. Zimbabwe failed to comply with its decision. The farmers again approached the Tribunal for relief. The Tribunal found in their favour and granted a costs order against Zimbabwe. Again Zimbabwe failed to comply.

The farmers approached the North Gauteng High Court, Pretoria ('High Court') for the registration and enforcement of the costs order in South Africa. The High Court ordered the registration and execution of the costs order against property of Zimbabwe in South Africa. Zimbabwe applied to the High Court for the rescission of the order, but the application was dismissed. Zimbabwe appealed unsuccessfully to the Supreme Court of Appeal. Aggrieved by that outcome, Zimbabwe sought leave to appeal to the Constitutional Court.

In a majority judgment, written by the Chief Justice, the court developed the common law on the enforcement of foreign

judgments and orders to apply to those of the Tribunal. The majority held that the High Court had correctly ordered that the costs order be enforced in South Africa.

Not only must the relevant provisions of the Treaty be taken into account as we develop the common law, but so must the spirit, purport and objects of the Bill of Rights be promoted. A construction of the Amended Treaty as well as the right of access to courts, with due regard to the constitutional values of the rule of law, human rights, accountability, responsiveness and openness, enjoins our courts to be inclined to recognise the right of access to our courts to register and enforce the Tribunal's decision. This will, as indicated above, be achieved by extending the meaning of 'foreign court' to the Tribunal. The need to do so is even more pronounced since Zimbabwe, against which an order sanctioned by the Treaty was made by the Tribunal, does, in terms of its Constitution, deny the aggrieved farmers access to domestic courts and compensation for expropriated land. Of importance also is the fact that a further resort to the Tribunal was necessitated by Zimbabwe's refusal to comply with the decision of the Tribunal (para [68]).

The court held that that development was provided for by the SADC legal instruments on the enforcement of the decisions of the Tribunal in the region. The majority also held that the Constitution enjoins our courts to develop the common law in order to facilitate the enjoyment of the rights provided for in the Bill of Rights, such as the right of access to courts, compensation for expropriation, and the rule of law, which, in terms of the amendment to the Constitution of Zimbabwe, would have been denied to the farmers had the costs order of the Tribunal not been enforced. For these reasons the appeal was dismissed with costs. The judgment is an important affirmation of South Africa's commitment to SADC regional instruments and structures.

THE LEGAL PROFESSION

Attorneys

Professional practice: 'Routine issues'

An apparent conflict of interests as well as an attempt to cause the recusal of a judge because of past professional associations, characterised *Wishart and Others v Blieden NO and Others* 2013 (6) SA 59 (KZP), in which applicants had been summoned to appear before Blieden J in an enquiry under section 417 of the Companies Act 61 of 1973. The applicants had initially refused to

attend such an enquiry, and had submitted through their attorney that Blieden J should refuse to allow the second to fourth respondents (all advocates briefed in the matter) to appear, which the judge had declined to order. The current application initially sought to review and set aside this decision, but the quest for this relief was abandoned, and narrowed to focus on the second to fourth respondents, seeking their exclusion from any participation in examining the applicants on the grounds that they were subject to a conflict of interest and were privy to confidential information in the matter (paras [1], [2]). This judgment then essentially turned into a dispute between the applicants and these three respondents, as well as their instructing attorney.

The matter was heard in Pietermaritzburg by Gorven J, who started (paras [1]–[15]) by outlining the facts and allegations at some length, relating to the relationship of the respondents to the applicants, through the web of companies in which the latter had material interests, one of which, Avstar, was the subject of the impugned enquiry. He concluded (para [16]) that ‘. . . the applicants make out no case on the papers that confidential disclosures concerning Avstar were made to any of the respondents’. This was not the end of the matter, however, as the judge then had to dispose of a number of further arguments on behalf of applicants, beginning with an application for his recusal. This aspect of the application was based on the fact that some eight years before this trial, while still an advocate in practice, the judge had participated in sequestration and related proceedings in which second respondent had also participated, although at no stage were they co-counsel or briefed by the same attorneys. Indeed, the application for recusal only followed when Judge Gorven, probably sensing the apprehensions of the applicants, mentioned this incident at the outset of proceedings in this matter. After the judge provided a detailed account of his interaction with the second respondent, the applicant persisted with his application for recusal. Judge Gorven referred to the Code of Judicial Conduct now in operation in this country, and reiterated that his dealings with the second respondent were on a ‘purely professional level’, as a result of which he dismissed the application for his recusal, as no ‘reasonable, objective and informed person would . . . reasonably apprehend’ that he would not bring an impartial mind to bear on the dispute (paras [19]–[23]).

As to the final interdict sought by applicants, Gorven J held that the test for the granting of this interdict (para [24]) was uncontro-

versial, but that its application in this case needed to be seen in the context of 'the legal contours which bear on this relief' in a number of different national jurisdictions, viz England, the United States of America, Canada and Australia (paras [26]–[33]). He set out the comparative law in some detail, because applicants had invited him to develop the South African law along the lines followed in Australia (para [34]), before setting out the law, as he saw it, in this country, relying on the approach taken in the Competition Appeal Court and elsewhere in several cases dealing with the fiduciary relationship between lawyer and client (paras [35]–[38]). Having defined the test to be applied (para [39]), Gorven J applied this to the facts before him, dealing with the question of standing, which became an issue as the applicants claimed a relationship of 'informal client' of the respondents, through their stake in the companies involved in the litigation. After detailed consideration of the facts and disputed averments, he concluded that the applicants' right not to be examined could not be supported on any grounds, and that, as the law in South Africa currently stood, the respondents owed no legal duty, either past or present, to the applicants (para [50]).

Again, this was not enough to dispose of the application, because it had been argued that the judge ought, in the circumstances and exercising the inherent jurisdiction of the courts to do so (as confirmed in section 173 of the Constitution) to be developing South African law in the light of the comparative experience already set out. Gorven J acknowledged (para [52]) two instances in which this jurisdiction ought to be exercised: when the common law is inconsistent with a constitutional provision, or when such a rule falls short of the 'spirit, purport and objects' of the Bill of Rights (Constitution, s 39 (2) referring to *S v Thebus* 2003 (6) 505 SA (CC) para [28]). However, he held that neither of the latter triggers to such jurisdiction existed here, but speculated that it was possible that, if it had been established that the applicants had been 'informal clients', a legal duty in delict may have arisen as a result. However, such a situation would arise only if the facts warranted any development at all which, after further review of case authority both here and abroad, the judge was unable to establish (para [57]). The applicants had, therefore, signally failed to prove the clear right required to grant an interdict, and the application was dismissed with costs.

While a reading of the report suggests that the application was at best far-fetched in its aspirations, the thorough, courteous and

clear manner in which Judge Gorven reached his various findings and decisions is commensurate with the best traditions of judicial impartiality and accountability, both to the parties and to the wider public, in this country. This is encouraging, given some of the dubious practices shown to exist in the administration of justice and outlined in several respects in the rest of this section.

In *Steyn NO v Ronald Bobroff & Partners* 2013 (2) SA 311 (SCA), the 'contentious question of the duties and obligations of an attorney to his/her client' and an attorney's liability 'for want of the requisite care, skill and diligence expected', were considered by the appeal court. The facts (paras [5]–[8]) were briefly: the appellant had instructed the respondent firm of attorneys to pursue a claim under the Road Accident Fund on behalf of her minor son, who had sustained serious head injuries in a motor accident. A claim was lodged with the Fund, but was not met, with the result that a trial date was set down, some four years after the engagement of the respondent's services. Four months before the trial date, the appellant terminated the respondent's services, without giving reasons. Five days after the trial had led to an award of damages to the appellant, she instituted a claim for damages against the respondent, claiming interest of almost half a million rand, calculated on the sum awarded as damages, over the period of fourteen and a half months which, she alleged, had been the delay caused by the respondent's failure timeously to lodge her claim. The gist of her claim was that the respondent firm both advertised and was known widely as specialist personal injury attorneys, and that she had therefore expected a degree of professionalism and care in such matters which had not been forthcoming.

Bosielo JA (with whom Brand and Shongwe JJA, and Southwood and Saldulker AJJA concurred) deemed it wise to start his judgment with a brief exposition of the evolution of the profession of an attorney in this country, acknowledging that claims for negligent conduct could lead to awards for damages by a court of law (paras [2], [3]). He then set out in complete terms the appellant's particulars of claim detailing exact time periods which had elapsed between the various stages in pursuing her claim against the Fund, and decided that the matter was to be resolved as one arising out of contract rather than delict (paras [11]–[14]). The central question which needed to be resolved was whether the fourteen and a half month delay in lodging the claim, breached a tacit term of the agreement signed by the appellant

when engaging the respondent's services (para [24]). Given that the head injuries that the appellant's son had suffered were complex, requiring more than one medical examination over time, the court was unable to hold this delay unreasonable (para [26]), especially given the respondent's failure to adduce expert testimony to the effect that such a delay was unreasonable (para [29]). The appeal was accordingly dismissed with costs.

Brand JA delivered a brief separate judgment, concurred in by the rest of the court, in which he clarified the nature of the 'fundamentally flawed premise' from which appellant's claim proceeded. This was that *mora* interest could only be claimed on a principal debt, rather than, as here, as a 'component in the calculation of damages for alleged breach of mandate' (paras [35], [36]). On this ground too, Brand JA would have rejected the appeal (para [38]).

While the disposal of this appeal appears to be reasonably grounded, we feel constrained to note several instances of poor proofreading encountered in the main judgment, such as the use of 'expedience' when 'expedition' was intended in para [9], of 'breadth' rather than 'breath' in para [12] and the misspelling of Aquilian (Acquilian — para [14]) and 'practising' (practicing — para [29](f)). While one appreciates the great pressure under which the judiciary mostly operates, such lapses are to be regretted; fortunately, the fact that they have been noticed indicates that they are not often encountered.

Delay in carrying out professional duties required the attention of the Supreme Court of Appeal once again in *Margalit v Standard Bank of South Africa Ltd* 2013 (2) SA 466 (SCA), but in this case the claim for damages in the form of interest on money due to the client succeeded. The essence of the negligence alleged by the client was the failure of the conveyancing attorney to note that there were two bonds registered over the property being sold, rather than just one, the resolution of which oversight delayed transfer of the property and full payment to the seller, who then sued for loss of interest on the principal sum. Leach JA (with whom Nugent and Pillay JJA, and Southwood and Erasmus AJJA concurred) had little difficulty in both establishing that negligence existed and attributing it to the conveyancer's overlooking the existence of the second bond over the property, a standard of care which 'fell well short of what is expected of a reasonable conveyancer' who should 'fastidiously examine all relevant documents' (para [29]). Interestingly, although expert

evidence had been led in the court *a quo*, it had not touched directly on the question to be decided by the court, but this did not deter the Supreme Court of Appeal from ruling on the matter of negligence because 'the nature of the conduct may well be such that a court, even without the benefit of professional opinion, may determine that the conduct . . . clearly falls below the mark' of reasonableness, as had been the case here. The court was also constrained to comment critically on what seems to be an astonishing level of professional error and incompetence by the respondents, including the loss by Standard Bank of its copies of both the title deeds as well as its mortgage bonds over the properties: '[a]ccording to the evidence, banks losing documents of this nature is an almost everyday occurrence' (para [10]).

Two further judgments relating to professional practice in general need to be noted at this point. In *Law Society of the Cape of Good Hope v Randell* 2013 (3) SA 437 (SCA), the judgment of the Eastern Cape High Court noted in last year's *Annual Survey* was unanimously overruled in a judgment by Mthiyane DP (Majiedt JA and Van der Merwe, Swain and Mbha AJJA concurring). The earlier decision had effectively stayed striking-off proceedings brought by the appellant against an attorney who was due to stand trial accused of criminal activity relating to his non-professional duties as a member of a school governing body. This approach was found to have erred both in legal principle and on application to the facts of the case as ' . . . a stay will only be granted when there is an element of state compulsion impacting on the accused person's right to silence' (para [23]), a principle which accorded with approaches in foreign jurisdictions (paras [24]–[26]). The appeal was dismissed with costs on an attorney and client scale.

A rather alarming aspect of attorneys' practice, if widespread, was exposed and deprecated by the court in *Plumb on Plumbers v Lauderdale* 2013 (1) SA 60 (KZD). Here Lopes J, in reading the papers in sequestration proceedings, noticed allegations of fact which sounded familiar. On further research by his registrar, three further sequestration applications within the three-week-period before the Durban High Court were discovered containing identical allegations of fact in the founding affidavits, a remarkable coincidence (para [2]). The attorney concerned was asked certain questions in this regard and filed affidavits to seek to explain these coincidences, but the court was not satisfied that the explanation justified what had happened in this case. In

reaching this conclusion, Lopes J issued the following warning: 'However much the swearing of an oath may have become diluted in modern society by the inexperience or lack of training of commissioners of oaths, or a lack of appreciation of their functions, the swearing of an oath by a deponent is a serious and important function' (para [6]). After making further remarks which highlighted similar concerns raised by judges about this matter in the past, the court did not confirm the rule *nisi*, and referred the conduct of the lawyers involved to the Law Society and the Society of Advocates for further investigation (para [11]).

Contingency fees

Some years ago, in an attempt to widen access to the courts and to regulate informal practices, the Contingency Fees Act 66 of 1997 was passed, requiring a number of formal steps to be taken to safeguard the position of the client in such an arrangement. This practice came before the courts in two reported cases in 2013. In *Tjatji v Road Accident Fund and Two Similar Cases* 2013 (2) SA 632 (GSJ), Boruchowitz J had to rule on the validity of three agreements to pursue claims against the Road Accident Fund, all of which had been entered into between the respective attorneys and clients within days of the trials which would dispose of their claims. Were such agreements, which replaced earlier agreements entered into between the attorneys and their clients, valid in law? In several respects, the court found that, although they may have been in the correct form, they failed to comply with the requirements of the Act *in substance*. In particular, the judge held that the Act was intended to be 'exhaustive of the rights of legal practitioners to conclude contingency fee agreements with their clients' (para [12]), that such an agreement which does not comply with the Act is illegal (para [13]) and that, although the Act was silent as to when exactly such agreements were to be entered into (as was argued by the attorneys concerned, para [14]), there were clear indications in the text of the Act that such agreements had to be entered into sufficiently early so as to be able to comply with the Act's requirements (para [15]). Therefore, in each case the new agreement was invalid (the reasons are set out in paras [16]–[24]), and additionally so because they attempted retrospectively to validate agreements entered into in violation of the Act (para [25]). As these purported agreements were invalid, the common law of a 'reasonable fee' for the work performed was ordered by the court (paras [26]–[28]).

The matter of contingency fees received much broader consideration by a full bench of the North Gauteng High Court in *South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development (Road Accident Fund, Intervening Party)* 2013 (2) SA 583 (GNP). According to Kathree-Setiloane J, who delivered judgment on behalf of the court (Mlambo JP and Fabricius J concurring), the 'meaning, effect and constitutionality' of the Contingency Fee Act had elicited much comment within the legal profession, and the Law Societies of the Northern Provinces and the Free State had, as a result, made rulings permitting their members to conclude agreements 'outside the prescripts of the Act, provided that certain criteria were met' (para [3]). The applicant in this case ('SAAPIL') was a voluntary association representing personal injury lawyers which sought a decision from the court as to whether the Act was intended to exhaust the authority of legal practitioners to conclude contingency agreements with their clients. SAAPIL presented three arguments: that the Act did not override the common-law right of practitioners to conclude contingency agreements; that if the Act were found to be exhaustive, it would be unconstitutional on the basis that it discriminated unfairly against lawyers and their clients and so fell foul of section 9 of the Constitution; and that sections 2 and 4 of the Act were unconstitutional because they breached certain rights in the Bill of Rights. These arguments were opposed by both the responsible Minister and the Road Accident Fund.

The limitations of this forum prevents doing full justice to the full and learned judgment of Judge Kathree-Setiloane, which bears close reading, so the essence of her findings must be relied on here. As to the first argument that the Act was not exhaustive, the court pointed to any number of judgments under the common law that contingency fee agreements were 'contrary to public policy, unenforceable and unlawful' (para [7]). No matter, argued SAAPIL, times had changed, and it was the duty of the court to adapt the law to adjust to modern developments in legal practice, and to serve to widen access to the courts for indigent clients. The court declined this invitation, both because it considered that the case law relied on by SAAPIL did not in fact support this view (para [18]), but also because 'law reform is primarily the responsibility of the Legislature, and not the Judiciary' (para [19]). After further analysis of previous judgments on the issue of contingency fees, including *Tjatji* (above), the court held that the Act

was indeed exhaustive of the authority of the profession to conclude contingency fee agreements: SAAPIL's argument that the Act did not preclude future developments permitting such arrangements outside its four corners was 'manifestly unfounded and irreconcilable' with existing precedent (para [34]).

As to the challenge based on inequality, Kathree-Setiloane J carefully reviewed the then state of equality jurisprudence, in particular the requirements that discrimination be rational, proportional, reasonable and fair. She relied extensively on the work of the South African Law Reform Commission which preceded the adoption of the Act (paras [45]–[51]) and various ethical and other practices of the attorneys' profession to conclude that the requirements put in place by the Act are both 'laudable and sensible', and that SAAPIL's proposition that it is unconstitutional was unsustainable (para [52]).

Finally, SAAPIL's argument that the setting of a cap on professional fees in section 2 of the Act contravened the right to have access to the courts in section 34 of the Constitution, was supported by no evidence in the papers (para [58]). The approach is in line with those in comparative jurisdictions (paras [59]–[61]), and even if this amounted to a limitation of the right, it was permissible and justifiable in terms of section 36 of the Constitution (para [62]). As to the Act's apparent infringement of the rights to remain silent and against self-incrimination (under section 35 of the Constitution), such an argument was again 'completely unsustainable' and SAAPIL 'has once again failed dismally to put up evidence . . . to support these challenges' (para [65]). This challenge was 'patently lacking in merit and [fell] to be dismissed' (para [67]). The application was dismissed with costs.

The clear and utterly persuasive approach taken by the full bench in this matter leaves the reader with no doubt as to the mind of the court and the conclusions it reached on the state of this particular aspect of the law. It is also written with a strong sense of the socio-economic conditions into which it will fall, and sets the stage appropriately for the consideration of two cases which reflect very negatively on the efficiency and probity of parts of the attorneys' profession. (As a matter of record, the Constitutional Court in February 2014 held that there were no reasonable grounds for success in an appeal from this judgment and another one heard by the same bench: see *Ronald Bobroff & Partners Inc v De Law Guerre; South African Association of Personal Injury*

Lawyers v Minister of Justice and Constitutional Development 2014 (3) SA 134 (CC), a decision of the court.) The continued attempts by certain law societies and practitioners to assert the existence of a 'common law' contingency fee agreement outside the parameters of the Contingency Fees Act is regrettable. This is especially so in light of the clear statement by the Supreme Court of Appeal in *Price Waterhouse Coopers Inc. v National Potato Co-operative* 2004 (6) SA 66 (SCA) para [41] that 'any contingency fee agreement . . . which is not covered by the Act is . . . illegal'. Despite this, the use of so-called common-law contingency fee agreements has been widespread. In light of the clear authority, it is submitted that two things need to be done as a matter of priority. First, attorneys who have utilised so-called common-law contingency fee agreements, are under a legal, moral and ethical duty to refund their clients all amounts over-charged. Second, the Law Societies are under a regulatory obligation to take appropriate steps against attorneys who have abused the contingency fee regime.

Professional malpractice?

The first two judgments noted in this section make for at least disturbing, and sometimes shocking reading, given what they reveal about the state of the administration of justice in some areas of legal practice. We start with an area which has been prominent above and in which contingency-fee practice looms large.

In late 2012, counsel for the parties in a claim under the Road Accident Fund ('RAF') asked Judge Satchwell of the South Gauteng High Court to make their agreement an order of court. Perhaps they had no option but to request this from her, or perhaps they were culpably ignorant of her role in the development of this area of the law, but they certainly ended up with more than they had bargained for. The sorry tale is told in *Motswai v Road Accident Fund* 2013 (3) SA 8 (GSJ). In *Motswai*, an attorney knowingly prepared court papers containing untruths in support of a claim for general damages despite the fact that the road accident victim had not sustained any serious injury.

The bare facts which underlay this judgment can be quickly summarised: Motswai, a pedestrian, was injured in a motor accident and suffered a soft tissue injury to his right ankle, for which he was given painkillers after X-rays had been taken — no permanent disability was expected by the medical doctor who

treated him. Yet, within a year, a claim was registered on his behalf with the RAF, including a claim for general damages, and within a further nine months summons was issued against the RAF for an amount more than triple the first claim, including considerable damages for past and future medical expenses as well as general damages for pain and suffering, loss of amenities of life, and disability resulting from a 'fractured right ankle', and costs. In the last category were recompense for the services of several medical specialists as well as an occupational therapist and an industrial psychologist, although the file before the judge contained no reports from the last two, and the RAF had in its defence procured a similar number of reports (paras [5]–[15]). When counsel for the parties approached Judge Satchwell in chambers, they said that there was only one outstanding issue to be settled, and that was whether Motswai should be compensated for loss of earnings attendant upon future need to undergo physiotherapy for his injury. As the plaintiff was at that stage employed on only three days per week, it took the judge a mere '30 seconds' to determine that, should such treatment be still needed, it could happen on those days of the week when he was not working (para [16]).

Judge Satchwell starts her judgment by recording the fact that she spent three and a half years of her life 'considering the principles and practice of road accident compensation both in South Africa and throughout the world', as chair of the Road Accident Fund Commission. During this time she learned of the important part which such compensation can play as part of a national system of social security, but also that '... the current system is both perceived by and utilised as a means of providing a livelihood for administrators, attorneys, advocates and professional experts employed both by the RAF and road accident victims' (para [1]). In her words, the judgment before her was litigation 'for the sole benefit of an enrichment of those "facilitators" of access to road accident compensation whom I have heard one judge describe as "carnivorous" and whom I would describe as "predatory"' (para [2]). With this opening salvo, the court sets the scene for what follows: a litany of the cynical abuse of a system set up to benefit some, yet 'captured' in certain cases by others, those intended to make the system work effectively: this, the judge informs us, is not an 'unusual' situation, her sources being 'many judges' in her division of the High Court (para [20]).

There was, in her judgment, no triable issue: there had been no serious injury as the basis for a claim, and an officer of the court had prepared and signed pleadings knowing that they were based on untrue allegations (paras [22]–[32]); there had been no actual financial loss or *quantum* of damages, the road accident victim would receive no benefit, and the apportionment for future medical expenses had been an irrelevance (paras [38]–[52]). These portions of the judgment are replete with comments critical of the conduct of those who facilitated this charade, but Judge Satchwell devoted certain sections of it directly to this aspect. Under the heading ‘The Duty of Legal Representatives’ (paras [33]–[37]), the judgment refers to those attributes stipulated in earlier judgments of the courts to be required of legal practitioners, such as ‘complete honesty, reliability and integrity’, while also noting judgments in which the conduct of legal representatives had fallen short of these standards. Satchwell J concludes this section of her judgment by finding that the attorney representing Motswai had behaved in a manner which was ‘legally untenable, iniquitous and ethically unconscionable’, and noted that a copy of the judgment would be sent to the Law Society of the Northern Provinces (paras [36], [37]). Furthermore, under the general heading ‘Rewards for Facilitators’ (from para [53]), the court isolates the benefits accrued by legal representatives (paras [54]–[61]), medical and other experts (paras [62]–[77]), and the ‘supine and uncritical’ attitude of the administrators and attorneys employed by the RAF (paras [78]–[89]), and subjects each such category of ‘facilitators’ to withering criticism.

Finally, when it came to the award of costs, Judge Satchwell held that none of the legal representatives or other experts should receive any fees: indeed, she was of the view that, if the latter were to be remunerated, the attorneys should bear such costs *de bonis propriis*. As this possibility had not been raised with them earlier, she postponed a final decision on these costs to a hearing to be arranged, but ruled definitively that counsel should be paid on the magistrate’s rather than the High Court scale (paras [90]–[92]). As part of her order, the judge required that her judgment be forwarded to the Law Society of the Northern Provinces, the Bar Council, the Chairperson of the RAF, the Minister of Transport and the Health Professions Council.

Judicial criticism of the shocking practices detailed starkly in this judgment were echoed, albeit within a more limited ambit but in hardly less forthright terms, in *Tasima (Pty) Ltd v Department of*

Transport 2013 (4) SA 134 (GNP), an appeal to the full bench of the North Gauteng High Court from an order of Ledwaba J in the urgent motion court in that division. While the substance of the legal dispute between the parties concerned the respondent's alleged failure to abide by an agreement between it and the appellant concerning the provision by the latter of an electronic national traffic information system, a matter of national importance and much in the media, the truly shocking aspect of this judgment is less the outcome than what it exposes regarding the quality of service rendered to the respondent by the State Attorney's office.

Tuchten J (with whom Van der Merwe and Kollapen JJ concurred) devoted the entire first half of his judgment (paras [1]–[43]) to recounting the tortuous procedural path that this dispute had followed until that point, including applications to the Deputy Judge President for special hearing dates, meetings between the parties' legal representatives which should have but did not occur, requests by the appellant for contempt proceedings, and so on. (There appears to be some inaccuracy in the judgment itself in telling this story, as the references to '2012' on several occasions in paras [25]–[27] of the judgment make no sense: '2013' must have been intended.) Be that as it may, at the root of these delays and frustrations of the administration of justice was the State Attorney's office in Pretoria, and particularly one of its employees, Ms Lithole, who consistently failed to respond to correspondence and meet deadlines. This was evidence of a 'startling dereliction of duty' by the respondents, which for example, included a 'considered decision' by counsel in the case not to file answering affidavits to the appellant's factual allegations on occasion, an 'exceptionally unwise' decision, in the view of the court (para [14]).

Further evidence of dereliction of duty came in the founding affidavit by Ms Lithole (referred to in para [31]) that the fact that some communication had reached her from the appellant's attorneys on 21 December 2012, rendered her and other staff at her office unable to respond, as they 'had been preparing to go on leave' over the festive season. Ms Lithole's answering affidavit is described by the court as 'disgraceful': in describing her own office as 'dysfunctional', she complained that the appellant's attorneys communicated mainly by e-mail, as she 'rarely' looked at e-mails: had they instead written letters to her, she would certainly have responded 'accordingly' (para [33]). This conduct

appeared to the court to be 'unprofessional', and her whole explanation appeared to be 'questionable', given the fact that she had, on occasion in this litigation, resorted to using e-mail. Indeed, the court felt compelled to raise the possibility (on which it did not rule) that her explanation could in whole or part be untruthful (para [35]). In any event, it 'deprecated strongly' her conduct, which 'seriously prejudices the administration of justice' (para [36]). As a result, Tuchten J ordered that copies of the judgment be sent to the Minister of Justice, the Portfolio Committee on Justice in Parliament and the Law Society for the Northern Provinces, with a request that the latter investigate Ms Lithole's conduct and the office of the State Attorney (para [38]). The court also had strong words of censure for the arguments of counsel for the respondents as 'utterly without merit', for an attempt to postpone the appeal, and also for the direct participation by counsel in the formal administration of agreeing on trial dates which should be left to the attorneys (paras [41], [42]).

As to the substance of the appeal, the appellant's arguments stood unopposed due to the failure by the respondents' counsel to file answering affidavits (para [46]). The rest of the judgment deals with the consequences of the respondents' failure to comply with the agreements which it had made with the appellant, and on who should bear primary responsibility for this, even to the extent of being held in contempt of court order (paras [47]–[72]). The court's concern on this score was 'exacerbated by the alarming ineptitude' with which the respondents had conducted the case, including its 'indefensible and incomprehensible' decision by counsel not to file answering affidavits (para [59]). The appeal thus succeeded, and the court displayed its displeasure with the respondents' counsel by directing that 'counsel for the respondents may recover no fees from their attorneys or their clients in relation to this appeal and the application for postponement, whether for consultations, preparation of documents or attendance at court' (para [73], so ordered, point 6.1, although provision was made for the counsel concerned to contest this aspect within ten days of the order of court). In addition, it was ordered that Ms Lithole bear 'the costs of the application for the postponement of the appeal including the costs of both senior and junior counsel on the scale as between attorney and own client. . . . The liability of Ms Lithole for these costs will be *de bonis propriis*' (point 4 of the order).

Given the extent and specificity of judicial displeasure and censure expressed in this section of the *Annual Survey*, and the

frequency with which judgments are being ordered to be referred to those responsible for regulating the various parts of the practising legal profession, it is appropriate to ask how the various professional bodies have responded. In particular, arising from the cases outlined immediately above, what exactly have the Association of Law Societies and the General Council of the Bar done to counter professional abuse by some of its members of the road accident compensation scheme? What have the Chief State Attorney and the Minister of Justice done to respond to the trenchant criticism of the state and conduct of the Pretoria office? Should the courts not be moving to require, in their orders, a specific obligation on those responsible to report back to court, publically and in detail, about the steps that they have taken to stamp out the decay which threatens those aspects of legal practice identified in the judgments, much like the courts from time to time impose structural interdicts on government departments, usually in the socio-economic sphere, to report back within a certain time to the court itself, detailing the action taken? Certainly, the worrying signs noted in this respect over the past few years of this publication, and the shocking tales recounted especially in *Motswai* and *Tasima* above, give great cause for concern. Perhaps it is for Parliament's Portfolio Committee on Justice to begin to exercise some form of oversight in this sphere. Certainly, as regards the practising profession, the cries that we have heard over the years in the face of the Legal Practice Bill about the efficacy of 'self-regulation' need some justification in practice if they are to be taken seriously.

A matter of form?

This section on attorneys' practice ends on a slightly less disturbing, yet very serious point, and that is the tenacity of unthinking sexist practices in legal practice, this time in the form of statements attested to by commissioners of oaths. In *ABSA Bank Ltd v Botha NO* 2013 (5) SA 563 (GNP), Kathree-Setiloane J was once again called on to express stern and clear criticism, in the face of a deponent to an affidavit stating that 'she' is female, yet the commissioner of oaths before whom the deponent appeared certified that the deponent was a male person. An objection was lodged against summary judgment in circumstances where the commissioner, who worked for the plaintiff bank, had committed such an error, where the deponent described herself as the 'manageress' of the bank concerned.

The plaintiff argued that this was a mere administrative error, but the defendants took issue, and lodged an objection in terms of rule 30 of the Uniform Rules of Court.

Noting that courts are reluctant to give summary judgment where they are not fully satisfied that plaintiff has an unanswerable case (para [5]), the judge rejected the argument by the plaintiff here that resort to section 6 of the Interpretation Act 33 of 1957, justified the use of the masculine to include females. The judge noted that an affidavit must be sworn to in the presence of the commissioner of oaths: was the commissioner in this case then mistaken as to the gender of the deponent? 'What is the court to believe?' On the face of it, as a result, the plaintiff's verifying affidavit was 'inherently contradictory and irregular', and therefore not an affidavit as contemplated in the rules (para [13]). The application for summary judgment was refused, with costs, and offers a salutary lesson for those who persist with pre-constitutional practices, even if only for lack of effort.

Advocates

Given the relatively extensive exposure which misconduct in the attorneys' part of the practising profession has had in court, as reflected above, it would be odd were indiscipline among advocates not also to appear from time to time in the law reports, even though its much smaller size and relatively tighter regulation by the bar councils should conduce to the maintenance of professional probity among advocates. Much damaging media attention to the role of counsel in RAF matters in Pretoria drew to a conclusion in *General Council of the Bar of South Africa v Geach and Others; Pillay and Others v Pretoria Society of Advocates and Another; and Bezuidenhout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA), the judgments in which tell a tale complementing that in *Motswai* above.

The following situation gave rise to disciplinary action taken against thirteen members of the Pretoria Bar (paras [8]–[50]). In order to manage its cash flow constraints, the RAF adopted an approach to claims against it arising from motor accidents which allowed it to settle them only within a short period before they were to be heard in court. This led to countless attorneys seeking trial dates and briefing advocates to be ready to appear in court on such dates, a practice mostly matched by the RAF itself, but in the full expectation that almost none of the matters would have to proceed to trial, as they either would have been settled in the

days leading up to the trial date or on the day itself, or, if a trial were indeed to result, a postponement would be sought. This created an extremely difficult situation for the Deputy Judge President responsible for compiling the roll, and led to certain advocates who specialised in road accident matters accepting several briefs for the same day in court, which fell foul of the ethical prohibition in terms of the Bar rules on 'double-briefing'. Not only did it seem as though a blind eye was initially turned by all concerned to this practice, but such advocates typically compounded the felony by charging for each settled claim as if they had devoted a day in court to each matter. This meant that they were guilty of 'overreaching': they were often paid several times over for the same day's work, again contrary to rules of practice and indeed the law. This sad state of affairs was summarised by Nugent JA (with whom Mpati P and Ponnar JA concurred) in the 'main judgment' as follows (para [27])

... the manner in which the affairs of the Fund were being conducted made it ripe for plundering, and the advocates concerned set about doing just that. To the extent that they double-briefed they transgressed and that was at least potentially prejudicial to their clients. But even where each instruction was capable of being fulfilled without prejudice to the others they charged fees to which they were not entitled. To have charged trial fees in those circumstances was dishonest. It is unfortunate that the Pretoria Bar Council did not see things that way.

The last sentence refers to the fact that most of the advocates concerned and many others, including some of those later involved in investigating these practices, did not see the latter claims as dishonest (regarded as an astonishing attitude by Nugent JA, para [40]). But the Bar Council was not idle: indeed, when these practices first came to their attention in 2006, the Council issued a circular to all its members, making it clear that both double-briefing and overreaching characterised their conduct, and that persistence in such conduct would be visited with disciplinary measures (para [29]). Regrettably, by September 2009 these practices had resumed, and the Bar Council convened two different ad hoc committees to advise it as to what disciplinary measures should be taken against thirteen of its members.

In the event, substantial sanctions were imposed on each of the thirteen advocates, consisting of both fines and suspension from practice for between one and six months. The Bar Council then applied to the North Gauteng High Court (a full bench of

three retired justices, appointed as Acting Judges for this purpose), for its endorsement of the measures taken, as well as any other order it deemed appropriate. The end result was that seven of the advocates were fined, their periods of suspension from practice almost all increased, a further such period imposed but suspended, and ordered to repay substantial sums of money to the RAF. The remaining six were struck off the roll and ordered to make repayments to the RAF (paras [48], [49]). The court acted in terms of its authority under section 7(1)(d) of the Admission of Advocates Act 74 of 1964, and it was this order which was appealed to the Supreme Court of Appeal.

In broad summary terms, the General Council of the Bar ('GCB') sought through its appeal, the imposition of more severe sanctions on the seven suspended advocates, while those struck off the roll appealed against the severity of their punishment. Essentially it was argued by all appellants that the High Court had misdirected itself in several ways.

The appeal court was divided in its response, three of its members dismissed the appeals in most respects, while the minority would have upheld relatively minor aspects of the appeal by the GCB. Nugent JA spoke for the majority on the general principles to be applied in such an appeal, and on the merits of the GCB's appeal and that of Bezuidenhout. Ponnar JA wrote for the majority on the appeals of the remaining five advocates who had been struck off. As Nugent JA's judgment was styled the 'main judgment' by the dissenting judges, it will be dealt with first. Critical to the majority's decision was the view which it took on the limits of the role of an appeal court in the circumstances under review. Relying on earlier judgments in similar cases, the court outlined three stages of enquiry, the first two of which were uncontroversial in this appeal (para [57]). What fell to be assessed on appeal was the exercise by the High Court of its discretion to determine an appropriate sanction, and the approach adopted by the majority was summarised as follows (para [57])

[w]here a discretion is conferred it implies that the matter for decision has no single answer and calls for judgment, upon which reasonable people might disagree. That being so a court on appeal is restricted in determining whether the decision-maker has correctly gone about the enquiry. If he or she has correctly gone about the enquiry then a court on appeal may not interfere with the decision, albeit that it considers the decision to be wrong.

In determining the GCB's appeal, the main judgment refused to be bound by the precise descriptive terms used by the High Court in characterising certain factors as either 'mitigating' or 'aggravating' and so on: as the majority reasoned: 'Going behind the inapt language used in the judgment and examining instead the line of reasoning it reveals — which I think one must do where the judgment is no model of linguistic exactness or elegance, as in this case — I find the judgment to reveal clearly that that is indeed how the court dealt with the matter' (para [73]). As to the authority of any superior court to exercise discipline over practitioners, the majority held this was inherent, with its 'roots in antiquity' (para [78]). The majority held that the High Court had not misdirected itself in ordering that the seven advocates be suspended rather than struck off; and also dismissed the appeal by Bezuidenhout against his striking off, save that it released him from the obligation imposed to reimburse the RAF — the High Court had not been entitled to order such payment where the advocate was no longer within its jurisdiction due to his having been struck off (paras [70]–[82]). The Supreme Court of Appeal ordered that the errant advocates bear the costs of the appeal, including those of the GCB (para [86]).

Ponnan JA started his judgment with the resounding but frequently misunderstood line from Shakespeare's *Henry VI*, to the following effect: 'The first thing we do, let's kill all the lawyers'. This is often quoted mistakenly as an endorsement of a justified anti-lawyer sentiment, yet the intention was the exact opposite, for 'The Bard recognised that for tyranny and anarchy to flourish, the law and all those who were sworn to uphold it had to first be eliminated'. However, to enjoy such status, 'absolute personal integrity and scrupulous honesty are demanded of each of them' (para [87]). The five advocates who had been struck off sought through their appeal to persuade the Supreme Court of Appeal that they had been too harshly dealt with, and so this part of the majority decision of the court analysed closely the order of the High Court to determine whether there had been any misdirection on its part, in the sense of the exercise of its discretion, the test as described in the main judgment. In its view, the majority held that a striking off was 'wholly justified' in each of the five instances, and the appeals were dismissed (paras [88]ff).

But before dealing with the facts relating to the behaviour of each of the five appellants in turn, and in some detail (paras [97]–[118]), Ponnan JA dealt with the argument by one of them

that one of the members of the High Court, Van Dijkhorst AJ, had created a perception of bias against the advocates disciplined, through a report of some remarks he had made to the pro forma prosecutor in the disciplinary enquiry. Having established that the test to be applied required twofold reasonableness, in that the person perceiving it and the perception itself had to be reasonable (para [91]), Ponnar JA examined the evidence, and found no basis at all for the satisfaction of that test. As to the individual merits of their conduct, it is appropriate to note the majority's summary conclusion: 'Their transgressions paint a picture of advocates who appear to be quite indifferent to the demands of their profession. The sustained nature of their transgressions, unlikely excuses and exculpatory explanations "manifest character defects, a lack of integrity, a lack of judgment and a lack of insight"' (para [118], footnote omitted).

The dissenting judgment by Wallis JA (with whom Leach JA concurred) was limited in its scope, but important in many respects. The minority agreed with all but three outcomes of the majority judgments, being a difference of view on the failure of the appeal by the GCB against the suspension, and not striking off, of advocates Geach, Guldenpfennig and Van Onselen (para [119]). In broad terms, Wallis JA held that the High Court had misdirected itself as to sanction in respect of both Geach and Van Onselen, because it had reached incorrect factual findings; and secondly, that it had further misdirected itself by insufficiently observing the principle of parity in assessing sanction, which necessitated a reconsideration by the appeal court of the sanctions imposed on all thirteen advocates (para [120]).

After setting out the background (paras [121]–[124]) and his interpretation of the law, in which he held that an appellate court in the current circumstances was 'in as good a position as a high court to assess the facts' (paras [125]–[129]), Justice Wallis considered the principal misconduct of those disciplined, concluding that 'their misconduct was deliberate, flagrant, serious and committed over a lengthy period of time' (paras [130]–[140]). He then moved (para [141]ff) to consider the 'additional misconduct' found to have been established in respect of the disciplined advocates, and it is here that the differences in opinion between the majority and minority appear. In regard to Geach, the fact that he had failed over a period of almost twenty years to register as a vendor for Value Added Tax (VAT) purposes, which was an offence attracting a possible prison term, that he had only so

registered as the result of this enquiry into his briefing patterns and financial affairs, and that he had responded to his potentially criminal conduct with 'breath-taking insouciance' (para [148]), persuaded the minority that the High Court had misdirected itself in not sufficiently taking this into account in its judgment.

After a further consideration of what was required by way of proving 'fitness and propriety' to practise as an advocate (paras [151]–[155]), Wallis JA considered in each case whether the High Court had misdirected itself as to sanction. He held that it had, in respect of Geach, as his seniority and leadership position and his flagrant failure to register for VAT purposes warranted his striking off, rather than suspension (paras [158]–[164]). In regard to Williams, Guldenpfennig and Van Onselen, all of whom were suspended, the dissenting judges weighed up their misconduct taken as whole in each case, against the misconduct of four of those who had been struck off, in order to test the High Court's exercise of its discretion against the principle of parity, in imposing sanction (para [167]ff). Wallis JA found that the High Court had indeed misdirected itself in seven respects (para [184]), and pointed out any number of disparities in treatment between them (paras [188]–[194]), and so undertook a reconsideration of the sanctions imposed on these seven advocates (para [197]). As a result, the minority would have struck Van Onselen from the roll, (para [203]), would as a 'borderline' decision have allowed Williams to remain on the roll but suspended (para [204]), but would also have struck Guldenpfennig from the roll, because of the 'nature and seriousness of the misconduct and the terms of the response to it' (para [206]).

Given the detail and length of these judgments, and the seriousness of the subject matter, this summary cannot claim to have done justice to their importance or close reasoning. It suffices perhaps to remark on the astounding attitude taken by most of those involved, and it seems further, that their misconduct could somehow be seen as assisting the scheme of compensation of road traffic victims and was not dishonest, an approach roundly and starkly condemned on several occasions in all three judgments. In the context of the level of fraud and injustice perpetrated by the attorneys (and others) in the cases described earlier, we can only express the hope that the exposure of such practices will lead to their immediate demise. One of the chief means of ensuring professional accountability is a necessary degree of open governance, and those bodies who regulate the

practice of law are urged to continue to be vigilant and as open as possible when instances of malpractice arise.

The National Prosecuting Authority

Democratic Alliance v President of The Republic of South Africa 2013 (1) SA 248 (CC) is the final instalment in the litigation concerning the appointment of Mr Menzi Simelane ('Simelane') as the National Director of Public Prosecutions in the face of concerns regarding his fitness for that office.

A brief account of the material facts is sufficient. Simelane, in his capacity as Director General of the Department of Justice and Constitutional Development, was heavily involved in a dispute concerning the proper role of then National Director, Mr Vusi Pikoli ('Pikoli'). Following Pikoli's suspension, former President Mbeki appointed a commission of enquiry headed by former speaker of Parliament, Dr Frene Ginwala, to enquire into Pikoli's fitness to hold office. Simelane testified under oath before the Ginwala Commission. The Ginwala Commission heavily criticised the conduct of Simelane and commented adversely on the credibility of his evidence. The then Minister of Justice and Constitutional Development requested the Public Service Commission ('PSC') to investigate Simelane's conduct during the Ginwala Commission. The PSC recommended disciplinary proceedings against Simelane. The new Minister, Mr Jeff Radebe, rejected the recommendations of the PSC (para [4]). The President then appointed Simelane as the NDPP two days after the Minister had rejected the PSC recommendations.

The Democratic Alliance applied to the High Court for an order reviewing and setting aside Simelane's appointment, relying primarily on the requirement that the NDPP be a 'fit and proper person'. The Supreme Court of Appeal held that the President's decision to appoint Simelane was irrational and invalid for four main reasons. The first was that, according to the President, he had firm views about Simelane being the right person for appointment even before he had considered whether Simelane was fit and proper. Second, the President incorrectly reasoned that the absence of evidence contradicting the idea that Simelane was fit and proper for appointment, justified the conclusion that he was indeed a fit and proper person. Third, the President disregarded the criticism of Simelane made by the Ginwala Commission on the tenuous basis that the Ginwala Commission had not been appointed to investigate Simelane, but Pikoli. Finally, the Presi-

dent too lightly brushed aside the recommendations of the PSC that disciplinary proceedings should be instituted against Simelane (para [6]).

Although Zondo AJ dissented on one narrow issue, the court was unanimous in dismissing the appeal against the decision of the Supreme Court of Appeal. Yacoob ADCJ wrote the majority judgment. He identified the following as the relevant issues

- (a) The question whether the requirement that the National Director must be a fit and proper person to be appointed to that position is an objective jurisdictional fact antecedent to appointment.
- (b) The requirements of rationality concerned in particular with —
 - (i) the distinction between reasonableness and rationality and the relationship between means and ends;
 - (ii) whether the process as well as the ultimate decision must be rational;
 - (iii) the consequences for rationality if relevant factors are ignored; and
 - (iv) rationality and the separation of powers.
- (c) An investigation into whether the decision of the President to appoint Mr Simelane was rational and, in particular, whether the President's failure to take into account the finding in relation to and evidence of Mr Simelane in the Ginwala Commission was rationally related to the purpose for which the power to appoint a National Director was conferred.
- (d) If the decision is found to be rational in this sense then we must evaluate whether —
 - (i) the evidence shows that Mr Simelane is a fit and proper person to be appointed the National Director; and
 - (ii) the President had an ulterior purpose in making the appointment (para [12]).

Whether fitness and propriety is an objective requirement

After tracing the key provisions of the Constitution and the National Prosecuting Authority Act 32 of 1998, Yacoob ADCJ turned to the question of whether the fit and proper requirement is an objective requirement. The Supreme Court of Appeal had held that the requirement that the National Director must be a fit and proper person is a jurisdictional fact capable of objective assessment (para [14]).

For slightly different reasons, Yacoob ADCJ agreed that the requirement is an objective jurisdictional fact (para [20]). He identified six reasons for this view. First, the Constitution leaves it to an Act of Parliament to determine the content of the qualification of the NDPP. Therefore, the Constitution does not leave the

determination of appropriate qualification to the President, but obliges the legislature to ensure that the NDPP is appropriately qualified (para [21]). Second, the Act itself does not say that the candidate for appointment should be fit and proper 'in the President's view' which it could have done had that been the intention (para [22]). Third, while the fit and proper assessment does require a 'value judgment', it does not follow that the decision lies within the sole and subjective preserve of the President. Value judgments, Yacoob ADCJ observed, are involved in virtually every decision any member of the executive might make where objective requirements are stipulated (para [23]). Fourth, Yacoob ADCJ pointed to the constitutional provision requiring that the National Prosecuting Authority perform its functions without fear, favour or prejudice (s 179(4) of the Constitution). In the court's view, a construction that rendered the qualification criteria a matter for the President's subjective opinion would not be in keeping with the constitutional guarantee of prosecutorial independence (para [24]). Fifth, Yacoob ADCJ pointed to the provision permitting the suspension of the NDPP on the basis that he is not a fit and proper person. If the requirement were a subjective one, President A might appoint a person in the subjective belief that the person is fit and proper and President B might form the active view that the person is not fit and proper and suspend him on that basis. Neither the Constitution nor the Act could have contemplated that the position of NDPP would be so vulnerable to presidential whim (para [25]). Finally, Yacoob ADCJ relied on the importance of the NDPP and the need that the office be non-political and non-partisan (para [26]).

Reasonableness and rationality

Yacoob ADCJ then turned to consider the distinction between reasonableness and rationality, insisting that the two must be kept conceptually distinct (para [29]). Yacoob ADCJ described the rationality review in the following terms

The reasoning in these cases shows that rationality review is really concerned with the evaluation of a relationship between means and ends: the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and the purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was con-

ferred. Once there is a rational relationship, an executive decision of the kind with which we are here concerned is constitutional (para [32]).

By contrast, a decision will be unreasonable, if 'it is one that a reasonable decision-maker could not reach' (para [29]).

Does rationality extend to the process followed?

Yacoob ADCJ confirmed that both the process by which a decision is made and the decision itself must be rational (para [34]). This conclusion raised the question whether each step in the process must be rationally related to the purpose for which the power is conferred (para [37]). Yacoob ADCJ held that the decision of the President as head of the National Executive can be successfully challenged 'only if a step in the process bears no rational relation to the purpose for which the power is conferred and the absence of this connection colours the process as a whole and hence the ultimate decision with irrationality' (para [37]). He held that the court must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality (para [37]).

Ignoring relevant factors

The court then turned to consider ignoring relevant factors as an aspect of a rationality review. Yacoob ADCJ held that there is a three-stage enquiry to be made when a court is faced with an executive decision where certain factors have been ignored.

The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational (para [39]).

Yacoob ADCJ was willing to accept that there may be rare circumstances in which the facts ignored may be relevant, but ignoring the facts would not render the entire decision irrational in that the means might nevertheless bear a rational link to the end sought to be achieved (para [40]).

Rationality and separation of powers

The court made short shrift of the respondents' argument that reviewing and setting aside Simelane's appointment would undermine the separation of powers.

It is therefore difficult to conceive how the separation of powers can be said to be undermined by the rationality enquiry. The only possible connection might be that rationality has a different meaning and content if separation of powers is involved than otherwise. In other words, the question whether the means adopted are rationally related to the ends in executive decision-making cases somehow involves a lower threshold than in relation to precisely the same decision involving the same process in the administrative context. This is wrong. Rationality does not conceive of differing thresholds. It cannot be suggested that a decision that would be irrational in an administrative law setting might mutate into a rational decision if the decision being evaluated was an executive one. The separation of powers has nothing to do with whether a decision is rational. In these circumstances, the principle of separation of powers is not of particular import in this case. Either the decision is rational or it is not (para [44]).

The appointment of Simelane

Having set out the relevant principles, the court turned to the question of whether the President had acted rationally in appointing Simelane. The starting point for the court was to consider the purpose for which the power was conferred on the President to appoint the NDPP. For the court, this purpose is to ensure that the person appointed as NDPP is sufficiently conscientious and has the integrity required to be entrusted with the responsibilities of the office (para [49]). The court examined the comments of the Ginwala Commission on the evidence and conduct of Simelane, and concluded that they 'represented brightly flashing red lights warning of impending danger to any person involved in the process of Mr Simelane's appointment to the position of [NDPP]' (para [52]). The court concluded that any failure to take these comments into account, or any decision to ignore them and proceed with the appointment, would not be rationally related to the purpose of the power: to appoint a person with sufficient conscientiousness and credibility (para [52]). The court carefully considered the specific facts relating to the proceedings before the Ginwala Commission and concluded that all the Ginwala Commission's criticisms of the evidence and approach by Simelane had a sufficient basis in the evidence before it (para [78]). The court also held that the criticisms expressed in the report of the PSC were well founded (para [78]).

The court then turned to consider the reasons why the Minister decided to ignore the criticisms by the Ginwala Commission, the evidence before the Commission and the recommendations of the PSC, and to advise the President to ignore these matters in the process of making the appointment. The first reason given by the Minister was that the PSC had not given Simelane an opportunity to be heard. The majority rejected this reason, observing that Simelane had been heard in the Ginwala Commission and that he would also receive a hearing in any disciplinary enquiry that would be instituted (para [80]). It was on this issue that Zondo AJ dissented, being unwilling to accept that the PSC was not required to afford Simelane an opportunity to be heard in the course of its investigation.

The second reason advanced by the Minister was that he agreed with the submissions made to him by Simelane's lawyers consequent upon the recommendations of the PSC. Yacoob ADCJ described the relevant submissions as 'technical and legalistic in nature', and took the view that they 'did not have a bearing on Simelane's integrity and honesty' (para [81]). The Minister's third reason was that Simelane had not been able to respond to the PSC because, absent an enquiry, the allegations against him had not been proved. The court rejected this reason too, holding that it was the Minister's decision that resulted in Simelane not being able to defend himself in an enquiry (para [82]). Fourth, the Minister had argued that the Commission was not investigating Simelane but Pikoli. Yacoob ADCJ held that this reason was also unacceptable because it implied that dishonesty on the part of a senior state official before a commission of enquiry, where the enquiry is not directly about the person concerned, can be disregarded (para [83]). The last reason relied upon by the Minister was that the Ginwala Commission was not a court. The court held that this was an irrelevant consideration as 'dishonesty is dishonesty wherever it occurs' (para [84]). Accordingly, the court concluded that the Minister's reasons for ignoring the indications of dishonesty did not hold water (para [85]). Accordingly, the President's decision to ignore these matters coloured the rationality of the entire process and rendered the ultimate decision irrational (para [86]).

In two short paragraphs towards the end of the judgment, the court qualified its judgment, stating that the judgment does not mean that Simelane cannot validly be appointed as NDPP as he may have an explanation and may be able to persuade the

President that he is a fit and proper person (para [90]). Secondly, the court noted that it was unnecessary for it to determine whether Simelane is in fact a fit and proper person (para [91]). These provisos are somewhat at odds with the overall tenor of the judgment, which strongly suggests that there is no rational basis to conclude that Simelane was — or could ever be — fit and proper to be appointed as NDPP.

This judgment is of major significance for the administration of justice for at least three reasons. First, it concerns the appointment of the most senior functionary in the criminal justice system who is vested with the power to institute criminal proceedings on behalf of the state, a function to be performed without fear, favour or prejudice (s 179 of the Constitution). Given the levels of crime in South Africa and the alarming degree of official corruption, the NDPP occupies a critical constitutional position. Second, the decision represents the important and appropriate degree of oversight required by courts in a constitutional democracy. The court was here confronted with a decision taken by the President who has himself been the target of criminal prosecution. Yet the court did not flinch from its duty to subject even decisions of the President to critical scrutiny. The decision is thus a powerful affirmation of the principle that no one is above the law. Third, the decision has wider implications for the appointment of functionaries generally, and particularly the importance of compliance with statutory standards such as the 'fit and proper' requirement.

The institution of silk

The long-running saga of the constitutionality of the institution of silk was finally resolved by the Constitutional Court towards the end of 2013 (*Mansingh v General Council of the Bar* 2014 (2) SA 26 (CC)). It will be recalled that Mansingh, a member of the Johannesburg Bar, had succeeded in the High Court in challenging the President's powers to award silk (2012 *Annual Survey* 5). The decision was reversed by the Supreme Court of Appeal (*General Council of the Bar v Mansingh* 2013 (3) SA 294 (SCA)) and that court's decision has now been confirmed by the Constitutional Court. Nkabinde J, on behalf of a unanimous court, characterised the issue as being the correct interpretation of section 84(2)(k) of the Constitution and in particular, 'whether the President has the power under that section to confer silk or senior counsel status on advocates'. She stated that the case was not about 'whether the institution of silk or SC status is good or bad,

or whether it is worthy of protection', nor was it about 'the merits of the applicant's own unsuccessful application for SC status' (para [2]). Although Mansingh had raised a number of collateral issues in her affidavits concerning, for example, the allegedly adverse economic effects and personal distress caused by a failed application for silk, the appeal turned on the narrow issue of the meaning of 'honour' in section 84(2)(k) of the Constitution. That section confers on the President the responsibility for 'conferring honours'. Adopting a purposive and contextual approach to constitutional interpretation, Nkabinde J held that the concept of 'honours' is 'linguistically wide enough to include the award of silk status' and that a proper reading of the section, taken together with the historical context, 'reaches the same conclusion' (para [20]). Nkabinde J further held that Mansingh had 'not provided sufficient basis for excluding the conferral of silk from the ambit of the President's power under section 84(2)(k)', nor had she pointed to 'any features of the institution that warrant its exclusion from the broad understanding of "honour"' (para [33]).

In the Constitutional Court, Mansingh took issue with the Supreme Court of Appeal's characterisation of the honour. She had contended that the appointment of silk 'purports to be a certificate of professional quality by the President' but, so it was argued, the President was 'not in a position to draw the merit-based distinctions on which the system is founded'. Brand JA rejected this argument. Instead, he accepted the argument advanced by the General Council of the Bar that 'what lies at the heart of the conferral of silk is the recognition by the President, as the head of state, of the esteem in which the recipients of silk are held in their profession by reason of their integrity and of their experience and excellence in advocacy' (SCA judgment paras [7], [9]). Mansingh persisted with her argument in the Constitutional Court that 'the status of silk was a form of certification of professional quality'. Endorsing the approach of the Supreme Court of Appeal, Nkabinde J dismissed this argument as being 'without merit' (CC judgment para [30]).

In the Supreme Court of Appeal, Mansingh advanced a new contention, raised in neither her papers nor in argument in the High Court. It was contended that the institution of silk itself infringes the rights of non-silks to equality (guaranteed by s 9 of the Constitution) and the right freely to choose one's trade, occupation or profession (guaranteed by s 22 of the Constitution). Brand JA rejected this argument. He reasoned that the

contentions newly advanced were 'devoid of any basis of fact'. It was accordingly 'not clear how the institution of silk in itself can be said to impact on the rights guaranteed by section 9 or section 22. What is it in the institution of silk that offends the non-silk's right to equality or the way in which they conduct their advocates practices?'. Moreover, if such an attack were open to Mansingh, it ought to be directed 'against the practices which are not inherent in the honour of receiving silk — rather than against the institution of silk itself' (SCA judgment para [33]). This approach was expressly endorsed by the Constitutional Court (CC judgment para [37]).

The Mansingh litigation did not concern itself with the desirability or otherwise of the institution of silk, or with the procedures for its award. These are controversial questions. One of the more powerful cases for the abolition of silk has been made by Owen Rogers SC (as he then was) ('Silk: Why it should go' (2004) Dec *Advocate* 26). This article was attached to Mansingh's papers. A considerable amount of Rogers's argument rests upon the characterisation of silk as being 'a badge of forensic experience and excellence', which award by the President unfairly skews the operational conditions of advocacy, an argument largely rejected by the Supreme Court of Appeal and the Constitutional Court in the *Mansingh* litigation. These courts rejected the notion that the conferral of silk is a certificate of professional quality. Leaving aside proper legal classifications and accepting the characterisation of the institution as recognition of the esteem in which the recipients are held in their profession, there is still cogency in certain of Rogers's arguments. He contends that advocates should depend on their reputation earned in the marketplace and nothing else. By contrast, and by reason of the status attached to silk, advocates are frequently selected not simply on the basis of their ability, but because of their status. He argues that 'from the very fact that the institution of silk exists, many clients and not a few attorneys, assume that the status is significant and even if the wiser ones know that competence rather than status is what should matter, they cannot be sure that the judge may not attach significance to the fact that the other side is represented by a silk' (26).

Rogers also argues that the institution of silk influences briefing 'in a pernicious way' because in cases where a wealthy client briefs a silk, the other side might be induced to 'match fire with fire' even though the case does not warrant it. Experience bears out the correctness of this argument.

Finally, Rogers takes issue with the procedures for the selection of silks. He considers criteria such as experience, durable and extensive practice, and high standing as being 'inherently imprecise' calling for a value judgment where views could legitimately differ. Defending choices on a rational basis would therefore be extremely difficult. He considers that reform of the selection procedures could not remove the criteria which will 'always remain imprecise' (27). Once again, the force of this argument is dependent on characterising the institution of silk as a certificate of excellence. The argument is significantly diluted — although not eliminated — when the institution is considered as a reflection of the esteem in which the recipients are held by their profession. Viewed in this way, procedures can be devised to evaluate the esteem in which advocates are held by their peers, although value judgments cannot be entirely excluded.

As the Supreme Court of Appeal pointed out in the *Mansingh* judgment, while each of the GCB's constituent bars has designated its own procedure which ultimately leads to the granting of silk, these procedures have certain elements in common: 'In all cases the process starts with an application for appointment by the candidate for silk to his or her bar. The application is then considered by a committee of silks of that bar. Thereafter the names of the approved candidates are presented to the Judge President of the particular High Court, who makes a recommendation to the minister. The minister in turn makes a recommendation to the President, who confers the status of silk' (SCA judgment para [8]). The actual procedures for application and evaluation at bar level have undergone radical revision, at least in Johannesburg. Historically, an applicant for silk would apply to the Bar Council. The silks on the Bar Council would deliberate in private and, if unanimous, would forward the name of the candidate to the Judge President. No criteria were laid down, and there was an informal quota of silks each year to ensure that the ratio of silks to juniors was kept within certain limits. The process was thus lacking in transparency, the criteria were unspecified, and the results frequently bewildering. Dissatisfaction was inevitable. Over the years the Johannesburg Bar Council has introduced major reforms designed to make the process more transparent and fair. The present procedure entails the following: An applicant for silk is required to complete an extensive application form setting out, inter alia, academic qualifications and publications, if any; an overview of the candidate's profes-

sional history before admission to the bar; experience as an advocate including the number of reported cases and appearances in the Constitutional Court and Supreme Court of Appeal without a leader; an overview of the three most important or complex cases in which the applicant has appeared within the last two years; a list of all judges before whom the applicant has appeared in cases of substance in the past two years; and a list of silks who have led the applicant during the same period. The applicant is also required to indicate any positions of leadership held outside the bar and details of important outside achievements. The candidate is required to give an overview of service to the bar and *pro bono* work, as well as transformation initiatives in which the applicant has participated or initiated. Once the applications are received, the names of candidates are made known to the membership of the bar as a whole, and the completed application forms are open for inspection. Any member of the bar may comment in writing on any of the candidates, and group leaders are required to elicit the views of junior members. Group leaders must also convene a meeting of all silks in the group to evaluate the candidates and convey the views of the group, including junior members, to the bar council. All the silks on the bar council must elicit responses from the candidates to any adverse comments received. The silks committee of the bar council must then interview group leaders to obtain feedback on the candidates. Finally, each candidate is required to appear before the silks committee to be questioned on his or her application. The names of successful candidates are published to the bar as a whole, and each unsuccessful applicant is entitled to request reasons as to why his or her application was unsuccessful.

The process now adopted in Johannesburg represents a serious endeavour to make the system fair and transparent. Of course, value judgments can never be eliminated. Ultimately, however, matters of esteem will always have a significant subjective component.

POLICE

Case law

In *Fonde v Minister of Police* [2013] JOL 30860 (ECP), the plaintiff sued the defendant for damages arising from a police raid conducted at his home. The police acted after receiving

information which claimed that drugs had been bought at the plaintiff's house. The raid took place without a warrant but the police contended that, had they delayed, they might not have found dagga. In addition the magistrate's court, where they could have applied for a search warrant, was already closed.

The court found, on the probabilities, that the police had entered the plaintiff's house without his permission and had assaulted him as he had alleged. Of significance is the following comment by Robertson J (para [35])

The importance of the need for those in authority or positions of power to comply with those obligations is particularly highlighted because of the abuse of fundamental rights which took place in this country's past. Matomane and Sitinga were police officers prior to the enactment of the interim Constitution, followed by the Constitution. One would think that they would have comprehended the enormous shift which took place in relation to the protection of fundamental rights. I commented that they were unruffled during cross-examination. The glib manner in which they stood their ground tells me that they do not have a problem with the notion of torture. They are senior police officers. What sort of message do they send to their juniors? What effect does their conduct and that of police officers who commit similar abuses, have on the morale of the police force? Given the seriousness of their conduct and its wider implications, I believe it necessary to direct that a copy of this judgment be forwarded to the Minister of Police and the National Commissioner of Police.

In *F v Minister of Safety and Security and Others* 2013 (2) SACR 20 (CC), the Constitutional Court was confronted with the question as to whether the Minister of Safety and Security should be held vicariously liable for damages arising from the rape of a thirteen year old girl by a policeman who was off duty at the time. On appeal the Supreme Court of Appeal in *Minister of Safety and Security v F* 2011 (3) SA 487 (SCA) had restricted the earlier Constitutional Court finding in *K v Minister of Safety and Security* 2005 (6) SA 419 (CC), in particular finding that the conclusion in *K* was based only on the delictual omission of the on-duty policeman involved, and further that an intentional delictual commission like rape did not attract vicarious liability for the state.

In overturning this decision, Mogoeng CJ found that the state has a general duty to protect members of the public from violation of their constitutional rights (para [53]). The Police Service 'was established and clothed with the power and authority to be the hand through which the State would discharge these duties' (para [60]). Further, 'these constitutional duties resting upon the

State, and more specifically the police are significant in that they suggest a normative basis for holding the State liable for the wrongful conduct of even a policeman on standby duty, provided a sufficiently close connection can be determined between his misdeed and his employment' (para [61]).

On the facts the court found that the policeman was on standby and that, although his police car was unmarked, he was driving an official police car. Accordingly, his duty to protect the public continued in these circumstances as he could be summoned at any time to exercise his duties as a police officer in order to protect the members of the public. A police vehicle had been issued to him because he was on standby duty, and this vehicle enabled him to commit the rape by giving Ms F a lift. When she entered the vehicle she understood that he was a police officer. The conclusion was made on the basis of dockets lying in the vehicle and the police radio. The man was clearly identifiable as a police officer. Accordingly, the court held that the Minister of Safety and Security was liable for the damages suffered by the plaintiff as a result of the conduct of the police officer.

Crime statistics

The most recent statistics were published in the SAPS Crime Report 2012–2013 for the period 1 April 2012 to 31 March 2013.

The following table provides a comparison of contact crime, raw figures and population dynamics between 2004/5 and 2012/13.

Comparison of contact crime, raw figures and population dynamics: then (2004/5) and now (2012/13)			
1st year (2005/4) v 9th year (2012/13) of current administration			
Crime type:	Then (2004/5)	Now (2012/13)	Increase/decrease
Contact crime	Population: 46 586 600	Population: 52 274 945	Population diff 5 688 345 (12,2%) Raw figure difference
Murder	18 793	16 259	– 2 534
Total Sexual offences	69 117	66 387	– 2 730
Attempted murder	24 516	16 363	– 8 153
Assault with the intent to inflict grievous bodily harm	249 369	185 893	–63 476
Common Assault	267 857	172 909	–94 948
Robbery with aggravating circumstances	126 789	105 888	–20 901
Common robbery	90 825	53 540	–37 285

The following table is illustrative of all sexual offences committed between 2009/10 and 2012/13 as per province:

All Sexual Offences: 2009/10–2012/13									
CRIME RATIO PER 100 000 POPULATION									
PROVINCE	2008/09 Baseline	2009/10	2010/11	2011/12	2012/13	% Inc or dec 08/09–12/13	% Inc or dec 11/12–12/13		
Eastern Cape	143,7	136,1	139,1	135,3	145,2	1,0%	7,3%		
Free State	157,2	157,8	171,3	178,5	191,1	21,6%	7,1%		
Gauteng	174,0	148,6	125,0	109,6	98,6	-43,3%	-10,0%		
KwaZulu-Natal	131,4	127,0	120,2	113,6	119,9	- 8,8%	5,5%		
Limpopo	88,6	93,8	89,8	102,4	118,6	33,9%	15,8%		
Mpumalanga	130,8	127,6	122,8	111,9	104,7	-20,0%	-6,4%		
North West	146,6	137,9	147,0	152,8	155,7	6,2%	1,9%		
Northern Cape	170,3	160,8	169,2	158,5	159,9	- 6,1%	0,9%		
Western Cape	166,7	180,7	178,0	173,1	148,6	-10,9%	-14,2%		
RSA	144,8	138,5	132,4	127,5	127,0	-12,3%	-0,4%		

A similar set of figures is available for murders committed between 2009/10 and 2012/13:

Murder: 2009/10–2012/13							
MURDER: CRIME RATIO PER 100 000 OF THE POPULATION							
PROVINCE	2008/09 Baseline	2009/10	2010/11	2011/12	2012/13	%Inc or dec 08/09–12/13	% Inc or dec 11/12–12/13
Eastern Cape	49,5	48,4	47,3	48,0	50,8	2,6%	5,8%
Free State	31,6	31,4	34,1	34,9	37,2	17,7%	6,6%
Gauteng	37,9	32,7	29,1	26,6	24,0	-36,7%	-9,8%
KwaZulu-Natal	47,0	40,4	35,2	31,6	35,1	-25,3%	11,1%
Limpopo	14,2	14,6	12,2	13,2	12,9	-9,2%	-2,3%
Mpumalanga	25,1	24,3	20,2	19,9	17,1	-31,9%	-14,1%
North West	25,1	21,5	23,2	24,7	24,7	-1,6%	0,0%
Northern Cape	36,5	33,2	31,0	33,6	35,7	-2,2%	6,3%
Western Cape	44,6	42,4	44,2	43,5	43,7	-2,0%	0,5%
RSA	37,3	34,1	31,9	30,9	31,1	-16,6%	0,6%

The most reliable figure in this set of statistics is the number of murders reported, given the fact that when a murder is reported a body has been found. Accordingly, these figures are less likely to be manipulated in order to reveal an improvement by way of a reduction in crime. The murder rate has been reduced by 16,6% over a period of four years, that is from 2008 to 2012, although in the year now under review an increase of 0,6% was recorded.

PRISONS

Case law

Lee v Minister for Correctional Services 2013 (2) BCLR 129 (CC) represents an important decision in the protection of the health rights of prisoners. The plaintiff had claimed damages from the defendant for harm which he had suffered as a result of his having contracted pulmonary tuberculosis ('TB') while incarcerated as an awaiting trial prisoner in Pollsmoor Prison for four and a half years between 1999 and 2004. He sued the Minister of Correctional Services for damages arising out of having contracted TB.

While the High Court's decision was in his favour, it was overturned by the Supreme Court of Appeal which found that, absent proof that a reasonably adequate prison TB management system would have eliminated the risk of infection, the requirement of causation had not been proved (2012 (3) SA 617 (SCA)).

On appeal to the Constitutional Court, the court reversed this decision of the Supreme Court of Appeal and held that the Minister for Correctional Services was liable to the plaintiff in delict. The case was then remitted to the Western Cape High Court for a determination on the *quantum* of damages to be awarded.

Nkabinde J on behalf of the majority of the court, found that our existing law of causation justified asking the question whether the factual condition of the plaintiff's incarceration was a more probable cause of his TB than would have been the case had he not been incarcerated in these conditions. It was, therefore, held to be sufficient to satisfy the test for factual causation that the evidence established that the risk of TB contagion would have been reduced had the prison authorities introduced proper systemic measures. Accordingly, there was a chain of causation between the negligent omission by the prison authority in failing

to institute adequate systemic measures to curb the spread of TB, and the plaintiff's infection.

This judgment has been the subject of severe criticism. (See, for example, LTC Harms 'The puisne judge, the chaos theory under the common law' (2014) 131 *SALJ* 3, 7–9.) The majority of the court may well have been better advised to have followed the minority judgment of Cameron J who referred to 'the rigidity of the common law test for causation which requires claimants to prove more probably than not that the defendant's negligence caused their injury'(para [94]). The established common law 'but for' test may not have been sufficient to deliver adequately just outcomes in certain cases. For this reason, Cameron J found that the better approach would be to seek the development of the common law 'affecting a vulnerable group to whom our system of constitutional protection owes particular solitude' (para [113]). Accordingly, he would have ordered the matter to be referred back to the trial court for it to consider how the common law ought to be developed.

In *Masilela and Others v Bouwers and Others* 2013 (2) SACR 350 (GNP), the applicants were long-term prisoners who had been convicted of armed robbery and murder. They were classified by the Correctional Service authority as 'high risk offenders' who required maximum security incarceration because of the violent nature of their crimes. They applied to court to be transferred to a correctional centre in Johannesburg on the basis that they wished to be closer to their families. Furthermore, they contended that, were they to be housed at the Johannesburg Correctional Centre, they would be able to further their studies as courses that were offered at this centre were not presented at the facilities in which they were presently housed.

Apart from the fact they had not adopted the correct procedure in challenging the decision of the Correctional Service authorities, these applicants had been classified as high-risk prisoners upon admission. They were required to be held at a maximum security centre until they had successfully completed a sufficient number of rehabilitative programmes, which then might have justified their reclassification and placement in a medium-security correctional centre. There were sound reasons for the decision of the Correctional Service authority to imprison the applicants in a maximum-security centre. Accordingly, no basis could be found by which the court should order that they be transferred to a lesser- security prison which would be closer to their homes and families.

Prison statistics

The figures relating to the state of prisons in South Africa are derived from the 'Annual Report of Judicial Inspectorate for Correctional Services' for the period 1 April 2012 to 31 March 2013.

The prison population for the period 1 April 2012–31 March 2013 stands at 154 000 which has declined from the peak of 166 000 in 2008.

Overcrowding remains a problem. The following table is illustrative.

Population vs Capacity						
	Eastern Cape	Gauteng	kwaZulu/Natal	Limpopo/ Mpumalanga/ North West	Northern Cape/Free State	Western Cape
\$ Capacity	12 688	25 909	21 507	19 066	21 180	19 540
\$ Population	18 685	38 430	27 604	21 702	20 717	25 911

During the 2012–2013 year, 709 deaths were reported in prisons, 57 were unnatural and 652 were natural deaths. The overall number of deaths reported declined from 852 reported in 2011/2012. Twenty inmates either committed suicide by hanging, electrocuting themselves, setting their cells alight or from a drug overdose.

The inmate population on 31 March 2013 stood at 153 049 comprising 104 670 sentenced prisoners and 48 379 remanded detainees. Although the figure for sentenced offenders declined from the previous year — when it stood at 111 814 — the figure for remand detainees increased from 46 351 to 48 379.

The comments of the Judicial Inspector in this regard are instructive.

At a cost of approximately R9,000 per month per inmate, the problem is grave and has a serious impact on other budget allocations, to the detriment of providing for socio-economic needs. Lengthy periods in detention, it is accepted, are not always the fault of the state but also that of an accused and/or his legal representative. Well-managed courts shorten the time period from first appearance to finalisation; the net result would be advantageous to the administration of justice. However, courts are dependent on the police, prosecutions and defence. Our criminal procedure permits plea and sentence agreements ('plea-bargaining'), which are dependent on the prosecutor, and by extension the police, to provide the accused with details of the case against him/her to make an informed decision to tender a plea of guilty.