

# HEINONLINE

Citation:

Dennis M. Davis; Gilbert J. Marcus; Jonathan E. Klaaren, The Administration of Justice, 2005 Ann. Surv. S. African L. 816, 846 (2005)

Content downloaded/printed from [HeinOnline](#)

Thu Nov 16 08:45:30 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

## [Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

## THE ADMINISTRATION OF JUSTICE

DENNIS M DAVIS\*  
GILBERT J MARCUS†  
JONATHAN E KLAAREN‡

### THE JUDICIARY<sup>1</sup>

#### THE POLITICS OF LAW REPORTING: A RIPOSTE TO JUTA'S COMMENTS IN THE 2004 *ANNUAL SURVEY*

In the 2004 chapter on the Administration of Justice, we took the unusual step of criticising Juta, the publisher of the *Annual Survey* (at 823–6). We did so because we considered that Juta had behaved improperly in publishing a judgment critical of Jeremy Gauntlett SC but refusing his request to record that the Cape Bar Council had exonerated him of improper conduct. The details of the saga are fully recorded in last year's contribution and need not be repeated. As the publisher of the *Annual Survey*, Juta asserted a right to respond to the criticism levelled at it (2004 *Annual Survey* 845). Indeed, it appropriated an entire printed page to do so. Regrettably, we believe that Juta has compounded its error and that its comments cannot be allowed to stand unchallenged.

In essence, Juta makes three points. First, the judgment on leave to appeal was reported because it 'contradicted a previous assumption that a dissenting judgment in the court *a quo* meant that leave to appeal would be granted as a matter of course' (ibid). Second, the South African Law Reports contains only such editorial comment as may be necessary to elucidate the published judgments. Third, '[i]t is not incumbent upon the publishers of law reports to annotate the reports in order to vindicate any of the persons who from time to time draw adverse comment from presiding judges' (ibid). None of these arguments withstand scrutiny.

The justification advanced for the publication of the judgment on leave to appeal is substantially diluted if not evacuated by the fact that the SCA judgment was published simultaneously with the

---

\* B Com LLB (Cape Town) M Phil (Cantab), Judge of the High Court.

† SC BA LLB (Witwatersrand) LLB (Cantab), Member of the Johannesburg Bar, Visiting Professor, University of the Witwatersrand, Johannesburg.

‡ BA (Harvard) MA (Cape Town) JD (Columbia) LLB (Witwatersrand) PhD (Yale), Professor of Law, University of the Witwatersrand, Johannesburg.

<sup>1</sup> Mr Justice Davis played no part in this section of the chapter

judgment on leave to appeal. The SCA judgment dealt with the judgment on leave to appeal alluding specifically to the view that the mere existence of a minority judgment did not mean that another court might reasonably agree with the minority (para 37). It then dealt with the question of unreasonable delay, ultimately concluding that there had been a deemed refusal of leave to appeal. We reiterate that the publication of the leave to appeal judgment could not be justified for its value as precedent and the preponderant focus of that judgment was the rebuke to counsel. The latter point is simply not dealt with by Juta. Its silence on this issue is conspicuous.

Once it is clear that the real focus of the judgment on leave to appeal concerned the rebuke to counsel, the fallacy of the second argument is exposed. In any event, the annotation requested by Mr Gauntlett would have had precisely the effect of elucidating the published judgment. It would have informed readers that after proper enquiry (not afforded to Mr Gauntlett by the court) he was found not to have acted improperly.

Finally, for Juta to claim that it is not 'incumbent' upon it to annotate the law reports in order to vindicate criticism emanating from presiding judges serves only to highlight Juta's failure to appreciate the real issue. As we said last year, the issue 'concerned a simple matter of courtesy' (2004 *Annual Survey* 825). That Juta still fails to grasp this basic point reinforces our view that it behaved improperly and continues to do so.

#### HLOPHE JP'S REPORT ON RACISM

On 21 February 2005, Judge President Hlophe circulated his *Report on Racism in the Cape Provincial Division* (the Report) to all judges within the Division. The fact that he had compiled such a report was public knowledge. It had unaccountably been leaked to the media and attracted widespread publicity. It subsequently became a public document after it was published on the Business Day website (available at <[www.businessday.co.za/downloads/judiciary/JudgeHlopheReport.pdf](http://www.businessday.co.za/downloads/judiciary/JudgeHlopheReport.pdf)>). The Report details Hlophe JP's experience of racism 'real, actual and/or perceived' (at 1) within the Cape Provincial Division over which he has presided since May 2000. He states that he 'inherited a division which was virtually torn apart' by a number of factors, chief among them being his alleged marginalisation by his predecessor, Judge Edwin King, who 'had been allowed to reign in the Division with the support largely of the white Bar and some members of the Bench to the detriment of the

transformation agenda in the Division' (at 3). Upon assuming office, he was 'determined to transform the Cape Bench' (ibid).

The Report is lengthy. It runs to 43 typed pages with many annexures. It ranges from the specific to the general. The Report recounts the allegedly racist promotion of white secretaries, the objections by white judges to black acting appointments, the ridiculing of judgments by acting judges — 'some of their judgments were taken and marked with a red pen and circulated among members of the Bar in an effort to undermine black acting judges' (at 6). It suggests that the increasing use of private arbitration 'is inappropriate as it undermines the legal system and the transformation of the judiciary, neither of which can be compromised' (at 31).

Towards the end of the Report, Hlophe JP acknowledges a difficulty. Racism, he recognises, arises in different guises. The problem 'is that it is difficult to prove because in most cases it is not obvious. Often it is easy to deny because it is difficult to pinpoint' (at 35). Nevertheless, he expresses the view that 'evidence of racial practices at the Cape High Court is conclusive' (ibid), but whether or not this is so is debatable. However, a conclusion that 'racial practices' exist is scarcely surprising. It would be strange if the Cape High Court was somehow immune to the legacy of racism which infected all institutions in South Africa. The real question the Report raises is the calibre and integrity of the leadership such practices require. What is clear is that several of the incidents were never raised with the individuals concerned before publication of the Report. In many instances the defence, if any, to the charges remains unknown. Some individuals, however, defended themselves publicly.

Some of the incidents described do not appear to have any overt racist connotations. Falling into this category is a matter concerning Selikowitz J. He had applied for appointment to the Competition Appeal Court. Hlophe JP opposed the appointment because Selikowitz J had allegedly 'left the Division for Australia during term without letting me know' thereby causing 'a great deal of unhappiness' (at 4). When Selikowitz J was interviewed by the Judicial Services Commission for the post (to which he was ultimately appointed) he stated that he 'found it extremely painful that the Judge President would accuse a judge of lying in circumstances that were plainly based on incorrect facts' (David Yutar 'Cape judge accused of lying by boss: Row linked to divided bench' 12 April 2002 *Cape Argus* 2). Even though Selikowitz J was

appointed to the post he sought, Hlophe JP complains that there was never a formal ruling by the Judicial Services Commission on his objection. Instead Hlophe JP was apparently approached by Chaskalson CJ to withdraw the letter of complaint, something which he found 'bizarre, to say the least' (Report at 4). There is no suggestion that any of those involved in this incident were motivated by racism.

References are made to the holding of a 'whites only lunch', described as a 'classic case in which white judges showed that they were racially insensitive' (at 7). The issue attracted publicity in the press (see, for example, Carien du Plessis 'Cape judges bicker over lunch party' 5 January 2004 *This Day* 3). In the press reports, Desai J is reported to have stated that if it were true that the lunch was organised on a racial basis then the Chief Justice should explain to the President and the country 'why judges with a propensity to gather along racial lines were appointed to the bench in a democratic state' (ibid). The press reports record denials by some of the judges who attended the lunch that there was any racist agenda. The public imputations by Desai J attracted a stinging response by Thring J. In a letter dated 27 July 2004 (Annexure C to the Report) he referred to the press cuttings on the incident and stated:

'The purpose of this letter is to advise you formally that, unless and until a satisfactory explanation for his conduct in saying what he is reported to have said to the press is forthcoming from Desai, I shall find it impossible to sit with him in future in appeals or reviews or to engage in any work which will involve interaction and cooperation between us, eg being in the same review group. I am sure that you will understand why, and that you will not place me in the embarrassing situation of having to refuse to sit or work with him.'

Hlophe JP's response (if any) to this letter is not disclosed. Nevertheless, the Report states:

'An interesting development, however, is that following that incident the colleagues who normally organise these lunches have tried to be sensitive and they make it a point now to invite black judges. Ask yourself the following question: "If there was nothing wrong with the whites-only lunch why are black judges all of a sudden being invited to join such lunches?"' (at 8).

In another incident involving Thring J, Hlophe JP describes how he (Hlophe J) caused a circular to be distributed concerning the use of government vehicles by judges. The circular was written by a certain Mr K D Moekoa from the Department of Justice. Thring J

had apparently taken it upon himself to correct Mr Moekoa's grammar. Handwritten changes to the circular reveal corrections relating to the use of apostrophes, capital letters and tenses. An annotation reading 'text corrected to render it intelligible' (at 9) was apparently appended to the circular by Thring J. Thring J returned the circular, as corrected to the secretary of Hlophe JP. Hlophe JP's condemnation of Thring J was strident and unequivocal:

'I regarded this as insulting and I have no doubt that the judge concerned would never have done that to a white colleague. The innuendo was that I also do not know English because quite clearly, had I known English I would have corrected the text myself to render it intelligible. It was demeaning, insulting and humiliating upon me. Even though I felt very strongly about the matter, I decided not to personalise it and take it up with the judge concerned. I simply decided to keep the letter as I have done and on reflection I do not regret because this shows the extent to which some of the colleagues on the Cape Bench would be prepared to go in an effort to undermine and demean their own colleagues particularly those in the leadership positions. I found it absurd that a judge would do that in circumstances where he was not even provoked, it was a plain circular from the Head Office regarding the use of official government vehicles – an unprovoked reaction from the judge which clearly had an effect of humiliating and demeaning me' (at 9-10).

After publication of the Report, Thring J was determined to vindicate himself. He wrote to Chief Justices Chaskalson and Langa, to complain of 'unfounded accusations'. Substantial extracts from the correspondence were published in the *Cape Times* of 27 October 2005. Thring stated that it had come as a shock to learn that over a period of three years [Hlophe JP] appeared to have been nursing strong feelings of resentment and humiliation towards him. Thring J suggested that it appeared that this resentment and humiliation had festered and assumed 'their present exaggerated proportions'. He stated there were some who urged him to resort to litigation to clear his name of the unfounded accusations publicly brought against him. This was an invitation which Thring J regarded as 'tempting' though not a step he could bring himself to take, 'at least not at this stage'. Instead, Thring J publicly announced that he had placed all the papers dealing with the issue in the National Archives. He told the press that he had 'no intention of going down in history as the judge who was publicly accused by his Judge President of overt racism' (see also Anél Powell 'Blanket silence greets new twist in judges'

row' 28 October 2005 *Cape Times* 1). As to Hlophe JP's views on racism in the Cape Provincial Division, these were characterised as 'less real than imagined' (27 October 2005 *Cape Times*):

'About the "perceptions" of others I am not able to speak, for I am not privy to their minds. But those who are unable to distinguish perception from reality surely inhabit a world which is dangerous, not only to others, but also to themselves: for they run the risk of being led by their imagination into a kind of self-fulfilling and self-perpetuating paranoia where, eventually, they may become prepared to believe almost anything that may be suggested to them along certain prejudiced lines as though "perception", a kind of new gospel, were fact.'

In correspondence with the Chief Justices, Thring was apparently promised that the matter would be dealt with through facilitation and reconciliation. However, after eight months Thring J had reached the end of his tether (*ibid*):

'The Judge President wears the same mantle as was worn by Lord De Villiers, Watermeyer JP and many other great men. I cannot reach him without tearing the mantle. Tempting though it is, that is not a step I can bring myself to take at least at this stage. However, I have no intention of going down in history as the judge who was publicly accused . . . of overt racism and said and did nothing about it. The only practicable way that I can see of protecting myself against such a misapprehension is to ensure that all the relevant documentation . . . is securely preserved for posterity, so that others who may one day be interested in ascertaining the truth . . . may be able to do so.'

Despite his dramatic gesture in making the correspondence available in the national archives and announcing this in the press, it turns out that Thring J has placed a twenty-year embargo on access to the materials – even though much of the correspondence is already on public record.

Issues regarding the use of Afrikaans also feature in the Report. Hlophe JP states that there was opposition to the acting appointment of a black lawyer by white judges ostensibly on the grounds of lack of proficiency in Afrikaans. Another incident concerned a meeting in chambers during which an unnamed senior white advocate had made an appointment to see Hlophe JP and Traverso DJP:

'This senior advocate arrived with the Junior Counsel and all that he said was to greet me. He thereafter proceeded in my chambers and in my presence to address my Deputy in Afrikaans. The conversation proceeded, he totally ignored me and my Deputy entertained that. Immediately after he had left I took it up with my Deputy and asked whether she did not see anything wrong with what this particular

advocate had done. She was clearly embarrassed and said something to the effect that "John, I am embarrassed. This is a classic case of racism". I agreed with my Deputy. There is no other basis on which one can explain such behaviour – an advocate who makes an appointment to come and see me as the Judge President in my chambers and suddenly sits down, utters no word to me, cuts me out of the conversation and continues, in Afrikaans, with my Deputy who understands Afrikaans because it is her first language. I was so irritated and very angry about it' (at 11).

Hlophe JP's allegations are frequently unaccompanied by sufficient detail to assess their validity. Thus, reference is made to a case where 'a senior white colleague did not want to sit with a black junior judge'. Although no reference was made to race in this particular incident, the reasons furnished by the white judge were considered to be 'fairly spurious' (at 21). Another problem with the Report is resort to generalisation, sometimes in sweeping terms. Thus, it is stated that 'in the ten years that I have been here the Cape Bar has yet to support a black person for a judicial appointment' (at 27). This is simply not correct as appears from the records of the Cape Bar Council, the General Council of the Bar and the Judicial Services Commission. These records reveal that the Cape Bar Council supported Hlophe JP's appointment as Deputy Judge President in 1999 and again as Judge President in 2000. The records also reveal that the Cape Bar Council supported the appointments of Judges Ngcobo (in 1996), Motala (in 1998) and Meer (in 2002 in respect of her appointment to the Land Claims Court and again in 2003 in respect of her nomination to the Constitutional Court). It has also supported several black nominees to the Cape Bench including Msimang J, Mr Potgieter SC and Waglay J.

Hlophe JP is particularly critical of the increasing use of private arbitration. This phenomenon, he argues, 'undermines the ordinary courts of the land' and 'there is a real danger that some public interest disputes are being taken out of the legal mainstream' (at 31). He criticises retired judges who 'are heavily involved in arbitration proceedings, even though they are still on the Government's payroll' (*ibid*).

The Report concludes with the following recommendations (at 41–3):

- 1 Permission given to retired judges to sit as Arbitrators should be withdrawn with immediate effect;
- 2 Legislative measures should be introduced to control abuse of the Arbitration process. Given that a lot of work comes from various

- State departments, it is recommended that there should, in addition to such legislative intervention, be a clearly formulated policy to control and regulate Arbitration;
- 3 Every institution such as High Courts, lower courts, the Director of Public Prosecutions Office, Bar Council, Law Societies etc., must have a steering committee to identify, hear and adjudicate upon cases of racism (and possibly sexism) in the legal fraternity. Such steering committees could also, with the assistance of the Advocates' Bar and the Attorneys' Bar, investigate complaints relating to briefing patterns in the legal fraternity;
  - 4 A Regional Steering Committee should be established in each of the nine provinces to deal, on a regional basis, with allegations of racism and racial practices in each region;
  - 5 A National Steering Committee (under the control) of the heads of court to deal with such cases nationally;
  - 6 Because racism is difficult to prove and is often denied by the perpetrators, it is recommended that such cases should be reported, perhaps in a special report to ensure maximum publicity. Perhaps the names of the parties could be omitted to protect their identities, in appropriate cases;
  - 7 In order to eradicate the evil practice of racism, a holistic approach is called for i.e. we must look at the system/legal fraternity as a whole. It would be unrealistic to concentrate on the judiciary only. Racism exists in a very subtle manner throughout the entire legal fraternity. After all racist attorneys/advocates are future judges and they will not change unless and until racism has been adequately addressed;
  - 8 Sensitivity training of lawyers is a *sine qua non*. It must be ongoing; goal directed and designed to improve relations among all races in this country;
  - 9 It is recommended that a Bench Book be developed and distributed to all judicial officers. In the United Kingdom the Equal Treatment Bench Book as well as a short practical guide entitled "Race and the Courts" are aimed at creating greater awareness and sensitivity to issues of race;
  - 10 In order to accelerate the process of transformation specific targets must be set. The fact that ten (10) years of liberation only 34% of the judiciary is black is lamentable. There is no reason why transformation of the judiciary should be so slow and painful.'

It would be wrong to dismiss the Report only because of its contested nature and frequently subjective contents. It undoubtedly highlights critical issues of transformation which, even if not susceptible to the kind of forensic scrutiny to which lawyers are accustomed, point to deep divisions. In recounting the incidents in the Report, Hlophe JP claims that he is not alone and that 'each black judge in this Division has similar stories to tell'. In pointing to the way forward, he acknowledges that transformation 'means

more than race and gender'. What is required is judges' 'committed to the new ethos of constitutional values' (at 40).

Perhaps the most important message of the Report is Hlophe JP's insistence that 'we must face the issue of racism and deal with it' (at 37). On this score, there has been a signal failure to deal with the many incidents he describes. Thring J thought it best to go public with his attempts to clear his name. But the response of others is not yet known. This is because the Judicial Services Commission has declined to make public the detailed responses Hlophe JP's targets furnished to it.

Hlophe JP refers in his report to an article by Professor Pumla Gobodo-Madikezela, ('The Subtleties of Bigotry') of the University of Cape Town in which she states:

'The legacy of apartheid lies in both what is visible and what is invisible. During apartheid it was not only legal, but also socially acceptable for whites to treat other racial groups as inferior. Ten years ago there was a shift in the political landscape and laws changed. Racist behaviour was no longer appropriate. South Africans, however, did not become colour-blind and attitudes did not change overnight. Thus, expecting all white people to behave towards black people without being influenced by their racial advantage under apartheid – consciously or otherwise – may be unrealistic. Old attitudes and assumptions continue to influence behaviour at an implicit level.'

Few would contest these sentiments. The public airing of Hlophe JP's views has at least sought to focus attention on the problem, if not the solution.

#### JUDICIAL ASSERTION AND REASONING

Courts of appeal are a safeguard against injustice. They exist not only to correct errors by courts of first instance but also to establish a coherent body of principle and precedent. The SCA was, until 1994, the highest court of appeal. It remains such in non-constitutional matters. It will generally only hear matters of importance after the requisite leave to appeal has been granted.

That the SCA in *Micro Finance Regulatory Council v AAA Investment (Pty) Limited* (now reported in 2006 (1) SA 27 (SCA)) reversed the decision of Du Plessis J in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2004 (6) SA 557 (T) is a matter of no moment. It is the manner of reversal that is disquieting. The reported decision of the court takes up just over five printed pages. As is customary, the report reproduces the authorities relied upon by counsel representing the parties. They run to some

four printed pages. The judgment, however, does not refer to a single authority. That part of the judgment which reflects the 'reasoning' takes up approximately one page. It may be objected that a statistical analysis of this sort reveals nothing. The issue may be so elementary and trite that nothing more was required.

At issue was whether or not the Micro Finance Regulatory Council ('the Council'), a company incorporated under s 21 of the Companies Act 61 of 1973, exercised a public power by virtue of its functions and recognition by the Minister of Finance as a regulatory institution in terms of the Usury Act 73 of 1968. The Council was authorised by the Minister to determine the conditions under which micro lenders would be exempt from the provisions of the Usury Act. If the unanimous assent and the length and conceptual depth of its judgment are the only guidelines, the SCA appeared to have little difficulty in finding that the Council was 'a private regulator' that did not 'purport to exercise legislative or other public powers that require a constitutional or legislative source' (para 24).

The dividing line between public and private power is a matter on which there is substantial learning both here and abroad. All modern text books on administrative law deal with the issue. The topic is directly addressed in pre-constitutional decisions going back more than twenty years concerning the Stock Exchange (see, for example *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W)). The matter was certainly not regarded as self-evident by Du Plessis J. His judgment is replete with references to the case law (English and South Africa) and the text book writers on the topic. Yet, the SCA chose to refer to no authority at all.

In so dealing with the appeal in this matter, it is submitted that the court failed to discharge its constitutional duty. And yet, only recently it had occasion to deal with the importance of reasoned judicial decisions. In *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) the court, in a gentle rebuke to the court below, referred to the following observations by Chief Justice M M Corbett from his article 'Writing a Judgment' (1998) 115 *SALJ* 116:

'In addition, should the matter be taken on appeal, the court of appeal has a similar interest in knowing why the judge who heard the matter made the order which he did. But there are broader considerations as well. In my view, it is in the interests of the open and proper administration of justice that the courts state publicly the reasons for

their decisions. Whether or not members of the general public are interested in a particular case – and quite often they are – a statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice.’

The Constitutional Court has also commented upon the need for reasoned decisions. Thus, Kriegler J in *S v Mamabolo (e-TV and others intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 observed that the process of open dispute resolution ‘ought as a matter of principle to be analytical, rational and reasoned’ (para 18). In *Mphahlele v First National Bank of SA Limited* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 Goldstone J considered that the duty to furnish reasons was an incident of the rule of law enshrined as a founding value in s 1 of the Constitution. In English law the failure by a court of first instance to furnish adequate reasons is a recognised ground of appeal. Henry J in *Flannery v Halifax Estate Agencies Limited* [2000] 1 All ER 373 observed at 377–8:

‘The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties – especially the losing party – should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know . . . whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.’

Were it not for the fact that the Constitutional Court is the apex court on constitutional issues, the decision of the SCA would have been the last word. The judgment of the Constitutional Court on appeal (*AAA Investments (Pty) Limited v the Micro Finance Regulatory Council* (unreported, CC Case No CCT51/05, 28 July 2006) stands out in striking contrast to the decision of the SCA. Although the court was divided on the outcome, it was unanimous in holding that the SCA was wrong in its characterisation of the powers of the Council. The various judgments run to some 97 typed pages. Yacoob J, for the majority, after an analysis of South African, English, Canadian and American law found that the SCA had put ‘form above substance’ and disregarded ‘the nature of the function that the Council must perform’ (para 45). It had ignored ‘the reality of almost absolute ministerial control over the Council’s functions’ (ibid). He had to ‘strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature’ (ibid). Although the appeal failed,

the Constitutional Court judgment 'does not uphold any of the reasoning of the SCA' (para 63). Moreover, the reasons for the dismissal of the appeal 'are so at odds with the reasoning of the SCA that it is not fair, in all the circumstances, for the SCA's order in relation to the costs of the appeal in favour of the Council to remain undisturbed' (ibid).

## THE LEGAL PROFESSION

### LAW SOCIETY RULES

The Rules of the KwaZulu-Natal Law Society were amended by GG 27370 of 18 March 2005.

### CAN ONE EVER HAVE TOO MANY LAWYERS? LAW SCHOOL ENROLLMENT AND GRADUATION STATISTICS

According to statistics collected and prepared by the National Information Controller of the Law Society of South Africa, the number of first-time first year registrations in law at the nation's universities in 2005 was 7341, a number slightly lower than such registrations in two of the previous three years. Encouragingly, this figure was made up of more than a thousand fewer LLB students (5118 as compared with 6163) from the previous year and a significant increase of BCom (Law) students (1635 as compared with 993). Either the toll of law school education or else the diverse choices of students are reflected in the lower graduation figures, as 2005 saw 2436 students receive their LLB degrees. These 2005 LLB graduates were made up of 951 Africans, 221 coloured persons, 496 Indian, and 795 white as well as 1237 men and 1199 women.

The 2005 law graduate figure (2436) represents a large number of potential entrants to the legal profession itself. As of 1 July 2005, there were an estimated 16 285 practising attorneys in South Africa, with 1993 persons having articles registered. While figures for advocates and for legal professionals elsewhere are not included in these totals, the universities are producing annually one law graduate for about every seven practising attorneys, a rate that may lead to employment difficulties.

### IMPOSTORS, ATTORNEYS AND IMPOSTOR ATTORNEYS

To what extent do an innocent attorney and his firm share the responsibility when an impostor using the legal services of the

attorney defrauds the state? This was the question in *Road Accident Fund v Shabangu & another* 2005 (1) SA 265 (SCA) after an impostor who had been defrauding the Road Accident Fund ('Fund') was found out. The impostor had gained R258 593 from the Fund, pretending to be the widow of a person killed in a road accident with the aid of the deceased's brother. The true widow later appeared and sued. It was common cause that the attorney and his firm were not parties to the fraud, but could the Fund recover the compensation paid to the impostor as well as the costs in the second suit from the attorneys?

The Fund tenaciously pursued its claim on six alternative bases: both express and tacit warranty, breach of warranty of authority, negligent misrepresentation, negligence in failing to ascertain the true identity of the client, and negligence in failing to ascertain the true identity of the client in paying over to her the amount of compensation. After rejecting the first three of these (paras 4–9), the court then posed the question whether the attorney owed any legal duty to the Fund, a question that would be dispositive of the last three bases and the one of interest here (para 10). Can an attorney owe a legal duty to a third party, such as the Fund, while carrying out the instructions of the client?

Relying on English law, the court stated that 'the attorney-client relationship imposes a duty on an attorney to advance the interests of his client, even where that course will cause harm to the opposite party ...' (para 11). In the ordinary course of protecting his client's interests, an attorney would in general incur no liability for harm caused to the party on the other side (ibid). 'Something more' would be required to establish such liability (ibid). The court held that it would be impossible to articulate an all-embracing test as to when a legal duty owed by an attorney towards a third party would arise, and noted that such question of wrongfulness 'is essentially one of legal policy' (para 12). In the circumstances of the case at hand, the court declined to identify policy that would justify the imposition of a delictual duty. The court noted that the Fund had a duty to investigate claims in terms of s 4(1) of the Road Accident Fund 56 of 1996 and had no wish to shift the investigative duty to attorneys. To do so would undermine the attorney-client relationship, increase the cost to the client, and result in delays (paras 17–18). It was not necessary for the attorney to treat the client with suspicion and to seek independent corroboration (para 17). The only *caveat* was an admittedly subjective test: an attorney could not engage in 'a wilful

abstention from all sources of information which might lead to suspicion' (para 18). The *status quo* position of the SCA in relation to the imposition of a duty to suspect impostors in delict is also understandable from the point of view of several recent aggressive impostor-hunting laws including those applicable to attorneys such as the Financial Intelligence Centre Act 38 of 2001.

And of course impostors may be attorneys as well as widows. *Parker v Maphumulo* 2005 (2) SA 212 (C) (also discussed in the chapters on succession and negotiable instruments) concerned another impostor: a person representing himself as an attorney to the mother of a minor child entitled to a distribution from a deceased's estate. Having convinced the real attorney administering the deceased's estate that the minor was entitled to the payment, the impostor then apparently arranged to irregularly deposit a cheque made out to the fund of the minor's guardian but sent to him by the real attorney. In the court's view, it was not negligent for the real attorney to post such a cheque where there was a *bona fide* and not unreasonable belief that the recipient was an attorney and with the expectation that the banks would follow the proper procedures regarding its deposit (at 216C-G).

#### OFF THE ROLL AND OUT OF OUR COURTS

*Soller v President of the Republic of South Africa* 2005 (3) SA 567 (T) (also discussed in the chapter on constitutional law) concerned an application for leave to sue a judge in terms of s 25(1) of the Supreme Court Act 59 of 1959. Section 25(1) mandates that leave of court must be sought before a civil action may be brought against a judge. Mr Soller had been struck off the roll in proceedings in 2001, in part because he had deliberately lied to court and had made serious defamatory allegations regarding a judge being involved in child pornography and another being involved in attempted murder. It was the judgment in those proceedings that gave rise to his present claim of defamation. In the 2001 proceedings, Bertelsmann J (in whose judgment De Villiers J had concurred) had written:

'The respondent is visibly tormented by his personal conviction that these powerful entities are conspiring against him. However sad this situation may be, it does not detract from the fact that the respondent has seen fit to attack all the Judges of an entire Division of the High Court of South Africa in the most ill-tempered and unrestrained fashion possible, and has hurled accusations of gross misconduct at other persons and entities without any evidence that could pass muster

at all. Regardless of the respondent's personal pain, his actions, deplorable in themselves, clearly evidence his utter inability to consider these matters objectively and dispassionately. Whatever his personal feelings, as an officer of the Court he must have appreciated that his contemptuous actions towards the Judiciary constituted very serious professional transgressions. His insistence that his accusations, grotesque as they are, are the truth, not only adds insult to injury, but demonstrates clearly that the respondent does not have, or does no longer have, the ability to reflect maturely upon matters upon which he is engaged as an attorney. His uncritical assertion of his own convictions as the absolute truth demonstrates that he is a danger not only to himself, but also to his clients and the public at large. The transgressions I have described are serious. The mindset which produced them renders the respondent unfit to practice (sic) as an attorney of this Court' (para 7).

Admitting that this passage could constitute defamation, the court found no good cause to grant leave to pursue the civil action (paras 10–11). There was no evident malice on the part of the judges who struck off the application. And furthermore those judges needed to be particularly thorough as the Court has the final responsibility of deciding whether a person is a fit and proper person to continue to practice. This justified the robust language used in the decision (para 11).

#### TOUTING

The case of *Law Society, Cape of Good Hope v Berrangé* 2005 (5) SA 160 (C) resulted from the marketing agreements signed by Mr Berrangé with two estate agencies promising suitable consideration calculated on commercial principles for promoting and marketing Mr Berrangé's law firm, Buchanan Boyes. Considerable conveyancing work was done by Mr Berrangé's law firm apparently as a result of these agreements; Seeff Residential Properties was paid R237 000 and Pam Golding Properties received R271 500 respectively. The Cape Law Society laid and investigated a charge of unprofessional conduct, the suspicion being a violation of the Society's rule 14.6.1.1, which provides as follows:

##### '14.6 Sharing of Fees

A member shall not, directly or indirectly, enter into any express or tacit agreement, arrangement or scheme of operation, the result or potential result whereof is –

14.6.1.1 to secure for the member professional work solicited by an unqualified person . . .'

Internal disciplinary hearings were held and were stopped after admissions were made, with the matter then being brought to court. Upon close examination of the invoices sent in terms of the purported marketing agreements as well as other evidence not directly countered, the court found the inference irresistible that the genuine basis underlying the invoices for such substantial amounts was the significant number of conveyancing transactions sent the way of Buchanan Boyes by the estate agencies (at 166C–E). The court found the most plausible inference to draw from the evidence was that ‘the conveyancing work referred to [Buchanan Boyes] from Seeff and Pam Golding was generated as a result of the agencies inviting their clients to refer their conveyancing work [there]’ (at 173B). This was soliciting in breach of the rule.

The court noted that the Cape Law Society had for a number of years been concerned regarding a ‘payments as a reward to estate agents for the referral of conveyancing work’ (at 174A). The court saw this practice as ‘touting for business’ and stated that it ‘displays a high level of disloyalty to other members of the profession’ (at 174C). Noting that Mr Berrangé had paid a fine previously after a finding of unprofessional conduct, the court suspended him from practice for a period of two years. It does not appear from the record whether any sanction was levied against the law firm.

#### CLEANING UP AFTER A FORMER HOMELAND

*Law Society, Northern Provinces (Incorporated as the Law Society of the Transvaal) v Maseka & another* 2005 (6) SA 372 (B) is the second case concerning the regulation of the legal profession of the former homeland of Bophuthatswana. The other is *Mabaso v Law Society, of the Northern Provinces* 2004 (3) SA 453 (SCA) (discussed in 2004 *Annual Survey* 833).

In *Maseka*, the applicant Law Society sought a mandamus compelling the attorney (first respondent) to produce various books and records for inspection. The application was opposed by the first respondent and the Bophuthatswana Law Society (second respondent). One of the points raised *in limine* by the respondents was that the Law Society of the Northern Provinces (‘NP Law Society’) had no jurisdiction in respect of the first respondent. The NP Law Society had succeeded to the former Transvaal Law Society, but the territory of the former Transvaal Province had

been eroded when the Republics of Bophuthatswana and Venda were created during the apartheid years. The respondents contended that while the NP Law Society had jurisdiction over the provinces of the new democratic dispensation (namely, Gauteng, North West Province, Limpopo and Mpumalanga), their jurisdiction did not extend over the territory of the former Republics.

Having regard to s 71 of the Attorneys Act 53 of 1979, the court found that the jurisdiction of a law society could be understood as both provincial and extra-territorial in nature. Thus, the NP Law Society could exercise jurisdiction over an attorney whose name was on the roll in a court in the province although he was not practicing in the province. As the judge stated:

'If an attorney has committed unprofessional conduct in another province, it would not, in my view, be unreasonable for the law society having jurisdiction where he or she is enrolled to seek to investigate the matter. If the investigation warrants further steps, that law society could take steps alone or in conjunction with another law society also having jurisdiction, to address the situation' (at 176E).

Enrollment was thus a sufficient basis of jurisdiction. Depending on exactly how the regulatory authority for the legal profession evolves (as well as the provinces themselves) this extra-territorial authority may become significant.

However, the court also had to consider the issue of concurrent jurisdiction between the NP Law Society and the Bophuthatswana Law Society. Here, the judge noted dryly that '[t]he legal regulation of an attorney who practices in the territory of the former Republic of Bophuthatswana is a little complicated and not altogether satisfactory' (at 377D). Recognizing that the Bophuthatswana Law Society exists and does exercise concurrent jurisdiction in some matters, the Court nonetheless rejected an argument of statutory interpretation to the effect that the jurisdiction of the NP Law Society was limited to fidelity fund matters (at 378A).

The principle of broad extra-territorial and concurrent jurisdiction for a law society means that a relatively well-capacitated law society such as the Law Society of the Northern Provinces will be able to pursue matters of alleged unprofessional conduct such as those underlying this case. The negative effect (which must be negligible) would be upon the local autonomy and regulation of the attorneys' profession in the former homeland of Bophuthatswana. The real point, of course, is why the comprehensive regulatory overhaul of the legal profession has been so slow in progressing that such a 'not altogether satisfactory' situation remains.

The remainder of the case turned on whether the council of a law society's right to inspect an attorney's records in terms of s 70 of the Attorney's Act was administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000, and is discussed further in the chapter on administrative law.

## POLICE

### POLICE AUTHORISATION OF FIREARM LICENCES

In *Minister of Safety and Security v De Lima* 2005 (5) SA 575 (SCA) (also discussed in the chapter on delict) the respondent was shot with a revolver as a result of which he became a paraplegic. The shooter lawfully acquired possession of the firearm by virtue of a licence for which he had applied at the Parow police station. The licence was granted to him some five months before the shooting incident. Respondent sued the appellant on the basis that the police had been negligent in recommending that a firearm licence be issued and that, in issuing the licence, their negligence had been a direct cause of respondent's injuries.

A Special Force Order (General) 19B which was issued on 24 September 1979 by the Commissioner of the South African Police sets out the factors which have to be taken into account by the police when making a recommendation about the suitability of an applicant for a firearm. Of relevance to this case were questions about the temperamental nature of the applicant, and in particular whether he was quick tempered with a tendency towards violence. In the *De Lima* case, it appeared that some five years prior to applying for a licence to own a firearm, Mr Dos Santos (the shooter) was arrested on a charge of common assault, a charge which was subsequently withdrawn. Had the police conducted a proper interview with Dos Santos and asked how the charge came to be brought and subsequently to be withdrawn, they would have found that 'Dos Santos had a tendency to lose control of himself and, on the day in question, did so completely in the face of what appears not to have been particularly severe provocation' (para 8). Accordingly Cloete JA found that police had breached their duty of conducting a proper enquiry as to whether 'Dos Santos was a suitable person to possess a firearm and, in considering that question, the circumstances under which Dos Santos came to be charged, and the circumstances under which the charge came to be withdrawn . . .' (para 4).

In finding that the police are required to instigate a proper enquiry in order to evaluate the factors which are set out in Special Force Order (General) 19B, the judgment imposes clear obligations on the police to consider the merits of each application for a licence to own a firearm. This is a welcome approach, given that firearm-related deaths remain a leading external cause of non-natural deaths in South Africa (See the press release of the South African Medical Research Council 'Firearms still the leading cause of non-natural death' 30 November 2005).

### CRIME STATISTICS

The following table represents the latest official statistics provided by the South African Police Service for crime in the Republic of South Africa. It provides figures for crime from April-March 2001/2002-2004/2005.

**Crime in the RSA per Crime Category from April to March  
2001/2002 to 2004/2005**

Crime Category	April to March			
	2001/2002	2002/2003	2003/2004	2004/2005
Murder	21 405	21 553	19 824	18 793
Rape	54 293	52 425	52 733	55 114
Attempted Murder	31 293	35 861	30 076	24 516
Assault with the intent to inflict grievous bodily harm	264 012	266 321	260 082	249 369
Common assault	261 886	282 526	280 942	267 857
Robbery with aggravating circumstances	116 736	126 905	133 658	126 789
Common robbery	90 205	101 537	95 551	90 825
Indecent assault	7 683	8 815	9 302	10 123
Kidnapping	4 433	3 071	3 004	2 618
Abduction	3 132	4 210	4 044	3 880
Neglect and ill-treatment of children	2 648	4 798	6 504	5 568
Culpable homicide	10 944	11 202	11 096	11 995
Public violence	907	1 049	979	974
Carjacking (Sub-category of robbery with aggravating circumstances)	15 846	14 691	13 793	12 434
Truck hijacking (Sub-category of robbery with aggravating circumstances)	3 333	986	901	930
Bank robbery (Sub-category of robbery with aggravating circumstances)	356	127	54	58
Robbery of cash in transit (Sub-category of robbery with aggravating circumstances)	238	374	192	220
House robbery (Sub-category of robbery with aggravating circumstances)	—	9 063	9 351	9 391

Crime Category	April to March			
	2001/2002	2002/2003	2003/2004	2004/2005
Business robbery (Sub-category of robbery with aggravating circumstances)	—	5 498	3 667	3 320
Arson	8 739	9 186	8 806	8 184
Malicious damage to property	145 451	157 070	158 247	150 785
Crimen Injuria	60 919	63 717	59 908	55 929
Burglary at residential premises	302 657	319 984	299 290	276 164
Burglary at business premises	87 114	73 975	64 629	56 048
Theft of motor vehicle and motorcycle	96 859	93 133	88 144	83 857
Theft out of or from motor vehicle	199 282	195 896	171 982	148 512
Stock theft	41 635	46 680	41 273	32 675
Illegal possession of firearms and Ammunition.	15 494	15 839	16 839	15 497
Drug related crime	52 900	53 810	62 689	84 001
Driving under the influence of alcohol or drugs	24 553	22 144	24 886	29 927
All theft not mentioned elsewhere	576 676	620 240	606 460	536 281
Commercial Crime	58 462	56 232	55 869	53 931
Shoplifting	68 404	69 005	71 888	66 525

These figures indicate that many serious crime levels have declined over the reported period. For example from 2002/3 to 2004/5, violent crimes (murder, attempted murder serious assault and rape) have fallen by 8 per cent and property crimes (aggravated robbery, common robbery, car theft and housebreaking) have declined by 11 per cent.

These statistics have to be treated with considerable caution, particularly the claim of reduced levels of serious crime. Thus, even on these figures, reported rape increased by some 5 per cent over the period 2003/2004 to 2004/2005. It is well documented that official rape statistics are very unreliable due to under-reporting. In this connection, Anthony Altbetker (*The Dirty Work of Democracy: A Year on the Streets with the SAPS* (2005)) has noted that there are three requirements for a crime to be introduced into the official statistics: It has to be noticed; it has to be reported; and it has to be accurately recorded. In particular, he writes that numerous cases of domestic violence are never recorded, which thus contributes to a considerable measure of under-reporting. Altbetker has also argued that numerous crimes of rape are not reported, particularly date rape and hate crimes, especially when lesbians are involved (see Tisha Eetgerink 'Talking crime: Perception versus statistics' 6 June 2006 *Mail and Guardian*). Altbetker concludes that only two types of crime statistics are 'truly reliable': The first being murder because police cannot refuse to record a

murder, and the other being car theft and carjacking where these tend to be well reported for insurance purposes.

Even if the reductions in certain forms of serious crime are an accurate reflection of the current patterns of crime, as is evident from the statistics, there has been a significant increase in the level of drug-related crimes. The main contributor has been a 120 per cent increase in drug related crime in the Western Cape since 2002/2003 and to a lesser but still significant extent, increases in KwaZulu Natal (80 per cent) and the North West (71 per cent) during the same period. Julie Berg ('The rise of 'Tik and the Crime Rate' (2005) *South African Journal of Criminal Justice* 306) argues that this rise in drug-related crime in the Western Cape is directly correlated to the rise in the use of Methamphetamine or 'Tik'. Between July 2000 and December 2004 there was an increase of 300 per cent in the use of tik. Berg cites one estimate of there being 140 000 users in the greater Cape Town area. The extensive use of this drug has a significant impact upon certain types of crime such as prostitution, domestic violence, theft and house-breaking. She also notes that there is arguably an 'even more' tangible connection between tik and crime for 'the increasing market for "tik" is in direct competition with other drug markets and this has resulted in a "tik war"' (ibid at 325).

## PRISONS

### CASE LAW

In *De Lange v Clerk of the Magistrate's Court, Port Elizabeth* 2005 (2) SACR 308 (SE) the applicant sought an order that he be received by and serve his sentence of imprisonment at the correctional centre in Malmesbury rather than a prison in Port Elizabeth. The applicant claimed that, although being convicted on charges of fraud and sentenced in the regional court of Port Elizabeth to four years imprisonment, he would run the risk of bodily harm, were he to be imprisoned in the Eastern Cape. He had practiced as an advocate in that region and had been involved in a number of criminal cases on behalf of persons incarcerated in various Eastern Cape prisons. Some of his clients were unsuccessful and he was concerned they 'might seek revenge against him'. (para 7). Furthermore, Malmesbury was close to his home and the prison was therefore suitable for his imprisonment in view of the fact that many of his friends and relatives could visit him there.

Erasmus J held that s 299 of the Criminal Procedure Act 51 of

1977 did not empower the magistrate of Port Elizabeth to indicate on the warrant of imprisonment that the applicant could be received at a correctional centre outside of the magisterial district in which the person was sentenced (para 14). Furthermore, prisoners could not conclude binding arrangements with the Department of Correctional Services as to where they should be imprisoned (para 22).

In *Van Rooyen en andere v Die Departement van Korrektiewe Dienste en 'n ander: In re: S v Du Toit en andere* 2005 (1) SACR 77 (T), the applicants were 13 of the 22 accused in the so-called Boeremag trial. They were detained in a C-Maximum prison which was not suitable for awaiting trial prisoners. Accordingly, their counsel were unable to consult with their clients after hours. Applicants complained that they had unsuitable facilities to consult with their counsel or to prepare properly to provide their counsel with instructions. They wanted to use a joint consultation room in a secluded section of the prison but the first respondent refused to give permission, adopting the approach that a court did not have the power to prescribe to the prison authority under what circumstances prisoners could be held in prison. Following the earlier decision of the SCA in *Minister of Correctional Services v Kwakwa* 2002 (1) SACR 705 (SCA) Jordaan J described this argument as 'verbasend' (at 95 c). The court found that the refusal of the first respondent to provide adequate facilities was a clear breach of prisoners' right to prepare for trial as well as s 17(4) of the Correctional Services Act 111 of 1998 which provides that prisoners facing trial or sentence must be provided with the opportunities and facilities to prepare their defence.

In *S v Boltney* 2005 (1) SACR 278 (C) the question arose as to whether an accused who breaks conditions of parole should be sentenced to a period of imprisonment longer than that which she or he would have served in the normal course of events. Blignault J noted that s 65(d) of the Correctional Services Act 8 of 1959 had provided that a prisoner who breaks parole should not be imprisoned for a term which is longer than the remaining portion of the sentence. This section had been repealed and replaced by s 117(e) of the 1998 Act which provides that any person who is subject to community correction and then absconds and thereby avoids being monitored, is guilty of an offence and upon conviction may be imprisoned to a period of imprisonment with or without the option of a fine.

Blignault J found that, notwithstanding this wording, the provisions of s 65(3)(d) encapsulated an important principle, namely

that in an ordinary case an accused who breaks parole should not be sentenced to a longer term of imprisonment than that which he would have had to serve in the ordinary course. Blignault J noted that there may well be exceptional circumstances where a heavier sentence may be imposed (para 14).

In *Mnguni v Minister of Correctional Service & others* 2005 (12) BCLR 1187 (CC) a prisoner, serving a prison term of 15 years sought an order, without legal assistance, requiring the respondents to reconsider his request for medical parole in terms of s 79 of the Correctional Services Act 111 of 1998. He had been diagnosed in prison as HIV-positive during 1998. In 2004 he was informed that his CD4 blood count had dropped below a critical level and accordingly his immune system was severely compromised. The High Court had ordered that a medical practitioner prepare a report on his medical status and that the case management committee interview him and then prepare and submit a report to the Correctional Supervision and Parole Board so that consideration could be given to his placement on parole. He alleged that he had been called before the case management committee and informed that prisoners were no longer released on medical parole. He therefore sought an order requiring that this decision be reconsidered. The Constitutional Court held that direct access had not been established. However, as he was not being represented, it ordered that the matter be drawn to the attention of the Law Society concerned with the request that it consider whether to appoint an attorney to consult with the applicant as to whether he had a legal claim (para 7).

## PRISON STATISTICS

**Categories of prisoners in SA prisons**  
**Annual Report 2005/2006 of the Judicial Inspectorate of Prisons**

	January 2005	December 2005
Total Prisoners	187 456	157 402
Available accommodation	113 825	114 522
Sentenced prisoners	135 143	111 075
Unsentenced prisoners	52 313	46 327
Males (sentenced)	132 098	108 788
Males (unsentenced)	51 215	45 395
Females (sentenced)	3 045	2 287
Females (unsentenced)	1 098	932
Juveniles (sentenced)	12 261	9 494
Juveniles (unsentenced)	10 577	9 079
Children (sentenced)	1 508	1 137
Children (unsentenced)	1 775	1 217

A total of 46 327 persons, that is 29 per cent of the total prison population at December 2005 are unsentenced, of which 5 393 have remained in custody for more than one year. The following table reflects the terms of imprisonment of the 211 075 sentenced prisoners.

**Terms of imprisonment per sentence group**

SENTENCE GROUPS	AGES Years	20-25 years	> 25 Years	All Ages
0-6 Months	671	1 510	2 019	4 200
>6-12 Months	619	1 479	1 714	3 812
>12-<24 Months	510	1 158	1 421	3 089
2-3 Years	1 331	3 560	4 763	9 654
>3-5 Years	1 176	3 816	5 683	10 675
>5-7 Years	573	3 033	5 483	9 089
>7-10 Years	664	5 287	12 347	18 298
>10-15 Years	446	5 810	17 484	23 740
>15-20 Years	152	2 416	8 554	11 122
>20 Years	68	1 556	7 862	9 486
Habitual Criminal	0	7	1 137	1 144
Life Sentence	36	1 147	5 432	6 615
Periodic	5	3	12	20
Day Parole	0	0	32	32
Reformatory	17	5	15	37
Ordered by Court as				
Dangerous	0	1	29	30
Death Sentence	0	0	28	28
Mental Instability	0	1	1	2
Totals:	6 268	30 789	74 016	111 075

In his report, Judge Fagan (*Report of the Judicial Inspectorate of Prisons*) notes that as a result of the special remission of sentenced prisoners which took place between 12 June to 9 August 2005, the sentenced prison population decreased by about 25 000. The excess of prisoners over accommodation was therefore reduced from 73 569 to 42 880.

Notwithstanding the early release of these 25 000 prisoners, South Africa remains ninth in the world rating of countries with the biggest prison populations per general population. Only the United States of America, China, the Russian Federation, Brazil, India, Mexico, Ukraine and Thailand are ahead of South Africa (*ibid* at 20).

## LITERATURE

- Adhikarie, Z (ed) *Legal Advisors' Forum Parliamentary Counsel* (2005) Cape Town: Juta & Co. Ltd.
- Botha, A *The Law Society of South Africa Practice Manual Service Issue 23* (2005) Durban: LexisNexis Butterworths.
- Bruce, D & Isserow, M *Putting people first? A survey of witness satisfaction in three Gauteng Magistrates' Courts* (2005) Johannesburg: Centre for the Study of Violence and Reconciliation.
- Bruce, D & Neild, R *The police that we want: A handbook for oversight of police in South Africa* (2005) Johannesburg: Centre for the Study of Violence and Reconciliation.
- Daniels, H *MMF – RAF Practitioner's Guide Service Issues 14 & 15* (2005) Durban: LexisNexis Butterworths.
- Du Bois, Francois *The Practice of Integrity. Reflections on Ronald Dworkin and South African law* (2005) Cape Town: Juta & Co. Ltd.
- Lane, P *South Africa's equality courts: An early assessment* (2005) Johannesburg: Centre for the Study of Violence and Reconciliation.
- LexisNexis Butterworths *The Lawyer's Pocketbook 2006* (2005) Durban: LexisNexis Butterworths.
- LexisNexis Butterworths with the Board for Sheriffs and the South African Institute for Sheriffs *Sheriffs Handbook Issue 10* (2005) Durban: LexisNexis Butterworths.
- Maroga, M *Community Policing and Accountability at Station level* (2005) Johannesburg: Centre for the Study of Violence and Reconciliation.
- Masuku, D *Strengthening democratic policing in South Africa: Enhancing and coordinatng the internal and external accountability systems of the South African police service* (2005) Johannesburg: Centre for the Study of Violence and Reconciliation.
- McQuoid-Mason, David & Coetzee, Lindi (eds) *Street Law South Africa: Practical law for South Africans: Educator's manual 2nd ed* (2005) Cape Town: Juta & Co. Ltd.
- Newham, G *A decade of crime prevention in South Africa from national strategy to local challenge* (2005) Johannesburg: Centre for the Study of Violence and Reconciliation.
- Seedat, Shameela (ed) *Debating the Transformation of the Judiciary: Rhetoric and Substance* (2005) Conference Report, Cape Town: IDASA.
- Seedat, Shameela (ed) *Equality Courts* (2005) Research Report, Cape Town: IDASA.
- Steinberg, Johnny *After the commandos: the future of rural policing in South Africa* (2005) Pretoria: Institute for Security for Studies.
- Vetten, L, Budlender, D & Schneider, V *The price of protection: Costing the implementation of the Domestic Violence Act (no. 116 of 1998)* (2005) Policy Brief No. 2, Johannesburg: Centre for the Study of Violence and Reconciliation.

- Badwaza, Yoseph Mulugeta *Public interest litigation as practiced by South African human rights NGOs: Any lessons for Ethiopia?* (2005) LL.M. Thesis, Bellville: University of the Western Cape.
- Gallinetti, Jacqui & Odongo, Godfrey *The Treatment of Children in South African Prisons – A report on the Applicable Domestic and International Minimum Standards* (2005) Research Paper No. 11, Bellville: CSPRI, Community Law Centre, University of the Western Cape.
- Le Goff, Laurent *An international arbitration act for South Africa* (2005) LL.M. Thesis, Bellville: University of the Western Cape.
- Muntingh, Lukas *Offender rehabilitation and reintegration: taking the White Paper on Corrections forward* (2005) Research Paper No. 10, Bellville: CSPRI, Community Law Centre, University of the Western Cape.
- Obiokoye, Onyinye Iruoma *Eradicating delay in the administration of justice in African courts: A comparative analysis of South African and Nigerian courts* (2005) LL.M. Thesis, Bellville: University of the Western Cape.
- Riley, Diana *The information needs of attorneys in a large South African law firm* (2005) M.Bibl. Thesis, Cape Town: University of Cape Town.
- Tapscott, C *A study of best practice in prison governance* (2005) Research Paper No. 9, Bellville: CSPRI, Community Law Centre, University of the Western Cape.
- Arendse, N 'A threat to the judiciary or much ado about nothing?' (2005) 18(1) *Advocate* 22.
- Arendse, N 'The legal practice bill' (2005) 18(2) *Advocate* 5.
- Arendse, N 'The way forward' (2005) 18(2) *Advocate* 2.
- Arendse, Norman 'The restructuring of the bar' (2005) 18(3) *Advocate* 30.
- Avery, M 'Global assault on attorney-client privilege' (2005) 5(9) *Without Prejudice* 35.
- Baatjies, Reuben 'Communities providing services' (2005) 7(5) *Local Government Bulletin* 12.
- Bertelsmann, Eberhard 'Advocacy training at Oxford' (2005) 18(3) *Advocate* 14.
- Bezuidenhout, Amanda 'Thinking outside the box: Pietermaritzburg juvenile court' (2005) 7(3) *Article 40* 6.
- Bodenstein, Jobst 'Access to legal aid in rural South Africa: in seeking a coordinated approach' (2005) 26(2) *Obiter* 304.
- Bohler-Muller, N 'When things fall apart: ethical jurisprudence and global justice' (2005) 20(1) *SA Public Law* 29.
- Bojosi, K N 'The death row phenomenon comes to Botswana: *Lehlohonolo Bernard Kobedi v The State*' (2005) *CILSA* 304.
- Brickhill, Jason 'The right to a fair civil trial: The duties of lawyers and law students to act pro bono' (2005) 21(2) *SAJHR* 293.
- Brink, Sharon 'Legal pluralism in South Africa in view of the Richtersveld Case' (2005) 16 *Stellenbosch Law Review* 174.
- Brown, Gerda 'Probation services in Gauteng' (2005) 7(3) *Article 40* 1.

- Burt, Kevin 'Delimiting the limits of legal advice privilege' (2005) 4 *De Rebus* 22.
- Buys, R 'Law societies under fire: the law' (2005) 6(1) *Without Prejudice* 4.
- Carpenter, G 'Without fear or favour – ensuring the independence and credibility of the “weakest and least dangerous branch of government”' (2005) 3 *TSAR* 499.
- Cowan, Ruth B 'The Women's Legal Centre during its first five years' (2005) *Acta Juridica* 273.
- Davis, D M 'The criminal justice system' (2005) *March News & Views for Magistrates* 6.
- Davis, L & Booyens, K 'The functioning of the Hatfield Criminal Court: a police perspective' (2005) 18(2) *Acta Criminologica* 116.
- De Jong, M 'An acceptable, applicable and accessible family-law system for South Africa – some suggestions concerning a family court and family mediation' (2005) 1 *TSAR* 33.
- De Klerk, Willem 'University law clinics in South Africa' (2005) 122 *SALJ* 929.
- Dickson, A J 'One-year pupillage a huge success' (2005) 18(1) *Advocate* 19.
- Dickson, A J 'Pupillage format – 2006' (2005) 18(3) *Advocate* 12.
- Dorkin, B 'Through the eyes and hands of a volunteer' (2005) 66 *Agenda* 123.
- Du Plessis, F 'Antipathy to international arbitration' (2005) 6(1) *Without Prejudice* 17.
- Du Plessis, F 'Needed – a reputation as an arbitration friendly jurisdiction' (2005) 5(6) *Without Prejudice* 34.
- Du Plessis, Francois 'International alternative dispute resolution' (2005) 10 *De Rebus* 20.
- Erasmus, Deon 'From Bantu divorce courts to divorce courts: a successful exercise in legal transformation' (2005) 26(1) *Obiter* 116.
- Erasmus, J C & Mans, G G 'Churches as service providers for victims of sexual and/or violent crimes. A case study from the Paarl community' (2005) 18(1) *Acta Criminologica* 140.
- Essop, Fatimah 'The junior bar – issues of national interest' (2005) 18(3) *Advocate* 50.
- Fagan, J J 'Our bursting prisons' (2005) 18(1) *Advocate* 33.
- Field, Tracy 'Demystifying and problematising the paradigm shift affecting legal education' (2005) 16 *Stellenbosch Law Review* 324.
- Froneman, J C 'Legal reasoning and legal culture: Our “vision” of law' (2005) 16 *Stellenbosch Law Review* 17.
- Gad, R 'Threatening the right to undisturbed access to legal advice' (2005) 5(6) *Without Prejudice* 38.
- Gallinetti, Jacqui 'Civilian oversight and South African prisons: an examination of the Independent Visitor System' (2005) 9(1) *Law, Democracy and Development* 67.

- Haynie, Stacia L 'Oral advocacy and judicial decision making in the South African Appellate Courts' (2005) 21(3) *SAJHR* 473.
- Hocter, Shannon 'Regulation of the use of CCTV as a crime prevention technique' (2005) 26(1) *Obiter* 76.
- Jackson, J 'The role of legal advisers in Africa-wide investments' (2005) 5(3) *Without Prejudice* 8.
- Jagwanth, Saras 'A review of the judicial inspectorate of prisons in South Africa' (2005) 9(1) *Law, Democracy and Development* 45.
- Kemp, Vicky & Pleasence, Pascoe 'Targeting civil legal needs: matching services to needs' (2005) 26(2) *Obiter* 285.
- Klaaren, Jonathan, Stein, Nikki & Xulu, Carolina Nomphumelelo 'Constitutional Court statistics for the 2004 term' (2005) 21(4) *SAJHR* 636.
- Kriel, J 'Emerging trends among the South African inmate population and persons subject to community corrections' (2005) 18(2) *Acta Criminologica* 100.
- Le Roux, Wessel 'The right to a fair trial and the architectural design of court buildings' (2005) 122 *SALJ* 308.
- Lewis, Carole 'Reaching the pinnacle: Principles, policies and people for a single apex court in South Africa' (2005) 21(4) *SAJHR* 509.
- Lumina, Cephas 'Students' perceptions of the problem method in law: Implications for teaching practice' (2005) 16 *Stellenbosch Law Review* 349.
- Luyt, W F M 'A critical view on HIV/Aids in South African prisons within the framework of the Dublin Declaration on HIV/Aids in prisons' (2005) 18(2) *Acta Criminologica* 71.
- Malan, Koos 'The unity of powers and the dependence of the South African judiciary' (2005) 38(1) *De Jure* 99.
- Mashigo, D 'Counsel and protection from suit' (2005) 18(2) *Advocate* 45.
- Mbazira, Christopher 'Johannesburg's special cases policy' (2005) 7(2) *Local Government Bulletin* 5.
- McQuoid-Mason, D J 'Access to justice and the role of law schools in developing countries: some lessons from South Africa: Part 2:1990 until the present' (2005) 1 *Tydskrif vir Regswetenskap* 1.
- McQuoid-Mason, David 'Lessons from South Africa for the delivery of legal aid in small and developing commonwealth countries' (2005) 26(2) *Obiter* 207.
- Minnie, Deon 'The accused: can film teach judicial officers about prejudice and bias in sexual offences cases?' (2005) *Dec News & Views for Magistrates* 5.
- Morrison, C J 'Gender discrimination versus equality in the police' (2005) 18(3) *Acta Criminologica* 20.
- Mpati, L 'Executive control over the judiciary' (2005) 18(3) *Advocate* 32.
- Mungar, Upkaar 'Litigating for children with psychiatric, psychological and emotional needs: children's litigation project' (2005) 7(2) *Article* 40 10.

- Muntingh, L.M. 'Surveying the prisons landscape – what the numbers tell us' (2005) 9(1) *Law, Democracy and Development* 21.
- Muntingh, Lukas 'Children in prison: some good news, some bad news and some questions' (2005) 7(2) *Article* 40 8.
- Muralidhar, S 'Legal aid practices: comparative perspectives' (2005) 26(2) *Obiter* 261.
- Naude, W 'Poor, young and unmarried: men and crime in South Africa' (2005) 18(1) *Acta Criminologica* 126.
- Newham, G 'Strengthening democratic policing in South Africa through internal systems for officer control' (2005) 36(2) *South African Review of Sociology* 160.
- Nicholson, C M A 'Back to the future: teaching legal history and Roman law to a demographically diverse and educationally under-prepared student body' (2005) 11(2) *Fundamina* 50.
- Nicholson, C M A 'Same game, new name? The more things change in legal education the more they stay the same' (2005) 68(2) *THRHR* 226.
- Nielsen, J S 'Human rights, prisoners and the courts: quo vadis?' (2005) 18(1) *Advocate* 36.
- Nienaber, P M & Kahn, E (eds) 'Reminiscences of bench and bar mainly of the Free State' (2005) 122 *SALJ* 1.
- Ntlama, N 'Unlocking the future: monitoring court orders in respect of socio-economic rights' (2005) 68(1) *THRHR* 81.
- Ntlama, Nomthandazo 'Monitoring the achievement of equality through the Equality Courts' (2005) *Dec News & Views for Magistrates* 6.
- Olivier, M 'Onlangse wysigings aan artikel 9 van die Wet op Landdroshowe 32 van 1944 met betrekking tot die aanstelling van landdroste in waarnemende of tydelike hoedanighede' (2005) 68(4) *THRHR* 654.
- Olivier, M 'The appointment of an unqualified person as a temporary magistrate in terms of section 9(3) of the Magistrates' Court Act 32 of 1944: *Piedt vs The State* [2001] 2 All SA 415 (E)' (2005) 19(2) *Speculum Juris* 233.
- Pithey, Bronwyn 'Children awaiting trial project: Western Cape' (2005) 7(1) *Article* 40 10.
- Potgieter, P J, Michell, L J, Khoza, V I & Cilliers, C H 'Correctional officers' perceptions of restorative justice' (2005) 18(1) *Acta Criminologica* 40.
- Rautenbach, Christa 'Therapeutic jurisprudence in the customary courts of South Africa (Traditional Authority Courts as Therapeutic Agents)' (2005) 21(2) *SAJHR* 323.
- Reed, Tricia 'Divorce settlement agreements – What every attorney should know about the financial services industry' (2005) 8 *De Rebus* 20.
- Rogers, O & Arendse, N 'Racism in the legal fraternity' (2005) 18(1) *Advocate* 24.
- Schulze, Christian 'International commercial arbitration: An overview' (2005) 46(2) *Codicillus* 45.

- Singh, D 'Resorting to community justice when state policing fails: South Africa' (2005) 18(3) *Acta Criminologica* 43.
- Sloth-Nielsen, J 'Developing a child justice system through judicial practice' (2005) 7(4) *Article 40* 1.
- Sloth-Nielsen, Julia 'Policy and practice in South African prisons: an update' (2005) 9(1) *Law, Democracy and Development* 1.
- Spilg, B 'Judicial independence: a dummy's guide' (2005) 18(2) *Advocate* 16.
- Steinberg, J 'Assessing the future of rural policing: the impact of closing the Commandos' (2005) 13 *SA Crime Quarterly* 1.
- Steinberg, J 'Sector policing that works: a case study of the West Rand' (2005) 11 *SA Crime Quarterly* 27.
- Steyn, J 'Recruiting newcomers to the South African Police Service for the organisation's culture' (2005) 18(3) *Acta Criminologica* 82.
- Sutherland, R 'Changing briefing patterns' (2005) 5(3) *Without Prejudice* 20.
- The Editors 'Restorative justice training for magistrates' (2005) 7(3) *Article 40* 8.
- The Editors 'The detention of children: giving effect to the law' (2005) 7(4) *Article 40* 11.
- The Editors 'The management of children in the criminal justice system: update from the Department of Social Development' (2005) 7(3) *Article 40* 10.
- Van As, H 'Taking legal aid to the people: unleashing local potential in South Africa' (2005) 26(2) *Obiter* 187.
- Van As, Hennie 'Legal aid in South Africa: making justice reality' (2005) 49(1) *Journal of African Law* 54.
- Van As, Hennie 'Taking legal aid to the people: Unleashing local potential in South Africa' (2005) 26(2) *Obiter* 187.
- Van der Merwe, Stephan '*Litigation skills for South African lawyers* by CG Marnewick: Book review' (2005) 16 *Stellenbosch Law Review* 165.
- Van Wyk, B E & Theron, W H 'Fighting gangsterism in South Africa: a contextual review of gang and anti-gang movements in the Western Cape' (2005) 18(3) *Acta Criminologica* 51.
- Vawda, Yousuf A 'Access to justice: from legal representation to promotion of equality and social justice – addressing the legal isolation of the poor' (2005) 26(2) *Obiter* 234.
- Weiner, S 'Advocacy training' (2005) 18(2) *Advocate* 10.
- Weiner, Sharise 'Compulsory continuing legal education – yes or no?' (2005) 18(3) *Advocate* 16.

