L.V. THERON

Table of Contents

(Click on the Link below to navigate to that section)

- Nomination
- Acceptance Letter
- Questionnaire
- Cals Annexure A Report
- Cals Annexure A Final Literature Review
- Cals Annexure B
- Cals Annexure C
- Cals Annexure D & E
- Judgments

CALS
Centre for Applied Legal Studies

SONKE GENDER JUSTICE
HIV/AIDS • GENDER EQUALITY • HUMAN RIGHTS

11 May 2015
Ref: Nyembe/BHR

The Secretariat of the JSC
Constitutional Court
Private Bag X1
Constitution Hill
Braamfontein
Johannesburg
2017

Per email: Chiloane@concourt.org.za
Per email: Dube@concourt.org.za

Dear Commissioners

NOMINATION OF JUDGE LEONA THERON TO THE CONSTITUTIONAL COURT

1. The Centre for Applied Legal Studies ('CALS') and Sonke Gender Justice ('Sonke') hereby nominate Judge Leona Theron of the Supreme Court of Appeal ('SCA') to the Constitutional Court for the reasons set out below.

2. CALS is a public interest law clinic and NGO founded in 1979 and based at the School of Law of the University of the Witwatersrand. It seeks to achieve the realisation of human rights through advocacy, strategic litigation and research across five programmes. The programmes are: basic services, business and human rights, environmental justice, gender, and rule of law. One of the ways CALS aims to achieve the realisation of human rights is through the transformation of the legal profession. We believe that the transformation of society demands that the people who adjudicate legal disputes are able to locate them within the transformative objectives of the Constitution and on the foundation of human rights. To this end, CALS has conducted research on the transformation of the legal profession, which is attached and marked for your reference as **"Annexure A"**.

3. CALS also instituted legal proceedings at the Constitutional Court on the issue of the extension of the then Chief Justice's term of office; the Constitutional Court agreed with CALS that this issue had to be determined based on the constitutional imperatives of the rule of law, the separation of powers and judicial independence. This decision may be found at the following citation: *Justice Alliance of South Africa v President of Republic of South Africa and Others, Freedom Under Law v President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others* 2011 (5) SA 388 (CC).

4. Sonke is a non-profit organisation that works to create the change necessary to attain gender equality in South Africa. The organisation does so by calling for human rights to be protected and fulfilled by the state and citizens. Sonke's Policy Development and Advocacy Unit ('PDA') specifically works to shape South African and international legal and policy decisions on gender equality. Through its gender transformation of the judiciary project, the organisation aims to strengthen South Africa's Judiciary. Sonke works towards achieving these aims by engaging in advocacy to ensure that the judiciary is equitably comprised of women judges, and staffed with judges who uphold and advance the rights to human dignity, gender equality and freedom as espoused in the Constitution.

5. It is against this backdrop that CALS and Sonke nominate Judge Leona Theron of the SCA to the vacant seat at the Constitutional Court.

6. Judge Theron's CV indicates a lifelong commitment to human rights. Her efforts at ensuring the realisation of human rights and justice extend beyond direct service delivery to those in need towards decisions that advance the cause for gender equality and rule of law are set out below.

7. Judge Theron was admitted as an advocate in 1990. However, her legal career and commitment to human rights did not begin at admission. While studying for her LLB degree at the University of Natal, Judge Theron also served the legal profession and impoverished members of South African society as a secretary in the Legal Aid Clinic of her university. Judge Theron holds three degrees, a BA and a LLB from the University of Natal and a LLM from Washington DC.

8. Judge Theron's commitment to the realisation human rights is evident from the activities she undertook while still in law school: she served as an acting co-ordinator to the Street Law course and taught law to students at various high schools and staff at community-based organisations around Durban. This indicates an understanding that human rights can only be realised by individuals once they are understood and claimed by the people who have them. Judge Theron's commitment to human rights education is marked by lecturing posts held at Mangosuthu Technikon and the University of Natal as well as a trainer post she held at university based NGO – the Community Law Centre.

9. It is clear, from Judge Theron's CV, that the workers' rights are an area of keen concern to her. She spent over six months in Washington DC doing work on the rights of employees at the International Labour Organisation (as a special assistant to the director) and at the Occupational Safety and Health Law Centre (as a summer associate).

10. CALS and Sonke are not the only organisations to recognise Judge Theron's remarkable legal career. In 1994 Judge Theron was appointed the provincial adjudication secretary of the Independent Electoral Commission and in 1995 then President Nelson Mandela appointed Judge Theron as a commissioner of the Judge White Commission. This

commission was set up to investigate and adjudicate the benefits conditions of public service employees.

11. Judge Theron's legal acumen has been locally and internationally acknowledged; she was the recipient of the prestigious Fulbright Scholarship in 1990 and in 2000 was awarded the Department of Justice Women Achiever of the Year award.

12. Between July 1998 and May 1999 Judge Theron acted three times until she was appointed as a Judge to the Kwa-Zulu Natal Court, Durban in October 1999. She served at the High Court for 10 years, a period interrupted by an acting position at the SCA in 2006. In 2010, Judge Theron was appointed to the SCA. Judge Theron is currently acting at the Constitutional Court.

13. In a decision that was ultimately confirmed by the Constitutional Court, *Gumede v President of the RSA & others (Women's Legal Centre as amicus curiae)* [2008] JOL 21972 (D), Judge Theron demonstrated an acute knowledge of the various forms of discrimination experienced by black women in South Africa. Explaining the intersectional discrimination experienced by black women, Judge Theron said at para 12:

> "In my view, the proprietary regime established by the codification of customary law, is, *prima facie*, discriminatory. It is discriminatory as only African women are subjected by the law to such consequences. The discrimination is on two of the prohibited grounds listed in section 9(3) of the Constitution, namely race and gender."

14. Judge Theron's dissenting decision in *S v Nkomo* [2007] 3 All SA 596 (SCA) sets out an articulate understanding of women's experiences of sexual violence in the South African context. In that decision, Judge Theron said at para 28:

> "Against the backdrop of the unprecedented spate of rapes in this country, courts must also be mindful of their duty to send out a clear message to potential rapists and to the community that they are determined to protect the *equality, dignity and freedom of all women*. Society's legitimate expectation is 'that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because [substantial and compelling] circumstances are, unwarrantedly, held to be present.' *In our constitutional order women are entitled to expect and insist upon the full protection of the law.*" (Emphasis added.)

15. For convenience, these decisions are attached and marked "**Annexure B**" and "**Annexure C**" respectively.

16. Judge Theron's decision, written when she was an acting judge of the SCA, demonstrates an understanding not only of the law, but of the country within which the law is made and implemented and of the people for whom the law was enacted. This perspective is imperative for the highest court in the country which seeks to ensure the realisation of

human rights in a country with among the world's highest rates of sexual and gender-based violence.

17. It follows from the aforegoing that the appointment of Judge Theron will contribute to the Constitutional Court in a number of different ways: firstly, it will increase the number of women sitting on the Constitutional Court bench; secondly, it will assist the Constitutional Court in taking a gendered perspective to decision making; and thirdly, it will contribute to ensuring that the realisation of the ideals of the Constitution remain progressive and gender sensitive.

18. Section 174(1) of the Constitution provides that *"any appropriately qualified man or woman who is a fit and proper person may be appointed as a judicial officer"*. We are of the view that Judge Theron is indeed a fit and proper person and would be an effective and transformative jurist in the highest court of South Africa. Judge Theron is a sound, informed jurist and stands out from her peers. Her appointment will be valuable to the bench. As stated in section 174(2) of the Constitution, the judiciary needs to reflect broadly the racial and gender composition of the country. Judge Theron is more than fit and suited for the position. Her appointment is compelling on her merits and necessary in the interests of transformation of the judiciary.

19. We therefore, nominate Judge Theron to the Constitutional Court. This nomination letter will be followed by Judge Theron's application and supporting documentation.

20. Should you have any questions, concerns or queries, please feel free to contact Nomonde Nyembe, Baone Twala or Cherith Sanger at the contact details set out below.

Yours sincerely,

Nomonde Nyembe
Attorney: Centre for Applied Legal Studies
Telephone: +2711 717 8606
Email: Nomonde.Nyembe@wits.ac.za
Fax: +2711 717 1702
Reception: +2711 717 8600

Cherith Sanger
Admitted Attorney: Legal Consultant for Sonke Gender Justice
Telephone:+2721 423 7088
E-mail:cherith.sanger@gmail.com
Fax:+2721 424 5645

Baone Twala
Candidate Attorney: Centre for Applied Legal Studies
Telephone: +2711 717 8652
Email: Baone.Twala@wits.ac.za
Fax: +2711 717 1702
Reception: +2711 717 8600

S.A Chapter: International Association of Women Judges

advancing human rights and equal justice for all

Private Bag X2010
Mmabatho

2735

Phone: (018) 392 8200 x 8204
Fax: (018) 392 1908
Email: SKgoele@justice.gov.za

08 May 2015

The Secretariat of the JSC

Constitutional Court

Private Bag x 1

Constitution Hill

Braamfontein

Johannesburg

2017

RE: NOMINATION FOR APPOINTMENT AS JUDGE OF THE CONSTITUTIONAL COURT- JUDGE LEONA VALERIE THERON

The SAC-IAWJ nominates Justice Leona Valerie Theron for permanent appointment to the Constitutional Court of SA.

Judge Theron's curriculum is published on the Supreme Court of Appeal website and is well known. Her excellence is evident in her receipt of the Fulbright Scholarship in 1990, the Natal Young Achiever Award in 1994, the Common Wealth Foundation Fellowship in 1995, the Department of Justice Woman Achiever Award in 2000, the University of Durban Westville Mababongwe Award in 2003 and the KZN Legal Forum Award for Contribution to the Development of Justice in South Africa in 2011, KZN Business Women's Association Life Achievement Award 2014. She sits on various boards and has delivered papers at numerous conferences, both locally and internationally. She has been actively involved in professional bodies and the community through these bodies, as well as in judicial education and training.

Justice Theron is appointed in the Supreme Court of Appeal (the SCA) since 1 December 2010, having served as acting judge of the SCA from May 2006 to June 2007 and December 2009 to March 2010 and prior to this as a High Court judge in Kwa Zulu Natal. She has written well-reasoned judgments which are available on the internet and through the SCA Judgment website. She is known for her fearlessness in cases such as *S v Nkomo* [2007] 3 All SA 596 (SCA) in which she dissented from the majority judgment that referred to a report that some cases of rape " cannot be classified as falling within the worst category of rape" and which sought to overturn the prescribed term of life imprisonment handed down in the lower court. In that judgment she stated emphatically that, the rape of the complainant was one of the worst imaginable and expressed the view that our "Courts not shrink from their duty to impose, in appropriate cases, the prescribed minimum sentences ordained by the legislature." Her calibre of judicial discernment will be an asset to the Constitutional Court bench.

She is a founder member of the SAC-IAWJ since August 2004. She was Vice President of Programmes upon inception of the Chapter until 2007 when due to her appointment to the SCA, a senior position, as well commitments on other Committees she vacated the position to give other young women the opportunity to develop in this leadership position. She has been and continues to serve as a mentor for upcoming young women judicial officers.

She is one of the few senior members that have supported the SAC-IAWJ throughout the years even after her appointment to the Supreme Court of Appeal by attending conferences and addressing our meetings on topical issues particularly the inequalities of the appointment of Judges at all levels of the judiciary. Her paper has been referred to and quoted authoritatively by UCT: DRGU from time to time as well as within the leadership of the SAC-IAWJ. She has raised pertinent issues with all the Chief Justices at the conferences she has attended, which issues were addressed as part of the resolutions adopted at our conferences. We wholehearted and proudly support her for appointment to the Constitutional Court.

The Constitutional Court will benefit extremely from her energy, her acute consciousness of the Constitutional dynamics and imperatives of a South African judiciary and her astute scholarship in all matters that come before her.

The SAC-IAWJ nominates Justice Leona Valerie Theron for permanent appointment to the Constitutional Court of South Africa.

Yours Sincerely

Judge AM Kgoele

President of the SAC-IAWJ (On behalf of the Executive Committee)

ADVOCATES FOR TRANSFORMATION (KWAZULU-NATAL)

Tel No.: 031-3013310
Fax No.: 0866650593

Suite 1901, 19th Floor
The Marine
22 Gardiner Street
DURBAN
4001

11 MAY 2015

Judicial Service Commission

Attention: The Secretary

Dear Madam/Sir,

RE: **MOTIVATION: JUDGE LEONA THERON FOR POSITION ON THE CONSTITUTIONAL COURT**

It is my privilege on behalf of AFT - KwaZulu-Natal to provide this motivation in support of our nomination of the Honourable Madam Justice Leona Theron for the position on the Constitutional Court.

Judge Theron came from truly humble beginnings, growing up in a poor, deprived "coloured" township outside Durban. She rose above the surrounding environment of unemployment, poverty, alcohol and other abuse not least, the widespread presence of gangsters. Judge Theron is a shining example and role model to the community having overcome so many adversities in her life being the first person from all sides of her family to have matriculated and, whilst at University, worked part time including being a cashier at OK Bazaars in order to financially contribute towards her studies.

After completion of her BA LLB degrees at the then University of Natal, in 1989 she was awarded a Fulbright Scholarship by the US Government to study in America, graduating in 1990 with a LLM degree from Georgetown University in Washington DC. Whilst there she also worked for the ILO and for a firm of attorneys in Los Angeles.

Judge Theron practised as an Advocate from the end of 1990 and also lectured at the then University of Natal. She was appointed a member of the Judge White Commission by the then President Mandela and she was appointed a Judge on the 15th October 1999 in our Division being the first black female Judge to be appointed in this Province and, at the age of 32, the youngest Judge in our history at the time. She has now also served as a Judge in the Supreme Court of Appeal where she has acquitted herself with distinction. Judge Theron has also published numerous judgments, one of which being a dissenting judgment in S v Nkomo in disagreeing with the majority judgment of Lewis and Cameron JJA who altered a life sentence for rape to 16 years imprisonment. Judge Theron previously also delivered a judgment in Gumede v Government of RSA wherein she declared certain sections of the Natal Native Code unconstitutional because these discriminated against women in customary marriages. Judge Theron retains her active involvement in community affairs, having been involved in numerous community organisations and actively supporting the 16 Day No Violence Against Women campaign.

Judge Theron was one of the founding members of the SA Chapter of the International Association of Women Judges (IAWJ). Under her leadership, the SA Chapter of the IAWJ, and in partnership with Nadel and the Black Lawyers Association and various other NGO's, World Aids day was celebrated on the steps of the Durban High Court and at the Pietermaritzburg High Court. This

was a first in the legal fraternity and soon earned Judge Theron the title of 'activist judge'.

In December 2010, Judge Theron was appointed as a Judge of the Supreme Court of Appeal. She is currently the youngest member of the Supreme Court of Appeal. Judge Theron has been appointed as acting judge in the Constitutional Court, the highest court in South Africa, from February until May 2015.

Judge Theron is one of the longest serving women judges in South Africa, having served, together with her acting stints, more than 16 years on the bench. She has been actively involved in judicial education and training. Until 2013, she served as a member of the South African Judicial Education Institute and continues to be involved as a trainer in judicial education programs.

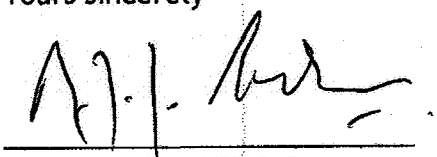
Judge Theron sits on a number of boards, and has delivered papers at numerous conferences, both within South Africa and internationally. Judge Theron has, over the years, has received numerous awards for her contribution to the development of justice in South Africa.

It is well known that the Judicial Service Commission is enjoined to consider the provisions of Section 174 of our Constitution and "the need for the judiciary to reflect the racial and gender composition of South Africa". Appointing Judge Theron would, in our view, address both gender and racial transformation of the judiciary at the highest level. Judge Theron is uniquely the only person from the historically "coloured" racial group who has made herself available and was amongst the first few women judges who served on the Supreme Court of Appeal. In our view she brings a unique perspective to

the judiciary and without doubt would enhance the Constitutional Court with her scholarship and serve it with distinction.

AFT KZN is therefore privileged and honoured to provide this motivation in support of Judge Theron and we duly commend her to you for the position as a Judge on the Constitutional Court of our country,

Yours sincerely



R.B.G. CHOUDREE S.C.
Chairperson
AFT KwaZulu-Natal

L Theron
51 Fourth Street
Houghton Estate
Gauteng

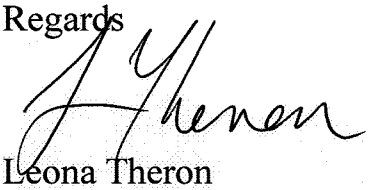
The Secretariat of the JSC
Constitutional Court
Private Bag x 1
Constitution Hill
Braamfontein
Johannesburg
2017

11 May 2015

RE: NOMINATION FOR APPOINTMENT AS JUDGE OF THE CONSTITUTIONAL COURT

I accept the nomination for a permanent seat on the Constitutional Court.

Regards



Leona Theron

JUDICIAL SERVICE COMMISSION

Private Bag X 1
Constitution Hill
Braamfontein
Johannesburg
2017

Tel: (011) 359 7537/7570
E-mail:chiloane@concourt.org.za/dube@concourt.org.za
Fax2Email: 086 649 0944

QUESTIONNAIRE FOR JUDGES

SECTION 1: PERSONAL

1. **What are your full names and surname**

1.1	Surname	**THERON**
1.2	Full names	**LEONA VALERIE**
1.3	Maiden name	N/A

2. **What is your address?**

2.1.	Residential	51 4TH STREET, HOUGHTON ESTATE, JOHANNESBURG
2.2	Postal	AS RESIDENTIAL

2.3	Telephone Number	011 3597400
	Chambers	CONSTITUTIONAL COURT
	Secretary	MR MOSALA SELLO
	Mobile	0842839150
	Fax	0866404378/0866490680
	E-mail	ltheron@justice.gov.za

3. **What is your date and place of birth?**

3.1.	Date of birth	7 November 1966
3.2	Place of birth	Durban, KZN
3.3	Citizenship	SOUTH AFRICAN
3.4	Identity Number	6611070042088

4. **What is your marital status?**

4.1 (Indicate with an "X")

4.2

Married	~~Single~~	~~Divorced~~	~~Widower~~	~~Widow~~
4.3X				

4.2 Particulars of children

Number and ages of children

4 children – ages 25, 23, 18, 17

5. **Please furnish particulars of your tertiary education.**

5.1 Qualifications **MASTER OF LAWS,** May 1990, Washington D.C. USA
BACHELOR OF LAWS, April 1989, University of Natal
BACHELOR OF ARTS, April 1987, University of Natal

5.2 Name of institution(s) UNIVERSITY OF NATAL
GEORGETOWN UNIVERSITY

5.3 Dates acquired 1987, 1989, 1990

6. **Please furnish chronological particulars of employment since leaving school or university**

Name of employer	***Position held***	***Period***
Department of Justice	Acting Judge of the Constitutional Court	Feb 2015 - May 2015
	Judge of the Supreme Court of Appeal	Dec 2010 to date
	Judge of the High Court (KZN)	Oct 1999 – Nov 2010
	Acting Judge of the Supreme Court of Appeal	Dec 2009 - March 2010
	Acting Judge of the Supreme Court of Appeal	March 2006 - Jun 2007
	Acting Judge of the High Court (KZN)	15 April - 30 May 1999
	Acting Judge of the High Court (Transkei)	16 March-9 April 1999
Self employed	Advocate of the High Court of SA	Dec 1991 - Oct 1999
	Member of the Judge White formerly Browde	Jan 1995 - May 1997

	Commission of Inquiry	
UKZN	Part-time lecturer	Jul - Nov 1994
IEC	Provincial Adjudication Secretary	Feb – May 1994
Community Law Centre	Trainer	Nov 1990 - June 1991
Reich, Adell & Crost Law Offices	Summer Associate	Aug - Sep 1990
Occupational Safety and Health Law Centre, Washington DC	Summer Associate	June - July 1990
International Labour Organisation (ILO) Washington DC	Special Assistant to the Director	Dec 1989 – May 1990
Dawson & Partners	Candidate Attorney	Feb – June 1989
Mangosuthu Technikon	Part-time Lecturer	Feb – June 1989
UKZN	Street Law Co-ordinator	Nov 1988- Jan 1989
UKZN	Student Librarian	March 1987– Nov 1988
Legal Aid Clinic UKZN	Secretary	May 1986 – Nov 1988
OK Bazaars	Part-time cashier	Dec 1981 – Jan 1989

7. **Please furnish chronological particulars of your membership of legal organizations – Past and Present.**

Name of organisation	***Position held***	***Period***
National Association of Democratic Lawyers	Ordinary Member, Member of the Durban branch executive for a period	1990 - 1999
Advocates for Transformation	Member	From the time the organization was established until 1999
Commonwealth Magistrates and Judges Association	Member of Council Member	2009-2012 2007 to date
SA Chapter of the International Association of Women Judges	Founder Member Vice President (Programs) Member	2003 2004 – 2007 2004 to date

8. **Please furnish particulars of community and other organizations of which you are or have been a member in the past ten years.**

Name of organisation	*Position held*	*Period*
	CHURCH	
Anglican Church	Chancellor/Special Advisor to the Bishop of Natal, Bishop Rubin	2000 to date
Anglican Church of Southern Africa	Deputy Provincial Chancellor (served Archbishop Ndungane and now serving Archbishop Makgoba)	2011 to date
Anglican Church of Southern Africa	Board Member – Pension Fund	2007 - 2011
	EDUCATIONAL	
South African Judicial Education Institute	Council Member	2008-2013
Commonwealth Judicial Education Institute	Member of the Board of Trustees	2007 to date
	OTHER	
African Monitor	Trustee	2008 to date
Ombudsman for Long Term Insurance	Member Chairperson	2009 - 2013 2013 to date
Rules Board for Courts of Law	Member Chairperson of High Court Sub-Committee	2008 – 2012
Natal Playhouse	Council Member Member of Audit and Governance Sub-committee	2001 – 2014 April 2015 to date
NICRO	Provincial Board Member (KZN)	1999 – 2010
Centre for Socio-Legal Studies (UKZN)	Board Member	1999 -2008

9. **Are you now or have you ever been a member of a secret organization?**

(Indicate with an "X")

~~YES~~	NO
	X

If so, please identify the organization and the dates of membership. N/A

10. **Is there anything about the state of your health which should be disclosed to the Commission?** (Indicate with an "X")

~~YES~~	NO
	X

If so, please state:

SECTION 2: JUDICIAL AND LEGAL BACKGROUND

11 Please furnish particulars of your appointment.

11.1 To which court were you appointed? THE HIGH COURT (NPD)

11.2 In which division were you appointed? DURBAN AND COAST LOCAL DIVISION

11.3 Please give the date of your appointment. OCTOBER 1999

12. **If you have any publications in the field of law please list them and identify those which you regard as most significant and state shortly why you regard them as significant.**

Gender Equality from a South African Perspective CMJA Journal 2008

13. **In regard to major publications indicate by whom they have been reviewed. N/A**

14. **If any of your writings have been cited in judicial decisions please identify those decisions and indicate whether the citing was with approval. N/A**

15. **If you have any publications outside the field of law please list them. N/A**

16. **Cases**

16.1 **List the cases where you have written the judgment (not more than ten) which you regard as being the most significant and why?**

Nkomo v *The State* - dissenting judgment in rape matter – held that the minimum sentence ought to be applied and not a lesser sentence.

Gumede v *President of the Republic of South Africa* - a ground-breaking decision on the rights of women in customary marriages. Found that all monogamous African customary marriages must be deemed "in community of property", and that men would no longer be considered the head of the household and therefore were not automatically in charge of all family property.

The Occupiers, Shulana Court 11 Hendon Road v Mark Steele – Rescission of judgment – good cause shown – bona fide defence based on non-compliance with s 4(6) and (7) of Prevention of Illegal Eviction from and Occupation of Land Act 19 of 1998 and s 26(1) and (3) of the Constitution.

Moseme Road Construction CC v King Civil Engineering Contractors – Setting aside Tender Award – dissenting judgment on why unsuccessful tenderer should have been entitled to costs.

Guardrisk Insurance Company v Kentz – setting out and clarifying the nature of a construction guarantee – equivalent to a letter of credit. Were conflicting judgments on this aspect.

Quartermark Investments v Pinky Mkwanazi – sale of immovable property induced by fraud – ownership does not pass despite registration – *rei vindicatio* available even if raised mero motu by the court if the facts in support thereof appear in the papers – accords with the principle of legality.

Gavin Gainsford NO v Tanzer Transport – Proceedings by a liquidator in a winding-up – liquidator may sue in their capacity as liquidators or in the name of the company in liquidation proceedings under s 386(4)(a) of the Companies Act 61 of 1973.

Minister for Safety and Security v Scott – Delictual claim for pure economic loss – Public policy dictating that delictual liability not be imposed where the loss of contractual income and profits suffered by a stranger to the contract – danger of indeterminate liability.

Fischer and City of Cape Town v Ramahlele – dispute of fact whether the applicants were in possession and occupation of structures demolished by the City – not possible to determine on the papers – sent back to the High Court.

Royal Sechaba Holdings v Grant William Cloote – res judicata – issue estoppel – privity of interest not established – commented that the rule was not immutable but no reasons offered for relaxation or extension of the rule.

16.2 **Which of these cases has been reported?**

Nkomo v The State 2007 (2) SACR 198 (SCA)

Gavin Gainsford NO v Tanzer Transport 2014 (3) SA 468 (SCA)

Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd [2014] 1 ALL SA 307 (SCA)

Moseme Road Construction CC v King Civil Engineering Contractors 2010 (4) SA 359 (SCA) (Dissent)

Quartermark Investments(Pty) Ltd v Mkwanazi 2014 (3) SA 96 (SCA)

Minister for Safety and Security v Scott 2014 (6) SA 1 (SCA)

Fischer & City of Cape Town v Ramahlele 2014 (4) SA 614 (SCA)

Royal Sechaba Holdings v Grant William Coote [2014] 3 ALL SA 431 (SCA)

The Occupiers, Shulana Court 11 Hendon Road v Mark Steele 2010 (9) BCLR 911 (SCA)

16.3 **Please list cases in which you gave judgment that were unsuccessfully appealed against (not more than ten).**

Shinga and (Society of Advocates, Pietermaritzburg Bar intervening as Amicus Curiae) v S [2007] 1 All SA 113 (N) partially upheld by the Constitutional Court.

Ethekwini Municipality v Haffejee [2010] 2 All SA 358 (KZD) Confirmed by the Constitutional Court 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC).

Gumede v President of the Republic of South Africa (Women's Legal Centre as amicus curiae) [2008] JOL 21972 (D) . Confirmed by the Constitutional Court [2008] ZACC 23.

Industrial Development Corporation of SA v PFE International Inc 2012 (2) SA 269 (SCA); [2012] 2 ALL SA 71 (SCA). Confirmed by the Constitutional Court 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC)

Head of Department, Department of Education, Free State Province v Welkom High School [2012] 4 All SA 614. Confirmed by the Constitutional Court 2014 (2) SA 228 (CC) (2013 (9) BCLR 989; [2013] ZACC 25.

16.4 **Please list cases in which you gave judgment that were successfully appealed against (not more than ten).**

BOE Bank v Grange Timber Farming Co
Durban Bus Company
De Gree v Webb (CENTRE FOR CHILD LAW AS AMICUS CURIAE) 2007 (5) SA 184 (SCA)

16.5 **Please list any reserved judgments still outstanding and the date(s) on which judgment was reserved.**

17 **What would you regard as your most significant contribution to the law and the pursuit of justice in South Africa?**

From a young age I understood the value of education. I have been involved in many programs aimed at educating and empowering disadvantaged members of our society. As a law student I taught street law I high schools and communities in and around Durban. For many years, while a law student, I worked at the Legal Aid Clinic assisting litigants who could not afford legal representation. This is where my understanding and commitment to human rights began.

I believe that the additional skills I acquired through studying overseas have been put to great use in South Africa. Upon my return to South Africa I was employed by an NGO, the Community Law Centre that was involved in empowering vulnerable, particularly rural, members of society, making them aware of their rights and able to access such rights. To this end we developed and conducted community legal education workshops.

As an advocate I provided legal assistance, inter alia, to accused charged with political offences and to vulnerable groups facing evictions. Whilst an advocate I was actively involved in the National Association of Democratic Lawyers and Advocates for Transformation. I served on the executive of the Nadel Durban branch, assisted in organising meetings, conferences and established a publication 'Nadel News'. I performed duty at clinics organised by Nadel providing free legal services to poorer communities. I was involved in mentoring programs of junior members of the profession.

I participated in the transition to democracy by leaving my practice for four months to work for the IEC in KZN. It was a most fulfilling experience to be involved in the 'new dispensation' in this way.

Since my appointment as a judge, I have strived to be true to my oath of office. I have made every effort to dispense justice in an independent, fair and impartial manner. I have tried to treat every litigant with dignity and respect. It is evident from my judgments that I have fearlessly upheld the Constitution and attempted to develop the common law in accordance with the Constitution. In particular, when presented with the opportunity, I have protected the dignity and rights of vulnerable people, especially women (See *Nkomo v The State* and *Gumede v President of the Republic of South Africa*) even if it meant being a lone voice. In my time on the bench I have written about 75 reported judgments (41 published and 34 online).

Outside of my judicial duties, I am actively involved in the general affairs of the legal community. I was a founder member of the South Africa Chapter of the International Association of Women Judges and I have been involved, inter alia, in creating an awareness of gender issues and empowering women, within the profession in particular, and in the community in general. Under my leadership as Vice-President of Programs of the Chapter, World Aids Day was celebrated for the first time on the steps of the Durban High Court and the Pietermartisburg High Court, as part of the program to mark the Annual 16 Days of Violence. We participated in 'Take a Girl Child To Work', established prison programs for children living in prison

with their mothers. We conducted continuing judicial education workshops for members, established ties with international organisations and provided opportunities for members to attend and participate in international conferences.

I have actively participated in judicial education. As far back as 2005, (if I recall correctly) I was a member of a sub-committee chaired by the late former Chief Justice Langa, at a time when the value and necessity for judicial education was not widely recognized in South Africa. This committee was involved in judicial education for aspirant judges and continuing judicial education for sitting judges. This committee was later involved, under the leadership of Chief Justice Mogoeng and Deputy Chief Justice Moseneke, in the passing of the Judicial Education Bill. I was one of the first Council Members of the South African Judicial Education Institute and held this position until December 2013.

I was appointed by the Minister of Justice as a member of the Rules Board for Courts of Law for the period 2008 to 2012 and also served as a member of and later Chairperson of the High Court Sub-Committee. The Rules Board is a statutory body established to review the rules of court and to make, amend or repeal rules, subject to the approval of the Minister of Justice.

My contribution to the development of the law has been recognized in the following awards:

- KZN branch of the SA Chapter of the International Association of Women Judges award for Contribution to Society and Achievements in the Legal Profession (May 2015)
- KwaZulu-Natal Business Women's Lifetime Achievement Award (2014)
- KwaZulu-Natal Legal Forum Award for Outstanding Contribution to Justice (2011)
- University of Durban Westville Mababongwe Award (2003)
- Department of Justice Woman Achiever of the Year (2000)

SECTION 3: GENERAL

18. **Are there any circumstances known to you which may cause you embarrassment in seeking the appointment for which you have been nominated?**

~~YES~~	NO

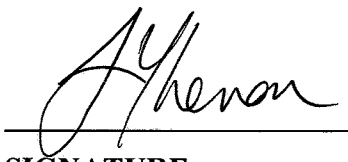
If so, please furnish particulars. N/A

19. **Is there any other relevant matter which you should bring to the attention of the Commission?**

~~YES~~	NO

If so, please furnish particulars. N/A

20 **Do you hold or have you ever held any other office of profit? If your answer is yes have you divested yourself of those assets? Kindly furnish details if applicable. NO**



11 MAY 2015

SIGNATURE **DATE**

Annexure A

TRANSFORMATION OF THE LEGAL PROFESSION

REPORT

ACKNOWLEDGEMENTS

The Centre for Applied Legal Studies (CALS) wishes to thank all those who have supported the work outlined in this research report. In particular, CALS would like to thank our funding partners at the Foundation for Human Rights (FHR) for their insights and financial assistance. Without the resources they have provided, research in this area would not have been possible. The idea for the project developed not least because of the consistent work that FHR has been doing on the transformation of the judiciary.

We would like to thank Tabeth Masengu of the Democratic Governance and Rights Unit at the University of Cape Town for her collegiality in sharing her work and information with us. We would also like to thank Bowman Gilfillan for hosting the meeting of the Expert Reference Group at the outset of the project.

CALS is grateful to the following individuals for their valued contribution to the work outlined here:

Kirsten Whitworth: Project Lead

Bonita Meyersfeld: Director

Cebile Ndebele: Team Member

Jonathan Klaaren: Independent Researcher

Alice Brown: Independent Researcher

Lee-Anne Bruce: Communications

CONTENTS

A. INTRODUCTION & RESEARCH QUESTION 5

1. INTRODUCTION 5

2. RESEARCH QUESTION 5

3. CONTEXT 6

4. OUR ASSUMPTIONS 7

4.1. MEANING OF TRANSFORMATION 7

4.2. EXCLUSION THROUGHOUT THE LIFESPAN OF THE LEGAL CAREER 7

5. PRELIMINARY FINDINGS 8

6. OUTPUT ONE: LITERATURE REVIEW 9

7. OUTPUT TWO: EXPERT REFERENCE GROUP MEETING 10

8. OUTPUTS THREE AND FOUR: INTERIM AND FINAL REPORTS 12

B. FIELD RESEARCH STRUCTURE AND METHODOLOGY 13

9. RESEARCH METHODOLOGY 13

9.1. FIELD RESEARCH: OVERVIEW OF PROCESS 13

9.1.1. Objectives 13

9.1.2. Format 13

9.1.3. Preparation 13

9.2. FIELD RESEARCH METHOD 1: STRUCTURED DISCUSSION GROUPS – BREAKFASTS FOR CHANGE 13

9.3. FIELD RESEARCH METHOD 2: SEMI-STRUCTURED INDIVIDUAL INTERVIEWS 14

9.4. FIELD RESEARCH METHOD 3: ELECTRONIC SURVEYS 14

10. IMPLEMENTATION OF THE RESEARCH METHODOLOGY 15

10.1. BREAKFASTS FOR CHANGE 15

10.2. INDIVIDUAL INTERVIEWS 16

10.3. ELECTRONIC SURVEYS 16

10.4. CHALLENGES 18

10.5. PROJECT ADVOCACY 19

C. FINDINGS AND RECOMMENDATIONS 20

11. PROJECT FINDINGS 20

11.1. THE INTERSECTION OF RACE AND GENDER DISCRIMINATION 20

11.2. GENDER DISCRIMINATION AND REPRODUCTIVE RIGHTS 22

11.3. LATENT DISCRIMINATION AND 'OTHERNESS' 22

11.4. Sexual Harassment 24
11.5. Coloured People Feel Particularly Excluded and Isolated 24
11.6. The Importance of Networks 25
11.7. Fronting / Window Dressing 26
11.8. Scepticism about Black and Female Professionals' Ability (or: a Mistake by a Black Lawyer Is Worse than the Same Mistake made by a White Lawyer) 26
11.9. Language, Accent and Class 28
11.10. The One 'Good Black Female' Lawyer 28
11.11. Briefing Patterns and Work Allocation 29
11.12. Scepticism about Transformation 30
11.13. Hierarchical Structures of the Legal Profession 32
11.14. The Importance of Training, Monitoring and Accountability 33
11.15. The Importance of Mentoring, Sponsorship and Champions 33
11.16. The Importance of a Clear Understanding of Transformation 34
11.17. Impact of Economic Disadvantage 35
12. Recommendations 36
12.1. TO THOSE WORKING ON TRANSFORMATION OF THE JUDICIARY 36
12.1.1. Identify the Link between Transformation of the Judiciary and Transformation of the Profession as a Whole 36
12.2. TO LAW FIRMS AND MEMBERS OF THE BAR 36
12.2.1. Take it from the Top 36
12.2.2. Address the Pattern of Exclusion of Black Women 36
12.2.3. Ensure Accountability 36
12.2.4. Manage Assumptions about 'All' Black Women 36
12.3. TO GOVERNMENT 37
12.3.1. Map the Progression of Black Women in the Profession 37
13. Conclusion 37

A. INTRODUCTION & RESEARCH QUESTION

1. INTRODUCTION

This document is the final report on the Transformation of the Legal Profession project ("the project") conducted by the Centre for Applied Legal Studies ("CALS") in partnership with the Foundation for Human Rights from 15 February 2014 to 31 August 2014.

When initially conceptualised, the project was envisaged as being twelve months in duration. Ultimately, the project was agreed to be of six months' duration from 1 January 2014 to 1 August 2014.

The CALS team on the project consisted of Kirsten Whitworth (Project Lead); Cebile Ndebele (Team Member); Alice Brown (Researcher), Jonathan Klaaren (Researcher) and Bonita Meyersfeld (Director of CALS).

CALS is a centre of the University of the Witwatersrand, Johannesburg, and is therefore subject to the requirements of the Human Research Ethics Committee (non-medical). Any research carried out that involves human subjects must go through the ethics application process. An ethics application has been submitted to the Committee under protocol number HDS14-08-00008.

The research is not designed to be conclusive evidence regarding transformation in the legal profession. Rather, it is designed to test the accuracy of the assumptions identified. All three methodologies used yielded consistent evidence that affirms the following: that sexual harassment and the intersection between gender/race discrimination are factors that impede advancement in the legal profession.

2. RESEARCH QUESTION

The South African legal profession continues to face the challenge of meaningful transformation. The top positions in the profession, from senior partners of law firms, to senior counsel at the Bar and senior members of the judiciary, remain largely homogenous. These positions are dominated by white men, with a marked absence of diversity on the basis of race, gender and other marginalising characteristics. According to the 2013 South African Legal Fellows Network survey,[1] South Africa's major corporate law firms are still dominated by white men, especially in the upper echelons;[2] 80 per cent of the chief executives of the 12 firms canvassed in the survey were white men, as were 72 per cent of all managing partners. The picture at the CEO/managing partner level was replicated in the ownership and remuneration structures of the firms: 53 per cent of all equity partners were also white and male.

The judiciary represents similar trends, at least in respect of gender. Although the racial diversity of the Constitutional Court in the 20 years of democracy has gone from seven white judges and four black judges to the current bench, where the majority of the judges are black and two are white, the same is not true of gender. In the same period, the number of women on the Constitutional Court has remained unchanged: two in 1994 and two in 2014.

The key research question for the project participants was therefore as follows: why has there been so little

---

1 2013:10 [2013] De Rebus 114.

2 On behalf of the collaborating organisations, Plus 94, a research firm, canvassed 12 out of 51 identified law firms in the country that employed 20 or more legal professionals. The 12 firms employed, in total, 1815 legal professionals. Disabled employees made up just 0.6 per cent of all legal professionals at firms participating in the survey.

change at the senior level of the legal profession, especially in respect of the intersection between race *and* gender. With a large number of black women graduating from law schools and entering the profession ,it is incongruous that the upper echelons are not more integrated.

Given the short time period, the project was not intended to conduct exhaustive research across the entire profession. Rather, the project was designed to yield preliminary findings in order to broaden the scope of the debate around transformation in the legal profession away from the judiciary, to include the profession as a whole.

3. CONTEXT

The lack of diversity in the legal profession is usually in the spotlight following the process of the appointment of senior members of the judiciary. The Judicial Services Commission ("JSC") has come under scrutiny for its appointment patterns, decision-making processes and the extent to which the constitutional imperatives of racial and gender diversity are reflected in its recommendations to the President.

On 5 June 2014, the Democratic Governance and Rights Unit ("DGRU") of the University of Cape Town convened a meeting of its *Judges Matter* project at which Tabeth Masengu delivered a presentation entitled *The Gender Transformation Aspect of Judicial Appointments*. The presentation looked at JSC interview processes, with a specific focus on the appointment of women. This is a welcome move away from the mere headcounts that are conducted in the media during JSC processes, and focuses greater attention on the process itself.

The presentation was very revealing: since June 2012, in respect of the Constitutional Court, there have been two interview processes. Nine candidates were interviewed, of whom eight were men and one was a woman. Out of these two processes, two men were appointed. At the level of the Supreme Court of Appeal, there have been three interview processes since June 2012. Fifteen candidates were interviewed. Of these candidates, there were 13 men and two women. Six men and one woman were appointed out of these processes.

At High Court level, which includes the Labour Appeal Court, Labour Courts, Electoral Courts and Land Claims Courts, the numbers are slightly more encouraging. There have been four interview processes. During these processes, 61 candidates were interviewed, of whom 32 were men and 29 were women. These processes led to the appointment of 17 men and 14 women judges.

Constitutional Court	Supreme Court of Appeal	High Courts (including Labour Appeal Court, Labour, Electoral and Land Claims Court)
2 interview processes	3 interview processes	4 interview processes
9 candidates interviewed: 8 men 1 woman	15 candidates interviewed: 13 men 2 women	61 candidates interviewed: 32 men 29 women
2 men appointed	6 men and 1 woman appointed	17 men and 14 women appointed

Figure 1: T Masengu *The Gender Transformation Aspect of Judicial Appointments*

As at October 2013, there were 77 women judges out of a total of 239 in South Africa. The JSC processes have

resulted in the two women Constitutional Court judges on a bench of 11, and two women Supreme Court of Appeal judges on a bench of 26. While the numbers cited may seem encouraging in respect of the High Courts, gender transformation is simply not taking place higher up in the judiciary.

The transformation – or lack thereof – of the judiciary is not a new debate. Every few years it captures the attention of the profession, the media and South Africans concerned with transformation. At the commencement of the project, South Africa found itself once again in the throes of such discussions.

Today the debate revolves around the question of whether one should appoint judges on the basis of talent or diversity.[3] By broadening the frame of reference to the profession as a whole, the project challenges this binary: talent and diversity are not alternatives. Diversity is not inconsistent with talent and ability. To say otherwise suggests that black women, for example, are less capable than white men and are appointed for their diverse characteristics rather than their legal capability. The project seeks to invert that assumption.

The project also seeks to understand the specific emphasis on race and not gender, where racial transformation has advanced, albeit slowly, and gender transformation has had a much slower growth pattern.

The language used to describe the racial groups in this research emanates from the standard language used in the national discourse around transformation. These categories are not a reflection of how people may self-identify, nor do we endorse the categorisation as appropriate. It is a function of capturing external perceptions that may impede advancement in the legal profession.

4. Our Assumptions

4.1. Meaning of Transformation

As with any research, the project began with a number of assumptions. The project adopted an understanding of transformation as an open, bias-free and non-hierarchical profession which sees the removal of prejudices so that talent can flourish, unhindered by the assumptions that are often linked to the characteristics of race, sex, gender and sexual orientation, among others.

Transformation is not a case of facilitating the appointment of less qualified black lawyers to senior positions; rather, is it about the removal of barriers that impede talented lawyers from opportunities to develop and gain skills, experience and knowledge within the legal profession because they are black, women, lesbian, living with a disability or disease or, in some way, non-compliant with the dominant homogenous culture.

This requires us to ask deeply uncomfortable questions, not only about the lack of transformation at the end point of the profession, namely the judiciary, but also and perhaps even primarily about the entire lifespan of a legal career, from graduation to attaining some of the most senior positions in the profession. This focus on the entirety of the legal profession and on the career paths through the legal profession is a distinctive perspective of this project.

4.2. Exclusion Throughout the Lifespan of the Legal Career

Predominant among our assumptions is that it is simply too late to question the paucity of suitable talented

[3] Susannah Cowen *Judicial Selection in South Africa* (DGRU, 2010); M Olivier 'A perspective on gender transformation of the South African judiciary' (2013) *South African Law Journal* 448.

female/black candidates when it comes to the judicial appointment process. This is the highest stage of a legal career and an exclusive focus on this stage ignores the lifespan of a legal professional, beginning with entry into the profession. Based on the definition of transformation above, the project is founded on the assumption that there are still many barriers of difference that impede the career trajectory of, predominantly, black women in the profession. The project's first assumption, therefore, is that there are a series of points of exclusion along the spectrum of the legal career of black women.

The project posits that regardless of the type of legal career that an individual chooses to follow, talented female/black lawyers face barriers to achieving senior positions. Our profession operates according to assumptions – often invisible but very real assumptions – about race, gender and similarly exclusionary characteristics. Black and female lawyers are not appointed (or are not available for appointment) to senior positions in law because of barriers, behaviour and unwritten rules of the profession that impede talent and promote stereotypes throughout the lifespan of the legal career. Indeed, part of the value of this project lies in surfacing and outlining the barriers, behaviour and unwritten rules of the profession.

5. PRELIMINARY FINDINGS

Black women face an array of barriers throughout their legal careers. These barriers differ during the course of the profession. The patterns are depicted below and include:

1. A shortage of jobs and few connections to established members of the profession: because the profession remains largely male and white, it is unlikely that black women will have longstanding connections with people in the profession. Connections remain an important part of entering the profession – not necessarily because of nepotism but rather to learn the standard modes of behaviour and how best to conduct oneself within a very particular law culture;

2. Offers from the corporate sector which cannot be matched by the legal profession: many outstanding young lawyers move to the corporate sector;

3. Cultural alienation: black and/or female lawyers face invisible rules determined by social interaction outside of work. Informal engagement around weekends and sport create alienating cultural practices;

4. Bias based on historic roles of black women: many black female lawyers noted that they are associated with their white colleagues' domestic workers, albeit subliminally;

5. Racism: there are lawyers who continue to refer to black women as window dressing, a direct form of racism which speaks to the person's race / gender rather than their capability;

6. Sexual harassment: women are exposed to a spectrum of alienation based on references to their physicality, from inappropriate and lewd comments, to violence and rape;

7. Briefing patterns: both at the Bar and at firms, briefing patterns tend to prefer a small selection of black women and a larger selection of white men. This is due to a reluctance to brief outside one's race and/or sex and also due to client demands (although the inverse is also true in that clients may demand diversity in their legal representation);

8. Behaviour based on gendered roles: women are still asked to pour the tea in meetings, even if there are other junior men, reinforcing the domestic assumptions regarding women's roles;

9. Lack of childcare facilities: work/family dynamics and social imperatives continue to preference female childcare over male childcare. This is exacerbated by the insistence by senior female members of the Bar that childcare was not – and is not – necessary; and

10. The trailblazer phenomenon: exceptional women who have reached the senior levels of the profession have set a standard of excellence required for black women to succeed that does not apply to white men.

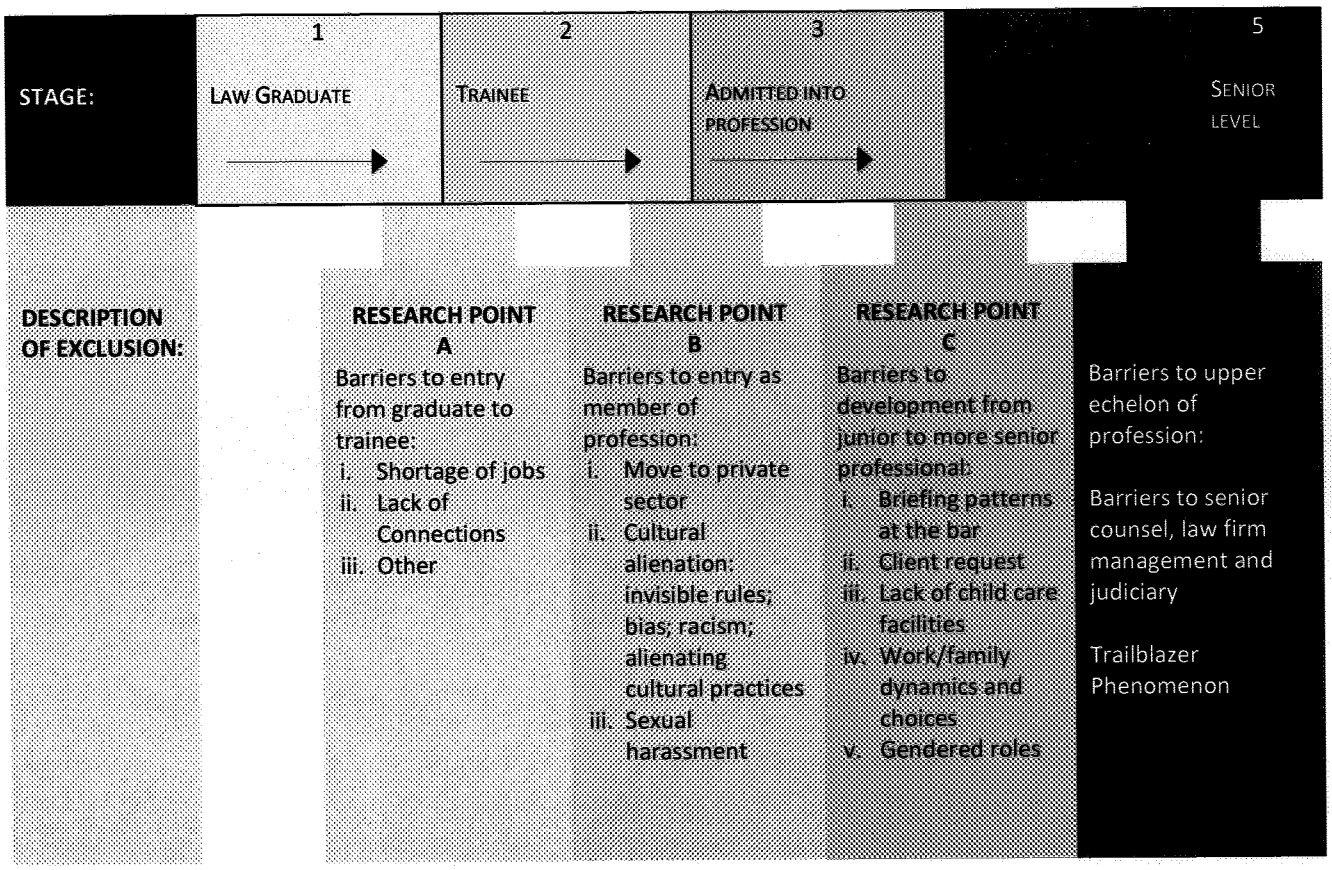
6. OUTPUT ONE: LITERATURE REVIEW

The project was embedded in and has advanced existing research on the transformation of the judiciary. The majority of research in this area has focused on the racial and gendered make-up of the judiciary and not on the legal profession as a whole. Within the profession, there has been some attention to the attorneys and advocates, but otherwise there is very little extant relevant research. One recent exception noted in the literature review is an earlier inquiry into this area of research, focusing on the management of 50 top law firms in Johannesburg. The research notes the dominance of white men in senior positions of such firms.

In preparation for the Expert Reference Group meeting, Researchers Jonathan Klaaren and Alice Brown prepared a preliminary literature review, which was circulated to the attendees in advance of the meeting and formed the basis for part of the discussion. The literature review was subsequently updated and a copy of the final literature review is attached to this document as "A".

On the basis of this literature review, four phases for a standard legal professional career in South Africa were identified. Phase One covers the period of time as a law student (from first registration in the LLB to LLB graduate). Phase Two covers the period of time of vocational training (e.g. service as an articled clerk or pupillage, prior to admission as an attorney or an advocate with Bar Council). Phase Three covers the period of time from admission (as an attorney or with a Bar Council) to five years of experience. Phase Four then covers the period from five years' professional experience to senior status in the profession, e.g. a legal professional with at least ten years' of experience.

The assumptions and preliminary findings are depicted diagrammatically as follows:



7. OUTPUT TWO: EXPERT REFERENCE GROUP MEETING

To test our initial assumptions, on 28 March 2014, we hosted an Expert Reference Group meeting at the offices of Bowman Gilfillan in Sandton, Johannesburg. The aim of the meeting was to gather experts on transformation, representatives from the legal profession, including advocates, attorneys, academics, members of civil society, and government representatives, in order to present to the group the aims and proposed methodologies of the project; to test the assumptions underlying the project; and to canvass the opinions of the experts whose own experiences and work are relevant to the research.

The meeting was very well attended by a broad spectrum of professionals. The debate was lively and fed significantly into the project's design. The Expert Reference Group helped us better to understand and address the lack of transformation in the legal profession and points of exclusion. Attendees included a judge of the High Court; the Deputy Minister of Justice; academics; senior law firm partners; junior lawyers; junior members of the Bar; representatives of the National Association of Democratic Lawyers (NADEL) and former lawyers no longer in practice. The meeting comprised twelve black women, five white women, four black men and five white men.

At the meeting, Bonita Meyersfeld presented the aims of the project, and outlined the proposed methodologies to be used. Jonathan Klaaren and Alice Brown discussed the preliminary literature review and made four key points:

1. The legal profession must be viewed holistically in order to understand the lack of transformation.

2. The research posits four phases to the 'standard' legal career, while understanding that this is, in itself, a potentially overbroad categorisation. These phases are (i) law graduates entering the profession, (ii) the professional training phase, (iii) junior professional (the first five years or so) and (iv) senior professional. (See section 6 above)

3. To identify points of exclusion from law, we must track the progression or lack of progression along the lifespan of a legal career of black women.

4. The project is applied research, rather than purely academic or theoretical research.

Bonita Meyersfeld then opened the meeting for discussion. Although various avenues of further research were suggested, the attendees were unanimous in their support for and welcoming of the research question and proposed methodology (which is described in section B below).

The following questions were raised in the Expert Reference Group meeting:

1. What is the underlying purpose of the research? Are we seeking to achieve an understanding of transformation for the sake of a diverse judiciary (as required by the Constitution) or are we seeking to achieve a more diverse profession as a whole, for the sake of an equal and open legal profession?

2. Is the project aimed, ultimately, at transforming the judiciary through transforming the legal profession, or does it intend to look at the profession more broadly, and to consider positions such as magistrates, prosecutors, and others positions within the profession?

3. Should the project take into account the alternative judiciary, i.e. mediators and arbitrators?

4. Is the project clear on the meaning of the concepts 'diversity' and 'transformation'? Is the project looking only at race and gender as indicators of transformation, or taking into account an individual's values and constitutional development?

5. Who is the intended audience of the project?

6. Who are the 'members of the profession' for the purposes of engagement?

7. Will the research compare different law schools and where their graduates end up, and the experiences of those graduates within the profession?

8. Will the research use statistics or pure narrative from interviews? Are there sufficient statistics available to inform the breadth of the proposed research?

9. If statistics are used, will the research focus only on quantitative rather than qualitative research?

10. Will structured discussion groups only look within the profession, or will there be structured discussion groups that canvass the views of those outside the profession, i.e. those who use the services provided by the profession?

11. Will the research engage in comparative studies, both in respect of other jurisdictions and in respect of other professions?

12. What type of 'points of exclusion' will the research consider? Will it go beyond race and gender and interrogate differentials such as economic status, whether a job applicant has a driver's licence and the geographical background of an individual?

13. Is it possible to transform the legal profession without looking at broader societal issues?

14. What is so special about lawyers? What is unique to the legal profession that requires transformation as opposed to broader societal transformation, particularly given that there are structural impediments in every profession?

15. Is it possible, or appropriate, to build a business case for why transformation is important, given that it will be difficult to convince some people to care about transformation as a social justice imperative?

The meeting was a resounding success for the research questions and assumptions posed. It brought together a diverse group of experts and practitioners, including senior members of the profession. The positive responses to the invitation meant that the venue had to be changed to accommodate the overwhelming numbers. This in itself is a finding: the issue of transformation of the legal profession is taken very seriously at all levels, from the practitioner, to the judiciary, to government. This high level of questioning and critical engagement with the project assisted the Researchers in testing their initial assumptions and formulating the next steps of the project with greater clarity and insight into the realities of the profession. Above all, it confirmed the imperative for change.

The Expert Reference Group meeting had the following impact on the progression of the project:

1. The research question was further developed to include recommendations regarding the purpose and relevance of the research question;

2. The importance of economic status became a key component of the research;

3. The breadth of the legal profession was widened, in order to canvass those beyond the practising attorneys' and advocates' profession in respect of interventions and solutions; and

4. The participants at the meeting confirmed the assumptions and proposed methodology.

8. Outputs Three and Four: Interim and Final Reports

The third output was an interim report, which was submitted to the Foundation for Human Rights on 30 June 2014. The interim report formed the basis of the presentations of the research for the Public Interest Law Gathering, described in greater detail in section 10.5 below.

This report is the fourth and final output of the project.

B. FIELD RESEARCH STRUCTURE AND METHODOLOGY

9. RESEARCH METHODOLOGY

9.1. FIELD RESEARCH: OVERVIEW OF PROCESS

9.1.1. Objectives

The objective of the field research was to engage directly with members of the profession, at various stages of their career, to (i) identify some of the impediments to advancement in the profession (invisible barriers or points of exclusion) and (ii) to identify potential interventions that could mitigate these specific barriers. The research looked at the experiences of legal academics, practising attorneys and advocates, and attorneys and advocates who have left private practice, all of whom are at various points along their respective careers. The research was conducted in Gauteng. While it would have been particularly interesting to have spoken to established judges, this fell beyond the ambit of the research, given that the research specifically examines the barriers throughout the lifespan of a legal career that ultimately result in a smaller pool of eligible candidates for appointment to the judiciary.

9.1.2. Format

The field research comprised: (i) semi-structured individual interviews; (ii) semi-structured discussion groups under the mantle 'Breakfast for Change'; and (iii) electronic surveys.

9.1.3. Preparation

In preparation for the Breakfasts for Change, the project team (i) identified the organisations that would offer members of their group, firm or company as participants in the project; (ii) scheduled the meetings for such engagement; and (iii) prepared background research and certain questions for each discussion (after each Breakfast for Change, the questions became richer and more comprehensive, based on the data captured in preceding meetings). The Breakfasts for Change were led by the Project Lead and the Director.

In preparation for the semi-structured individual interviews, the project team (i) identified the organisations that would support the study and encourage members of their group, firm or company to participate in the one-on-one individual interviews; (ii) scheduled the meetings for such engagement; and (iii) prepared the questions for discussion. The individual interviews were led by the Researchers.

In preparation for the electronic survey, the project team, led by the Researchers, (i) prepared an electronic survey to yield answers to the research questions and (ii) identified the organisations to be approached to agree to the distribution and facilitation of the electronic survey. In some instances, this aspect of the project required an engagement with an entity's human resource management and its IT staff, both presenting complex and difficult areas of navigation. A sample of one of the surveys is attached to this report as "B".

9.2. FIELD RESEARCH METHOD 1: STRUCTURED DISCUSSION GROUPS – BREAKFASTS FOR CHANGE

The project envisaged a series of structured discussion groups, with representation based on stage of career, race, gender, and age. There would also be a series of randomly constructed structured discussion groups (i.e. where participants are selected using a randomised selection without any of the defining characteristics above) in order to challenge the groups identified in the preceding categories, and which were intended to yield

information to facilitate the understanding of the disaggregated structured discussion groups.

The structured discussion groups were designed to capture small-group input by members of the legal profession who share similar characteristics. With one exception (where senior and junior members of the profession attended the Breakfast), the group context of the Breakfast for Change discussions was designed to encourage the sharing of anecdotes and experiences by similarly placed individuals in a space where they would feel safe doing so. The Breakfasts were discussion-based, and varied according to the nature of each group. The Breakfasts tended to open with fairly generic questions, and were then guided by the information provided by the participants. It was in the interests of the research to encourage discussion, rather than to pressurise the participants with a flurry of questions. However, it was also often necessary to drill down into statements made by participants by asking further specific questions in relation to statements made. By their nature, these questions could not be prepared in advance. One of the objectives of the Breakfasts was the pursuit of interventions and solutions. After discussing issues relating to transformation, participants were asked to propose solutions to address issues raised in the discussion.

A sample invitation letter to a Breakfast for Change, a participant information form, and a consent form are attached to this report as "C", "D" and "E" respectively.

9.3. Field Research Method 2: Semi-Structured Individual Interviews

The selection criteria were the same as the structured discussion groups described above, i.e. gender, race, stage and age. Each participant was asked the same basic standardised questions, which were developed as part of the project.

Identified organisations were asked to inform members of their respective group, firm or company of the study and the possibility of volunteering to participate in the semi-structured individual interviews. The aim was to include 15 to 20 participants in this aspect of the study with the understanding that all information and data collected during this process would be anonymous and confidential, identities would be withheld and demographic information would be used for statistical and research purposes only. Each interview took between 60 to 75 minutes on average and, in the end, 15 legal practitioners agreed to participate.

The individualised approach allowed the Researchers to garner information that may not have been forthcoming in the group context that characterised the Breakfast for Change discussions. The semi-structured nature of the interviews provided a degree of flexibility to cover those issues not covered by pre-prepared interview questions. It also allowed for further and deeper probing of specific responses and comments in order to address issues that emerged during the interviews. In particular, the interviewing of individuals was designed to understand if there are universal or standard barriers for specific members (black women, for example) of the profession at specific stages of the legal profession.

9.4. Field Research Method 3: Electronic Surveys

Electronic survey questionnaires were used to increase the range, outreach and impact of the research. This also assisted with the correlation and comparison of the project findings with the findings of other existing research (including the 2013 Johannesburg Bar Council research on junior advocates at the Johannesburg Bar, currently under embargo by the Johannesburg Bar Council). Electronic surveys allowed us to correlate and compare the findings of the other two methodologies. This bolsters the finding that sexual harassment and the intersection between race and gender discrimination are common impediments to advancement in the legal

profession, described in section 11.1 below.

As a technique, electronic surveying yields quantitative data, which was seminal to augmenting the information emanating from direct engagement with people in the profession. Respondents were given the option of answering questions using a range of responses such as "never", "very rarely", "occasionally", "often", "continuously" or "not sure".

10. Implementation of the Research Methodology

We outline below our approaches to the described research methodologies, some of the challenges faced, and some of the additional activities undertaken in the project.

10.1. Breakfasts for Change

The structured discussion groups were held as breakfasts for various reasons. First, a breakfast creates a slightly more informal atmosphere, and encourages conversation. Additionally, it avoids disruption to an individual's or entity's operations by ensuring minimal interruption to the work day. We realised that we would be more likely to secure participation by scheduling structured discussion group meetings at the beginning of the business day than if we were to ask participants to interrupt their days to attend meetings. This is especially important in the legal profession where one charges per hour.

Originally, the project was envisaged as being twelve months in duration. As the timeframes narrowed, we were placed under certain pressures to schedule the Breakfasts for Change within a shorter period of time than originally anticipated.

The structured discussion groups were arranged thematically, and ranged in attendance from three to ten participants:

- The first Breakfast for Change was held for admitted attorneys who had chosen to leave private practice. All of the participants were female. It was hosted by CALS at Wits University. There were three participants.

- The second Breakfast for Change was held with members of the Johannesburg Bar. All of the participants self-identified as 'black, 'Indian' or 'coloured'. It was hosted by the Victoria Mxenge Group, and attended by advocates from a variety of groups. There were five participants.

- The third Breakfast for Change was held at a large Johannesburg attorneys' firm. The participants were broadly representative in terms of age, stage of career, race and gender. There were ten participants.

- The fourth Breakfast for Change was held for candidate attorneys who are members of the South African chapter of a global network of public interest lawyers. All of the participants were black. It was hosted by CALS at Wits University. There were three participants.

- The fifth Breakfast for Change was held for legal academics. The participants were broadly representative in terms of age, stage of career, race and gender. It was hosted by CALS at Wits University. There were five participants.

A further Breakfast for Change was to be hosted at a medium-sized Johannesburg attorneys' firm but this could

not be arranged during the currency of the project. The medium-sized law firm was, however, represented at the Expert Reference Group meeting at the beginning of the project.

10.2. INDIVIDUAL INTERVIEWS

The Researchers undertook 15 one-on-one interviews with individuals across the spectrum of the legal profession. Participants included attorneys and advocates in the private sector and civil society at varying stages of their careers. Participants were also disaggregated by race and gender:

- 1 African woman: candidate attorney
- 1 African woman: attorney, admitted approximately 3 years
- 1 African woman: attorney, admitted approximately 8 years
- 1 African woman: attorney, admitted approximately 10 years
- 1 African woman: attorney, admitted approximately 5 years
- 1 African woman: attorney, admitted approximately 7 years
- 1 African woman: advocate, admitted approximately 9 years
- 1 Indian woman: attorney, admitted approximately 8 years
- 1 Indian woman: attorney, admitted approximately 25 years
- 1 Indian woman: advocate, admitted approximately 11 years
- 1 African man: attorney, admitted approximately 16 years
- 2 African men: attorneys, admitted approximately 10 years
- 1 African man: attorney, admitted approximately 10 years
- 1 white woman: advocate, admitted approximately 13 years
- 1 white man: attorney, admitted approximately 10 years

There were few representatives from the group of 'coloured' people. Across the project there were only two coloured members of the profession with whom we engaged.

10.3. ELECTRONIC SURVEYS

The electronic surveys consisted of six separate surveys, which were distributed to various organisations, including:

- A civil society organisation with offices in multiple cities;

- A network of attorneys involved in corporate and commercial law practices;
- The South African chapter of a global network of public interest lawyers;
- The Johannesburg and Cape Town offices of a large attorneys' firm;
- A medium-sized Johannesburg attorneys' firm; and
- A Johannesburg-based civil society organisation.[4]

All institutions are based in part or entirely in Johannesburg. The data was collected between 27 May 2014 and 16 July 2014 and the surveys were distributed within the email networks of the above organisations.

The intention in putting together this set of surveys was to achieve a somewhat representative sample of the Johannesburg legal services market. Although it would be difficult to draw the line between the two precisely, the sample includes significant responses from lawyers working in both public and private spheres. One caveat, however, is that the sample clearly does deviate from the Johannesburg legal services market in its exclusion of the large number of solo practitioners and small firms of, for instance, one or two professionals. Of the 10 959 law firms in South Africa as of 2014, 62% are solo practitioners and 35% have between two and nine attorneys. Only 30 firms have more than 50 attorneys.[5]

A total of 95 respondents responded to these surveys. Only 73 surveys were completed in full and the remaining respondents did not respond to all items. Of the 95 respondents, 65 identified themselves by race and gender. After analysis for race and gender, on the variables of interest (as further described below), we were left with a sample size of 62. Quite organically, black female professionals became the largest group of participants. This is inversely proportionate to the number of practicing black female attorneys in South Africa (black female attorneys constitute 13% of practising attorneys in South Africa).[6] The final sample consisted of:

- 26 black females
- 8 black males
- 19 white females
- 9 white males

The entire cohort of white males came from the large commercial firm but otherwise the race/gender cohorts were spread across the component surveys. Black females thus constituted 41.9% of the sample, while black males were 12.9%; white females were 30.6%, and white males were 14.5%. For purposes of this survey, 'black' was taken to mean a combined category of persons identifying as either African, Indian, or coloured.

We can compare this with the current demographic composition of the legal profession in order to get a sense

[4] A test run of the electronic survey was conducted on a voluntary and confidential basis within CALS.

[5] B Whittle, The attorneys' profession in numbers *De Rebus* September 2014. http://www.myvirtualpaper.com/doc/derebus/de_rebus_digital_september_2014/2014082002/ (last visited Aug 26, 2014).

[6] Ibid.

of the representativeness of the sample. In the legal profession, it is white males who make up 40% of the whole. White females make up 24% of the profession – thus are slightly overrepresented in the sample here. Black males are 23% of the profession and therefore are slightly underrepresented in the sample at only 13%. Finally, the extent of overrepresentation of black females is shown by their share of the national profession – 13% -- being just one third of the percentage in the research sample.

A further aspect of the representativeness of the sample concerns diversity within the senior and management ranks of the organisations for which the respondents work. As a whole, the respondents mostly worked in organisations where 60% to 80% of the partners or principals were male.[7] On the racial side, the picture was slightly different and a bit more evenly spread within our sample:

- 14.6% reported working with no white principals or partners;
- 14.6% reported working with 20% white partners/principals;
- 6.2% reported working with 40% senior white colleagues;
- 22.9% reported working with 60% white management;
- 35.4% reported working with 80% white partners/principals;
- 6.2% reported working with all white partners/principals.

Again, we can compare this with the current demographic composition of the legal profession in order to get a sense of the representativeness of the sample. In the 2013 research cited in section 2 above, 80% of the chief executives were white as well as 72% of the managing partners. 53% of all equity partners were white and male.

The survey questions themselves were modelled on a recent survey done by the Law Society of Australia. The topics covered in the survey include work satisfaction, availability of career development and progression opportunities, workplace tolerance of flexible working arrangements, the level of discrimination and harassment at work, and drivers of retention and attrition. At least as an initial matter, sample size was not large enough to facilitate analysis of the availability of career development and progression opportunities and the drivers of retention and attrition. Nonetheless, we were able to conduct a preliminary analysis of work satisfaction, workplace toleration of flexible working arrangements, and the level of discrimination and harassment at work.

10.4. CHALLENGES

There were several challenges in setting up and conducting the field research.

The first was the risk of non-response. Members of the legal profession literally earn their fees through time and the request for members of the profession to engage with the project, in any form, was a cost not only to their productivity but also possibly to their ultimate income for the month in question. Notwithstanding this challenge, the project was met with a high number of participants who committed their time to the research. This experience reinforced the finding of the initial Expert Reference Group meeting, namely, that members of

[7] The responses regarding the composition of partners/principals were all male (2%), 80% male (29.7%), 60% male (46.8%), 40% male (2%), 20% male (8.5%), and all female (10.6%).

the legal profession take the issue of transformation very seriously.

Ten organisations were identified and invited to participate in the electronic survey and to nominate individuals or to call for volunteers for individual interviews. Some of those organisations were also invited to participate in the Breakfasts for Change. One month after the letters of invitation had been sent, only two organisations had confirmed their participation. Two months later, seven organisations had either not acknowledged the invitation, or had undertaken to consider the invitation but had not responded to it.

It became necessary for members of the project team to leverage professional relationships with members of various organisations in order to explain the project and confirm the organisations' participation. In our interactions with members of these organisations, it was clear that the project was extremely welcome and seen as very valuable. Yet, despite this interest, it remained difficult to schedule sessions within the available time of the project.

The second challenge related to the need to obtain an appropriate balance between the various parts of the profession, including attorneys, advocates, the academy and people who no longer are in practice. This diversity was achieved to some extent but, as with all research, a wider group of participating entities over a longer period of time would have enriched the research findings.

The third challenge was to ensure representation across the profession, based on gender, race, age, stage of career, and sector of the profession. This challenge proved to be surmountable with a wide diversity represented in the field research.

10.5. PROJECT ADVOCACY

In addition to the research component of the project, various members of the team engaged in project advocacy at various points during the project.

Project Lead, Kirsten Whitworth, attended the *Judges Matter* meeting in Cape Town on 5 June 2014. The meeting was organised by the University of Cape Town's DGRU, in order to discuss the Judicial Services Commission and the appointment of women judges. On 9 June 2014, Ms Whitworth also attended a meeting facilitated by Sonke Gender Justice to discuss women judges, and the interaction between gender and race.

Researcher Alice Brown attended the ENSAfrica *Contemporary Conversations: Interactive Dialogue between In-house Counsel and Outside Counsel* on 5 June 2014. Of particular interest for the purposes of our project was the panel on 'Diversity in the Law, Why It's Top of Mind for General Counsels'. The General Counsel of Coca-Cola Bottling Investments Group and the Legal Director - Africa of Cummins, Inc. were the guest speakers and in their presentations, both emphasised their respective companies' commitment to diversity and transformation, identifying ways in which they monitor and assess compliance on the part of the law firms they hire.

Both Kirsten Whitworth and Alice Brown presented on the project at the Public Interest Law Gathering (PILG), held at the University of the Witwatersrand, Johannesburg, on 24 and 25 July 2014, as part of a panel on 'Transformation and Diversity in the South African Judiciary and Legal Profession'. The panel also included Tabeth Masengu (Research Officer at the DGRU), Alison Tilley (Head of Advocacy and Special Projects at the Open Democracy Advice Centre) and Sammie Moshenberg (former Director of the Washington DC Operations for the National Council of Jewish Women, where she led BenchMark: NCJW's Judicial Nominations Campaign which she helped develop in 2001 as a way to educate and engage NCJW's members and their communities on

the importance of the federal judiciary and filling judicial vacancies with a diverse group of individuals with a proven record of fidelity to core constitutional values). Jonathan Klaaren chaired the session.

C. FINDINGS AND RECOMMENDATIONS

11. PROJECT FINDINGS

As mentioned in section 7 above, the project is applied research, rather than purely academic or theoretical research. The research is not designed to yield conclusive evidence regarding transformation in the legal profession. Rather, it is designed to test the accuracy of the assumptions identified in section 4 above. It is also important to bear in mind that the project is not held up as scientific research, nor was it designed as such. It engaged in qualitative research, by investigating the lived realities of those with experience in the legal profession. All three methodologies yielded consistent evidence that affirms the following: that sexual 'othering' – the process of prejudging a person on the basis of stereotypes relating to their race, gender and class, and the intersection between gender and race discrimination are factors that impede advancement in the legal profession.

11.1. THE INTERSECTION OF RACE AND GENDER DISCRIMINATION

i. Description of the Finding

On the whole the participants noted that the experience of discrimination based on race is different from that based on gender. Where one is part of the racial and gender minority, a most particular type of discrimination is experienced, which is not addressed by the transformation project. The data indicates that while black women experience the same types of gender discrimination as their white female colleagues, they also experienced a *different and additional* form of discrimination by virtue of their race. Similarly, the experience of racial discrimination is similar to that experienced by their black male colleagues but there too, there is a *different and additional* form of discrimination based on their gender.

ii. The Research Leading to the Finding

Gender tends to be seen as less important in the process of transformation than race. In the context of the intersecting points of discrimination (namely race and gender) there appears to be a deepening divide. When we speak of groups who are disadvantaged or poorly represented in the legal profession, we speak of blacks, women and black women. It is important to acknowledge each of these groupings and to recognise that the intersectionality of being both black and female cannot be ignored. The prejudice against a person based on both gender and race, was not addressed by the project of racial transformation. Black women can face discrimination and prejudice both because of their race and their gender. As a participant noted, it seems that while white women suffer from sexual harassment throughout their careers, black women suffer from both sexual harassment and gender discrimination. As a result of this intersection of discrimination, there are fewer successful black women than white women, and this appears most manifestly on the Bench. A participant noted that it is particularly distressing that the Constitutional Court, which is the guardian of our Constitution, does not appear to be transformed for black women, and that this does not bode well for black women.

The Bar participants expressed very particular concerns. Certain participants at the Bar observed that the experience of being at the Bar is significantly different for black and women advocates because they feel like a

cultural minority. People talk in a particular way and socialise in a particular way, and work flows as a result of socialising.

Due to racism, prejudice and pre-conceived notions of ability, or inability, many black legal practitioners believe that they have to "work twice as hard" to disprove these negative assumptions but, even in doing so, they only get "half as far" as their white counter parts, again, due to racism, prejudice and pre-conceived notions of their capabilities.

Participants at the Bar remarked about the difficulties of being self-employed. This is reportedly exacerbated for black counsel: a participant noted that she has financial responsibilities that other people do not, including, for example, having to buy her parents a house before she was able to buy one for herself, which meant she had to work much harder and for far longer in order to reach the same position as her white colleagues.

The participants from the Bar noted that the Johannesburg Bar Council has not adopted either a maternity leave or a sexual harassment policy, but has recommended instead that such policies be adopted by individual groups. They noted with concern that this lack of leadership from the Bar Council is indicative of the established hierarchy of the Bar, and the cemented traditions where women's views and positions are not taken as seriously as those of men. They noted that because the Bar relies so heavily on tradition, it is very difficult to change things from the way that they have always been done.

The attorney's profession was similarly problematic. One participant was the only black female employee when serving her articles. She worked with a number of white men. She described an incident where her employer shouted at her in the corridor, in front of her colleagues, yelling "I will not have incompetent women in my firm".

Participants made nuanced references to respect. A number of female participants observed that they feel that although they are taken seriously within the workplace, they are not taken as seriously as their male colleagues. One participant remarked that she had felt that she was taken seriously throughout her upbringing, until she began working in a law firm. She noted that this is endemic to the legal profession, and not specific to any one firm.

For example, senior members of the profession will assume that, as the only woman in the room, the female staff member will make the coffee. The same participant noted that ninety per cent of the time, she is the only woman in the room. Her supervising partner ensures that either he or the most junior person in the room makes coffee. However, other partners tend automatically to assume that, as the only female present, she will make the coffee.

Several black women spoke of difficulties that they had in teams supervised by white women. One person gave an example of working in a team that was entirely comprised of women and where, initially, she thought that there would be support and solidarity. Instead, she was confronted with instances of what she perceived as racial prejudice and discrimination. There must be "an honest discussion around gender discrimination and the different impacts on black women and white women".

The sentiments above were largely confirmed in the results of the electronic surveys. One part of the survey focused on aspects of discrimination, bullying/intimidation and sexual harassment. It posed the question to respondents "To what extent have you personally experienced any of the following in your current workplace?" and then queried several different aspects of discrimination, bullying/intimidation and sexual harassment.

Respondents were given the option of answering "never", "very rarely", "occasionally", "often", "continuously" or "not sure".

The most prevalent of these issues were bullying/intimidation and discrimination based on gender, age, and ethnicity. For the subset of black females in the sample, the level of bullying/intimidation experienced and reported (7.6%) was consistent with the sample as a whole. With respect to white women, the reported level of bullying/intimidation was 15.8%, about twice the rate in the sample as a whole and twice the rate reported by the black females in the study.

11.2. GENDER DISCRIMINATION AND REPRODUCTIVE RIGHTS

Gender discrimination on the whole seems to be accepted in the legal profession, particularly when it comes to pregnancy. One participant spoke of the tension between her desire to try to become a director/partner in her firm and her desire to start a family. She does not know if these two goals are compatible. Another participant described one incident where a woman had disclosed her pregnancy to an employer and had been asked what she was "going to do about it." The strong implication was that she needed to terminate her pregnancy, or lose her job. According to the electronic survey, no respondents had requested unpaid maternity/paternity leave but this may be because none of the respondents had been pregnant.

11.3. LATENT DISCRIMINATION AND 'OTHERNESS'

"I didn't realise how hard it is to be coloured until I came to [firm]"

i. Description of the Finding

As participants discussed their experiences, the 'invisible barriers' and alienating behaviour became part of the definition of transformation. It was observed that those who are different have the following choices (i) seek to accommodate the prejudice in adjusting their behaviour and not being offended; (ii) seek to assimilate into the dominant culture through language, behaviour and other social conduct; or (iii) challenge the institutional culture that perpetuates privileged white culture, with possible consequences of alienation and ultimately leaving the profession.

ii. The Research Leading to the Finding

Prejudice and exclusion may not always be deliberate or conscious. Male and female junior associates in law firms noted vastly different experiences, as did white and black attorneys. Some participants observed that, within the law firm context, seniors tend to be dismissive of juniors as a whole but still treat white males better than their black / female colleagues. A theme that came out quite strongly was that some participants who are different from the hegemonic norm are penalised for their difference, and that they should not have to pay a "tax" for being different. Instances of preferring white junior counsel over black junior counsel continue to occur. Both clients and the senior counsel will more readily listen to the white junior than to a black female junior.

There was also recognition that prejudices are often unconscious or unintentional. Some female participants noted that prejudice is not always apparently negative, for example, male senior partners may be 'protective' of their female juniors, treating them more like a daughter than a professional colleague. This facially neutral practice becomes negative, however, by undermining the female junior and categorising her as a child in a

parent-child relationship. This practice, and its unintended paternalistic side-effect, was acknowledged by male participants.

An example of othering or sub-conscious prejudice was raised by a participant from the Bar, who noted that, social conversations are often about cricket or rugby, historically white sports in South Africa. Confirming this position, a member of the attorney's profession noted that the only unifying sporting discussion is the English Premier League or European Football League. Importantly, this was also an example of how women may be excluded irrespective of the race of their male colleagues. Some efforts at cultural exchanges are made but may backfire, for example, a white senior male lawyer asked a black senior male lawyer, in a discussion about cricket, how BafanaBafana was doing, thereby offering a well-intended but ultimately belittling overture of inclusion. The participant noted that black members of the Bar feel that they must take an interest in historically white sports in order to participate in social conversations. Yet, the same courtesy tends not to be extended to them by their white counterparts.

Some participants from the Bar observed that a good relationship with an attorney, which is encouraged by social interaction, leads to more work. But, there are limited opportunities to socialise across race, which restricts briefing patterns and some participants noted that attorneys tend to brief counsel that look like they do.

Lawyers who socialise together tend to give each other work. The example that has been repeated on a number of occasions, by advocates, attorneys, and corporate lawyers, is the expectation that one cannot succeed if one does not go skiing with the right people.

One member of the Bar voiced an objection to the fact that advocates get work by playing golf, but admitted that it is preferable to learn how to play golf than to rebel against the system.

If lawyers have spent the day together on a Sunday it is more likely that there will be a more compatible working relationship during the week. This acts as an organic and unintended but very real barrier to development for people who are not part of the homogenous seniority.

For example, one participant reported about the longstanding arrangement by an all-white and all-male group to watch a rugby match. Black associates were invited only an hour before the match. The event had apparently been arranged as an informal social outing by a group of employees who tended to socialise with each other. The last minute invitation from obviously white colleagues to obviously black colleagues only served to reinforce the alienation based on race.

A black female candidate attorney reported being told that she would "never be like" her white male counterpart and while he is taken to meetings, she is sent to make deliveries and photocopies. She observed that her colleague attended the same school as their supervisor, and believes that there was a pre-existing relationship between them, which influences their interaction within the professional sphere.

Perhaps most poignantly, a participant observed that as a black lawyer, it is difficult to abandon ingrained prejudices, even against oneself. The participant noted that this leads to hesitation before speaking in consultations and with colleagues, because there is a need to be particularly comfortable saying something, due to a lack of confidence and trust in one's own abilities. The participant emphasised that this is not just about language: every time she is in a room with white people, she is hesitant to talk in case she embarrasses herself.

11.4. SEXUAL HARASSMENT

i. Description of the Finding

As participants related their experiences, it became apparent that sexual harassment is a problem across the profession with insufficient structures in place to address it; insufficient understanding of the range of behaviours that constitute sexual harassment; and a lack of understanding of the manner in which it impedes advancement.

ii. The Research Leading to the Finding

Some participants related that there is a range of behaviour that constitutes sexual harassment experienced in the professional environment (in varying degrees of intensity). However, senior management at law firms and some members of the Bar Council either do not seem to understand the complexity of sexual harassment, or deny its existence. In the opinion of one participant, sexual harassment is a problem at the Bar but the Bar Council has no formal position on the matter. Although there are few formal complaints, there are several stories of sexual harassment. This status quo is entrenched by the concern at junior levels that being too vocal in raising concerns around sexual harassment, will "rock the boat" and the individual will be seen as a troublemaker. The lack of understanding, coupled with a fear of being perceived to be disruptive (referred to as a "career limiting move"), creates a de facto system in which there *is* sexual harassment but not consequences for such violations. Because there is little, if any, relief for victims and survivors of sexual harassment, the imperative of silence remains. Quite simply, complaining about sexual harassment has the result of impeding the flow of work to the complainant.

The established hierarchy of the Bar obfuscates the identification of acts that constitute sexual harassment. Participants from the Bar observed that the generally accepted rule of practice at the Bar is that juniors do "whatever is required" of them by their seniors. This can – and does – extend to sexual harassment. Some are of the view that it is understood to be a career-limiting move not to acquiesce to a senior's demands. One participant reported incidents where a senior had asked a junior to accompany him to Cape Town on a business trip, even though she was not on brief, and had no role to play in the matter. The innuendo was that the request was made for non-professional reasons. The same participants noted, however, that at the Bar, reputation is everything, and women fight a constant battle between having to manage their reputations while managing sexual harassment, and perceptions of their colleagues.

Another participant noted "sexual harassment is a big issue at the Bar. It is not spoken about but it needs to be exposed. If you could get women to tell their stories at the Bar, you would be shocked".

11.5. COLOURED PEOPLE FEEL PARTICULARLY EXCLUDED AND ISOLATED

Many participants noted that the transformation debate is often seen in binary form, as white versus black. As a result, coloured members of the legal profession tend to fall outwith any one particular group. One participant remarked that it was only when she started working at a law firm that she realised how it felt to be a "coloured woman". Another participant observed that she would not be invited to social events by black colleagues, because she was not seen as black, nor did she fit in with white colleagues' social groupings. The result is that one is excluded both for the purposes of social networks, and also, for the purposes of having a network of similarly placed individuals with whom one can commiserate in the Gauteng area.

Therefore, in terms of social groups, a particularly isolated category of persons is 'coloured' women at the Bar. One participant noted that it is much harder to be of "mixed race" because she does not belong to any group, and therefore has no comfort zone or protective category. The absence of a network of coloured women (as opposed to networks of black men and black women) highlighted this to her.

11.6. THE IMPORTANCE OF NETWORKS

i. Description of the Finding

Participants noted that the so-called old boys' network is well documented and understood: groups of similarly placed people support, interact and protect each other. The support that individuals gain from networks provides significant advantages in career progression. Many participants noted that white male lawyers look after the interests of other white male lawyers, often subconsciously.

Increasingly, black 'boys' clubs' are also emerging. The result is that black and white female lawyers fall through the cracks without the right connections, either through gender, family, schooling, or conforming to an appropriate dress, behaviour or accent.

ii. The Research Leading to the Finding

Some participants spoke of the very specific culture of the Bar, noting that people talk and socialise in a particular and different way. Because work follows as a result of socialising, it is important to be attuned to that way of socialising. Those who are already familiar with this are at an advantage, and they tend to be white and male. Success is therefore easier for those who fit that culture.

Many participants noted that the 'boys' club' may not be the exclusive domain of white lawyers. There are black boys' clubs and, to a lesser extent, Indian boys' clubs. There are, however, no equivalent 'women's clubs'. Some female attorneys noted that they worked in all female teams, but on the whole, there are no organic groupings of women, with a dearth of encouragement from women for each other.

The absence of a women's network arises in part because of discrimination by women (particularly senior women) against other women. Some participants noted that this may be because of the need for women to act like men and to relinquish their gendered identity in order to fit into the hegemonic norm.

The participants from the Bar acknowledged that theirs is a particularly tough environment. It is a fight to enter this domain; it is a fight to remain in this domain; and it is a significant fight to succeed in this domain. Some participants noted that entering the Bar and succeeding as an advocate can be difficult for anyone because of the series of challenges that coming to the Bar poses. For example, the financial strain of pupillage followed by the 97-day invoicing period places a burden on all members of the Bar. It is difficult to come to the Bar in general but it is particularly acute for anyone who is not part of the overwhelmingly white and male domain. White men do not face the same difficulties precisely because the position of a minority is one hurdle they do not have to clear. One participant remarked that this problem is exacerbated by the tendency that the legal community has "to intermarry", thus perpetuating the cycle of socialising within particular circles, and making it difficult for outsiders to gain access.

One participant noted that there are two manifestations of exclusion in respect of career progression, both formal and informal. There are formal programmes such as performance monitoring, but informally, people are

able to rise to the top based on their informal relations. This participant noted that the only time that he is able to have ordinary conversations with colleagues, regardless of race or seniority, is when they play soccer.

11.7. FRONTING / WINDOW DRESSING

i. Description of the Finding

A number of black participants spoke of being used in expedient and opportunistic ways by their firms: they described being invited to participate in meetings in which their respective firm was soliciting or "pitching" work from potential clients.

ii. The Research Leading to the Finding

Participants spoke of being actively recruited to participate in these sessions. Then, the next time they would hear about that client and work would be weeks or months later, in the corridors, so to speak. They would learn that the firm had been retained and was engaged in the work but that they, the black attorney used to attract the client, would not have been included in the work. It becomes clear why a black, capable attorney would want to leave the profession for such a reason.

One participant told us of an incident in which she was included in the pitch to solicit work from a particular client. Her name and photograph were included in the team profile presented to that prospective source of business. Months later, and inadvertently, she learned that the firm had indeed been hired by the client but that she had not been included in the team and work that the firm had received. Another participant spoke of the "dishonesty" of "using black identities" to solicit business from government entities such as Eskom but then not being included in the work once the firm was appointed.

11.8. SCEPTICISM ABOUT BLACK AND FEMALE PROFESSIONALS' ABILITY (OR: A MISTAKE BY A BLACK LAWYER IS WORSE THAN THE SAME MISTAKE MADE BY A WHITE LAWYER)

i. Description of the Finding

Many of the participants believe that those in senior positions (be it within law firms, at the Bar or in the judiciary) doubt and question the intelligence, talent or prior experience of black and female practitioners. In their opinions, black professionals are generally viewed as less than equal or worthy until they prove themselves differently. In contrast, they felt that their white colleagues were always presumed to be competent and capable until or unless they prove otherwise. Black and female and, in particular, black female professionals, need to overcome preconceived ideas and assumptions related to their race, gender, language and accent.

ii. The Research Leading to the Finding

Participants almost always agreed that the legal profession is far from transformed. They noted that it is largely white and male physically, and that this is reflected in the profession's ideology and prejudices. Many participants spoke about facing preconceived notions and attitudes that assumed blacks were incompetent, lazy or token appointees without substantive knowledge and skills. On more than one occasion and in more than one setting, the research team heard some participants talk about the requirement for them, as black professionals and/or as women, to "prove themselves" or to "show that [they] could do the work" or to "have

to work harder and longer" than their white male counterparts to be recognised and respected by their supervisors. In other words, the presumption of intelligence was against them. One participant reported that a senior white male lamented that there were "no competent blacks". Another participant noted that, in many instances, clients "do not trust" black attorneys or women attorneys.

One mid-level professional stated that black candidates attorneys need to "work extra hard" and understand that the playing field is not level. These young professionals should not be "naïve" about the reality of who stays and who departs at the end of the articles period. According to this source, as a general rule, the majority of white candidate attorneys obtain offers and stay while the majority of black candidate attorneys depart because they are not invited to continue with the large firms once they have completed their articles. This, in the opinion of this participant, is the reality that black entrants into the profession must face.

A participant reported an incident where a black female lawyer had sent an email containing spelling errors to a client. The client replied to the entire team, complaining that *this was why he opposed working with black women* and insisting that she be removed from the matter. The firm took her off the matter. After this incident, the attorney in question left the firm. The critique of the firm's response was not because spelling is not an important component of professional lawyering; rather, the response linked the error to the race and gender of the attorney – and all like her. The participant noted that it is highly unlikely both that the client would have requested the removal of the attorney, and that the firm would have agreed to his removal, had he been a white man.

Just as women may discriminate against other women, the same was true in respect of race. It was noted that there are black professionals who are affected by this. Some of the participants noted that it can be difficult for people to go against what they have been trained to think for years, such as perceptions that blacks are intellectually inferior. There are, for example, deep-seated prejudices about which type of matters black counsel are, or are not, capable of handling.

A black senior counsel noted that, when briefed on a construction matter, he will automatically think "Black counsel do not understand construction law, so I had better find a white junior", despite the fact that there are black junior counsel who are indeed experienced in construction law. He feels that he has been conditioned to underestimate black juniors because his white counterparts underestimate black juniors, and because he, himself, was underestimated as a junior. He noted that, even though he himself is black and aware of the imperatives of transformation, these assumptions are very difficult to unlearn and will take time.

Some participants from the Bar noted that there are black attorneys who feel that they cannot brief black advocates. They fear that if such black counsel fails to perform to a certain standard, this will serve as confirmation that *all* black professionals cannot succeed. They noted that some black attorneys would rather brief white counsel than risk confirming their white colleagues' prejudices about black professionals.

One participant observed that, as a black lawyer, his seniors assume that he cannot do the work that he is given, or that he will find it more difficult to take instructions than his white colleagues. He also noted that he and his black colleagues seem to be criticised in a different way to white colleagues when making mistakes: a mistake made by black colleagues seems to be of far greater significance and to have greater consequences. Similar mistakes made by a white colleague are shrugged off as an innocent mistake. The position suggests that when a white professional makes a mistake, it is because there was an error in judgment. When a black professional makes a mistake, it confirms that black colleagues are, on the whole, unable to do the work.

11.9. LANGUAGE, ACCENT AND CLASS

i. Description of the Finding

Some participants noted concerns about prejudices in the workplace against those who are black and "have an accent", because of the assumption that they belong to a lower socio-economic category of non-professionals.

ii. The Research Leading to the Finding

A participant noted that in a consultation, clients associate certain accents with assumptions about an individual's ability. That person is at a disadvantage before they have even begun the consultation. As a result, people are pigeonholed at the time of greeting clients, and before there has been any engagement with the substance of a matter. This can have a silencing effect, resulting in a junior sitting quietly in a consultation, allowing others to speak. This perpetuates the problem, allowing white colleagues of the same status to establish seniority because they feel able to speak more freely.

A participant noted that how English is spoken matters, and that this is true of academia, law firms and the Bar. People, who speak English better than others, automatically benefit from the perception created that they are better at their job. This erodes the confidence of those who are not as proficient in English, creating the impression that black juniors are not 'hungry' for the work.

Another participant noted that language is a particular barrier for Afrikaans-speakers, and that many Afrikaans students do not apply to the perceived top law firms because they feel that being Afrikaans speakers is viewed negatively, and that they will not be able to succeed. This adds an additional barrier for Afrikaans-speaking coloured individuals, who have both racial and language barriers to clear.

11.10. THE ONE 'GOOD BLACK FEMALE' LAWYER

iii. Description of the Finding

Participants from the Bar observed that once a black junior has proved him- or herself, s/he is inundated with work because s/he immediately becomes known as "the one black person who can do it".

iv. The Research Leading to the Finding

Participants noted the risk of being pigeonholed: once a junior does well in a particular field, it is difficult to get work in another field, and thus to grow a diverse practice. The inundation of work also presents the potential negative consequence of making mistakes because of an unmanageable workload, thereby reinforcing prejudices against the capability of black professionals, both male and female.

Participants from the Bar raised concerns that some clients will not trust black attorneys with matters because "they'll mess it up." If the firm insists on a black attorney to manage the matter, the client will then insist on hiring white counsel, because "the buck stops" with white counsel. The implication is that at least the person who has control over the end product will be able to fix the deficiencies of the black attorney (representing discrimination based not only on race but also on a longstanding distinction between the Bar and the side-Bar).

In a perverse way, the perception that there are only a few good black legal practitioners can be advantageous, at least initially, for some juniors. Capable black juniors will have flourishing practices but this quickly becomes

an unmanageable burden because they are the black counsel everyone will use. The burden for the "good black junior" who receives a great deal of attention and work, soon amounts to *too much* work, the sheer volume of which undermines their ability to perform optimally. Inevitably there will be a moment of under-performance, which will expunge his or her reputation as the "good" black. Similar weak moments for white juniors are not so absolute in their consequences and are not interpreted as evidence of a lack of capability amongst *all* white female juniors. Moreover, this perception of there being only a few good blacks also impacts adversely on the work and attention that other black professionals receive. So, some black juniors are over-worked and over-used while others are under-developed and ignored. The support for the 'good black' lawyer is therefore an exception, rather than the rule.

11.11. BRIEFING PATTERNS AND WORK ALLOCATION

i. Description of the Finding

Various participants noted that work allocation is based on either informal relations or racial and gender prejudices. In order for this to occur, it was observed, senior professionals must change their patterns of briefing (which some are already doing). Change therefore must come "from the top". Directors of law firms and senior counsel need to be deliberate in their briefing patterns and allocation of work to address the issues of transformation.

The briefing patterns have an economic impact too. In respect of attorneys, the more lucrative commercial fields are skewed towards white attorneys and black attorneys tend to be found in the less lucrative fields such as criminal and labour law.

ii. The Research Leading to the Finding

Participants from the Bar observed in order to get effective training, one needs exposure to a mix of small manageable cases in which an advocate can grow one's confidence and larger matters in which one can get exposure. Participants noted that white juniors are given small matters in which they can succeed and are able to shine; black female juniors, however, are usually brought into larger matters only. Moreover, because of the perceived 'lack of good black female' advocates, junior black advocates are brought into matters, which are far beyond their experience, setting up them to fail. As a result, they are seen as incapable of delivering quality work, which has an impact on obtaining future work. Where the junior advocate, notwithstanding her lack of experience, succeeds and bucks the stereotypes, she is then inundated with high level work, subsequently missing out on a steady progression of training that her male colleagues ordinarily receive. A participant noted that after herself ten years at the Bar she has never managed small, relatively simple matters because of the lack of training in those areas.

Some participants also noted that some parastatals insist on black juniors for all of their work. Because people tend to work with the same people repeatedly, a clique develops. Some participants observed that there are some black female juniors who are preferred over others, and as a result are briefed in too many matters. Some cannot maintain the workflow and lose credibility. A participant observed that this could be alleviated by widening the pool of black women briefed; there are many capable black women who do not yet have access to this work, despite clients and attorneys lamenting the lack of black female counsel, which is simply untrue.

Another participant observed that, at times, even when black juniors are brought into large matters, clients rely exclusively on the white senior counsel. The participant reported being excluded from consultations and not

being informed about developments in the matter. While formally on brief, the participant described that she was not involved at all in the matter. When the client asked for an invoice, the participant refused to provide one. She explained that she had been excluded from the work in the matter, making her position one of 'window dressing'. Because she could not do any work she refused to bill the client.

Some participants felt that the role of senior advocates is critical, but that it is difficult to get buy-in from them for a number of reasons, including that mentoring takes a great deal of time and effort. They noted, however, that this is only part of the problem, because there is a balance to be struck between being a junior on matters on the one hand and developing a practice through individual briefs on the other. The risk of not developing properly is that after ten years at the Bar, one should have certain skills, but juniors who have spent ten years battling to keep their heads above water in very large matters with poor mentoring or supervision may not have those skills. Some participants noted that leaving private practice for the corporate world then becomes an attractive option.

A number of female participants spoke of problematic work assignment patterns in firms. In a mixed group of male and female junior attorneys, the women talked about how they were assigned administrative or company secretary type assignments while their male counterparts would be included in meeting with clients and given "real" legal work such as transactional work. One participant reported that during her period of articles, women were assigned more administrative work; substantive work was the preserve of white males.

In a particular team, white candidate attorneys and juniors reportedly received the "crème de la crème" of the work; of the two black women on the team, one was allocated some, but insufficient, work and another received no assignments at all.

One participant spoke of the presumption that blacks and women can only do certain kinds of work, which others considered to be 'soft" law. She noted that some think that blacks and women "can't do numbers".

At the Bar, advocates shared the observation that family law and trusts and estates are seen as "women's work". They found that gaining exposure to and experience in commercial and corporate work can be difficult for female (and black) advocates.

The nuanced nature of 'othering' i.e. making someone feel inferior or insecure because of their differences from the hegemonic norm, and discrimination is evident in the various narratives accompanying the workloading of black women. These narratives include (i) black women are imposed on clients; (ii) black women lack experience and therefore seniors do not give them work; and (iii) the smallest error will be interpreted as evidence of the ineptitude associated with race and gender.

11.12. SCEPTICISM ABOUT TRANSFORMATION

i. Description of the Finding

Many of the participants expressed doubt or pessimism about the possibilities or probabilities of meaningful transformation in the near term. They spoke about the slow pace of transformation, the lack of will to effect meaningful transformation, and the ways in which the legal profession is conservative and traditional. All of this leads them to doubt that matters will change for the better any time in the near future. Many participants acknowledged that the profession needs to be transformed, and noted that buy-in from senior levels of the profession is critical in order for transformation to be successful.

ii. The Research Leading to the Finding

Participants acknowledged that transformation is not a simple or rapid process, with one participant commenting on the audacity of a senior director of a prominent law firm who had recently announced that, within his law firm, all gender issues would be resolved within the next five years. The same firm gave their female attorneys sewing kits to mark International Women's Day, thereby reinforcing the stereotype of women's domesticity. "The real barrier to change: deep seated patriarchy and racism," the participant stated, "cannot be wished away."

One participant observed that she did not believe that she will see "real" transformation in her lifetime. In her opinion, "not enough is being done," there has not been adequate skills-transfer and training has been insufficient. "Transformation is very far off." Some participants observed that as long as the upper echelons of the profession remain occupied by white men who do not recognise the problem, it will be very difficult for transformation to be taken seriously and to advance.

Comments made included: "We still have a long way to go"; "We need to move away from lip service transformation." My firm is "great at giving audience" to transformation issues and discussions "but it does not always get it right." Echoing the sentiments of others, a participant noted that at the junior level within the profession, diversity can be seen but at the higher ranks, it drops off.

Institutions may spend a great deal of money on surveys and assessments but some participants question the willingness of these entities to take matters beyond the information-gathering stage. Money spent on these types of effort "does not translate into practice. This is the problem."

It was also noted that interventions in support of transformation "will not come from the law firms". There is "no commitment", there are "no penalties", "no negative press", and "no accountability".

One participant noted that, although some black advocates (for example) want to see change, they want just enough change so that they can obtain what white men have, but not so much that the status and power that they seek is perceived to be somehow diluted or diminished by transformation.

A participant noted that "there has been transformation at the Bar over the last [ten or so] years. There are more women and blacks at the Bar. The work distribution is better but it is still inequitable. White men are more likely to be successful at the Bar. [People of colour] fall through the cracks. [We must recognise that] the Bar is intrinsically conservative and traditional. Bar leaders find change threatening, even some of the blacks [in leadership positions]." Another participant noted the "dramatic changes in the last 13 years [at the Bar]. We must recognise this," however, this participant went on to note that "progress has not been that good. The numbers speak for themselves."

Many participants spoke of the inevitability of transformation, not because the current leadership is willing to do the right thing, but rather due to the changing demographics and increased opportunities of previously disadvantaged population groups. One participant noted that "eventually, the Bar will be transformed. But it may not reach those who are already at the Bar. The evolution of the profession is inevitable."

11.13. HIERARCHICAL STRUCTURES OF THE LEGAL PROFESSION

i. Description of the Finding

Some participants spoke of the role of profit and rainmakers in the context of legal practice. They noted that law firms and groups of advocates exist to make money, not to ensure positive and integrated workplaces or social policies. As a result, problematic, discriminatory, racist and/or sexist behaviours or actions of rainmakers and lucrative clients are often ignored. The corollary is that being seen at work is a component of getting work and being perceived as a good lawyer. This creates impediments for those who would prefer to work outside of the established working routines.

ii. The Research Leading to the Finding

A number of participants spoke of the difficulties faced by those under-represented in private sector firms (that is, black men, black women and white women) in gaining access to lucrative clients and how this limits their ability to become authentic members of the top echelons of the large South African firms. Rainmaking is difficult, especially without support from seniors.

Rainmakers can also be laws unto themselves. Because they bring large profits to the firm, they are often not held accountable with regard to their prejudices and biases.

Indeed, when one participant was asked why he had left a major firm, his response was that he had two choices: one, as a black man he could stay at the firm and make partner with no clients or two, he could leave the firm for the corporate sector and try to establish a name for himself with clients in that setting. He chose the latter.

Many participants also spoke about how members of firms can be very territorial when it comes to clients.

Some participants spoke about the difficulty of breaking out of the status of a junior, even as they advance in their careers. Another participant also spoke of the difficulty faced by black attorneys (juniors and directors) to get work clients and progress in one's career. Obtaining work is challenging for all lawyers but there are black directors who are still treated as though they are at the senior associate level, impeding their ability to grow a client base.

In order to rise within the profession's hierarchy, lawyers must be *seen* at work. This creates problems for those who want to work flexible hours. Because childcare remains the perceived primary responsibility of women and not men, this 'face time' creates problems mostly for women. In the electronic survey, flexible working arrangements were requested by just over 10% of the sample. These included flexible hours (start and finish times); remote working (working from home); and part time work or a compressed workweek.

The surveys also surfaced information about why a respondent did not request access to flexible working arrangements despite finding such flexibility necessary. Of these persons not requesting access to flexible working arrangements, the largest group - 42.8% of the sample – did so because the arrangements were "not feasible due to the requirements and expectations of my role". The next most prevalent reasons were "concern that making the request would negatively impact my status/reputation" and "concern that if approved, the arrangement would impact negatively on my status and career opportunities", both expressed by 30.3% of the sample.

For the subset of black female respondents in the sample, the picture is largely similar to the overall sample. The highest number of requests was for remote working (34%) and flexible hours (30.4%). As in the sample overall, black women interested in, but who did not request, flexible working arrangements, noted that the primary reasons was that it was "not feasible due to the requirements and expectations of my role".

11.14. THE IMPORTANCE OF TRAINING, MONITORING AND ACCOUNTABILITY

i. Description of the Finding

A number of participants in the study spoke of the importance of receiving (i) proper, appropriate and timely legal training and (ii) exposure to both substantive areas of law and to clients during the early stages of one's legal career. Those fortunate enough to receive this type of training and exposure spoke highly and enthusiastically of these experiences. Those who did not benefit from these types of interventions recognised the adverse impact that this absence had on their professional development and expressed disappointment, if not anger, about the lack thereof. Often, participants (in both the individual and group interviews) stated that white male juniors were more likely to garner these types of experiences than black females, black males and white women.

ii. The Research Leading to the Finding

Many participants referred to law firms' laudable value statements and policies in support of transformation, diversity and equal opportunity. They say that the words are there, the policies are in place, but these statements do not translate into practices and actions in the work environment. Against this background, a number of participants talked about the need for legal workplaces to be monitored and assessed in the context of their transformation policies and held accountable when they fail to meet or uphold these assertions and policies. An important observation was that unless clients demand transformation or the failure to effect transformation negatively impacts profit, there is little, if any, incentive to implement the change articulated in the firm's vision statements. Black female respondents to the electronic survey disproportionately expressed scepticism about the leadership's commitment to actualising transformation. One of the key areas of dissatisfaction cited in the electronic survey was individuals' concern with the leadership and direction of the organisation. 38.4% of black female respondents were either "very dissatisfied" or "dissatisfied" with the leadership and direction of their organisation.

11.15. THE IMPORTANCE OF MENTORING, SPONSORSHIP AND CHAMPIONS

i. Description of the Finding

Most of the participants stressed the crucial role of mentorship and sponsorship in the context of legal practice (as an attorney and as an advocate). Juniors and mid-level professionals do best when they have the guidance and assistance of legal practitioners who are senior to them. Beyond training (which is also critical), these types of relationships help newcomers to the profession develop their professional reputations and build confidence, networks and client-bases. Those participants who have or had mentors and sponsors noted the positive effect of these relationships on their careers. And again, both those who benefited and those who did not benefit from these types of professional relationships spoke of the tendency for mentorships and sponsorships to be disbursed, so to speak, along racial lines.

ii. The Research Leading to the Finding

Participants were of the view that those in senior positions set the tone regarding diversity and transformation. One participant noted that "in a large firm, you need a mentor or sponsor. You can't become partner on your own".

One participant noted that if a trailblazer is female, this can have a significant, and negative, impact on a junior's professional development. This is because there is constant comparison to the achievements of the trailblazer. A particularly high standard is set by the trailblazer – higher than the standard required for the majority of lawyers advancing in the profession. The result is that female juniors are expected to have the same characteristics as that trailblazer; their white male counterparts are not required to meet such demanding standards.

A number of participants also noted the importance of seniors being public about their faith in their black junior colleagues. One participant noted that importance of the senior lawyer sponsoring juniors positively in front of the clients by saying asking the junior "bring the client up to date about this matter," instead of dismissing them in front of clients as mere juniors.

One participant reported a consultation with the Human Resources Department where she was told "we don't move problems", in response to her request to move to another team. She did eventually move to another team, and was told by her new supervisor that, over time she would "become numb". This contributed to the participant's leaving private practice, which could have been avoided had she had appropriate mentoring.

A number of participants observed that if a senior leader (be it a director, a managing partner or a senior counsel) seriously and vigorously takes up the mantle of promoting transformation, there is a trickle-down effect and circumstances within the work place or professional environment improve noticeably.

Participants from the Bar were asked why some people get support and others do not. One response was that "some juniors don't feel comfortable seeking support. Some groups don't have seniors who do this. Some groups don't have enough seniors. Then, the snowballing effect kicks in. Some juniors take on too much and then can't apply themselves to the tasks at hand. Reputation is everything. Relationships with attorneys: they function on reputation and word of mouth".

A number of participants expressed concern at the absence of black female role models in the top echelons of law firms. One black female participant observed that the absence of women in senior positions, on whom she can model her career, means that she does not feel that the senior position is an option for her. As a result, she frequently finds herself questioning her choice of career. Female participants within a law firm noted that they feel that they are expected to lose their femininity and individuality, and channel their energies into being trailblazers who demonstrate none of the characteristics of the stereotypes associated with women.

11.16. THE IMPORTANCE OF A CLEAR UNDERSTANDING OF TRANSFORMATION

i. Description of the Finding

A number of participants expressed concern at the use of the word "transformation" without a clear understanding of its meaning.

ii. The Research Leading to the Finding

One participant told us she is frequently told that, should she go to the Bar, she will have no problems getting briefs because she is a black woman. She expressed discomfort at being guaranteed briefs by virtue of her race and gender, and wants her success to be based on her merit. This leads her to question what transformation is, and what drives debates on transformation.

The same participant told us that she is concerned when questions of transformation look only at race and gender, and suggested that the debate should also take economic circumstances into account. She provided the example of a white female colleague with whom she served her articles. Her colleague started her articles and had a number of loans which she had had to take out in order to pay for her studies, whereas she, as a middle class black female, had had her studies paid for by her parents.

11.17. IMPACT OF ECONOMIC DISADVANTAGE

i. Description of the Finding

Participants recognise the growing black middle class that is entering into the legal profession. However, issues of economic status and class continue to impede development and growth in the profession.

ii. The Research Leading to the Finding

Although, since 1994, there are many more black law students, many of them come from poor or modest economic backgrounds. And, even with the possibility of entering into well-paying employment in the private sector and government, many come to these positions with limited financial resources, debt and sizable family obligations and responsibilities. What does this mean in the context of transformation and diversity in the legal profession? This reality plays out in a variety of ways. For example, several participants spoke of issues involving candidate attorneys and young black professionals who did not have driver's licenses or did not have cars and how this adversely affected these attorneys during their article periods.

A participant told of a black female candidate attorney in a large firm who did not have a car and therefore used public transport to travel to work. This hindered her ability to work late, although she did the best she could under the circumstances. Yet, white seniors who supervised this young attorney saw her inability to work late into the night on a regular basis as laziness and lack of dedication. In the end, this candidate attorney left the firm.

This issue of access to driver's licenses and cars, and the impact of the lack of these on young attorneys from disadvantaged economic backgrounds, was introduced in a number of settings over the course of this study. One participant observed that just as South African society does not always reflect the values of the Constitution, the legal profession does not reflect the values of the Constitution, and the people who work within the profession are not as progressive as the Constitution. He provided an example of eviction law, where the rules are designed to protect the poor, but where there is largely a resistance from the profession to assist the poor, in the face of the imperatives of profit-making. He observed that this is indicative of the way South African society views the poor and vulnerable.

12. RECOMMENDATIONS

The project mapped four stages of the legal profession and in respect of each stage there are clear recommendations to be made.

12.1. TO THOSE WORKING ON TRANSFORMATION OF THE JUDICIARY

12.1.1. Identify the Link between Transformation of the Judiciary and Transformation of the Profession as a Whole

The first recommendation is to acknowledge and identify that the lack of transformation in the judiciary is linked to a lack of transformation in the legal profession. Addressing the representation of the judiciary demands an analysis of the lifespan of the entire legal profession to determine why black women in particular are exiting the profession, resulting in a smaller pool of black female candidates for the judiciary than their white male colleagues.

12.2. TO LAW FIRMS AND MEMBERS OF THE BAR

12.2.1. Take it from the Top

Transformation requires a champion. The champion must be someone with power in the organisation and who is both respected and a high fee earner. Change occurs if behaviour by those with power is adjusted. Somebody in a position of power in a firm needs to take on the role of championing transformation and addressing the impediments identified within that firm. This should not be left to human resources.

12.2.2. Address the Pattern of Exclusion of Black Women

The second recommendation is to acknowledge and respond to the patterns of discrimination that cause black women to leave the profession. The points of exit within the legal profession are in fact patterns of exclusion that mitigate the retention of black women in the profession. This pattern is something that is going to require correction and to be addressed so that there is a greater pool of black women in stage three of the legal profession to fortify and fuel the judicial selection process.

12.2.3. Ensure Accountability

For those firms and counsel groups who speak about transformation, there has to be fair and representative mechanisms that hold perpetrators to account and protect victims of discrimination and harassment. The Law Society and the Bar Councils at a minimum should have policies around harassment and sexual discrimination for the parts of the profession they represent. This does not preclude individual group policies.

12.2.4. Manage Assumptions about 'All' Black Women

Senior lawyers should be very clear about their own responses to black and white juniors. They should always draw a distinction between criticism of an individual's work and criticism of an individual and the group to which they belong. The former is acceptable and promoted excellence. The latter is a form of racial and gender discrimination, both of which are prohibited and which impede transformation of the profession as a whole.

12.3. TO GOVERNMENT

12.3.1. Map the Progression of Black Women in the Profession

For those firms and counsel groups who speak about transformation, there has to be fair and representative mechanisms that hold perpetrators to account and protect victims of discrimination and harassment. The Law Society and the Bar Councils at a minimum should have policies around harassment and sexual discrimination

The Department of Justice and Constitutional Development should undertake a research project to monitor the career paths of black female law graduates and determine how and if they progress in the legal profession over a ten year period.

Encourage the JSC to take responsibility for the patterns of discrimination that may or may not be emerging in the profession and, as a result, in their decision-making.

13. CONCLUSION

The research relies on an assumption that transformation of the legal profession is an important objective. Apart from the constitutional imperative that the judiciary be representative of the country, why would transformation matter? The research undertaken in the production of the report indicates that across the profession in Gauteng, lawyers are experiencing a range of hostility and exclusionary conduct based particularly on the intersection of race and gender. This hostility is deeply inconsistent with the notions of dignity and ubuntu, which underlie our constitutional democracy. It is also causing the stultification of excellence and the effective repression of talent in the profession. In the same way as centuries of gender- and race-based discrimination has led to the loss of scientists, mathematicians and artists because the identity and race of a person mattered more than their skill, so too we risk the loss of excellence in the legal profession today.

The research aims to reveal the invisible nature of barriers that continue to impede the progression of black women in the legal profession. If we are at all serious about the commitment to reverse this pattern, these findings need to be explored further and addressed. Failure to do so will result in the debate about transformation of the judiciary being a constant and unchanging phenomenon well into South Africa's future.

For queries, please contact:
Bonita Meyersfeld: 011 717 8622 or bonita.meyersfeld@wits.ac.za

TRANSFORMATION OF THE LEGAL PROFESSION

FINAL LITERATURE REVIEW

---

1. Introduction

This document presents some preliminary discussion concerning transformation dynamics drawing on the relatively thin literature on the South African legal profession. Following on from the concept note that explains the Transformation of the Legal Profession Research Project, this introductory section posits and outlines four phases to the lifespan of a legal professional career in South Africa. The next section covers the existing literature, with specific attention both to the posited four phases to the lifespan of a legal professional career in South Africa and to potential presence and operation of reasons for exclusion and inclusion.

At least as a starting hypothesis and as a guide to this research, we posit four phases for a standard legal professional career in South Africa. Phase One covers the period of time as a law student (from first registration in the LLB to LLB graduate). Phase Two covers the period of time of vocational training (e.g. service as an articled clerk or pupillage, prior to admission as an attorney or an advocate with Bar Council). Note that there is some evidence to the effect that three years rather than five years is an important threshold (Godfrey 2009: 111). The next two phases are somewhat more arbitrary. Phase Three covers the period of time from admission (as an attorney or with a Bar Council) to five years of experience. Phase Four then covers the period from five years' professional experience to senior status in the profession, e.g. a legal professional with at least ten years' of experience.

2. The Existing Literature

South Africa has been missing from the existing academic historical comparative work on the legal profession. The extensive work of Richard Abel is a clear case in point here. Despite Abel's careful and formative attention to South Africa and its legal politics in his monograph *Politics by Other Means* (1995), the country is missing from his historical and comparative work on the legal profession (Abel 1988a, 1988b) that includes nearly every other country with a developed legal profession. There is certainly nothing on South Africa to compare with Abel's full-scale work on the English legal profession (Abel 2003), which tells the story of English lawyers in the 1990s.

Why is there this lack of research into the legal profession in South Africa? There appear to be two primary reasons. First, the existing knowledge base about the legal profession in South Africa has been in a sense over contextualised, indeed skewed, by the struggle against apartheid. On the question of the role of law in respect of apartheid, lawyers have certainly come in for some critical examination (White 1988) as well as celebration (Broun 1999), but the bulk of scholarship on lawyers under apartheid has been of a jurisprudential nature (Budlender 1988, Dyzenhaus 1998), even where such analyses have explicitly valued everyday lawyering as well as impact cases (Budlender 1988). Likewise, Meierhenrich's account of anti-apartheid lawyering attends particularly to the effects of such lawyering on the legitimacy of the legal system (Meierhenrich 2008: 208-217). Combining these two concerns, Albie Sachs presented a short pen portrait of 'Brown and Black Lawyers in Action', including accounts of the Treason and Rivonia Trials (Sachs 1973: 205-229). This gap in terms of knowledge of the profession as a whole has been perpetuated, in a certain sense, by the attention given to issues of public interest law as opposed to access to justice in the transitional and post-apartheid contexts (Budlender 1988, Marcus and Budlender 2008).

Second, there has been little to no state support for research into the transformation of the legal profession – a feature that appears as true after apartheid's demise as during its reign. It is notable that little or none of the funding provided by the Attorneys Fidelity Fund has supported research. Instead, it is used for teaching law students, particularly in the university law clinics (which have an access to justice mission as well as legal education). Likewise, the percentage spend by the Law Society of South Africa on research is dwarfed by its spending on continuing education and vocational education. Research spending by the attorneys' profession has been perhaps one or two surveys, which were themselves seen as excessively expensive. The Bar appears to have a similar attitude, having recently funded two or three studies, but not having as yet demonstrated a sustained interest. Finally, the state appears not to be funding research in any comprehensive manner. The funding for legal research coordinated through the South African Law Reform Commission has largely gone to doctrinal and comparative research supporting legislative drafting efforts. Apart from a few ad-hoc projects – notably the scarce skills research funding underlying the work of Shane Godfrey provided by the Department of Labour and the assessment currently being undertaken by the HSRC and the University of Fort Hare with extensive funding from the Department of Justice and Constitutional Development – there appears to be little coordinated or sustained research into the contemporary dynamics and future trends and prospects of the legal profession.

So what research does exist? Perhaps the two best and most focused accounts of the legal profession in South Africa are Lisa Pruitt's early and careful study, No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession (2002) and Godfrey's work on the legal profession (2009a, 2009b). While Pruitt uses the perspective of the US market for legal services and its accompanying analytical literature, Godfrey begins by examining the legal services market based on a concern regarding scarce skills in the South African labour market. The work by Martin Chanock on the development of the profession in the first few decades of the 1900s bears mention as well.

Lisa Pruitt's work provides a comprehensive contemporary investigation into the question of black representation particularly in the commercial law segment of the attorneys' profession. Her research

and arguments took into account three studies of the legal profession done in the first ten years post-apartheid (Pruitt 2002: 550 n7). Pruitt drew on earlier theoretical work of Wilkins and Gulati and came to a fairly pessimistic conclusion regarding the then-current place of black commercial lawyers as well as the potential for improvement. In her view, "[w]hile black law graduates are moving into [elite commercial law] firms at an unprecedented pace, however, few are remaining with the firms for more than a couple of years, often no longer than is required for them to become admitted attorneys. Early in their legal careers, even in comparison to their white counterparts, these black attorneys take full advantage of their mobility in the current labour market to pursue alternate career opportunities in both the public and private sectors". (Pruitt 2002: 671)

Based on her findings, Pruitt put forward that the reasons for exclusion seen by blacks included very low law firm salaries, lack of opportunities within the corporate firms, better paying professional opportunities in non-law firms, cultural alienation, and professional isolation. Whites identified intellectual inferiority, deficits of human capital, interest, loyalty, and perseverance as explanations for exclusion. Ultimately, Pruitt located the relative underpresentation of blacks in elite commercial law firms in the interplay of institutional and individual racism, a racism that Pruitt found was shielded from the market and its potential corrective force by a lack of transparency.

Put into the above posited four-phase and points of exclusion structure, Pruitt found that law firms were not discriminating at the end of Phase Two (e.g. in the hiring decisions) but were discriminating in their implementation of practices of training and mentoring operative and determinative in Phase Three (Pruitt 2002: 673). Indeed, for Pruitt the real question as to why the firms are not doing more to identify and counter these practices is, in part, because there is no clear 'integration leader' in the top five law firms.

The interviews Pruitt conducted as well as her secondary research into questions of remuneration, firm structure, and candidate attorney training could well be profitably updated from her research period of 1999-2000. One set of non-exclusive reasons used in a survey in another Commonwealth jurisdiction regarding retention included: Better salary/remuneration, Lack of promotional opportunities, More scope for flexible working arrangements, Better work-life balance, More flexibility to balance my work and personal responsibilities, Unhappy with the workplace culture, Unhappy with the leadership and direction of the organisation, Unhappy with the relationship I had with the person to whom I reported, Experienced bias or discrimination, Experienced harassment or bullying, More independence/ control in work, Better quality of work, More interesting or varied work, Wanted to work in a different sector, Looking for a change/ something new, Better position/ significant job opportunity, Better job security/ reliability of work and/or income, Better mentorship, Better learning and development opportunities, Better location, Wanted to start a new business/ work for myself, Too much pressure on billable hours, Too much pressure on bringing in clients/ new business, Reduced stress and pressure, Mental or physical health reasons, Wanted to work in a business/company, Wanted to work in a team-based working environment, Wanted to give back to the community, It's part of my career plan, Didn't want to work as a lawyer anymore, Taking time out from the profession (career break), Taking time out from the profession (parental leave), Relocation with my partner/family, Redundancy/ termination of employment, and Retirement (Law Council of Australia, 2014).

With funding and support from the Department of Labour, Shane Godfrey conducted a thorough investigation of the legal profession. Sourced largely from Legal Education and Development (LEAD) section of the Law Society of South Africa (LSSA) and from the General Council of the Bar of South Africa (GCB), Godfrey's data extended through 2006 and his work was published in 2009. Reflecting at least the data he was working with (if not also the dominant concern of the profession regarding the profession at the time), Godfrey's findings are particularly valuable and focused with respect to the first two phases of a standard legal career. Godfrey's data do not permit him to make analyses regarding the further two phases in a standard legal career – the first five years after admission and then the period from that level of experience to senior status either as an attorney or as an advocate.

Godfrey's findings with respect to Phases One and Two pertain both to overall dynamics and to dynamics with respect to racial and gender representivity. In Phase One, his data show a drop-out rate of 51% overall for law students between their first year of LLB registration and LLB graduation (Godfrey 2009: 113 (Figure 5.1)). For Phase One, the African attrition rate was 17 percentage points higher than the overall rate, 68% versus 51%.

For Phase Two (which is of course a shorter period), the drop-out rate is much lower than it is for Phase One, 18% of those completing an LLB degree attrite and do not gain admission as an attorney (Godfrey 2009: 113). Godfrey was unable to calculate a specific attrition rate for Africans in Phase Two because of the unavailability of data from the KZN provincial law society.

With respect to representation in the profession, the attention has been largely to issues of transformation understood in terms of race (Pruitt 2002, Godfrey 2009) with some but lesser attention being paid to gender. Godfrey unfortunately relegates the analysis of the gender dimension to a single footnote, 2009: 119, n39.

Martin Chanock's work employs a different research method to the interviews of Pruitt and the statistical analysis of Godfrey. Using a historical approach, Chanock argues that the South African legal profession had to struggle at least up until 1936 to establish itself in a power social and economic position. In this period, lawyers varied considerably in social status and education. In addition, they worked in a field where contestation with non-lawyers for legitimate work status was constant. Chanock links the formalist voice of the legal profession with its desire to establish dominance over the magistracy (which was both judicial and administrative) in the lower courts (Chanock 2001: 229). Chanock identified earlier on a central South African paradox: "We can see something of a conundrum in relation to the 'prestige' of law in South African society. Lawyers were not popular, yet 'law' came to be a central and eventually revered part of the composition of whiteness". (Chanock 2001: 231) While there was the occasional voice of conscience – what we would term today as public interest law – for the most part the profession depicted by Chanock is one that is formalist in a sense worse than its British model, distasteful of women and non-whites, of ambiguous status, deeply implicated in the concentration of rural land ownership and in the growth of the mining industry, and ignorant of the legal needs of the most disadvantaged (Chanock 2001: 239).

3. Research on the attorneys' sub-sector of the legal profession

Beyond Pruitt and the studies she draws on, at least two other studies have added significantly to our understanding of the dynamics within the attorneys' profession.

In 2007/2008, the Mandela Institute of the Wits Law School collaborated with the Black Lawyers Association and other groups to commission a study on black commercial lawyers, with the research carried out by the Community Agency for Social Enquiry (CASE 2008). Drawing on a more limited number of interviews than Pruitt, the CASE study identified a prevailing perception among black commercial law professionals that could only be considered a slight improvement on Pruitt's pessimistic view and forecast: "Black commercial attorneys currently perceive improved ease of access to commercial law firms as a result of transformation legislation such as BEE and Affirmative Action. The perception is, however, that larger, established firms only recruit candidate attorneys to improve their procurement profile and often neglect to transfer skills, an important defining characteristic of an empowered individual. This sentiment is shared by black firms partnering with larger firms". (CASE 2008: 22)

In 2008, the LSSA commissioned a National Survey of the Attorneys Profession that found that the total number of professionals employed in attorneys' practices was 20 743 (36.7% of total employment). More than half (54.1%) of the professionals were equity partners and the majority of professionals (72.7%) were White. At the most senior levels – namely equity partners, salaried partners, senior associates and consultants – more than 75% of the attorneys were White. Women constituted 40.4% of the attorneys in private practice.

In 2013, a collaboration between the Wits Law School, the Vance Center of the New York City Bar, and the South African Legal Fellows Network (SALFN) together with other partners surveyed demographics within the commercial law firm sector (Klaaren 2014). According to the survey of large corporate law firms, "senior positions seem to be dominated by white males". 80% of the chief executives of the 12 firms canvassed in the survey were white men as were 68% of all managing partners. Further, the picture at the CEO/managing partner level was replicated in the ownership and remuneration structures of the firms: 53% of all equity partners were also white and male. In a number of firms, equity partners continue to play a significant strategic management role. Correspondingly, the survey found that there "are far fewer black males employed in senior positions compared with white males" and that the total number of black male lawyers made up less than half of the total white male count: 9.7% compared with 29.1%.

With the addition of white women to the SALFN analysis, the dominance by white persons becomes more pronounced. There were more white lawyers in senior positions than any other race group: 79% of managing partners and 80% of the chief executives. This was carried through at the level of equity partners, where 79% were white women or men. The survey found that though 53.4% of employees at firms are female, the number of white women is more than double that of black African women: 28.1% versus 11.9% of the total.

The survey may also be viewed from the perspective of African women. As one looks higher and higher up the corporate ladder within these large law firms, there is an overall decline in the percentage of African women. Indeed, the decline could well be termed precipitous with respect to

the drop off between the representation of African women at the candidate attorney stage and at the subsequent career stage of employment as an admitted attorney. First-year and second-year articled clerks account for 23.6% and 24.5% of the total of black African women, respectively, in the survey. If replicated across the non-participating firms in the corporate legal sector, this means that over half of the African women professionally employed in large corporate law firms are candidate attorneys.

The relatively junior profile of the African women employed is further replicated within the structure of the admitted attorneys in the firms surveyed. In the 12 participating law firms, the percentage of African female legal professionals employed at the first and second years of associate level is 20.8%. 17.1% of employees are black female associates with three or more years' experience. 10.6% of the African women are employed at equity partner or director level, with no black female lawyers at managing partner or chief executive level.

As of 2014, 64% of practising attorneys are white and and 63% male. The picture is significantly different – indeed effectively reversed -- for candidate attorneys where 41% are white and 44% male (Whittle 2014b).

4. Research on other sub-sectors of the legal profession

There is some but not much literature examining the transformation dynamics of the advocates at the Bar, here understood as the dominant Society of Advocates' structures. A particular and particularly appropriate focus in the Bar's self-examination of its transformation challenges has been directed towards briefing patterns. For instance, the characterisation of such patterns as the major transformational challenge facing the Bar was an outcome of the Bar's March 2007 Transformation Symposium (Bham 2007).

The High Court judiciary has been the topic of numerous investigations into diversity arguments (see e.g. Olivier 2013; Hoexter & Olivier 2014). Nonetheless, there does not appear to be as yet a study taking a career or labour market perspective on the High Court judiciary.

Compared to the literature on the attorneys, the Bar, and the High Court judiciary, there is not much on other significant sub-sectors of the profession: the magistracy, prosecutors, other state lawyers, legal academics, and paralegals. Research in other jurisdictions (such as Israel) where courts have had some significant impact on governance has increasingly focused on government lawyers (e.g. Dotan 2013).

There is a particular paucity of work on the magistrates, with the shining exception of Olivier 2014. Olivier offers an overview of the position of magistrates within the South African judicial regime. He notes that at the district level, the percentage of magistrates being women has improved from 24% in 2000 to 40.6% in 2013 (Olivier 2014: 330).

There is some self-avowedly preliminary and incomplete literature on community based paralegals and community advice offices (Dugard and Drage 2013).

The popular and professional literature has also been concerned with issues of transformation in the profession. Here, there are two significant threads of discussion. First, there has been an explosion

of popular interest in the demographic profile of the judiciary that has paralleled the increasing political salience of this issue and its increased attention by legal academics. Second, there is a long tradition of discussion within the professional literature both reporting on and advocating for (and defending against) calls for transformation. An example reporting on and advocating transformation within the advocates' sub-sector is Bham 2007. Within the attorneys' sub-sector an example is Whittle 2014a.

BIBLIOGRAPHY

1. R Abel, 1995. *Politics By Other Means? Law in the Struggle Against Apartheid, 1980-1994* (Routledge)
2. R Abel, 2003. *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford)
3. R Abel and P Lewis (eds), 1988a. *Lawyers in Society: The Civil Law World* (University of California Press)
4. R Abel and P Lewis (eds), 1988b. *Lawyers in Society: The Common Law World* (University of California Press)
5. AfriMAP and the Open Society Foundation for South Africa. *South Africa: Justice Sector and the Rule of Law* (2005)
6. A Bham, 2007. 'Transformation Symposium' *Advocate (The South African Bar Journal)* August 2007: 5-7
7. KS Broun, 1999. *Black Lawyers White Courts: Soul of South African Law* (Ohio University Press)
8. G Budlender, 1988. 'On Practising Law' in H Corder (ed) *Essays on Law and Social Practice in South Africa* (Juta) 319-333
9. CASE, 2008. 'Perceptions of the Progression of Black Commercial Lawyers' Ppresentation at Black Commercial Lawyers Summit, University of the Witwatersrand, 4 March 2008
10. M Chanock, 2001. *The Making of South African Legal Culture, 1902-1936: Fear, Favour and Prejudice* (Cambridge University Press)
11. Competition Authority, 2006. Competition in Professional Services: Solicitors and Barristers (Ireland)
12. Competition Bureau, 2007. Self-Regulated Professions: Balancing Competition and Regulation (Canada)
13. Y Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel* (2013)
14. S Godfrey, 2009. 'The Legal Profession: Transformation and Skills' 126 *South African Law Journal* 91
15. C Gonzalez, 2014. 'Women of Colour in Legal Education: Challenging the Presumption of Incompetence' *The Federal Lawyer* 48-64 (July 2014)
16. Law Council of Australia, 2014. 'National Attrition and Re-engagement Study (NARS) Report'.
17. Law Society of South Africa, 2008. National Survey of the Attorneys Profession (September 2008)
18. K Hawkey, 2013. 'Justice Department responds to Legal Practice Bill submissions.' *De Rebus*, May 2013: 34-37
19. C Hoexter & M Olivier (eds). *The Judiciary in South Africa* (Juta, 2014)
20. J Klaaren, 2014. 'Current Demographics in Large Corporate Law Firms in South Africa' (unpublished paper)

21. J Meierhenrich, 2008. The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000 (Cambridge University Press)

22. R Midgley, 2007.' South Africa: Legal Education in a transitional society' Paper presented at a Joint Meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, Humboldt University, Berlin, 28 July 2007

23. CJ Ogletree, 1995. From Mandela to Mthwana: Providing Counsel to the Unrepresented Accused in South Africa 75 *Boston University Law Review* 1

24. Oko, 2004. The Problems and Challenges of Lawyering in Developing Countries 35 *Rutgers Law Journal* 569-573

25. M Olivier, 2013. A Perspective on the Gender Transformation of the South African Judiciary (2013) 130 *South African Law Journal* 448

26. M Olivier, 2014. 'The Magistracy' in C Hoexter & M Olivier (eds). *The Judiciary in South Africa* (Juta, 2014) 319-354

27. L Pruitt, 2002. No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession 23 *Michigan Journal of International Law* 545-676

28. A Sachs, 1973. Justice in South Africa (University of California Press)

29. A Sarat and S Silbey, 1988. The Pull of the Policy Audience 10 *Law & Policy* 97-166.

30. J Sarkin, 2002. Promoting Access to Justice in South Africa: Should the Legal Profession have a Voluntary or Mandatory Role in Providing Legal Services to the Poor? 18 *South African Journal on Human Rights* 630

31. D Wilkins and G Gulati, 1996. Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis 84 *California Law Review* 493

32. L White, 1988. To Learn and Teach: Lessons from Driefontein on Lawyering and Power *Wisconsin Law Review* 699

33. B Whittle, 2014a. LSSA news *De Rebus* Jan/Feb 2014:25

34. B Whittle, 2014b. The attorneys' profession in numbers *De Rebus* Sep 2014, http://www.myvirtualpaper.com/doc/derebus/de_rebus_digital_september_2014/2014082002/ (last visited Aug 26, 2014)

Jonathan Klaaren & Alice Brown
August 2014

Survey Information & Consent

There are significant gaps in diversity in more senior roles in the legal profession. The representation of both blacks and women in sectors of the profession and in the judiciary has come under intense scrutiny.

This Centre for Applied Legal Studies (CALS) study, funded by the Foundation for Human Rights, aims to improve understanding about the experiences and motivations of legal professionals from all demographic groups as they move through their careers. This includes improving understanding of the reasons why lawyers choose to leave the legal profession or choose a different career path.

The survey itself should take between 10 and 15 minutes to complete and will collect information relating to your current employment, career moves and progression since admission, and future career aspirations.

This survey is being administered and managed by the Centre for Applied Legal Studies (CALS) at the University of the Witwatersrand, Johannesburg. All information is confidential and specific information provided about individuals will not be identified or provided to any other party. All results will be de-identified and aggregated for analysis and reporting. Nothing you say will be attributed to yourself or your organisation.

Funding for this research is facilitated by the Foundation for Human Rights which is funded by the Department of Justice and Constitutional Development and the European Union under the Sector Budget Support Programme – Access to Justice and the Promotion of Constitutional Rights.

1. Based on the information above, do you consent to participate in this survey?

◯ Yes

◯ No

Screening Questions

2. Do you have a legal qualification to be a lawyer?

- ◯ Yes
- ◯ No

Screening Questions

3. Are you currently working in paid employment?

- ◯ Yes
- ◯ No

Screening Questions

This question asks about "working as a lawyer". We understand this to include working as a lawyer (e.g. primarily giving legal advice and doing legal work) for a corporation, parastatal or NGO, even without being admitted to practise, as well as working as a legal academic or legal researcher. We also understand "working as a lawyer" to include work as a candidate attorney or as a pupil.

4. Are you currently working as a lawyer?

- ◯ Yes
- ◯ No

Screening Questions

5. Have you ever worked as a lawyer?

- ◯ Yes
- ◯ No

Primary demographics: Lawyering

6. Are you ...

- ◯ Male
- ◯ Female

7. How old are you?

- ◯ Less than 25 years of age
- ◯ 25-29 years
- ◯ 30-34 years
- ◯ 35-39 years
- ◯ 40-44 years
- ◯ 45-49 years
- ◯ 50-54 years
- ◯ 55-59 years
- ◯ 60-64 years
- ◯ 65 years or older

8. How many years is it since you were first admitted to practise in South Africa? (please round to the nearest number of full years)

years

9. How many years practising experience do you have post admission (excluding any time taken as breaks from the profession)?

years

Studying law

10. What were the main reasons for your decision to study law? (please select all that apply)

- [ ] I had an interest in the law
- [ ] I had an interest in social justice
- [ ] I had an interest in government and/or politics
- [ ] I had an interest in international relations
- [ ] I thought a law degree would provide good job opportunities
- [ ] I thought a law degree would ensure job security
- [ ] I thought a law degree would give me a broad skill base for employment in different fields
- [ ] I wanted intellectual stimulation
- [ ] I got the marks/grades to study law
- [ ] I wanted a good income
- [ ] I wanted prestige/status
- [ ] I wanted a career change
- [ ] I had the right aptitude for a law degree
- [ ] I wasn't good at maths or science
- [ ] I wasn't sure what else to do
- [ ] My parents/family wanted me to study law
- [ ] Other (please specify)

11. When you started your law degree, did you plan to practise law after graduating?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

12. When you finished your law degree, did you plan to practise law?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

13. To what extent did your law degree meet the expectations you had when starting it?

- ◯ Major extent
- ◯ Moderate extent
- ◯ Minor extent
- ◯ Not at all
- ◯ Not sure/can't say

Professional Legal Training

14. What kind of professional legal training did you do prior to admission?

- ◯ Candidate attorney in a private law firm
- ◯ Candidate attorney and a six months LEAD course
- ◯ Pupillage
- ◯ Other (please specify)

15. How long (excluding breaks) were you engage in professional legal training prior to admission?

- ◯ Six months or less
- ◯ More than six months and less than or equal to one year
- ◯ More than one year and less than or equal to one year and six months
- ◯ More than one year and six months and less than or equal to two years
- ◯ More than two years and less than or equal to three years
- ◯ More than three years

Other (please specify)

16. When you started your professional legal training, were you planning to practise as a lawyer?

- ◯ Yes
- ◯ No

17. When you finished your professional legal training, did you plan to practise as a lawyer?

- ◯ Yes
- ◯ No

18. How would you describe your time of professional legal training?

Current legal employment characteristics

19. Which ONE category best describes your main work (the role that you spend most time on each week)?

- ◯ Courts and Tribunals: Judge or Magistrate
- ◯ Courts and Tribunals: Judge's Clerk
- ◯ Courts and Tribunals: Registrar
- ◯ Courts and Tribunals: Other court personnel
- ◯ Courts and Tribunals: Tribunal Member
- ◯ Courts and Tribunals: Other (please specify)
- ◯ Advocate: Senior Counsel
- ◯ Advocate: Junior Counsel
- ◯ State Prosecutor: Senior Counsel
- ◯ State Prosecutor: Junior Counsel
- ◯ Legal Aid South Africa: Attorney
- ◯ Private law firm: Equity partner
- ◯ Private law firm: Salaried partner
- ◯ Private law firm: Sole practitioner
- ◯ Private law firm: Special Counsel
- ◯ Private law firm: Consultant
- ◯ Private law firm: Senior Associate
- ◯ Private law firm: Associate
- ◯ Private law firm: Attorney
- ◯ Private law firm: Candidate Attorney
- ◯ Private law firm: Locum
- ◯ Private law firm: Paralegal
- ◯ Private law firm: Other role (please specify)
- ◯ Corporate legal (in-house): General Counsel/Head Legal Counsel
- ◯ Corporate legal (in-house): Senior Legal Counsel/Senior Lawyer
- ◯ Corporate legal (in-house): Legal Counsel/Lawyer
- ◯ Corporate legal (in-house): Non-legal role (e.g. company director, management)
- ◯ Corporate legal (in-house): Other (Please specify)
- ◯ Government legal: Management
- ◯ Government legal: Policy
- ◯ Government legal: State Attorney
- ◯ Government legal: Legal
- ◯ Government legal: Other (please specify)

- ◯
- ◯ Non-governmental organisation/not-for-profit: Legal
- ◯ Non-governmental organisation/not-for-profit: Non-legal
- ◯ Legal Academia
- ◯ Other Academia
- ◯ Not currently working (e.g. on leave, studying, unemployed)
- ◯ Retired (retaining admission to practice)
- ◯ Other (please specify)

Other (please specify)

20. For how many years have you been employed at your current workplace?

- ◯ Under 1 year
- ◯ 1 year - < 2 years
- ◯ 2 years - < 3 years
- ◯ 3 years - < 4 years
- ◯ 4 years - < 5 years
- ◯ 5 years - < 7 years
- ◯ 7 years - < 10 years
- ◯ 10 years - < 15 years
- ◯ 15 years or more

21. Do you currently work full time or part time in your current main role?

- ◯ Full time
- ◯ Part time

Current legal employment characteristics (cont.)

22. Please specify the fractional Full Time Equivalency (FTE) of your role. The purpose of this question is to ask about the extent of part-time work, e.g. 10% of a full-time post, 60% of a full-time post, etc.

- ◯ 0.1 (0.5 day / week)
- ◯ 0.2 (1.0 day/ week)
- ◯ 0.3 (1.5 days / week)
- ◯ 0.4 (2.0 days / week)
- ◯ 0.5 (2.5 days / week)
- ◯ 0.6 (3.0 days / week)
- ◯ 0.7 (3.5 days / week)
- ◯ 0.8 (4.0 days / week)
- ◯ 0.9 (4.5 days / week)
- ◯ Other (please specify)

_____

Current legal employment characteristics (cont. cont.)

23. How many hours a week do you usually work (excluding breaks)?

hours

24. How many partners/principals are there in your firm?

- ◯ 1-4 partners/principals
- ◯ 5-10 partners/principals
- ◯ 11-20 partners/principals
- ◯ 21-39 partners/principals
- ◯ 40+ partners/principals

Other (please specify)

25. Approximately what proportion of the partners/principals are female?

- ◯ None
- ◯ 20%
- ◯ 40%
- ◯ 60%
- ◯ 80%
- ◯ 100%
- ◯ Not sure

26. Approximately what proportion of the partners/principals are white?

- ◯ None
- ◯ 20%
- ◯ 40%
- ◯ 60%
- ◯ 80%
- ◯ 100%
- ◯ Not sure

27. To your knowledge, do any of the partners/principals at your firm work part time (i.e. less than 5 days a week)?

- ◯ Yes
- ◯ No
- ◯ Not sure

28. Approximately how many people are employed as lawyers (excluding volunteers but including candidate attorneys) in your organisation or business?

- ◯ 1 lawyer
- ◯ 2-10 lawyers
- ◯ 11-29 lawyers
- ◯ 30-59 lawyers
- ◯ 60+ lawyers
- ◯ Not sure

Other (please specify)

29. What are the areas of law that you mainly practise? (please select all that apply)

- [ ] Administrative Law
- [ ] Advocacy
- [ ] Banking/Finance
- [ ] Civil Litigation
- [ ] Commercial Law
- [ ] Conveyancing/Real Property
- [ ] Corporate Law
- [ ] Criminal Law
- [ ] Debts/Insolvency
- [ ] Employment/Industrial Law
- [ ] Environmental Law
- [ ] Family Law
- [ ] Human Rights/Public Interest/Social Justice
- [ ] Immigration Law
- [ ] Information technology/Telecommunications
- [ ] Intellectual Property
- [ ] Litigation - general
- [ ] Personal Injury
- [ ] Planning/Local Government
- [ ] Small Business
- [ ] Taxation
- [ ] Trade Practices Law
- [ ] Wills and Estates
- [ ] Not applicable to my situation
- [ ] Other (please specify)

30. In which province is your main workplace located?

- ◯ Limpopo
- ◯ Mpumalanga
- ◯ KwaZulu-Natal
- ◯ Eastern Cape
- ◯ Western Cape
- ◯ Northern Cape
- ◯ North-West
- ◯ Gauteng
- ◯ Free State
- ◯ Outside South Africa

31. And is your main workplace located in:

- ◯ The central business district of a large metropolitan (including Sandton)
- ◯ A suburban area of a large metropolitan
- ◯ A town or small city
- ◯ A rural or remote location

Legal career satisfaction

In answering the following questions, please note the following:
For the purposes of this study, discrimination is defined as any distinction, exclusion or preference made on the basis of race, colour, sex, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment and occupation (International Labour Organisation Agreement No. 111, 1958). This may include opportunities related to the type of work allocated, benefits provided, or access to promotion or career progression.

32. To what extent are you satisfied with the following aspects of your current main employment position?

	Very satisfied	Satisfied	Neutral	Dissatisfied	Very dissatisfied	Not relevant	Not sure
The level of salary/remuneration	○	○	○	○	○	○	○
The stability and reliability of my income	○	○	○	○	○	○	○
Opportunities for promotion and advancement	○	○	○	○	○	○	○
Access to flexible working arrangements	○	○	○	○	○	○	○
The hours I am required to work	○	○	○	○	○	○	○
The requirements for billable hours	○	○	○	○	○	○	○
The requirement for non-chargeable commitments	○	○	○	○	○	○	○
The level of work-life balance that I have	○	○	○	○	○	○	○
The level of support in my organisation for work-life balance	○	○	○	○	○	○	○
The culture of my workplace	○	○	○	○	○	○	○
The leadership and direction of my organisation	○	○	○	○	○	○	○
The relationships I have with my colleagues	○	○	○	○	○	○	○
The relationship I have with the person to whom I report	○	○	○	○	○	○	○
The level of independence and control I have over my work	○	○	○	○	○	○	○
The quality/profile of work I am given the opportunity to do	○	○	○	○	○	○	○
Exposure to a variety of interesting work	○	○	○	○	○	○	○
Opportunities to practise in the areas of law in which I am interested	○	○	○	○	○	○	○
Opportunities to make full use of my skills and abilities	○	○	○	○	○	○	○
The level of personal satisfaction in the work that I do	○	○	○	○	○	○	○

The level of job security	◯	◯	◯	◯	◯	◯	◯
Accessibility of mentors to support my career development	◯	◯	◯	◯	◯	◯	◯
Support provided to access contacts and networks	◯	◯	◯	◯	◯	◯	◯
Accessibility of learning and development opportunities	◯	◯	◯	◯	◯	◯	◯
The extent to which I am respected by my clients	◯	◯	◯	◯	◯	◯	◯

33. To what extent have you personally experienced any of the following in your current workplace?

	Never	Very rarely	Occasionally	Often	Continuously	Not sure
Bullying or intimidation	◯	◯	◯	◯	◯	◯
Sexual harassment	◯	◯	◯	◯	◯	◯
Discrimination due to my gender	◯	◯	◯	◯	◯	◯
Discrimination due to my age	◯	◯	◯	◯	◯	◯
Discrimination due to my ethnicity	◯	◯	◯	◯	◯	◯
Discrimination due to my sexual preference	◯	◯	◯	◯	◯	◯
Discrimination due to disability/health issue	◯	◯	◯	◯	◯	◯
Discrimination due to my family or career responsibilities	◯	◯	◯	◯	◯	◯
Discrimination due to pregnancy	◯	◯	◯	◯	◯	◯

34. Have you requested access to any of the following flexible working arrangements in your current employment position (select all that apply)?

	Not requested	My request was approved	My request was partially approved	My request was denied
Part time work	◯	◯	◯	◯
Remote working (e.g. working from home)	◯	◯	◯	◯
Flexi-time/time off in lieu	◯	◯	◯	◯
Compressed work week	◯	◯	◯	◯
Flexible hours (start and finish times)	◯	◯	◯	◯
Job sharing	◯	◯	◯	◯
Paid maternity/paternity leave	◯	◯	◯	◯
Unpaid maternity/paternity leave	◯	◯	◯	◯
None of the above	◯	◯	◯	◯

35. If you have not requested access, why have you not requested access to any flexible working arrangements? (select all that apply)

- [ ] I have requested access to flexible working arrangements
- [ ] Not relevant for me/not interested
- [ ] Not feasible due to impact on household income
- [ ] Not feasible due to the requirements and expectations of my role
- [ ] Unlikely that my request would be approved
- [ ] Concern that making the request would negatively impact my status/reputation
- [ ] Concern that if approved, the arrangement would impact negatively on my status and career opportunities
- [ ] Other (please specify)

36. To what extent do you agree or disagree with the following statements about how the arrangements that were approved have worked in practice:

	Agree strongly	Agree	Disagree	Disagree strongly	Not relevant	Not sure
Overall, the arrangements have worked as intended	○	○	○	○	○	○
Initially, the arrangements worked well but they were not sustainable for me	○	○	○	○	○	○
Management was/is supportive of these arrangements	○	○	○	○	○	○
My colleagues were/are supportive of these arrangements	○	○	○	○	○	○
The arrangements have negatively impacted my career path and opportunities for promotion	○	○	○	○	○	○
The arrangements have negatively impacted the profile and type of work I am given	○	○	○	○	○	○

37. Now thinking about your career as a whole, to what extent are you satisfied with each of the following:

	Very satisfied	Satisfied	Neutral	Dissatisfied	Very dissatisfied	Not sure	Not sureDissatisfied
The opportunities you have had for professional development and promotion	○	○	○	○	○	○	○
The rate at which your career has progressed	○	○	○	○	○	○	○
Your career trajectory (compared to your expectations)	○	○	○	○	○	○	○

Legal career moves

38. How many times have you left a job (e.g. changed employer, taken a career break, started your own business) in the last 5 years (since May 2009)?

times

39. How many times have you left a job (e.g. changed employer, taken a career break, started your own business) since admission?

times

40. Did you continue to work as a lawyer in the same workplace as you worked as a candidate attorney or pupil?

- ◯ Yes
- ◯ No

Other (please specify)

41. For your most recent move, please specify the year you moved

Year

42. For your most recent move, please specify the type of employment you moved from.

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm – sole practitioner
- ◯ Private law firm – law firm with 2-4 partners/principals
- ◯ Private law firm – law firm with 6-10 partners/principals
- ◯ Private law firm – law firm with 11-20 partners/principals
- ◯ Private law firm – law firm with 21-39 partners/principals
- ◯ Private law firm – law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Non-legal role (please specify)
- ◯ An extended break from paid employment
- ◯ Other (please specify)

Other (please specify)

43. For your most recent move, please specify the type of employment you moved to.

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm – sole practitioner
- ◯ Private law firm – law firm with 2-4 partners/principals
- ◯ Private law firm – law firm with 6-10 partners/principals
- ◯ Private law firm – law firm with 11-20 partners/principals
- ◯ Private law firm – law firm with 21-39 partners/principals
- ◯ Private law firm – law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Non-legal role (please specify)
- ◯ An extended break from paid employment
- ◯ Retirement
- ◯ Other (please specify)

Other (please specify)

Legal career moves (continued)

44. For your move from [Q42] to [Q43], please specify which of the following factors played a role in your decision to move (select all that apply):

	Major extent	Moderate extent	Minor extent	Not sure	No role
Better salary/remuneration	○	○	○	○	○
Lack of promotional opportunities	○	○	○	○	○
More scope for flexible working arrangements	○	○	○	○	○
Better work-life balance	○	○	○	○	○
More flexibility to balance my work and personal responsibilities	○	○	○	○	○
Unhappy with the workplace culture	○	○	○	○	○
Unhappy with the leadership and direction of the organisation	○	○	○	○	○
Unhappy with the relationship I had with the person to whom I reported	○	○	○	○	○
Experienced bias or discrimination	○	○	○	○	○
Experienced harassment or bullying	○	○	○	○	○
More independence/control in work	○	○	○	○	○
Better quality of work	○	○	○	○	○
More interesting or varied work	○	○	○	○	○
Change in practice area/different type of work	○	○	○	○	○
Looking for a change/something new	○	○	○	○	○
Better position/significant job opportunity	○	○	○	○	○
Better job security/reliability of work and/or income	○	○	○	○	○
Better mentorship	○	○	○	○	○
Better learning and development opportunities	○	○	○	○	○
Better location	○	○	○	○	○
Wanted to start a new firm/sole practice/work for myself	○	○	○	○	○
Too much pressure on billable hours	○	○	○	○	○
Too much pressure on	○	○	○	○	○

bringing in clients/new business					
Reduced stress and pressure	○	○	○	○	○
Mental or physical health reasons	○	○	○	○	○
Wanted to work in a business/company	○	○	○	○	○
Wanted to work in a team-based working environment	○	○	○	○	○
Wanted to give back to the community	○	○	○	○	○
It's part of my career plan	○	○	○	○	○
Didn't want to work as a lawyer anymore	○	○	○	○	○
Taking time out from the profession (career break)	○	○	○	○	○
Taking time out from the profession (parental leave)	○	○	○	○	○
Relocation with my partner/family	○	○	○	○	○
Redundancy/termination of employment	○	○	○	○	○
Retirement	○	○	○	○	○

Other (please specify)

Legal career intentions

45. Are you considering moving to a new job/new employment circumstances (e.g. changing employer, taking a career break, starting your own business) in the next 5 years?

- ◯ No
- ◯ Yes
- ◯ Maybe

46. In approximately what time are you considering moving to a new job/new employment circumstances?

- ◯ Next 12 months
- ◯ 1 - 2 years
- ◯ 3 - 5 years
- ◯ Not sure

47. What new job/employment are you considering moving to? (please select the workplace that you would be most likely to consider moving to)

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm – sole practitioner
- ◯ Private law firm – law firm with 2-4 partners/principals
- ◯ Private law firm – law firm with 6-10 partners/principals
- ◯ Private law firm – law firm with 11-20 partners/principals
- ◯ Private law firm – law firm with 21-39 partners/principals
- ◯ Private law firm – law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Non-legal role (please specify)
- ◯ An extended break from paid employment
- ◯ Retirement
- ◯ Other (please specify)
- ◯ Not sure

Other (please specify)

48. Please specify which of the following factors may play a role in your decision to move (select all that apply) and the extent to which the factor may play a role (select one extent)

	Major extent	Moderate extent	Minor extent	No role	Not sure
Better salary/remuneration	○	○	○	○	○
Lack of promotional opportunities	○	○	○	○	○
More scope for flexible working arrangements	○	○	○	○	○
Better work-life balance	○	○	○	○	○
More flexibility to balance my work and personal responsibilities	○	○	○	○	○
Unhappy with the workplace culture	○	○	○	○	○
Unhappy with the leadership and direction of the organisation	○	○	○	○	○
Unhappy with the relationship I had with the person to whom I reported	○	○	○	○	○
Experienced bias or discrimination	○	○	○	○	○
Experienced harassment or bullying	○	○	○	○	○
More independence/control in work	○	○	○	○	○
Better quality of work	○	○	○	○	○
More interesting or varied work	○	○	○	○	○
Change in practice area/different type of work	○	○	○	○	○
Looking for a change/something new	○	○	○	○	○
Better position/significant job opportunity	○	○	○	○	○
Better job security/reliability of work and/or income	○	○	○	○	○
Better mentorship	○	○	○	○	○
Better learning and development opportunities	○	○	○	○	○
Better location	○	○	○	○	○
Wanted to start a new firm/sole practice/work for myself	○	○	○	○	○
Too much pressure on billable hours	○	○	○	○	○
Too much pressure on bringing in clients/new business	○	○	○	○	○

Reduced stress and pressure	◯	◯	◯	◯	◯
Mental or physical health reasons	◯	◯	◯	◯	◯
Wanted to work in a business/company	◯	◯	◯	◯	◯
Wanted to work in a team-based working environment	◯	◯	◯	◯	◯
Wanted to give back to the community	◯	◯	◯	◯	◯
It's part of my career plan	◯	◯	◯	◯	◯
Didn't want to work as a lawyer anymore	◯	◯	◯	◯	◯
Taking time out from the profession (career break)	◯	◯	◯	◯	◯
Taking time out from the profession (parental leave)	◯	◯	◯	◯	◯
Relocation with my partner/family	◯	◯	◯	◯	◯
Redundancy/termination of employment	◯	◯	◯	◯	◯
Retirement	◯	◯	◯	◯	◯

Other (please specify)

49. What, if anything, would change your decision to move job/employment circumstances? (i.e. encourage you to stay in your current job)

50. Would you consider working in a private law firm in the future?

- ◯ Yes
- ◯ No
- ◯ Maybe

51. Please indicate briefly why you would or would not be interested in working in a private law firm in the future.

52. Please indicate what (if anything) would influence your decision.

53. Would you consider working as an advocate in the future?

- ◯ Yes
- ◯ No
- ◯ Maybe

54. Please indicate briefly why you would or would not be interested in working as an advocate in the future.

55. Please indicate briefly what (if anything) would influence your decision.

Primary demographics: Never lawyered

56. Are you ...

- ◯ Male
- ◯ Female

57. How old are you?

- ◯ Less than 25 years of age
- ◯ 25-29 years
- ◯ 30-34 years
- ◯ 35-39 years
- ◯ 40-44 years
- ◯ 45-49 years
- ◯ 50-54 years
- ◯ 55-59 years
- ◯ 60-64 years
- ◯ 65 years or older

58. How many years is it since you finished your first legal qualification? (please round to the nearest number of full years)

years

59. Are you admitted as a legal practitioner in South Africa?

- ◯ Yes
- ◯ No

60. In which province is your main workplace located?

- ◯ Limpopo
- ◯ Mpumalanga
- ◯ KwaZulu-Natal
- ◯ Eastern Cape
- ◯ Western Cape
- ◯ Northern Cape
- ◯ North-West
- ◯ Gauteng
- ◯ Free State
- ◯ Outside South Africa

61. And is your main workplace located in:

- ◯ The central business district of a large metropolitan (including Sandton)
- ◯ A suburban area of a large metropolitan
- ◯ A town or small city
- ◯ A rural or remote location

Studying law

62. What were the main reasons for your decision to study law? (please select all that apply)

- [ ] I had an interest in the law
- [ ] I had an interest in social justice
- [ ] I had an interest in government and/or politics
- [ ] I had an interest in international relations
- [ ] I thought a law degree would provide good job opportunities
- [ ] I thought a law degree would ensure job security
- [ ] I thought a law degree would give me a broad skill base for employment in different fields
- [ ] I wanted intellectual stimulation
- [ ] I got the marks/grades to study law
- [ ] I wanted a good income
- [ ] I wanted prestige/status
- [ ] I wanted a career change
- [ ] I had the right aptitude for a law degree
- [ ] I wasn't good at maths or science
- [ ] I wasn't sure what else to do
- [ ] My parents/family wanted me to study law
- [ ] Other (please specify)

63. When you started your law degree, did you plan to practise law after graduating?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

64. When you finished your law degree, did you plan to practise law?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

65. To what extent did your law degree meet the expectations you had when starting it?

- ◯ Major extent
- ◯ Moderate extent
- ◯ Minor extent
- ◯ Not at all
- ◯ Not sure/can't say

Decision not to work as a lawyer

66. To what extent did the following impact on your decision not to practise law?

	Major extent	Moderate extent	Minor extent	Not at all	Not relevant
Didn't like studying law	○	○	○	○	○
Studied a double degree and wanted to pursue a career related to my other degree	○	○	○	○	○
Couldn't find a job practising law	○	○	○	○	○
Couldn't find a job practising in the area of law I was interested in	○	○	○	○	○
I was offered another job opportunity	○	○	○	○	○
I never intended to practise as a lawyer	○	○	○	○	○
More interesting or varied work elsewhere	○	○	○	○	○
Better salary/remuneration elsewhere	○	○	○	○	○
More scope for flexible working arrangements elsewhere	○	○	○	○	○
Shorter working hours elsewhere	○	○	○	○	○
Greater support for work-life balance (personal life) elsewhere	○	○	○	○	○
Greater support for work-life balance (family commitments) elsewhere	○	○	○	○	○
Better job security elsewhere	○	○	○	○	○
Better mentorship elsewhere	○	○	○	○	○
Better learning and development opportunities elsewhere	○	○	○	○	○
Reduced stress elsewhere	○	○	○	○	○

67. Since finishing your law degree, which of the following sectors have you mainly worked in?

- [ ] Advertising/media/arts and entertainment
- [ ] Agriculture, forestry and fishing
- [ ] Banking and financial services
- [ ] Construction
- [ ] Consulting
- [ ] Education and training
- [ ] Government and defence
- [ ] Health and community services
- [ ] Hospitality, tourism and recreation
- [ ] IT and telecommunications
- [ ] Manufacturing
- [ ] Mining, resources and energy
- [ ] Not for profit
- [ ] PR, communications and marketing
- [ ] Property and business services
- [ ] Science and technology
- [ ] Transport and storage
- [ ] Whole and retail trade
- [ ] Other (please specify)

68. How satisfied are you with your decision not to practise law?

- ◯ Very satisfied
- ◯ Satisfied
- ◯ Neither satisfied nor dissatisfied
- ◯ Dissatisfied
- ◯ Very dissatisfied
- ◯ Not sure/can't say

69. How satisfied are you with your current career path?

- ◯ Very satisfied
- ◯ Satisfied
- ◯ Neither satisfied nor dissatisfied
- ◯ Dissatisfied
- ◯ Very dissatisfied
- ◯ Not sure/can't say

70. Would you be interested in practising law in the future?

- ◯ Yes
- ◯ No
- ◯ Maybe

71. If you did choose to eventually practise, in what capacity would you be interested in doing this?

- ◯ Advocate
- ◯ Private law firm
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not for profit
- ◯ Other (please specify)

72. Please indicate briefly why you might be interested in practising law in the future?

73. Please indicate briefly what (if anything) would influence your decision?

Primary demographics: No longer lawyering

74. Are you ...

- ◯ Male
- ◯ Female

75. How old are you?

- ◯ Less than 25 years of age
- ◯ 25-29 years
- ◯ 30-34 years
- ◯ 35-39 years
- ◯ 40-44 years
- ◯ 45-49 years
- ◯ 50-54 years
- ◯ 55-59 years
- ◯ 60-64 years
- ◯ 65 years or older

76. How many years is it since you were first admitted as a legal practitioner in South Africa? (please round to the nearest number of full years)

years

77. Prior to leaving the legal profession, how many years practising experience did you have post admission (excluding any time taken as breaks from the profession)?

years

Studying law

78. What were the main reasons for your decision to study law? (please select all that apply)

- [ ] I had an interest in the law
- [ ] I had an interest in social justice
- [ ] I had an interest in government and/or politics
- [ ] I had an interest in international relations
- [ ] I thought a law degree would provide good job opportunities
- [ ] I thought a law degree would ensure job security
- [ ] I thought a law degree would give me a broad skill base for employment in different fields
- [ ] I wanted intellectual stimulation
- [ ] I got the marks/grades to study law
- [ ] I wanted a good income
- [ ] I wanted prestige/status
- [ ] I wanted a career change
- [ ] I had the right aptitude for a law degree
- [ ] I wasn't good at maths or science
- [ ] I wasn't sure what else to do
- [ ] My parents/family wanted me to study law
- [ ] Other (please specify)

79. When you started your law degree, did you plan to practise law after graduating?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

80. When you finished your law degree, did you plan to practise law?

- ◯ Yes
- ◯ No
- ◯ I wasn't sure

81. To what extent did your law degree meet the expectations you had when starting it?

- ◯ Major extent
- ◯ Moderate extent
- ◯ Minor extent
- ◯ Not at all
- ◯ Not sure/can't say

Professional Legal Training

82. What kind of professional legal training did you do prior to admission?

- ◯ Candidate attorney in a private law firm
- ◯ Candidate attorney and a six months LEAD course
- ◯ Pupillage
- ◯ Other (please specify)

83. How long (excluding breaks) were you engage in professional legal training prior to admission?

- ◯ Six months or less
- ◯ More than six months and less than or equal to one year
- ◯ More than one year and less than or equal to one year and six months
- ◯ More than one year and six months and less than or equal to two years
- ◯ More than two years and less than or equal to three years
- ◯ More than three years

Other (please specify)

84. When you started your professional legal training, were you planning to practise as a lawyer?

- ◯ Yes
- ◯ No

85. When you finished your professional legal training, did you plan to practise as a lawyer?

- ◯ Yes
- ◯ No

86. How would you describe your time of professional legal training? Please answer in one sentence or one paragraph.

Current employment characteristics

87. Which ONE category best describes the sector in which you currently work?

- ◯ Advertising/media/arts and entertainment
- ◯ Agriculture, forestry and fishing
- ◯ Banking and financial services
- ◯ Construction
- ◯ Consulting
- ◯ Education and training
- ◯ Government and defence
- ◯ Health and community services
- ◯ Hospitality, tourism and recreation
- ◯ IT and telecommunications
- ◯ Manufacturing
- ◯ Mining, resources and energy
- ◯ Not for profit
- ◯ PR, communications and marketing
- ◯ Property and business services
- ◯ Science and technology
- ◯ Transport and storage
- ◯ Whole and retail trade
- ◯ Other (please specify)

88. For how many years have you been employed at your current workplace?

- ◯ Under 1 year
- ◯ 1 year - < 2 years
- ◯ 2 years - < 3 years
- ◯ 3 years - < 4 years
- ◯ 4 years - < 5 years
- ◯ 5 years - < 7 years
- ◯ 7 years - < 10 years
- ◯ 10 years - < 15 years
- ◯ 15 years or more

89. Do you currently work full time or part time in your current main role?

- ◯ Full time
- ◯ Part time

Current Employment Characteristics (continued)

90. Please specify the fractional Full Time Equivalency (FTE) of your role.

- ◯ 0.1 (0.5 day / week)
- ◯ 0.2 (1.0 day/ week)
- ◯ 0.3 (1.5 days / week)
- ◯ 0.4 (2.0 days / week)
- ◯ 0.5 (2.5 days / week)
- ◯ 0.6 (3.0 days / week)
- ◯ 0.7 (3.5 days / week)
- ◯ 0.8 (4.0 days / week)
- ◯ 0.9 (4.5 days / week)
- ◯ Other (please specify)

_____

Current Employment Characteristics (continued continued)

91. How many hours a week do you usually work (excluding breaks)?

hours

92. In which province is your main workplace located?

- ◯ Limpopo
- ◯ Mpumalanga
- ◯ KwaZulu-Natal
- ◯ Eastern Cape
- ◯ Western Cape
- ◯ Northern Cape
- ◯ North-West
- ◯ Gauteng
- ◯ Free State
- ◯ Outside South Africa

93. And is your main workplace located in:

- ◯ The central business district of a large metropolitan (including Sandton)
- ◯ A suburban area of a large metropolitan
- ◯ A town or small city
- ◯ A rural or remote location

Career moves

94. In what year did you last practise as a lawyer?

Year

95. Which one category best describes the last role in which you practised as a lawyer?

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm – sole practitioner
- ◯ Private law firm – law firm with 2-4 partners/principals
- ◯ Private law firm – law firm with 6-10 partners/principals
- ◯ Private law firm – law firm with 11-20 partners/principals
- ◯ Private law firm – law firm with 21-39 partners/principals
- ◯ Private law firm – law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Other (please specify)
- ◯ Other (please specify)

96. When you left your role as a practising lawyer, please specify which of the following factors played a role in your decision (select all that apply).

	Major extent	Moderate extent	Minor extent	Not sure	No role
Better salary/remuneration	◯	◯	◯	◯	◯
Lack of promotional opportunities	◯	◯	◯	◯	◯
More scope for flexible working arrangements	◯	◯	◯	◯	◯
Better work-life balance	◯	◯	◯	◯	◯
More flexibility to balance my work and personal responsibilities	◯	◯	◯	◯	◯
Unhappy with the workplace culture	◯	◯	◯	◯	◯
Unhappy with the leadership and direction of the organisation	◯	◯	◯	◯	◯
Unhappy with the relationship I had with the person to whom I reported	◯	◯	◯	◯	◯
Experienced bias or discrimination	◯	◯	◯	◯	◯
Experienced harassment or bullying	◯	◯	◯	◯	◯
More independence/control in work	◯	◯	◯	◯	◯
Better quality of work	◯	◯	◯	◯	◯
More interesting or varied work	◯	◯	◯	◯	◯
Change in practice area/different type of work	◯	◯	◯	◯	◯
Looking for a change/something new	◯	◯	◯	◯	◯
Better position/significant job opportunity	◯	◯	◯	◯	◯
Better job security/reliability of work and/or income	◯	◯	◯	◯	◯
Better mentorship	◯	◯	◯	◯	◯
Better learning and development opportunities	◯	◯	◯	◯	◯
Better location	◯	◯	◯	◯	◯
Wanted to start a new firm/sole practice/work for myself	◯	◯	◯	◯	◯
Too much pressure on billable hours	◯	◯	◯	◯	◯
Too much pressure on bringing in clients/new business	◯	◯	◯	◯	◯
Reduced stress and	◯	◯	◯	◯	◯

pressure					
Mental or physical health reasons	○	○	○	○	○
Wanted to work in a business/company	○	○	○	○	○
Wanted to work in a team-based working environment	○	○	○	○	○
Wanted to give back to the community	○	○	○	○	○
It's part of my career plan	○	○	○	○	○
Didn't want to work as a lawyer anymore	○	○	○	○	○
Taking time out from the profession (career break)	○	○	○	○	○
Taking time out from the profession (parental leave)	○	○	○	○	○
Relocation with my partner/family	○	○	○	○	○
Redundancy/termination of employment	○	○	○	○	○
Retirement	○	○	○	○	○

Other (please specify)

97. What, if anything, would have changed your decision to leave the legal profession?

98. What, if anything, do you miss about working in the legal profession?

Career intentions

99. Would you consider working as a lawyer again in the future?

- ◯ Yes
- ◯ No
- ◯ Maybe

Career intentions

100. In approximately what time frame would you consider returning to the legal profession?

- ◯ Within the next 12 months
- ◯ 1-2 years
- ◯ 3-5 years
- ◯ 6-10 years
- ◯ More than 10 years
- ◯ Not sure

101. What type of workplace would you consider working in as a lawyer? (please select the workplace that you would be most likely to consider working in)

- ◯ Court or Tribunal role
- ◯ Advocate
- ◯ State Prosecutor
- ◯ Legal Aid Attorney
- ◯ Private law firm – sole practitioner
- ◯ Private law firm – law firm with 2-4 partners/principals
- ◯ Private law firm – law firm with 6-10 partners/principals
- ◯ Private law firm – law firm with 11-20 partners/principals
- ◯ Private law firm – law firm with 21-39 partners/principals
- ◯ Private law firm – law firm with 40+ partners/principals
- ◯ Corporate legal (in-house)
- ◯ Government legal
- ◯ Non-government organisation/not-for-profit
- ◯ Academia
- ◯ Other (please specify)

102. Please indicate briefly why you would or would not be interested in working as a lawyer in the future.

103. Please indicate what (if anything) would influence your decision.

Demographics

104. What is the highest level of legal qualification you have completed?

- ◯ Doctor of Laws / PhD in Law
- ◯ Masters of Laws
- ◯ Juris Doctor / Postgraduate qualification for admission to practice
- ◯ Bachelor of Laws (LLB) or equivalent
- ◯ Combined Bachelor of Laws (LLB) and another degree (e.g. BA/LLB or BCom/LLB or BSc/LLB)
- ◯ Other (please specify)

105. What educational institution conferred on you your South African LLB or BJuris?

- ◯ Transkei
- ◯ Zululand
- ◯ University of Johannesburg
- ◯ UNISA
- ◯ Limpopo
- ◯ Venda
- ◯ Free State
- ◯ Ft. Hare
- ◯ Potchestroom University
- ◯ Pietermaritzburg
- ◯ Univ of KwaZulu-Natal
- ◯ UCT
- ◯ Rhodes
- ◯ Port Elizabeth
- ◯ Western Cape
- ◯ Wits University
- ◯ University of Pretoria
- ◯ Stellenbosch University
- ◯ I do not have a South African LLB or BJuris
- ◯ Other (please specify)

106. Which of these categories best describes your personal gross income (pre-tax, excluding superannuation) in the financial year ending 28 February 2014?

- ◯ Less than R250,000
- ◯ R250,000 - R500,000
- ◯ R500,000 - R750,000
- ◯ R750,000 - R1,000,000
- ◯ R1,000,000 - R1,500,000
- ◯ R1,500,000 - R2,000,000
- ◯ R2,000,000 - R2,500,000
- ◯ R2,500,000 - R3,000,000
- ◯ More than R3,000,000

107. Approximately what percentage of your total household income comes from your salary?

- ◯ 100%
- ◯ 80-99%
- ◯ 60-79%
- ◯ 40-59%
- ◯ 20-39%
- ◯ 0-19%
- ◯ Not sure/rather not say

108. Were you born in South Africa?

- ◯ Yes
- ◯ No

109. Are you a South African citizen or a permanent resident of South Africa?

- ◯ Yes
- ◯ No

110. Do you regularly speak a language other than English at home?

- ◯ Yes
- ◯ No, English only

111. Do you identify as being White, Indian, Coloured, or African?

- ◯ White
- ◯ Indian
- ◯ Coloured
- ◯ African
- ◯ Other (please specify)

112. Which best describes your marital status?

- ◯ Single
- ◯ Married or de facto
- ◯ Divorced, separated, widowed

113. How many dependent children do you have (including step-children)?

- ◯ 0
- ◯ 1
- ◯ 2
- ◯ 3
- ◯ 4
- ◯ 5 or more

114. Are any of these children ... (select all that apply)

- ◯ Aged under 6 and living with you all / some of the time
- ◯ Aged 6 - 12 and living with you all / some of the time
- ◯ Aged 12 - 17 and living with you all / some of the time
- ◯ Aged 18 or older and living with you all / some of the time
- ◯ None of the above

115. Are you the primary carer in your family?

- ◯ Yes
- ◯ No
- ◯ There is no primary carer – the role is shared

116. Who is the primary carer?

- ◯ My partner
- ◯ My ex-partner
- ◯ My or my partner's parents
- ◯ Other (please specify)

117. Do you have any other family or carer responsibilities?

- ◯ Yes
- ◯ No

118. Please indicate for whom you have carer responsibilities

- ◯ Grandparent/s (mine or my partner's)
- ◯ Parent/s (mine or my partner's)
- ◯ Sibling/s (mine or my partner's)
- ◯ Other (please specify)

Follow up interviews and Thanks

Thank you for your participation in our survey!

CALS may be undertaking follow up one-on-one interviews or telephone interviews with a number of lawyers to discuss their career progression, rationale for career moves and future intentions in more detail. The interviews will take about an hour for the one-on-one interviews and between 30 and 45 minutes for the telephone interviews. Please note that this will be a confidential process: responses will not be attributed to individuals or their employer in our reporting or in our discussions. If you choose to provide your contact details, you may be contacted for purposes of this research only and your contact details will not be provided to any other party than the CALS team conducting this research.

119. Would you be interested in participating in a one-on-one or telephone interview? If so, please provide your appropriate contact details below: name, email address, telephone.

- ◯ No thanks
- ◯ Yes – one-on-one interview
- ◯ Yes – telephone interview
- ◯ Yes – either type of interview

Other (please specify)

ANNEXURE C

CALS
Centre for Applied Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

Tel: 011 717 8609 (direct)
Ref: Whitworth/TLP

To: [Name]
Email: [address]

Date

Dear Name

Transformation of the Legal Profession: Invitation to a breakfast meeting

We would like to invite you to a breakfast meeting at The Wits Club at West Campus, Wits University, Braamfontein from **08:00 to 09:30** on **Thursday 26 June 2014**.

The Centre for Applied Legal Studies, together with the Foundation for Human Rights, is conducting a research project into the transformation of the legal profession. This breakfast is one of a series of Breakfasts for Change, which comprises the focus group component of the research. The focus group will be led by Professor Bonita Meyersfeld, with one of our researchers, Ms Alice Brown. Further information on the research is included in the appendix.

Please confirm your attendance by contacting Ms Cebile Ndebele on 011 717 8648 or Cebile.Ndebele@wits.ac.za.

Please do not hesitate to contact me if you have any questions in connection with this project.

Kind Regards

K Whitworth

Kirsten Whitworth
Attorney: Centre for Applied Legal Studies
Tel: 011 717 8609
Email: Kirsten.Whitworth@wits.ac.za

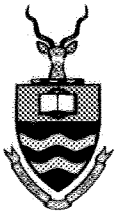
Appendix

The South African legal profession continues to face the challenge of meaningful transformation. While junior stages of the legal profession see a diverse representation of professionals, the top positions in the profession, from senior partners of law firms, to senior counsel at the bar and senior members of the judiciary, are less diverse. Senior positions do not reflect the diversity of the country, and are dominated by men, with a marked absence of diversity on the basis of race, gender and other marginalising characteristics such as sexual orientation, disability and religion.

The lack of diversity in the legal profession has gained widespread media attention with respect to the appointment of senior members of the judiciary. The Judicial Services Commission has come under scrutiny for its appointment patterns, decision-making processes and the extent to which the constitutional imperatives of racial and gender diversity are reflected in its recommendations to the President.

There have been successes of course. The racial diversity of the Constitutional Court in the 20 years of democracy has gone from seven white justices and four black judges to the current bench of two white judges and the majority being black judges. In the same period, however, the number of women on the Constitutional Court has remained the same: two in 1994 and two today, betraying a lack of meaningful transformation in respect of gender.

Against this background, the project aims to broaden the frame of reference of the debate to the profession as a whole to challenge the binary distinction between talent and diversity; understand the specific emphasis on race and not gender, where racial transformation has advanced, albeit slowly, and gender transformation has had a much slower growth pattern; and uncover other less visible barriers to transformation.



ANNEXURE D

FOUNDATION FOR HUMAN RIGHTS

CALS
Centre for Applied Legal Studies

TRANSFORMATION OF THE LEGAL PROFESSION

Participant Information Sheet

Dear Potential Participant

Greetings! Thank you for considering participating in our research.

The Centre for Applied Legal Studies (CALS), together with the Foundation for Human Rights, would like to invite you to participate in a research project examining transformation within the legal profession ("the project").

The South African legal profession continues to face the challenge of meaningful transformation. While junior stages of the legal profession see a diverse representation of professionals, the top positions in the profession, from senior partners of law firms, to senior counsel at the bar and senior members of the judiciary, are less diverse. Senior positions do not reflect the diversity of the country, and are dominated by men, with a marked absence of diversity on the basis of race, gender and other marginalising characteristics such as sexual orientation, disability and religion.

The lack of diversity in the legal profession has gained widespread media attention with respect to the appointment of senior members of the judiciary. Indeed, the Judicial Services Commission has come under scrutiny for its appointment patterns, decision-making processes and the extent to which the constitutional imperatives of racial and gender diversity are reflected in its recommendations to the President.

Yet, there have been successes of course. The racial diversity of the Constitutional Court in the 20 years of democracy has gone from seven white justices and four black judges to the current bench in which the majority of the judges are black and two are white. In the same period, however, the number of women on the Constitutional Court has remained the same: two in 1994 and two today, betraying a lack of meaningful transformation in respect of gender.

Against this background, the project aims to broaden the frame of reference of the debate to the profession as a whole to: challenge the binary distinction between talent and diversity; understand the specific emphasis on race and not gender, where racial transformation has advanced, albeit slowly, and gender transformation has had a much slower growth pattern; and uncover other less visible barriers to transformation.

In the current phase of research under the banner of "Breakfasts for Change," the research team will conduct approximately six structured discussion group meetings with 25 to 40 legal practitioners in

total. Ideally, the interviewees will be broadly representative in terms of age, race, gender and stage of career. Each meeting should thus have no more than six to eight participants.

Information and data collected during these meetings will be kept anonymous in the research. The researchers will take detailed notes during the interview. The researchers will keep personal information gained confidential. Although identities will be withheld, demographic information will be used for statistical and research purposes.

We invite you to participate in this study – which will take the form described above and last sixty to ninety minutes. We hope that participants will be forthright, candid and comfortable with the mission and purpose of this study and the fact that their contributions will be anonymous.

If you agree to participate, you may choose not to answer particular questions, and, should you initially consent to participate, you may withdraw your consent at any time. We must emphasise that participation in this research is entirely voluntary, and that you will not be paid for participation.

The study will be reported to the Foundation for Human Rights and made accessible through academic publication. A summary of the research will be available to each participant who requests it.

Please contact us with any questions at Jonathan Klaaren (jonathan.klaaren@wits.ac.za) and at Alice Brown (brown.alice99@gmail.com).

Regards

Jonathan Klaaren
Alice L. Brown

Funding is facilitated by the Foundation for Human Rights which is funded by the Department of Justice and Constitutional Development and the European Union under the Sector Budget Support Programme – Access to Justice and the Promotion of Constitutional Rights.

ANNEXURE E

TRANSFORMATION OF THE LEGAL PROFESSION

Participant Consent Form

I have read and understood the Participant Information Sheet regarding the Transformation of the Legal Profession and/or I have discussed the research project with the CALS researchers.

I understand that reporting from the study will be anonymous, that I may withdraw if I wish, and that the information will be kept confidential.

I give consent to participate in semi-structured interviews in this research project of the Centre for Applied Legal Studies.

Name: _____

Signature: _____

Date: _____

Gumede v President of the RSA & others (Women's Legal Centre as amicus curiae)
[2008] JOL 21972 (D)

Annexure B

Reported in (Butterworths)	Not reported in any LexisNexis Butterworths printed series.
Case No:	4225/2006
Judgment Date(s):	13 / 6 / 2008
Hearing Date(s):	6 / 12 / 2007
Marked as:	Unmarked
Country:	South Africa
Jurisdiction:	High Court
Division:	Durban & Coast Local
Judge:	Theron J
Bench:	Theron J
Parties:	Elizabeth Gumede (Born Shange) (At); President of the RSA (1R), Minister of Justice & Constitutional Development (2R), Premier of KZN (3R), KZN MEC for Traditional & Local Government Affairs (4R), Amos Gumede (5R), Minister of Home Affairs (6R);
Appearance:	Adv G Budlender SC, Legal Resources Centre (At); Adv V Soni SC, State Attorney (KZN) (4R, 6R); S Poswa-Lerotholi, Z K Seedat & Co (amicus curiae)
Categories:	Application - Civil - Substantive - Private
Function:	Confirms Legal Principle

Key Words

Constitutional law - Customary law - Marriage - Recognition of Customary Marriages Act 120 of 1998

Mini Summary

The applicant sought an order declaring certain provisions of the KwaZulu Act on the Code of Zulu Law 16 of 1985 ("The KwaZulu Act") and the Natal Code of Zulu Law Proclamation R151 of 1987 ("the Natal Code") unconstitutional. She also sought an order declaring that the distinction that the Recognition of Customary Marriages Act 120 of 1998 draws is unconstitutional.

Held that the distinction referred to is as follows: Customary marriages concluded after the commencement of the Act are automatically in community of property, while those concluded prior to the commencement of the Act continue to be governed by customary law.

The court found that the proprietary regime established by the codification of customary law, is, *prima facie*, discriminatory as only African women are subjected by the law to such consequences. The discrimination is on two of the prohibited grounds listed in section 9(3) of the Constitution, namely race and gender. It was not shown that any limitation of the right to equality was justifiable under section 36 of the Constitution.

An order of unconstitutionality of the impugned provisions was made.

THERON J

[1] Customary marriages concluded after the commencement of the Recognition of Customary Marriages Act 120 of 1998 ("the Recognition Act"), 15 November 2000, are automatically in community of property. Those concluded prior to the

commencement of the Recognition Act continue to be governed by customary law. In this application the applicant seeks an order declaring certain provisions of the KwaZulu Act on the Code of Zulu Law 16 of 1985 ("The KwaZulu Act") and the Natal Code of Zulu Law Proclamation R151 of 1987 ("the Natal Code"), unconstitutional. The applicant also seeks an order declaring that the distinction that the Recognition Act draws between the two categories of marriages is unconstitutional. This application was opposed by the fourth and sixth respondents ("the respondents").

[2] The applicant and the fifth respondent entered into a customary marriage on 29 May 1968, at KwaMuhle, Durban. The fifth respondent is not, and has never been, a partner to any other marriage, customary or civil. The applicant and fifth respondent have four children, all of whom have reached the age of majority. The marriage relationship between the parties has broken down. In January 2003 the fifth respondent instituted divorce proceedings against the applicant in the North Eastern Divorce Court ("the Divorce Court") seeking a decree of divorce and other ancillary relief. The divorce action has been stayed, pending the determination of this application.

[3] During the course of the marriage the fifth respondent acquired an immovable property at Umlazi Township, where the applicant currently resides, and an immovable property at Adams Mission, where he resides. The fifth respondent has

been on pension since April 2000. The applicant alleges that the fifth respondent did not allow her to work during the marriage. She says she performed all the requisite tasks to look after and maintain their home at Umlazi as the family home for the fifth respondent, herself and their four children. She was the primary care-giver of the children and she performed numerous functions of a familial and domestic nature. The Umlazi home contains furniture and appliances acquired by the applicant with an approximate value of R40 000.

[4] The applicant alleges that she has nowhere else to live other than at the Umlazi property. Her father died in 1985 and her mother in 1994. At the time of their deaths, they had been living on her father's employer's farm, which has since been sold. The applicant does not have any living brothers and her sisters are domestic workers who do not have sufficient means to care for her. The applicant is an old age pensioner. She survives on her pension and contributions which she receives from her children. She receives no maintenance from the fifth respondent.

[5] The applicant's primary complaint is that the matrimonial property regime to which she is subject (in consequence of the application of customary law) is discriminatory. It discriminates against her on the grounds of gender, because she is a woman, and on the grounds of race, because she is African. In her affidavit she states that:

> "... the law discriminates between my husband and me. It makes him the sole owner of all of the property acquired during our marriage. It creates a default situation in which, upon divorce, he will remain the owner of all that property, without having to make any showing as to why that should be the case. I will be the owner of none of the property, and will remain property-less, unless I am able to persuade the divorce court to order the transfer of some of 'his' property to me, or the forfeiture of the patrimonial benefits of the marriage."

The applicant's secondary complaint is that while the Recognition Act recognises the discriminatory consequences of this provision of customary law,1 and rectifies the position in respect of customary marriages entered into after the commencement of the Act, it perpetuates this discrimination in respect of customary marriages concluded before the commencement of the Act. The applicant contends that the under-inclusiveness of the Recognition Act and its perpetuation of the application of customary law to her marriage and the marriages of other women who are similarly placed, is inconsistent with the Constitution and accordingly invalid.

[6] The respondents, on the other hand, contend that, in terms of the provisions of the Recognition Act and the Divorce Act 70 of 1979 ("the Divorce Act"), the Divorce Court is adequately empowered to protect all of the applicant's proprietary and financial rights and interests upon her divorce from the fifth respondent. They contend that the impugned provisions do not violate the applicant's right to equality and, in the alternative, if the court finds that the provisions are unfair, then any limitation of the right to equality was justifiable under section 36 of the Constitution.

[7] In the Recognition Act customary law is defined as "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples".2 In KwaZulu-Natal customary law has been codified in the KwaZulu Act and the Natal Code. The KwaZulu Act applies in those areas which previously fell within the jurisdiction of the former KwaZulu Legislative Assembly. The Natal Code exists as Regulations made under the Black Administration Act 38 of 1927 and applies in those parts of the former province of Natal which did not fall under the jurisdiction of the KwaZulu Legislative Assembly. Both of these pieces of legislation are still in force by virtue of the provisions of section 2 of Schedule 6 of the Constitution.3

[8] It was not in dispute that customary law in its various manifestations has the result that the fifth respondent is the owner of all of the property acquired during the course of the marriage. This is so by virtue of the provisions of the KwaZulu Act and the Natal Code. Section 20 of both the KwaZulu Act and the Natal Code provides that:

> "The family head is the owner of all family property in his family home.4 He has charge, custody and control of the property attaching to the houses of his several wives and may in his discretion use the same for his personal wants and necessities, or for general family purposes or for the entertainment of visitors. He may use, exchange, loan or otherwise alienate or deal with such property for the benefit of or in the interests of the house to which it attaches, but should he use the property attaching to one of the houses for the benefit or on behalf of any other house in the family home an obligation rests upon such other house to return the same or its equivalent in value."

Section 22 of the Natal Code states that:

> "The inmates of a family home irrespective of sex or age shall in respect of all family matters be under the control of and owe obedience to the family head."5

A similarly worded provision of the KwaZulu Act (section 22), was repealed by the Recognition Act.

[9] This regime was to some extent altered by section 7(2) of the Recognition Act which provides that customary marriages entered into after the commencement of that Act is a marriage in community of property and of profit and loss. Section 7(1) of the Recognition Act provides that the proprietary consequences of a marriage entered into before the commencement of the Act continues to be governed by customary law. In terms of section 8(1) of the Recognition Act, only a court may dissolve a customary marriage. In terms of section 8(4)(a) of the Recognition Act, a court dissolving a customary marriage has the powers contemplated in subsection 7, 8, 9 and 10 of the Divorce Act.6 Section 8(4)(e) of the Recognition Act provides that the Divorce Court may, when making an order for the payment of maintenance, take into account any provision or arrangement

made in accordance with customary law. In the absence of a written agreement between the parties on the payment of maintenance, the Divorce Court may, after taking into account specified factors, make an order that one party pays maintenance to the other for any period or until the death or remarriage of that other party.7 Where the parties were married out of community of property, the court may, in the absence of an agreement between the parties and on the application of a party, order that the assets of the other party be transferred to the applicant party.8 The pension interest of a party is a patrimonial benefit9 and the court may order the pension fund to pay over to the other spouse any part of the pension interest of the member spouse.10

[10] Section 39(1)(b) of the Constitution requires that a court consider international law when interpreting the Bill of Rights. There are numerous international instruments which underscore the imperative to protect the rights of women and to abolish laws that discriminate against them. One such instrument is the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") which was ratified by South Africa on 15 December 1995. In CEDAW discrimination against women is defined as:

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."11

South Africa, as a state party to CEDAW, has a duty to take:

> "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."12

Article 13 of CEDAW makes specific reference to the duty of state parties to eliminate, in particular, discrimination against women in the areas of economic and social life, in order to ensure that men and women enjoy the same rights in respect of family benefits. Of particular relevance is Article 16(1) which provides that state parties shall ensure, on a basis of equality of men and women, the same rights and responsibilities during marriage and at its dissolution and the same rights for spouses in respect of ownership and management of property.

[11] Section 7 of the Recognition Act differentiates between people who entered into customary marriages before the commencement of the Act and those who entered into such marriages thereafter. The position prior to the Recognition Act was that the proprietary consequences of *all* customary marriages were governed by customary law. Now, the default position in respect of monogamous customary marriages entered into after the commencement of the Recognition Act is that they are in community of property.

[12] In my view, the proprietary regime established by the codification of customary law, is, *prima facie*, discriminatory. It is discriminatory as only African women are

subjected by the law to such consequences. The discrimination is on two of the prohibited grounds listed in section 9(3) of the Constitution,13 namely race and gender. The next question to consider is whether the discrimination is unfair.

[13] It was submitted, on behalf of the respondents, that the effect of the differentiation is not fixed. It was contended that persons such as the applicant, who had entered into customary marriages before the commencement of the Recognition Act, could vary the proprietary consequences of their marriages and that at the time of divorce, they had the same rights in respect of property and finances as the spouse in a civil marriage. It was argued that the flexibility of the system and the protection it afforded women at the time of divorce constituted a safety net that ensures that the provisions as a whole operate fairly. It was further submitted that the Divorce Court would be in a position to address all the applicant's concerns and that in these circumstances; the differentiation has very little, if any, potential to significantly impair the dignity of the applicant and is fair. It was further contended that the differentiation served a legitimate purpose in that it gives effect to indigenous culture and leaves intact the position of those who had already entered into customary marriages, but makes it possible for them to voluntarily change the proprietary regime of their marriages.14

[14] This court accepts that the Divorce Court has the power, *inter alia*, flowing from the provision of section 8(4) of the Recognition Act, read with section 7 of the Divorce Act, to make an order for maintenance and to order that the assets of one party be transferred to the other party. This does not resolve the problem. Firstly, the provisions of the Divorce Act do not affect the proprietary regime which exists during the subsistence of the customary marriage. Secondly, the current statutory provisions creates a default situation in which, upon divorce, the fifth respondent will remain the owner of all the property acquired during the course of the marriage, unless the applicant is able to persuade the Divorce Court to make an order transferring some of the fifth respondent's property to her or a forfeiture of benefits order in her favour. The position of the applicant in this regard is sharply different to that of women who are not black or who entered into customary marriages after the commencement of the Recognition Act.

[15] It was submitted by counsel for the respondents that the applicant's constitutional attack must be considered against the background and genesis of the Recognition Act. It was accepted that the Recognition Act is largely based on a report on customary marriages compiled by the South African Law Commission ("the Law Commission") in August 1998. It was common cause that the report was compiled after extensive consultations with, *inter alia*, non-governmental organisations, women's groups, traditional leaders, the legal profession, state departments and the religious community. It was also common cause that one of the principle aims of the

Recognition Act was to remove elements of discrimination in customary law and to "provide for the equal status and capacity of spouses in customary marriages". In doing so the Act gave expression to two constitutional principles. The first was passing legislation contemplated in section 15(3) of the Constitution. The second was to give effect to the cultural pluralism that is guaranteed by subsection 30 and 31 of the Constitution. It was further submitted that the Law Commission had considered it unfair not to draw a distinction between customary marriages entered into before or after the commencement of the Recognition Act, as not to do so may have retrospectively taken away contracted rights, not only of male spouses, but of third parties as well.15 The Law Commission had noted in its report that the need to protect the economically weaker spouse arises at divorce. It is recorded that "the Commission felt that it was immaterial whether estates were held separately or in community during marriage, provided that the economically weaker spouse was suitably protected on divorce", since problems tended to emerge only when the union was dissolved. The Law Commission's main goal was to ensure an equitable distribution of assets on the break-up of the marriage. It was further submitted that the respondents had acted upon the recommendation of the Law Commission and that they had accepted that the Recognition Act was the "first step in a process of reform".

[16] In my view, the respondents have failed to show that any limitation of the right to equality is justifiable under section 36 of the Constitution. In any event, the applicant's primary complaint is not the differentiation contained in section 7 of the Recognition Act. It is not the Recognition Act which creates that discrimination – it is customary law in its various manifestations which does so. The complaint against the Recognition Act is that it is under-inclusive in remedying that discrimination against African women.

[17] The following order is made:

1. Declaring that section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 is inconsistent with the Constitution and invalid.
2. Declaring that the inclusion of the words "entered into after the commencement of this Act" in section 7(2) of the Recognition of Customary Marriages Act 120 of 1998 is inconsistent with the Constitution and invalid.
3. Declaring that section 20 of the KwaZulu Act on the Code of Zulu Law 16 of 1985 is inconsistent with the Constitution and invalid.
4. Declaring that section 20 of the Natal Code of Zulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and invalid.

5. Declaring that section 22 of the Natal Code of Zulu Law Proclamation R151 of 1987 is inconsistent with the Constitution and invalid.
6. That the fourth and sixth respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved.
7. That each party is to pay its own costs in respect of the joinder application.16
8. That, in terms of section 172(2)(a) of the Constitution, this order is referred to the Constitutional Court for confirmation.

ANNEXURE "A"

Sections 7, 8, 9 and 10 of the Divorce Act 70 of 1979

7. *Division of assets and maintenance of parties*

(1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.

(2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.

(3) A court granting a decree of divorce in respect of a marriage out of community of property–

(a) entered into before the commencement of the Matrimonial Property Act 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act 1988, in terms of section 22 (6) of the Black Administration Act 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act 1988,

may, subject to the provisions of subsections (4), (5) and (6), on application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their assets, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.

(4) An order under subsection (3) shall not be granted unless the court is satisfied that it is equitable and just by reason of the fact that the party in whose favour the order is granted, contributed directly or indirectly to the maintenance or increase of the estate of the other party during the subsistence of the marriage, either by the rendering of services, or the saving of expenses which would have otherwise have been incurred, or in any other manner.

(5) In the determination of the assets or part of the assets to be transferred as contemplated in subsection (3) the court shall, apart from any direct or indirect contribution made by the party concerned to the maintenance or increase of the estate of the other party as contemplated in subsection (4), also take into account

(a) the existing means and obligations of the parties, including any obligation that a husband to a marriage as contemplated in subsection (3) (b) of this section may have in terms of section 22 (7) of the Black Administration Act, 1927 (Act 38 of 1927);

(b) any donation made by one party to the other during the subsistence of the marriage, or which is owing and enforceable in terms of the antenuptial contract concerned;

(c) any order which the court grants under section 9 of this Act or under any other law which affects the patrimonial position of the parties; and

(d) any other factor which should in the opinion of the court be taken into account.

(6) A court granting an order under subsection (3) may, on application by the party against whom the order is granted, order that satisfaction of the order be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.

(7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund–

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that–

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;

(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.

(9) When a court grants a decree of divorce in respect of a marriage the patrimonial consequences of which are according to the rules of the South African private international law governed by the law of a foreign state, the court shall have the same power as a competent court of the foreign state concerned would have had at that time to order that assets be transferred from one spouse to the other spouse.

8. Rescission, suspension or variation of orders

(1) A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor: Provided that if an enquiry is instituted by the Family Advocate in terms of section 4 (1) (b) or (2) (b) of the Mediation in Certain Divorce Matters Act 1987, such an order with regard to the custody or guardianship of, or access to, a child shall not be rescinded or varied or, in the case of an order with regard to access to a child, not be suspended before the report and recommendations referred to in the said section 4 (1) have been considered by the court.

(2) A court other than the court which made an order referred to in subsection (1) may rescind, vary or suspend such order if the parties are domiciled in the area of jurisdiction of such first-mentioned court or the applicant is domiciled in the area of jurisdiction of such first-mentioned court and the respondent consents to the jurisdiction of that court.

(3) The provisions of subsections (1) and (2) shall *mutatis mutandis* apply with reference to any order referred to in subsection (1) given by a court in a divorce action before the commencement of this Act.

9. Forfeiture of patrimonial benefits of marriage

(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2) In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.

10 Costs

In a divorce action the court shall not be bound to make an order for costs in favour of the successful party, but the court may, having regard to the means of the parties, and their conduct in so far as it may be relevant, make such order as it considers just, and the court may order that the costs of the proceedings be apportioned between the parties.

Footnotes

1 One of the purposes of the Recognition Act is "to provide for the equal status and capacity of spouses in customary marriages".

2 Section 1.

3 Section 2 of Schedule 6 reads:

"(1) All law that was in force when the new Constitution took effect, continues in force, subject to–
(a) any amendment or repeal; and
(b) consistency with the new Constitution.

(2) Old order legislation that continues in force in terms of subitem (1)-
(a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution

took effect unless subsequently amended to have a wider application; and

(b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution."

4 In both these Acts "family property" is defined as "all the property in a family home other than (i) property vesting in or pertaining specially to any particular house of that family home and (ii) the personal property of any major inmate or any inmate not related to or belonging to the family of the family head" and the "family home" is defined as "the domestic establishment and ordinary place of residence of a person and may consist of one or more houses and includes individual dwellings occupied by persons in townships, on mission stations or on private lands".

5 In section 1 of the Natal Code, an "inmate" is defined as "in relation to a family home ... any person usually residing therein and includes the head of a family resident in a family home, subject to the control of the family head".

6 See Annexure "A" to this judgment for an extract of these provisions.

7 Section 7(2) of the Divorce Act.

8 Section 7(3) of the Divorce Act. Sections 7(4) and (5) sets out the considerations that must be taken into account when such an order is made.

9 Section 7(7)(a) of the Divorce Act.

10 Section 7(8)(a)(i) of the Divorce Act.

11 Article 1.

12 Article 3.

13 Section 9(3) of the Constitution provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

14 Section 7(4) of the Recognition Act.

15 It is recorded in the report that: "The Council of SA Banks has urged that all contractual undertakings entered into under existing laws should continue to be governed by those laws until the contracts come to their conclusion or are renegotiated. This request (which aims at ensuring legal certainty) would accord with general legislative principles and is therefore supported by the Commission." (South African Law Commission Project 90 Report on Customary Marriages 1998 at 99).

16 The sixth respondent was joined as a party in these proceedings in terms of an order granted by this court on 22 August 2006 and pursuant to an application brought by the applicant.

Annexure C

Division:	SUPREME COURT OF APPEAL
Date:	1 December 2006
Case Number:	160/2000
Before:	CJ Lewis, Cameron JJA and LV Theron AJA
Sourced by:	PR Cronjé
Summarised by:	D Harris
Parallel Citation:	2007 (2) SACR 198 (SCA)

• Editor's Summary • Cases Referred to • Judgment •

Criminal law – Multiple rape – Sentence – What constitutes "substantial and compelling circumstances" warranting the imposition of a sentence less than the prescribed minimum sentence.

Editor's Summary

Having been convicted of rape and kidnapping by the regional court, the appellant was referred to the High Court for sentencing in terms of section 52 of the Criminal Law Amendment Act 105 of 1997. As the appellant was convicted of having raped the complainant five times, the High Court sentenced him to life imprisonment in terms of section 51(1) of the Act. The court found no substantial and compelling circumstances that warranted a sentence less than life imprisonment.

The present appeal was against the sentence of life imprisonment.

Held – The crucial question in this case was: what are the substantial and compelling circumstances that warrant the imposition of a sentence less than life imprisonment?

The sentencing court had failed to consider the youth of the appellant at the time of the offence, the fact that he had been employed, and the chance of rehabilitation. The present Court considered these to constitute substantial and compelling circumstances. Although, the Court found the aggravating circumstances to be serious, it did not deem the offence to warrant the maximum sentence of life imprisonment. It replaced the sentence with one of 16 years' imprisonment.

In a dissenting judgment, the view was expressed that the factors referred to by the majority decision did not constitute substantial and compelling circumstances.

Notes

For Criminal law see:

- *LAWSA* Second Edition (Vol 6, paras 1–421)
- Snyman CR *Criminal Law* 4ed Durban LexisNexis Butterworths 2003

Cases referred to in judgment

De Beer v S (case number 121/04 delivered on 12 November 2004)	603
Rammoko v Director of Public Prosecutions [2002] 4 All SA 731 (2003 (1) SACR 200) (SCA)	599
S v Abrahams [2002] JOL 9263 (2002 (1) SACR 116) (SCA)	600
S v Chapman [1997] 3 All SA 277 (1997 (2) SACR 3) (SCA)	603
S v Dodo 2001 (5) BCLR 423 (2001 (1) SACR 594) (CC); 2001 (3) SA 382 (CC)	597
S v Mahomotsa [2002] 3 All SA 534 (2002 (2) SACR 435) (SCA)	600

Page 597 of [2007] 3 All SA 596 (SCA)

S v Malgas [2001] 3 All SA 220 (2001 (1) SACR 469) (SCA)	597
S v Sikhipha [2006] JOL 17530 (2006 (2) SACR 439) (SCA)	601

View Parallel Citation

Judgment

LEWIS JA:

[1] The appellant was convicted of rape and kidnapping by a regional court in August 1998. The regional court sentenced him to imprisonment for three years for kidnapping but referred the sentence for rape to the Durban High Court in terms of section 52 of the Criminal Law Amendment Act 105 of 1997. That court (per Levinsohn J) sentenced the appellant to life imprisonment in terms of section 51(1) of the Act. The regional court had found that the appellant had raped the complainant five times during the course of a night. Rape, when committed "in circumstances where the victim was raped more than once whether by the

View Parallel Citation

accused or by any co-perpetrator or accomplice", attracts a minimum sentence of life imprisonment1 unless the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.2

[2] The appeal is against the sentence of life imprisonment alone, with the leave of the court below. That court found no substantial and compelling circumstances that warranted a sentence less than life imprisonment. It is significant, however, that the sentence was imposed in 1999 before this Court in *S v Malgas*3 determined the approach to be adopted in finding whether substantial and compelling circumstances exist.

[3] The court below relied heavily on earlier authority which suggested that factors regarded as mitigating prior to the enactment of the Act did not in themselves warrant the imposition of a sentence less severe than that prescribed by the Act. In *Malgas*, however, it was held that in determining whether there are substantial and compelling circumstances, a court must be conscious that the Legislature has ordained a sentence that should ordinarily be imposed for the crime specified, and that there should be truly convincing reasons for a different response. But it is for the court imposing sentence to decide whether the particular circumstances call for the imposition of a lesser sentence. Such circumstances may include those factors traditionally taken into account in sentencing – mitigating factors – that lessen an accused's moral guilt. These might include the age of an accused or whether or not he or she has previous convictions. Of course these must be weighed together with aggravating factors. But none of these need be exceptional.

[4] The court below did not consider the mitigating factors adduced by the appellant to constitute substantial and compelling circumstances. In that respect it erred. This Court is thus free to impose the sentence it considers

appropriate subject to the provisions of the Act, and in the light of the existing post-*Malgas* jurisprudence of this Court.

[5] Since the appeal is against the sentence alone, it is not necessary to deal in any detail with the evidence that led to the conviction. However, some background is necessary. The complainant's testimony, accepted by the regional court, was that in the late afternoon before the rapes were committed she went to a hotel bar in Isipingo in order to find a woman to whom she had lent clothing but who had not returned it to her. She found the woman who had suggested that she wait in the bar with the appellant, whom she had not previously met, for her return. She sat with the appellant who was drinking beer. She drank nothing other than a cold drink but it had tasted peculiar, suggesting, albeit implicitly, that it had been laced with alcohol. After a while, when the woman had not

View Parallel Citation

returned, she decided to leave. But when she attempted to do so the appellant forced her to go upstairs with him. He hired a room, forced her into it, forced her to undress and had sexual intercourse with her against her will.

[6] The appellant then decided to go back to the bar, and locked her in the room, hence the kidnapping conviction. She escaped from the room by jumping out of a window, and falling, some ten metres to the ground, on her leg, which she injured in the process. The doctor who examined her after she reported being raped noted in the J88 form that her left ankle was injured and swollen. He noted also that she had an arthritic condition. When the complainant testified she said that as a result of her fall she had injured her hip (it had been dislocated, she said) which was still painful, and that she required a crutch to walk. It is not clear whether her hip was painful because of her arthritic condition, because of the injury or because the injury exacerbated her condition. But her evidence that it was the result of the injury was not challenged by the appellant. Nor was the J88 report of the doctor contested. He had recorded bruising of the labia minora and majora and a torn hymen. The state argues that this suggests that force had been used. However, the doctor's oral evidence related only to the bruising and no inference can thus be drawn from the J88.

[7] Unfortunately when the complainant attempted to escape by jumping out of the window of the hotel room she fell where the appellant had been sitting and drinking. He forced her back upstairs into the room, and raped her four more times during the course of the night. He also forced her to perform oral sex on him and slapped her, pushed her and kicked her. He prevented her from leaving the room again by taking her clothes away.

[8] When, the following morning, the complainant managed to escape, she went straight to a police station to report the multiple rapes and kidnapping. Her evidence was corroborated to a large extent by police officers. They confirmed that when she approached them her clothing was dishevelled, and she was very distraught. They returned with her to the hotel room where they found the appellant.

[9] The appellant's version, rejected by the regional court, was that she consented to having sex with him, and

jumped out the window because she

was drunk. He had attempted to stop here from injuring herself, but she had slipped.

[10] What, then, are the substantial and compelling circumstances that warrant the imposition of a sentence less than life imprisonment? The appellant argues that his youth (he was 29 when he raped the complainant) and his clean record should count in his favour. So too should the facts that he was employed, and has three dependent children, be regarded as mitigating factors. Moreover, he argues, the complainant was not seriously injured. He also contends that, because after the charge against him was laid, the complainant had considered withdrawing the charge if she were paid compensation, she suffered no serious distress.

View Parallel Citation

[11] The complainant had indeed considered withdrawing the charge and had discussed the question of compensation with the appellant and his family. But that, she said, was because pressure was put on her by the appellant's family. In my view the fact that the complainant had discussed the question of compensation with the appellant is a neutral factor. It does not in itself show that she had not suffered emotional distress.

[12] There are, however, a number of aggravating factors that must be taken into account in determining the appropriate sentence for the appellant. He not only raped her more than once, but five times during the course of the night. He held her captive in a room while he demeaned and hurt her, forcing himself on her repeatedly through the night, even after she had seriously hurt herself when jumping out of the window, and was in pain. And he showed no remorse, claiming throughout the proceedings that the complainant had lied about being raped and about the events that had happened in the bar. At the same time he was prepared to pay her in order to persuade her to withdraw the charge of rape. The complainant had in fact not appeared when the trial was due to commence, because she claimed she was threatened, and had even stayed at the appellant's home town over that period. Eventually she was persuaded to proceed with the charge by a senior prosecutor.

[13] The factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes, that he was employed, and that there may have been a chance of rehabilitation. No evidence was led to that effect, however.

[14] Nonetheless these are substantial and compelling circumstances which the sentencing court did not take into account. A sentence of life imprisonment – the gravest of sentences that can be passed, even for the crime of murder – is in the circumstances unjust and this Court is entitled to interfere and to impose a different sentence, one that it considers appropriate.

[15] In *S v Mahomotsa*,4 this Court pointed out that even in the case of a serious and multiple rape a sentence of life imprisonment need not necessarily be imposed. If there are compelling and substantial circumstances the appropriate sentence is within the court's discretion. Mpati JA said:5

"The present being a case where the complainants were each raped more than once, the prescribed period of imprisonment for life is the sentence which should *ordinarily* be imposed. It should not be departed from lightly and for flimsy reasons which cannot withstand scrutiny (*S v Malgas*. . .; *S v Dodo*. . .) However, in considering the question, a Court is not prohibited by the Act from weighing all the usual considerations traditionally relevant to sentence.

View Parallel Citation

. . .

The rapes that we are concerned with here, though very serious, cannot be classified as falling within the worst category of rape. Although what appeared to be a firearm was used to threaten the complainant in the first count and a knife in the second, no serious violence was perpetrated against them. Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were inflicted on them. According to the probation officer – she interviewed both complainants – they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. These factors need to be taken into account in the process of considering whether substantial and compelling circumstances are present justifying a departure from the prescribed sentence.

It perhaps requires to be stressed that what emerges clearly from the decisions in *Malgas* and *Dodo* is that it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Act, a uniform sentence of either life imprisonment or indeed any other uniform sentence must or should be imposed. If substantial and compelling circumstances are found to exist, life imprisonment is not mandatory nor is any other mandatory sentence applicable. What sentence should be imposed in such circumstances is within the sentencing discretion of the trial Court, subject of course to the obligation cast upon it by the Act to take due cognisance of the Legislature's desire for firmer punishment than that which may have been thought to be appropriate in the past. *Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in S v Abrahams 2002 (1) SACR 116 (SCA), 'some rapes are worse than others and the life sentence*

ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust' (para [29]) (my emphasis).

Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty."

[16] In *Mahomotsa*, where the State had appealed against the sentences imposed in respect of the multiple rapes of two complainants (and where the respondent had raped the second complainant while awaiting trial on the first charge) this Court imposed a sentence of eight years' imprisonment

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 969/2013
Reportable

In the matter between:

MINISTER FOR SAFETY AND SECURITY **Appellant**
(Now MINISTER OF POLICE)

and

JACO SCOTT **First Respondent**
SCOTTCO (PTY) LTD **Second Respondent**

Neutral citation: *Minister for Safety and Security v Scott* (969/2013) [2014] ZASCA 84 (30 May 2014)

Coram: Navsa, Shongwe, Theron and Willis JJA and Legodi AJA

Heard: 02 May 2014

Delivered 30 May 2014

Summary: Delict – pure economic loss – contract between second respondent and American entity cancelled due to first respondent's arrest and detention – loss of contractual income and profits suffered by a stranger to a contract – public policy considerations dictating that delictual liability not be imposed – danger of indeterminate liability - quantum – first respondent wrongfully arrested and detained for about nine hours – award of R75 000 altered to R30 000.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Vorster AJ sitting as court of first instance):

1 The late filing of the appellant's supplementary record and heads of argument is condoned.
2 The appeal is reinstated.
3 The respondents are directed to pay the costs of opposition in the reinstatement application.
4 The appeal is upheld with costs including the costs of two counsel.
5 The order of the high court is set aside and replaced with the following:
'(i) The defendant is directed to pay the first plaintiff the amount of R30 000 being damages for unlawful arrest and detention, which amount shall bear interest at the rate of 15,5 per cent per annum from 8 February 2013 until the date of payment and in relation thereto, the defendant is directed to pay the first plaintiff's costs.
(ii) The second plaintiff's claim for special damages is dismissed and in relation thereto the second plaintiff is to pay the defendant's costs.'

JUDGMENT

Theron JA (Navsa, Shongwe and Willis JJA and Legodi AJA concurring):

[1] During 2005 Mr Jaco Scott (Scott), the first respondent, and Scottco (Pty) Ltd, trading as Scottco African Safaris (Scottco), the second respondent, instituted action against the appellant, the Minister of Safety and Security (the

Minister), in the North Gauteng High Court for payment of damages arising from the alleged unlawful arrest and detention of Scott. This included a claim by Scottco for loss of contractual income and profits. Prior to the commencement of the trial, the high court (Du Plessis J), issued an order in terms of Uniform Rule 33(4) and by agreement between the parties, that the issues of liability and quantum be separated. In respect of the merits, the high court found that the arrest and detention was unlawful and accordingly held the Minister liable for damages flowing from such arrest and detention.

[2] Subsequent to the determination of the merits, Vorster AJ was called upon to determine the quantum of the respondents' claim. Vorster AJ awarded Scott damages in the amount of R75 000 for general damages in respect of the unlawful arrest and detention and R577 610 being wasted advertisement costs, the details of which will become apparent in due course. The high court awarded damages to Scottco in the amount of R49 268 289 in respect of loss of income, which is probably more accurately described as the loss of contractual income and profits referred to in paragraph 1 above. The Minister, with the leave of this court, now appeals against the award of loss of contractual income and profits awarded to Scottco and the amount of R75 000 awarded to Scott.

[3] A proper appreciation of the issues in this matter requires an examination of the facts that gave rise to the respondents' claim. Scott is a professional hunter and a registered undertaker of big game hunting enterprises in South Africa. He is also the chief executive officer of Scottco, which is the owner of Mopane Ranch, constituted by five contiguous farms, situated about forty kilometres outside Musina, Limpopo Province. Scottco conducts hunting safaris for paying guests on Mopane Ranch.

[4] The respondents have, since 1995, been targeting the overseas, and in particular the American, market, in order to attract big game hunters to Mopane Ranch for hunting safaris. To this end, Scott attended hunting exhibitions in America. In 2001, during one such exhibition, he met Mr Michael Francis Cassidy (Cassidy), a resident of Orlando, Florida, in the United States of America and the associate publisher of Field & Stream magazine, which is dedicated to hunting and fishing and has a readership of approximately 14 million people. The February 2004 issue of the magazine carried an advertisement promoting the hunting facilities of Scottco. This was to have been one of three advertisements to appear in the magazine. The cost of the three adverts was $89 000 which, in terms of the applicable rates of exchange at the time, amounted to R577 610.

[5] At the time Cassidy had been looking for a partner in South Africa to host hunting trips for American game hunters. Cassidy visited the ranch in order to ascertain its viability for his purposes. He formed a favourable opinion and subsequently, on behalf of Field & Stream magazine, entered into an agreement with Scottco, represented by Scott, in terms of which:

'... *Field & Stream* will bring on an annual basis for a period of five (5) years beginning January 2004 not less than 50 of our top clients and/or staff to Mopane Ranch for plains game safaris, not to exceed 10 days in duration.

The agreed upon cost per client/staff will not exceed $10 000.00 (USD) and this sum shall include room and board, bar privileges in the main camp, and all plains game trophy fees. This sum does not include airfare, trophy fees (excluding plains game), and any taxidermist fees. Those fees not covered in this agreement shall be covered either by the client/staff member or *Field & Stream* and the financial responsibility will be determined and agreed upon by all parties prior to departing Mopane Ranch at the end of each Safari.

This above listed agreements can be terminated at any time by either party for good cause or by mutual agreement.'

[6] Pursuant to that agreement the first hunting trip was to take place in June 2004. The American hunters were expected to arrive at Mopane Ranch during the evening of 10 June 2004. Scott had made arrangements for the hunters to be transported by vehicle from OR Tambo Airport in Johannesburg to Mopane Ranch. He had also arranged with the driver to keep in telephonic contact so that he (Scott) could meet the hunters at the Ranch upon their arrival.

[7] What is set out in this paragraph is Scott's version of the events on the evening in question. Scott was with Mr Richard Kok and Mr Deon Scheepers, also professional hunters, on the day in question. After they had completed preparations at the Ranch in anticipation of the arrival of the American hunters, they went to the Spur restaurant in Musina for dinner. They arrived there at approximately 21h00 hours. At about 23h00, the driver of the vehicle transporting the American visitors telephoned Scott and advised him that he was at Makhado. Scott and his companions then left the restaurant, intending to proceed to the farm. While stationary in their motor vehicle at a stop street, they noticed a group of people standing at the nearby Horseshoe Pub and Grill who they had earlier observed at the Spur. Scott testified that he heard the group swearing and shouting at them. He gained the impression that the group was confusing him with someone else and he decided to approach them. Scott drove his motor vehicle into the parking area of the Horseshoe Pub. Scheepers alighted and soon thereafter members of the group started assaulting Scheepers. While Scott was alighting from the vehicle someone hit him on the head with an object and he fell to the ground. Shortly thereafter, two police officers, Sergeant Abel Ramaphakela (Ramaphakela) and Constable Azwinidine Ndonyane (Ndonyane), arrived on the scene and arrested him (Scott). He was transported to the police station where he was advised he was being arrested for being in possession of a firearm while under the influence of alcohol. He spent the night in a police cell

and was released the following morning when the charges against him were withdrawn.

[8] The other version of what had occurred at the Horseshoe Pub was presented by Mr Jacques Verster, who testified on behalf of the Minister at the trial on the merits. Verster said that he and his father had gone to the pub that evening to play billiards. Just as the bar was closing, Scott, Scheepers and Kok, accompanied by two ladies, entered the pub and demanded alcohol. Scheepers asked Verster where they could purchase more alcohol. Scheepers became annoyed by the response he received from Verster and uttered words to the effect that the latter needed to be taught a lesson. As Verster was leaving the pub, he was attacked by Scott and his friends. Verster assaulted and overpowered both Scheepers and Scott. After Kok fired shots, Verster approached and disarmed him, and overpowered him as well. For reasons that will follow, Verster's version of events is to be preferred.

[9] It was common cause that Ramaphakela and Ndonyane arrived on the scene shortly after the shots were fired. They were confronted with what appeared to be a drunken brawl. Verster presented his version of events from which it was apparent that Scott and his companions were the aggressors. The police officers found Scott lying on the ground with his weapon visible in its holster. According to the police officers, Scott was under the influence of alcohol, unsteady on his feet and not in a position to speak. Ramaphakela testified that he had removed the firearm from Scott's possession, while Scott's evidence was that he (Scott) had handed over the firearm upon being instructed to do so by Ramaphakela.

[10] I turn to deal with the events that occurred simultaneously with or subsequent to the incident at the Pub. The American group had arrived at

Mopane Ranch at about midnight. The gate was locked and no one was there to meet them. Cassidy made numerous attempts to telephonically contact Scott without success but eventually managed to gain access to the Ranch. Scott only arrived at the Ranch during the course of the afternoon of the following day. By that time it was no longer possible to undertake a planned elephant hunting trip, as there was 'a small window' within which to conduct the hunt. Scott testified that the elephant hunt concession was only valid for 11 June 2004 and the group ought to have been in the hunting area in Zimbabwe within six hours of their arrival at the farm. Scott, in his evidence, contradicted himself as to whether the elephant hunt did occur. According to Scott and Cassidy, the entire hunting trip was a disaster for the American group.

[11] On 18 June 2004, Cassidy cancelled the contract with Scottco. The letter of cancellation reads:

'The purpose of this letter is to inform you that effective immediately we are rescinding our agreement of November 3, 2003 and as such we will not be publishing any further ads for Scottco African Safaris which includes the issues of July 2004 and October 2004.

Furthermore, effective immediately, we are also rescinding our agreement of bringing not less than 50 of our clients/staff to Mopane Ranch in South Africa for plains game safaris for a five year period which began in January 2004.

In light of the situation we do not feel that you are entitled to a refund of any monies for the ads that did not run as the costs incurred by *Field & Stream* due to the above mentioned incident are quite substantial and we consider those costs to be offset by that balance. However, if you disagree with this decision I encourage you to contact our legal department to discuss this matter in detail.'

[12] Cassidy's evidence was that the decision to terminate the relationship with the respondents was based solely on the incident that occurred in 2004 when Scott was arrested. He explained that his company would not let him do business with a 'suspected criminal'. That, in brief, is the background against which this matter is to be determined.

[13] At the commencement of the hearing before us we were faced with an application by the Minister which the parties were agreed can properly be categorised as an application for reinstatement of the appeal and condonation for the late filling of the appeal record and the Minister's heads of argument. The appeal had lapsed for failure on the part of the Minister to prosecute it by not timeously filing his heads of argument. The Minister's heads of argument should have been lodged with the Registrar of this court on 23 September 2013. SCA Rule 10(2A)(*a*) provides that if an 'appellant fails to lodge heads of argument within the prescribed period or within the extended period, the appeal shall lapse'. At the hearing of the appeal, the respondents persisted in their opposition to the application.

[14] The Minister's attorney, in his affidavit in support of the application, set out the circumstances that led to the lapsing of the appeal. He stated that he had timeously lodged the 'quantum record' on 12 August 2013. The record had to be lodged on or before 5 October 2013. Subsequent thereto, the Minister's counsel was furnished with a copy of the quantum record. The affidavit proceeds as follows:

'Counsel considered the record and thereafter, advised me that for the central issue on appeal, the merits record was necessary and crucial for the prosecution of this appeal, and that I should instruct the Transcribers to prepare a supplementary Record, consisting of the record on the merits. Counsel further advised that I should advise the respondents' attorneys of record that we are of the view that the merits record will be relevant for the SCA appeal. As appears from the application for leave to appeal to this court, the core component of the Appellant's argument is that the liability of the Minister to the Second Respondent ("Scottco") should not have been the subject of a hearing of quantum at all because the issue of liability had been disposed of in the Minister's favour in the hearing on the merits. The validity of this argument cannot be assessed without the merits record.'

[15] The respondents refused to accede to the request to file the entire record in relation to the merits on the basis that it was not relevant to the issues on appeal which they contended related only to quantum. There were also numerous written exchanges between the Minister's attorney and the transcribers regarding the preparation of the record. It was initially envisaged that the record would be prepared by 4 October 2013. This did not occur. The merits record only became available on 1 November 2013 and the heads of argument were filed on 15 November 2013, about seven weeks out of time.

[16] The principles relating to condonation are well established. The factors that this court will have regard to when considering such an application include the adequacy of the explanation, the extent and cause of the delay, any prejudice to the parties, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the avoidance of unnecessary delay in the administration of justice and the applicant's prospects of success on the merits.[1] Condonation is an indulgence, not to be had merely for the asking. A litigant who does not comply with the rules is required to show 'good cause' why the rules should be relaxed.[2]

[17] The initial failure on the part of the Minister's attorneys to appreciate that the record in relation to the merits was necessary in the determination of this appeal, resulted in that portion of the record not being prepared timeously and this in turn had as its consequence the late filing of the heads of argument prepared on behalf of the Minister. It was alleged that the heads of argument could not be prepared without regard to the record in relation to the merits. It is clear that as soon as it was discovered that the merits record was necessary for

---

[1] *United Plant Hire (Pty) Ltd v Hills & others* 1976 (1) SA 717 (A) at 720E-H. *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited* [2013] 2 All SA 251 (SCA) paras 11-13.
[2] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6. See also *United Plant Hire (Pty) Ltd v Hills & others supra.*

the appeal steps were taken by the Minister's legal representatives to obtain the record. In the circumstances, the complete record and the heads of argument were filed as expeditiously as possible. At worst for the Minister, there was a seven week delay in complying with the rules of this court. There is no doubt that this matter is of considerable importance to the Minister as it raises an important legal issue and involves a substantial sum of money.

[18] The resistance of the respondents to the record in relation to the merits being filed was unwarranted. Where issues of liability and quantum have been separated, such record is often useful in respect of the determination of quantum. In this matter, that record was certainly necessary for a proper appreciation of all the circumstances that led to the assault and arrest of Scott. As will become apparent, the reasoning of Du Plessis J and especially his credibility findings on the evidence, are relevant to enable a proper appreciation of the circumstances against which the respondents' claims are being brought.

[19] The prospects of success of the appeal can readily be said to be reasonable.[3] For these reasons this court has decided to grant the application for reinstatement of the appeal and condonation for the late filing of the appeal record and the heads of argument, together with an appropriate costs order against the respondents.

[20] At the hearing of this appeal there was considerable debate as to whether the liability of the Minister to Scottco for loss suffered by the latter was properly an issue before Vorster AJ. Put simply, the question was whether Du Plessis J had in fact and in law determined that the Minister was liable for Scottco's loss of contractual income and profits. The Minister contended that that issue had been decided in his favour by Du Plessis J. The submission on behalf of the

[3] *Express Model Trading 289 CC v Dolphin Ridge Body Corporate* [2014] ZASCA 17 (26 March 2014) para 11.

Minister was that Du Plessis J had decided that the Minister was only liable to Scott personally and not for any loss suffered by Scottco.

[21] At the conclusion of the trial on the merits, Du Plessis J issued an order in the following terms:

'1 Dit word verklaar dat die eerste eiser onregmatig gearresteer en aangehou is;

2 Die eiser se eis gegrond op die beweerde aanranding van die eerste eiser word van die hand gewys;

3 Die veweerder word gelas om die koste van die verhoor te betaal.'

[22] On appeal to the full court of the North Gauteng High Court (Makgoba J with Rabie and Mngqibisa-Thusi JJ concurring), the order of Du Plessis J was upheld. The primary basis upon which the order was upheld however, was that the appeal had been perempted. For the sake of completeness, however, the full court dealt with the merits of the appeal. The sole question considered by the full court was the lawfulness or otherwise of Scott's arrest and detention.

[23] It is clear from the record that the question of the Minister's liability to Scottco for loss of contractual income and profits, with all its legal nuances, was not considered by the high court (Du Plessis J and Vorster AJ) or the full court. No thought was given and no reasons appear in relation to whether a claim for pure economic loss could in the circumstances of the case be sustained. All that Du Plessis J determined was that the arrest and detention was unlawful and that too, as will become evident later, on the narrowest technical basis. The parties were agreed that this court was in as good a position as the high court to determine the issue of the Minister's liability to Scottco. In light of the attitude of the parties and in the interests of justice, this court proceeds to determine that issue. I now turn to deal with it.

[24] Scottco's claim is formulated as follows:

'14.1 The second plaintiff operates Scottco African Safaris which derives its income from the American hunting market.

14.2 At the time of the first plaintiff's aforesaid arrest, detention and incarceration, the second plaintiff had hunters from America who were supposed to undertake an elephant hunt in Zimbabwe, which could not take place due to the first plaintiff's aforesaid unlawful arrest, detention and incarceration.

14.3 The first plaintiff's aforesaid unlawful arrest and detention occurred during the visit of the President and Founder of Field and Stream Magazine.

14.4 As a result of the first plaintiff's aforesaid unlawful arrest, detention and incarceration, and the consequent failure of the said elephant hunt in Zimbabwe, the second plaintiff's good name and reputation in the industry has been lost and the President and Founder of the Field and Stream Magazine, who is second plaintiff's main advertiser in America for hunting, no longer wishes to publish and promote second plaintiff's operations, due to the first plaintiff's aforesaid arrest and detention.

14.5 As a result of the first plaintiff's aforesaid arrest, detention and incarceration as well as the second plaintiff's resultant inability to have the American clients timeously at the elephant hunt concession in Zimbabwe, the second plaintiff has received adverse publicity and has and will further in future suffer a loss of income.'

[25] The parties were in agreement that the claim for loss of income and profits was a claim for pure economic loss.[4] Thus, the respondents accepted that such a claim could only be brought by way of an Aquilian action. Counsel for the respondents was constrained to concede that in that respect the particulars of claim were technically lacking. This concession was rightly made.[5] The respondents' particulars of claim purport to lay the basis for Scottco's claim against the Minister by stating that, as a result of the Minister's conduct (in the form of arresting and detaining Scott), Scottco's 'good name and reputation in

[4] Pure economic loss in this context relates to financial loss that does not arise directly from damage to the plaintiff's person or property but as a result of the negligent act itself, such as a loss of profit, being put to extra expenses, or the diminution in the value of property. See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461; [2006] 1 All SA 6 (SCA) para 1. See also J Neethling, JM Potgieter & JC Knobel *Visser Law of Delict* (6 ed, 2010) at 290.

[5] *Media 24 Ltd & others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd & others as* amici curiae*)*, 2011 (5) SA 329 (SCA) para 8.

the industry has been lost' and that it 'has received adverse publicity and has and will further in future suffer a loss of income'. Scottco did not persist with its claim for general damages for its loss of reputation and good name in the hunting industry.

[26] It was contended on behalf of the Minister, relying on *Media 24 Ltd & others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd & others as* amici curiae), that Scottco's pleadings were fatally defective in that it has failed to allege wrongfulness and plead the facts in support of that allegation.[6] The absence of such allegation may render the particulars of claim excipiable on the basis that no cause of action has been disclosed.[7] The Minister did not file an exception. I adopt the reasoning of Brand JA in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* that it would be futile, at this stage, to investigate whether the pleadings are excipiable.[8] Had an exception been filed, the respondents would have been entitled, if so advised, to apply for leave to amend their particulars of claim to make the necessary allegations.[9] The appropriate enquiry would be whether, despite the deficiency in the pleadings, and having regard to the evidence, the Minister ought to be held liable for the loss suffered by Scottco.[10]

[27] Scottco faces a number of insuperable difficulties in respect of the merits of its claim for pure economic loss. I propose to deal with each of these in turn.

[28] Neethling *et al*[11] in *Law of Delict* discuss claims based on an interference with a contractual relationship. They describe what this expression means:

---

[6] *Ibid* para 11.
[7] *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 14.
[8] *Ibid.*
[9] *Cotas v Williams & another* 1947 (2) SA 1154 (T) at 1159-1160.
[10] *Fourway Haulage* para 15.
[11] *Supra* at 306.

'Interference with a contractual relationship is present where a third party's conduct is such that a contracting party does not obtain the performance to which he is entitled *ex contractu,* or where a contracting party's contractual obligations are increased.' After discussing instances where a delictual action was granted to a prejudiced contracting party, the learned authors state the following:

'This exposition is, however, subject to the general rule in South African law that only the *intentional* interference with the contractual relationship of another in principle constitutes an independent delictual cause of action.'[12]

[29] With reference to the decision of this court in *Union Government v Ocean Accident and Guarantee Corporation Ltd*,[13] Neethling *et al* point out that courts have, as a rule, refused to extend delictual liability for negligent interference with a contractual relationship beyond historically justified instances. These instances are noted as follows:

(a) the delictual action of the master for injury to his domestic servant;[14] and

(b) a person who is in possession of property in terms of a contract with the owner may, to the extent that he has a direct interest in the economic value of such a thing, institute the *actio legis Aquiliae* against a third party who damages it.[15]

[30] In *Union Government*,[16] Schreiner JA said the following:

'[T]he law takes a conservative view on the subject of expansion of the Aquilian remedy beyond what the authorities have recognised in the past.'

This statement reflects the continuing concern of courts to guard against the spectre of indeterminate liability.

---

[12] *Neethling et al* 307.

[13] *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A).

[14] One of the historically justified instances recognised in *Union Government* was the rule of Roman Dutch law that an employer could claim damages from a third party who had wrongfully injured his domestic servant. In *Pike v Minister of Defence* 1996 (3) SA 127 (Ck) at 130B–132D it was held that this rule has been abrogated by disuse and was therefore no longer part of our law. Neethling *et al* at 253.

[15] Neethling *et al* at 307.

[16] *Union Government* at 587A.

[31] In the present case, the police had no knowledge of the contract or its terms – an aspect to which I will return in due course. There can thus be no talk of an intentional interference in the contractual relationship. In addition, the kind of liability now sought to be imposed does not fall within historically recognised instances. For these reasons alone Scottco's claim should fail. However, Neethling *et al* at 308-309 suggest that the above stated approach is too restrictive and proposed the following:

'In our opinion, however, any negligent conduct by a third party which causes the infringement of a contractual personal right or the increase of a contractual obligation ought, in principle, to found the Aquilian action. The fear of unlimited liability may be allayed by the correct application of all the elements of a delict.'

[32] I turn now to deal with the relevant constituent elements of a delict. Even assuming that Scottco was able to get past negligence, which is doubtful,[17] it faces problems in relation to wrongfulness and causation, both of which serve as a brake on indeterminate liability. Neethling *et al* rightly state that the courts have held that the wrongfulness of an act causing pure economic loss almost always lies in the breach of a legal duty.[18] The authors note that there is no general duty to prevent pure economic loss. As to whether, in a particular case, there was a legal duty to avoid pure economic loss, the yardstick is the general criterion of reasonableness or *boni mores*.[19] This involves the exercise of a value judgment which embraces relevant facts and considerations of policy. In essence, this amounts to judicial control over the scope of delictual liability.

---

[17] In *Kruger v Coetzee* 1966 (2) SA 428 (A) the test for negligence is set out in clear terms. Liability for *culpa* arises if (a) a *diligens paterfamilias* in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps. One can simply ask how, in the circumstances of the present case, the consequences which forms the basis of Scottco's claim could have been foreseen and guarded against. All the more so when one has regard to the lack of knowledge on the part of the police of the existence of the contract and its financial implications. See also Neethling *et al* at131-132. For a useful discussion on foreseeability in relation to consequence see Neethling *et al* at 141-148.

[18] See at 291 and the authorities there cited.

[19] *Rail Commuters Action Group Group v Transet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

[33] It is necessary to examine the relevant facts. Scott was arrested for being in possession of a firearm while under the influence of alcohol. Section 39(1)(*m*) of the now repealed Arms and Ammunition Act 75 of 1969 (which was still in operation as at 11 June 2004) made it an offence for a person to *handle* a firearm whilst under the influence of alcohol.[20] There was no evidence that Scott had handled the firearm. By having the firearm on his person while under the influence of alcohol, and without more, Scott did not commit an offence. It was this 'technicality' that formed the basis of the finding that Scott's arrest and detention was wrongful.

[34] Du Plessis J rejected Scott's version of the circumstances leading to the altercation with Verster and found that his version was improbable. The high court found that the probabilities favoured Verster's account of the incident. Du Plessis J reasoned as follows:

'Die meer waarskynlike oorsaak van die bakleiery is die Versters se weergawe dat die drie mans in die Horseshoe moeilikheid begin maak het. Scheepers se eie verklaring aan die polisie pas in elk geval beter in by die Versters se weergawe as by sy en Scott s`n. Daarby moet gevoeg word dat Scott ontken het dat daar enige dames in hulle geselskap was. Nogtans het mnr Geach, vir die eisers, aan die verweerder se getuies `n verklaring van ene Monica Woest gestel waaruit dit onomwonde blyk dat sy in die geselskap van Scott en sy maats was – soos wat Jaques Verster getuig het. Na my oordeel verskaf Jaques Vester en sy vader se weergawe `n sinvolle en waarskynlike oorsaak vir wat as `n tipiese kroeggeveg beskryf kan word.'

In my view, the high court's reasoning is unassailable.

[35] Du Plessis J also made certain credibility findings against Scott and his companions, with which I agree. In particular, the high court found that Scott

[20] Section 120(3)(*c*) of the Firearms Control Act 60 of 2000 makes it an offence to 'have control of a loaded firearm, . . . in circumstances where it creates a risk to the safety or property of any person and not to take reasonable precautions to avoid the danger'.

and Scheepers had presented a contrived version (bekookte weergawe) in order to advance the respondents' case. The judge put the matter thus:

'Daar is nog voorbeelde, maar na my oordeel is dit duidelik dat Scott en Scheepers met `n bekookte weergawe die eisers se saak probeer bevorder het en die gebeure probeer aandik het. Ek vind die weergawe namens die verweerder deurgaans meer waarskynlik. Spesifiek wat die twee polisiemanne betref, was dit my indruk dat hulle die gebeure so akkuraat moontlik probeer weergee het.'

[36] The evidence has demonstrated that the police officers resorted to the technically wrong basis for Scott's arrest. The police officers could lawfully have arrested Scott for assault with intent to do grievous bodily harm based on the report they had received from Verster. In my judgment, weighing up the nature of the error made by the police officers against the conduct of Scott and his companions, and particularly that the latter were the aggressors in respect of the assault incident, the error of the police officers pales into insignificance, and it would not be fair to impose liability upon the Minister in respect of Scottco.[21] Such imposition of liability on the Minister is likely to create an unascertainable class of potential claimants – one can imagine the absurdities that would arise if all persons or entities contractually linked to a person wrongfully arrested could sue the Minister for contractual loss suffered by them. Policy considerations militate strongly against the imposition of delictual liability on the Minister to Scottco.

[37] Over and above what is stated in the preceding paragraphs, legal causation is another obstacle on the part of Scottco. I am prepared to assume for purposes of this judgment, in favour of the respondents, that factual causation has been established and that it was Scott's arrest and detention that resulted in the failure of the elephant hunt and ultimately led Field & Stream to cancel the contract.

---

[21] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2014] 1 ALL SA 267 (SCA) para 25.

That being so, the enquiry turns to legal causation (remoteness of damage). This is an enquiry into whether the wrongful act is linked sufficiently closely to the loss concerned for legal liability to ensue.[22] Generally, a wrongdoer is not liable for harm which is 'too remote' from the conduct concerned,[23] or harm which was not foreseeable.[24] Thus the purpose of legal causation is to ensure that any liability on the part of the wrongdoer does not extend indeterminately without limitation. In this way, remoteness operates as a further limitation on liability, and thus the enquiry necessarily overlaps with that into wrongfulness.[25] However, this court in *Fourway Haulage* cautioned that wrongfulness and remoteness are not the same and involve two different enquiries.[26]

[38] This court has expressed a preference for the 'flexible approach' in determining legal causation. The traditional tests for legal causation ('reasonable foreseeability', 'direct consequences' and 'adequate causation') may nevertheless still be relevant as subsidiary determinants.[27] Brand JA in *Fourway Haulage* cautioned:

'[T]he existing criteria of foreseeability, directness, et cetera, should not be applied dogmatically, but in a flexible manner so as to avoid a result which is so unfair or unjust that it is regarded as untenable. If the foreseeability test, for example, leads to a result which will be acceptable to most right-minded people, that is the end of the matter.'[28]

[39] In my view, the damages claimed by Scottco are too remote to be recoverable. It is not possible, on the evidence, to find that the police officers knew of the contract between Scottco and Field & Stream Magazine. There was no evidence that the police officers knew, let alone foresaw, that Scott's

---

[22] *mCubed International (Pty) Ltd & another v Singer NNO & others* 2009 (4) SA 471; [2009] 2 All SA 536 (SCA) para 22.
[23] *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A); *Fourway Haulage* para 30; Neethling *et al* at 188.
[24] *Country Cloud* para 27; *Fourway Haulage* paras 28, 34 and 35.
[25] *Fourway Haulage supra* paras 30-32.
[26] *Ibid* para 32.
[27] See generally Neethling *et al* at 187-206.
[28] *Fourway Haulage* para 34.

detention would have any impact on the planned elephant hunt, lead to the cancellation of the contract between the respondents and Field & Stream Magazine and cause financial loss to Scottco. The cross-examination of the police officers did not traverse the existence of Scottco or the arresting officers' knowledge, if any, of Scott's relationship to Scottco. During the cross-examination of Ramapakhela in the quantum trial, counsel for the respondents expressly put it to him that Scott had informed Ramaphakela 'that you [Ramapakhela] are making a big mistake and he [Scott] has visitors from America coming'. It is noteworthy that Ndonyane was not cross-examined on this aspect at all.

Scott's evidence in this regard was vague and surprisingly lacking in detail:

'Het u enigsins die Suid Afrikaanse Polisie Diens daarop attent gemaak dat u `n afspraak gehad het die aand? --- *Ja, as ek reg kan onthou het ek.*

Wat was hulle houding daaromtrent? --- Nee, die offisier wat my arresteer het was adamant dat hy my toe sluit.' (Emphasis added.)

[40] The imposition of liability on the Minister will have 'unmanageable' consequences as it will open the door for indeterminate or limitless liability. It would indeed be 'untenable to right-minded people' to hold the Minister liable to Scottco in the circumstances of this matter. Put simply, to have damages imposed on the police for loss of contractual income and profits in relation to a contract they were unaware of and in circumstances where the arrest of Scott was effected on the basis of having been the aggressor in a drunken brawl, and where the justification for the arrest can rightly be said to have been merely technically erroneous, is to cast the net too wide and to land the police with liability for loss that is too remote. It follows, for all these reasons that Scottco's claim against the Minister must fail.

[41] I turn now to consider the propriety of the damages awarded to Scott by the high court (Vorster AJ) in respect of the advertisements placed with Field and Stream magazine. This was a claim pleaded by Scottco as 'fruitless and wasted expenditure in respect of advertising costs in Field and Stream magazine' in the amount of R612 765. There was no basis to compensate Scott for the money spent on the advertisement as this claim did not form part of his pleaded cause of action. At the hearing of this appeal counsel for the respondents conceded, and correctly so, that this was not a claim to which Scott was entitled.

[42] It is trite that the assessment of general damages is a matter within the discretion of the trial court and depends upon the unique circumstances of each particular case.[29] An appeal court is generally slow to interfere with the award of the trial court but will do so where there has been an irregularity or misdirection.[30] Where the appeal court is of the opinion that no sound basis exists for the award made by the trial court or where there is a striking disparity between the award made by the trial court and the award which the appeal court considers ought to have been made.[31]

[43] The court awarded Scott damages in the amount R75 000. The high court (Vorster AJ) identified the following factors as being relevant in its determination of the quantum: (1) Scott was unlawfully arrested and detained. (2) He suffered trauma and severe anxiety as result of the arrest and detention because he realised that the agreement with Field & Stream was in jeopardy and might be cancelled. (3) He was not given any medication although he reported

---

[29] *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) para 17; *Rudolph & others v Minister of Safety and Security & another* 2009 (5) SA 94 (SCA) paras 26-27.

[30] The misdirection might in some cases be apparent from the reasoning of the court, but in other cases it might be inferred from a grossly excessive award. *Minister of Safety and Security v Kruger* 2011 (1) SACR 529 (SCA) para 27.

[31] *Sekgota v South African Railways & Harbours; Ramotseo v South African Railways & Harbours* 1974 (3) SA 309 (A) at 314D-E; *Road Accident Fund v Delport NO* 2006 (3) SA 172 (SCA) para 22.

his injury and asked for medical assistance. (4) He spent the night in cell without sleeping as he feared interference from other inmates.

[44] There are a number of extremely relevant factors to which the high court did not make reference. I do not lose sight of the fact that because a fact was not mentioned in the judgment it does not mean that it was not considered.[32] What is striking about the reasoning of Vorster AJ is the complete absence of reference to the adverse credibility findings made against Scott by Du Plessis J (referred to in paragraph 35 above) and the finding that Scott and his companions were the aggressors in respect of the assault incident. It is also surprising that the high court made no mention of the relatively short duration of the detention, that the arrest was rendered wrongful on the basis of a 'technicality' and that the circumstances surrounding the arrest favoured the arresting officers. The further difficulty with which this court is confronted is that there was a dispute between the parties regarding the conditions of the cell in which Scott was detained and whether Scott's injuries were sufficiently serious to require immediate medical attention. It is not apparent from the judgment, which version the high court preferred and took into account in the determination of the quantum.

[45] A comparative study with other cases reveals that the award made by the high court is grossly excessive. In *Minister of Safety and Security v Seymour supra*, the respondent, a 63 year old man, had been unlawfully arrested and imprisoned by the state for five days. The high court had awarded him general damages in the amount of R500 000. On appeal, this court held that an appropriate award was the sum of R90 000. This court had regard to the fact that: throughout his detention he had free access to his family and medical adviser; he suffered no degradation beyond that which is inherent in being

[32] *Rex v Dhlumayo & another* 1948 (2) SA 677 (A) at 702.

arrested and detained; after the first period of about 24 hours the remainder of the detention was in a hospital bed; and although the experience was traumatic and caused him great distress, there were no consequences that were of sufficient concern to warrant further medical attention after his release.

[46] In *Rudolph v Minister of Safety and Security supra*, this court granted the first and second appellants R100 000 each for an unlawful arrest without a warrant and the consequent unlawful detention which lasted three nights. The court noted the conditions of their detention:

'The appellants were arrested and detained under extremely unhygienic conditions in the Pretoria Moot police station. The cell in which they were held was not cleaned for the duration of their detention. The blankets they were given were dirty and insect-ridden and their cell was infested with cockroaches. The shower was broken and they were unable to wash. They had no access to drinking water. Throughout their detention the first appellant, who suffers from diabetes, was without his medication. They were not allowed to receive any visitors, not even family members.'[33]

The first appellant was later, again unlawfully, re-arrested on a charge of sedition, again without a warrant, and detained for two nights ('from about 18h00 on Saturday 26 July 2003 to about 08h00 on Monday 28 July 2003'). It was noted that during his detention:

'He was made to sleep on a small, coarse mattress in a freezing cell and was not even provided with a blanket on the first night. It was only on the Sunday that his wife was allowed to visit him and bring him his medication and a sleeping bag.'[34]

The court awarded him R50 000 in damages.

[47] In *Minister of Safety and Security v Tyulu*,[35] the respondent, a magistrate, was wrongfully arrested for being drunk in public. While the detention following on from that arrest was for a relatively short period (less than a few

---

[33] *Rudolph supra* para 27.
[34] *Ibid* para 28.
[35] *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA).

hours), the court awarded the respondent R15 000 in damages. In doing so, the following considerations were deemed relevant: the age of the respondent, the circumstances of his arrest, its nature and short duration, his social and professional standing, and the fact that he was arrested for an improper motive.

[48] In *Mvu v Minister of Safety and Security & another*,[36] Willis J awarded the plaintiff R30 000 for a wrongful detention following on from a lawful arrest for malicious damage to property. The plaintiff had been incarcerated in the police cells with 'suspected rapists and robbers' from 10pm until the next morning.

[49] The plaintiff in *Seria v Minister of Safety and Security & others*[37] was an architect, in his fifties, who had been wrongfully arrested in the presence of guests he was entertaining at his home. He spent three and a half hours in full view of the public at the local police station and was detained overnight in the police cells, most of the time with a drug addict. The court found that a proper award was R50 000.

[50] In my view, bearing all the circumstances in mind and taking into consideration the decreasing value of money over the years since the decisions referred to and which were used as comparatives, an appropriate award is the sum of R30 000. This is so startlingly disparate from the award made by the high court that it justifies interference by this court.

Order

[51] 1 The late filing of the appellant's supplementary record and heads of argument is condoned.

---

[36] *Mvu v Minister of Safety and Security & another* 2009 (6) SA 82 (GSJ).
[37] *Seria v Minister of Safety and Security & others* 2005 (5) SA 130 (C).

2 The appeal is reinstated.

3 The respondents are directed to pay the costs of opposition in the reinstatement application.

4 The appeal is upheld with costs including the costs of two counsel.

5 The order of the high court is set aside and replaced with the following:

'(i) The defendant is directed to pay the first plaintiff the amount of R30 000 being damages for unlawful arrest and detention, which amount shall bear interest at the rate of 15,5 per cent per annum from 8 February 2013 until the date of payment and in relation thereto, the defendant is directed to pay the first plaintiff's costs.

(ii) The second plaintiff's claim for special damages is dismissed and in relation thereto the second plaintiff is to pay the defendant's costs.'

L V THERON

JUDGE OF APPEAL

APPEARANCES

For Appellant:	G J Marcus SC with K M Mokotedi
	Instructed by:
	State Attorney, Pretoria
	State Attorney, Bloemfontein
For Respondents:	G B Botha SC with De Weet Keet
	Instructed by:
	G P Venter Attorneys, Pretoria
	Honey Attorneys, Bloemfontein

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 366/2013
Reportable

In the matter between:

ROYAL SECHABA HOLDINGS (PTY) LTD **Appellant**

and

GRANT WILLIAM COOTE **First Respondent**
DANIEL ELARDUS ENGELBRECHT **Second Respondent**

Neutral citation: *Royal Sechaba v Coote* (366/2013) [2014] ZASCA 85 (30 May 2014)

Coram: Lewis, Bosielo, Theron and Willis JJA and Legodi AJA

Heard: 15 May 2014

Delivered 30 May 2014

Summary: *Res Judicata* – Issue estoppel – same parties requirement – privity of interest not established – rule not immutable but no reasons advanced for relaxation or extension of the rule.

Same relief – some issues determined in earlier arbitration while other issues not adjudicated upon – respondents not entitled to rely on defence of issue estoppel.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Vorster AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and in its stead is substituted the following order:

'The special plea is dismissed with costs'.

3 The matter is referred back to the high court for adjudication on the particulars of claim and the substantive defence.

JUDGMENT

Theron JA (Lewis, Bosielo, Theron and Willis JJA and Legodi AJA **concurring):**

[1] The appellant, Royal Sechaba Holdings (Pty) Ltd (Royal Sechaba), instituted action against the respondents, Mr Grant William Coote (Coote), and Mr Daniel Elardus Engelbrecht (Engelbrecht), the first and second respondents, respectively, in the North Gauteng High Court for payment of damages of R13 122 516 alternatively R4 140 000, for an alleged breach, by them, of their fiduciary duties. The respondents raised a special plea of issue estoppel. The high court (Vorster AJ) upheld the special plea and dismissed Royal Sechaba's claim with costs. This appeal is against that judgment, with the leave of the high court.

[2] In order to determine whether the special plea was properly upheld, it is necessary to examine the factual background giving rise to this litigation. Coote and Engelbrecht were employees and directors of Royal Sechaba. From February 2007 to September 2009, Coote was the company's chief executive officer and Engelbrecht its chief operating officer. On 1 August 2006, Royal Sechaba and Mr Louis Martin Jones (Jones), entered into a written contract of employment in terms of which Jones was appointed by Royal Sechaba as Director of Business Development and which was effective from 1 March 2007. The parties concluded a further agreement which was styled 'Addendum to Employment Agreement' (the Addendum) and effective from 1 March 2007, in terms of which Jones would be paid commission by Royal Sechaba on every contract he procured for the benefit of Royal Sechaba. In addition, Jones would be paid an incentive commission for managing and overseeing the performance of the contract concerned. In concluding this agreement, Royal Sechaba was represented by Coote, and Jones acted personally.

[3] To the extent here relevant, the Addendum provides that Jones would receive commission and incentive payments as follows:

'1. … All new customers that have no existing contract with Royal Sechaba, a 9% commission based on the projected nett profit as per feasibility document. The nett profit includes the estimated value of any assets that Royal Sechaba would retain at the end of the contract. The estimated value of these assets would be the purchase price less depreciation allowed by the Receiver of Revenue:

Sales Commission Structure:

- 50% upon starting of the business
- A further 25% halfway through the contract
- A further 25% upon completion of the contract

2. All new business from existing Royal Sechaba contracts brought in by Mr Louis Jones will attract the same commission structure as all other business.

3. Managing and overseeing the existing Support Services/remote site business and all new business as stipulated in (1) above Louis Jones will be remunerated at 9% operating incentive of actual nett profit achieved. This is calculated and paid quarterly in arrears.
4. All expenses, including commission and admin fee payable to Royal Sechaba will be deducted from the profits. This money will only be payable for the duration of involvement by Louis Jones'.

[4] Jones was extremely successful in procuring new business for Royal Sechaba. It was common cause that Jones was paid an amount of almost R24 million (half of this amount was shared with his management team) over a period of two years from May 2007 to May 2009. All these payments were authorised by Coote and Engelbrecht, among others. During July 2009 these payments were the subject of an investigation conducted by an auditor, Mr André Dames, at the instance of Royal Sechaba. Dames came to the conclusion that the payments made to Jones were incorrectly calculated on gross profit, rather than net profit, as provided for in the Addendum. He also found that Jones had received payments before he had become entitled thereto in terms of the payment schedule in clause 1 of the Addendum and that Jones had claimed and received commission on 'new business' which had not been procured by him.

[5] On 30 September 2009, Coote and Engebrecht were dismissed by Royal Sechaba, for among other things, authorising payments to Jones to which he was not entitled. During the course of the investigation, Jones as well as Coote and Engelbrecht, disputed that Jones had been overpaid. According to them the phrase 'net profit' as used in the Addendum meant 'net contract contribution' which differs from net profit in the ordinary accounting sense. They also alleged that all the payments received by Jones had been due to him. Even though the payment schedule provided for in clause 1 of the Addendum was not adhered to, the respondents alleged that they entered into an oral agreement with Jones in terms of

which Jones was entitled to receive his full sales commission prematurely (up-front) if cash flow permitted.

[6] The disputes between Royal Sechaba and Jones eventually culminated in the cancellation of both Jones' employment contract and the Addendum. Their disputes were subsequently referred to arbitration. The arbitrator was called upon to determine various disputes between the parties, including the interpretation of the Addendum, whether the Addendum was varied by way of a further oral agreement and whether Jones had been overpaid. The arbitration was protracted, lasting six weeks. Jones called some 19 witnesses, including nine experts. The respondents were key witnesses who testified on behalf of Jones.

[7] The arbitrator found, inter alia, that reference to 'actual net profit' in clause 3 of the Addendum, read with clause 4 thereof, meant net profit in the accounting sense of the phrase, namely, net profit after all expenses had been taken into account. The arbitrator also found that Jones did not procure a particular contract in respect of the Ingula Dam for Royal Sechaba and that he was not entitled to commission in respect thereof.

[8] Jones appealed against the arbitrator's award to an arbitration appeal tribunal (the Tribunal) comprising Kriegler J, Blieden J and Suttner SC. Royal Sechaba also cross-appealed against certain of the arbitrator's findings. The Tribunal upheld the appeal, dismissed Royal Sechaba's cross-appeal and substituted the arbitrator's award with one in terms of which Royal Sechaba was ordered to pay Jones an amount of R 1 673 608, 55 plus interest and the costs of the arbitration.

[9] The Tribunal found, inter alia, that the term 'net profit' in clauses 1 and 3 of the Addendum meant net contract contribution as contended by Jones and the

respondents. The Tribunal also found that the parties had concluded a further oral agreement in terms of which it was agreed that Jones would be paid prematurely and not in tranches as provided in the Addendum, provided Royal Sechaba had sufficient cash resources. Royal Sechaba instituted a review application in terms of s 33(1) of the Arbitration Act 42 of 1965 in the North Gauteng High Court, for the setting aside of the appeal tribunal award. The application was dismissed with costs.

[10] In this appeal, Royal Sechaba contended that the plea of issue estoppel had been wrongly upheld by the high court on two main grounds. First, it argued that the 'same person' requirement had not been met in that the respondents were not parties to the Jones arbitration. In reply, the respondents alleged that they were privies of Jones. Secondly, it contended that the 'same cause' requirement had not been satisfied as the issues which would arise in Royal Sechaba's claim against the respondents were not the same as those determined in the arbitration. I shall deal with each of these grounds in turn.

[11] The requisites of a valid defence of *res judicata* in Roman Dutch law were that the matter adjudicated upon must have been for the same cause, between the same parties and that the same thing must have been demanded.[1] Voet, *Commentarius ad Pandectas* 44.2.3 (as translated in *Bertram v Wood* 1893 (10) SC177 at 18) wrote:

'under no other circumstances is the exception allowed than where the concluded litigation is again commenced between the same parties, in regard to the same thing, and for the same cause of action, so much so, that if one of these requisites is wanting, the exception fails'.[2]

---

[1] Simply stated the requirements are *eadem persona* (same person), *eadem causa pretendi* (same cause) and *eadem res* (same right). *National Sorghum Breweries Ltd (t/a) Vivo African Breweries v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA); *Bafokeng Tribe v Impala Platinum Ltd & others* 1999 (3) SA 517 (BH).

[2] See *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 45E-F.

[12] The expression 'issue estoppel' is a convenient description of instances where a party may succeed despite the fact that the classic requirements for *res judicata* have not been complied with because the same relief is not claimed, or the cause of action differs, in the two cases in question.[3] The common law requirements of same thing and same cause (*eadem res* and *eadem petendi causa*) have been relaxed by our courts in appropriate circumstances. As was pointed out by Lewis JA in *Hyprop Invesments Ltd v NSC Carriers and Forwarding CC & Others*,[4] the relaxation and the application of issue estoppel effectively started in *Boshoff v Union Government*, where it was held that the strict requirements for a plea of *res judicata* (*eadem res* and *eadem petendi causa*) should not be understood literally in all circumstances and applied as inflexible or immutable rules.[5] Despite some debate as to the approach of Greenberg J in *Boshoff,* Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* confirmed the correctness of the approach and added that in particular circumstances these requirements may be adapted and extended in order to avoid the unacceptable alternative that the courts would be obliged:

'om met letterknegtige formalisme vas te klou aan stellings in die ou bronne, wat onversoenbaar sou wees met die lewenskragtige ontwikkeling van die reg om te voorsien in die behoeftes van nuwe feitelike situasies.'[6]

[13] Following the decisions in *Boshoff* and *Kommissaris*, Scott JA in *Smith v Porritt* summarised the development of the law in this regard:

'... the ambit of the *exceptio rei judicata* has over the years been extended by the relaxation in appropriate cases of the common-law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem*

---

[3] *Kommissaris van Binnelandse Inkomste v Absa C Bank Bpk* 1995 (1) SA 653 (A) at 670I-671B; *Smith v Poritt & others* 2008 (6) SA 303 (SCA) para 10.
[4] [2014] 2 All SA 26 (SCA) para 14.
[5] *Kommissaris van Binnelandse Inkomste, supra,* at 669F-H.
[6] *Supra.* To cling to doctrines of old authorities with literal formalism is irreconcilable with the development of the law to provide for requirements of new factual situations. (My translation.)

quaestio) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res judicata* is raised in the absence of a commonality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of 'issue estoppel'. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 670J - 671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res judicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis. (*Kommissaris van Binnelandse Inkomste v Absa Bank* (supra) at 670E - F.) Relevant considerations will include questions of equity and fairness not only to the parties themselves but also to others. As pointed out by De Villiers CJ as long ago as 1893 in *Bertram v Wood* (1893) 10 SC 177 at 180, 'unless carefully circumscribed, [the defence of *res judicata*] is capable of producing great hardship and even positive injustice to individuals.'[7]

[14] It was contended by Royal Sechaba that one of the essential requirements for a successful reliance on either *res judicata* or issue estoppel, that the parties must be the same (*idem actor*), was not proven by the respondents. It is accepted that the *idem actor* requirement does not mean identical parties but that 'same parties' for the purposes of *res judicata* and issue estoppel include their privies. The principle that a party's privies may also rely on an earlier judgment to found a defence of *res judicata* or issue estoppel originated from a statement in Voet's *Commentarius ad Pandectas* 44.2.5 where various illustrations are given of those who are 'deemed' to be the 'same person' or who are identified with one another for the purposes of *res judicata*, such as a deceased and his heir, a principal and his agent, a person under curatorship and his curator, a pupil and his tutor, a creditor and debtor in respect of a pledged article if the debtor gave the article in pledge after losing a suit in which a third party claimed it, a purchaser and seller, if the seller has won or lost the action.[8]

---

[7] *Smith v Poritt & others* 2008 (6) SA 303 (SCA) para 10.
[8] This list is set out in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 654.

[15] In *Ferreira v Minister of Social Welfare*, it was noted, with reference to the illustrations listed by Voet, that the persons who are 'deemed' to be the same as the persons concerned in the previous action all derive their interest in the later action from the parties to the original action.[9] In *Ferreira*, the mother of a child, who alleged that the appellant was the father, had obtained a judgment by default against the appellant for maintenance. She later issued summons for maintenance for a later period. The appellant filed a plea contesting the allegation of paternity. The mother, relying on the effect of the earlier judgment, objected to the appellant leading evidence in support of his plea and this objection was upheld on an application of the principle *res judicata*. On appeal, the court held that the order in the original action was designed to determine the amount of liability between the spouses *inter se*, and that the mother was there exerting a right of her own and not of the child. The court concluded that the right to a contribution order arose from the provisions of the Children's Act 31 of 1937 and that the right to claim such contribution was not 'derived' from the mother in the sense necessary to establish the applicability of the principle of *res judicata*.[10]

[16] The basis of the respondents' special plea in this case is that:

'The defendants [respondents] in this matter are parties associated with the parties in the arbitration, alternatively their privies, rendering the arbitration proceedings a final adjudication between the plaintiff and the defendants by arbitration of competent jurisdiction.'

In support of their contention that they were privies of the parties in the arbitration, the respondents rely on the following: (1) at all material times Coote was the chief executive officer and Englebrecht, the chief financial officer, of Royal Sechaba; (2) at all material times both respondents were directors of Royal Sechaba; (3) both respondents were actively involved in the negotiations that led to the conclusion of the Addendum; (4) they represented Royal Sechaba in these

---

[9] *Ferreira v Minister of Social Welfare* 1958 (1) SA 93 (E) at 95H-96A.

[10] Section 60 of the Act provided that a contribution order may be made against a respondent, who is defined as a person legally liable to maintain or to contribute towards the maintenance of a child.

negotiations with Jones; (5) Coote executed the Addendum; (6) from May 2007 to May 2009, both respondents were actively involved in the execution of the Addendum in the form of the verification of Jones' incentives and commissions; (7) both respondents were called as witnesses to the interviews relating to Jones' commission while they were still employees of Royal Sechaba, and (8) both respondents played an active role in the arbitration.

[17] This court in *Shokkos v Lampert NO*[11] held that to establish the relationship of 'party and privy' the privy must 'derive title' from the party.[12] Similarly in *Rail Commuters Group & others v Transnet Limited & others*,[13] it was held that for a plea of *res judicata* to succeed, the parties concerned in both sets of proceedings must either be the same individuals or 'persons who are in law identified with those who were parties to the proceedings.' On the other hand, in *Man Truck & Bus SA (Pty) v Dusbus Leasing CC & others*,[14] Rabie AJ stated that the list of privies should:

'... not be limited only to those listed by *Voet*. The question as to whether a person should be so regarded, should depend upon the facts of each particular case and should not only apply to the specific person or persons against whom judgment had been obtained.'

In *Man Truck* it was held that the sole members and controlling minds of two close corporations who had bound themselves as sureties for and co-principal debtors with their close corporations were bound by a court decision in earlier proceedings against the said close corporations, even though they were not themselves parties to that litigation.[15]

---

[11] *Shokkos v Lampert NO* 1963 (3) SA 421 (W) 425H- 426A.
[12] See also *Cassim v The Master & others* 1960 (2) SA 347 (D) at 355A-D.
[13] *Rail Commuters Group & others v Transnet Limited & others* 2006 (6) SA 68 (C) at 82H-83A.
[14] 2004 (1) SA 454 (W) para 34. *Man Truck & Bus* was followed in *Kruger & another v Shoprite Checkers* (65/05) [2006] ZANCHC 114 (26 May 2006) where a close corporation and its sole member were found to be privies.
[15] Brand JA in *Prinsloo*, did not find it necessary to decide whether the principle, as endorsed in *Man Truck*, that a privy included the sole member of a close corporation, was correct.

[18] The respondents were not 'in law identified' with either Jones or Royal Sechaba and neither did they 'derive title' from these parties. All they had in common with Jones is that they were former employees of Royal Sechaba and they were all witnesses in the arbitration. Jones' success or failure in the outcome of the arbitration would have no effect whatsoever on their personal rights and obligations. There is no basis upon which this court can find that the respondents were privies of the parties in the arbitration. The respondents had no control over Jones and neither did he represent them in the arbitration. They had no legal or beneficial interest in the arbitration. They undoubtedly had an interest in or concern with the outcome of the arbitration, but that is not sufficient to establish the requisite privity. On the facts of this case, they were not privies to the arbitration in the manner in which the concept of being a privy has been interpreted by our courts.

[19] It is, however, the view of this court that the 'same parties' requirement is not immutable and may in appropriate cases and in line with this court's duty to develop the common law, be relaxed or adapted in order to address new factual situations that a court may face. There is no reason in principle, why a court cannot relax the same person requirement for the very reasons why the two other requirements have, over time, been relaxed. In *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another*, Brand JA put the matter thus:

'In our common law the requirements for *res iudicata* are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of *res iudicata*. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see eg *Evins v Shield Insurance Co Ltd* 1980 (2) SA 815 (A) at 835G). Issue estoppel therefore allows a court

to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.'[16]

[20] Most recently, in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others*, Wallis JA stated that it was not clear that Voet confined 'same person' narrowly to those who 'derived their rights from a party to the original litigation' and continued:

'[I]t may be that the requirement of "the same person" is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.'[17]

[21] In order to develop the common law, by either relaxing or extending the 'same person' requirement, persuasive reasons must be placed before the court for doing so. If fairness and equity dictate a development of the law, and to do otherwise would defeat the very purpose of the defence, consideration should be given to allowing issue estoppel as a defence even where there is not, strictly speaking, identity of parties. The doctrine of *res judicata* is founded on the policy considerations that there should be finality in litigation and an avoidance of a multiplicity of litigation or conflicting judicial decisions on the same issue or issues.[18] As Brand JA in *Prinsloo* said, our courts have recognised that rigid adherence to the requirements of same cause of action and same relief would defeat the purpose of *res judicata*.[19] There is no reason why a similar approach

---

[16] [2012] ZASCA 28 para 23. See also the comments made by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 676B-E, referred to in para 26 above.
[17] *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others* 2013 (6) SA 499 (SCA) para 43.
[18] *Ibid* para 2. *Yellow Star Properties 1020 (Pty) Ltd v MEC, Department of Development Planning and Local Government* 2009 (3) SA 577 (SCA).
[19] Para 23.

should not be adopted to the same parties requirement. But in this matter, it was not argued why the requirement should be relaxed or extended, since counsel for the respondents persisted with the contention that the respondents were privies of the parties to the arbitration. He also disavowed any suggestion that the institution of action against the respondents amounted to an abuse of the court's processes.

[22] The high court correctly concluded that the same parties requirement was not established but nevertheless, and without any analysis, went on to find that it was 'appropriate to extend the application of *res judicata* to the facts in the instant case'. The only reason advanced by the high court for extending the rule in this manner was that 'the identities of the defendants in this matter as the persons who agreed and authorized the payments of commissions to Jones are inextricably linked to Jones as the receiver of those payments'. That, in my view, was not sufficient to allow the court to extend the principles governing issue estoppel.

[23] I turn now to deal with the second ground of appeal relied on by Royal Sechaba, that the same cause of action requirement has not been satisfied in that the issues determined by the Tribunal are not the same as those to be determined in this action although the relief sought was identical (the amount of the damages claim). The respondents, on the other hand, and in terms of their special plea, have alleged that the issues which will arise in this action are the same as those which have already been determined in the arbitration, and Royal Sechaba is accordingly precluded from proceeding against them on a basis inconsistent with the findings of the Tribunal. They do not plead *res judicata,* but issue estoppel. Thus, while the breach of a fiduciary duty complained of in the action against the respondents is different from the cause of action in the arbitration, the issues, the respondents argue, are the same. This enquiry requires an examination of the Tribunal's award as well as the pleadings.

[24] It was common cause that Royal Sechaba's claim against the respondents for overpayment of commission based on the interpretation of clauses 1 and 3 the Addendum had been determined by the Tribunal. This portion of the claim is pleaded as follows:

'[In breach of their fiduciary duties, the respondents] calculated the commissions and operating incentives paid to Jones and the designated employees on the basis of a measure referred to by them as "net contract contribution" (essentially gross profit), instead of net profit, as provided for in the addendum …'.

This was the main issue decided by the Tribunal.

[25] It was, however, contended that there were other issues between the parties and articulated in the particulars of claim which were not covered by, and adjudicated upon their merits, in the arbitration. One such issue was whether the respondents had breached their fiduciary duties to Royal Sechaba in that they had:

'Authorised and/or approved a payment of sales commissions to Jones and designated employees despite the fact that such sales commissions and operating incentives had not yet become due and payable in terms of the Addendum'.

The alleged improper behaviour related not to the conclusion of the Addendum, but the implementation thereof, more particularly whether the respondents, in agreeing to pay commission prematurely, had breached their fiduciary duties and not acted with the degree of skill, care and diligence that could reasonably be expected of a director. The issue of a 'breach of fiduciary duty' was not determined by the arbitration.

[26] The argument by Royal Sechaba that some of the issues were not decided by the Tribunal is correct. The Tribunal, for example, was called upon to determine whether Jones was entitled to commission in respect of the Ingula Dam contract. In terms of the Addendum, Jones was entitled to commission on contracts concluded for the benefit of Royal Sechaba and which he had secured.

There was a dispute whether Royal Sechaba had concluded a contract in respect of Ingula Dam. The Tribunal held:

'The defendant [Royal Sechaba] represented by Coote and Engelbrecht agreed on the payment to the claimant [Jones], and the evidence indicates that the contract has been continued albeit on a monthly basis. *Once the claimant and the defendant, represented by its officials, agreed that the claimant was entitled to be paid, there is no reason to set aside this agreement*'. (Emphasis added.)

It was common cause that although there had been reciprocal performance in respect of Ingula Dam, no formal contract had been concluded. It is therefore, at the very least, arguable whether Jones is, in terms of the Addendum, entitled to commission in respect of Ingula Dam.

[27] In these circumstances, I am inclined to agree with Royal Sechaba that while the issues to be determined between Royal Sechaba and the respondents are largely the same as the issues determined in the arbitration, there are issues which were not adjudicated upon in the arbitration.

[28] For these reasons, the appeal must be upheld.

1 The appeal is upheld with costs.

2 The order of the high court is set aside and in its stead is substituted the following order:

'The special plea is dismissed with costs'.

3 The matter is referred back to the high court for adjudication on the particulars of claim and the substantive defence.

L V THERON

JUDGE OF APPEAL

APPEARANCES

For Appellant:	J A Van der Westhuizen
	Instructed by:
	Weavind &Weavind, Pretoria
	Matsepes, Bloemfontein
For Respondents:	W J De Bruyn
	Instructed by:
	Cowan-Harper Inc, Johannesburg
	Lovius Block Attorneys, Bloemfontein