THE ADMINISTRATION OF JUSTICE

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THE JUDICIARY

Law, morality and the Constitution

In 1988 the Immorality Amendment Act 2 criminalized prostitution. It did so by the insertion of s 20(1)(aA) into the principal Act, which it renamed the Sexual Offences Act 23 of 1957. Section 20(1)(aA) provided that 'any person who . . . has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward . . . shall be guilty of an offence'. Before this legislative amendment, prostitution was not prohibited per se (see *S v H* 1986 (4) SA 1095 (T) at 1098F–G). The Constitutional Court had occasion to consider the validity of this provision (as well as other sections of the Act which prohibited the keeping of a brothel) in *S v Jordan & others (Sex Workers Education and Advocacy Task Force & others as* Amici Curiae*)* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117. The court was unanimous in dismissing the challenge to the prohibition against keeping a brothel. It divided sharply on the prohibition of prostitution, and by a majority of six to five upheld the validity of s 20(1)(aA). The decision invites two observations unrelated to its outcome. First, the court uncharacteristically failed, despite invitation, to engage with one of the leading jurisprudential debates of the last century concerning the legal enforcement of morality. Secondly, the tone of the majority judgment is surprisingly callous and morally judgmental.

The criminalization of prostitution in 1988 was preceded by the *Report of the ad hoc Committee of the State President's Council on the Immorality Act* (PC 1/1985). The moral disapprobation of sex work featured prominently in the Committee's report. An entire chapter was devoted to the subject. The Committee recognized the obvious: prostitution cannot be eradicated by measures under the criminal

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law, and 'the most effective way of combating prostitution would be to deal with the public manifestations under the criminal law and leave other manifestations to public opinion' (para 4.13). A reading of the Committee's report could leave no doubt as to its religious and moral underpinnings. Indeed, the language is reminiscent of religious zeal. It observed that 'since immorality, as reflected in the Act, relates to sexual practices outside wedlock, it is evident that the strengthening of the institution of marriage within which normal sexual relations could, and, in fact, in the main do take place, would be an important means of curbing immorality' (para 3.14). The Committee was of the view that the state had a function 'as one of the *custodes morum* to uphold Christian moral values' (para 3.22.1). It refused to accept that 'private morality is not the concern of the State, any less than is public morality' (para 3.22.7). Hence, whether immoral or indecent acts are committed in private or in public, the application of criminal sanctions would depend on the relative measure of 'abhorrence, shock, disgust, resentment or censure that society may express' (para 3.22.9.7). Despite this strident language, the Committee did not recommend the criminalization of prostitution. The legislature however, thought differently.

When the matter came before the Constitutional Court, the moral issues surrounding prostitution could scarcely be avoided. After all, the advent of constitutional democracy in South Africa had a profoundly moral impetus. The interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993) was proclaimed by the Constitutional Court to represent 'a radical and decisive break from that part of the past which is unacceptable', a past which was 'pervaded by inequality, authoritarianism and repression' (*Shabalala v Attorney-General of Transvaal* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593, para 26). By contrast, the aspiration of the future 'is based on what is ''justifiable in an open and democratic society based on freedom and equality''' (ibid).

The question of the legal enforcement of morality was the subject of a celebrated jurisprudential debate between Sir Patrick Devlin and Professor H L A Hart (see Patrick Devlin *The Enforcement of Morals* (1959), reprinted in 1965, and H L A Hart *Law, Liberty and Morality* (1963)). The debate had its genesis in the publication of the *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247), better known as the Wolfenden Report. This contained a central philosophical point of departure articulated in para 61 as follows:

> 'Further, we feel bound to say this. We have outlined the arguments against a change in the law, and we recognise their weight. We believe, however, that they have been met by the counter-arguments we have already advanced. There remains one additional counter-argument which we believe to be decisive, namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. *Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.* To say this is not to condone or encourage private immorality. On the contrary, to emphasise the personal and private nature of moral or immoral conduct is to emphasise the personal and private responsibility of the individual for his own actions, and that is a responsibility which a mature agent can properly be expected to carry for himself without the threat of punishment from the law' (our emphasis).

Lord Devlin took issue with this philosophical point of departure. His central thesis was that the suppression of vice is as much the law's business as the suppression of subversive activities. He argued that it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. He argued that a recognized morality is as necessary to society's existence as a recognized government. On this argument, one who is no menace to others might, by his or her immoral conduct, threaten one of the great moral principles on which society is based. Since every society has a right to preserve its own existence, it followed that it had the right to use the institution of the criminal law and its sanctions to enforce that right. The test postulated by Lord Devlin was that every moral judgement is a feeling that no right-minded man could act in any other way without admitting that he was doing wrong. This was determined by the man in the jury box. Such a person was not expected to reason about anything and his judgement might be largely a matter of feeling. Lord Devlin purported to lay down a threshold for the interference of the criminal law. He argued that nothing should be punished by the law that does not arouse feelings of intolerance, indignation and disgust.

This led to the response by Professor Hart. He addressed what appeared to be at the heart of Lord Devlin's thesis, namely the issue of moral populism and democracy:

> 'It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live. This is a

misunderstanding of democracy which still menaces individual liberty. . .' (op cit 79).

'The central mistake is a failure to distinguish the acceptable principle that political power is best entrusted to the majority from the unacceptable claim that what the majority do with that power is beyond criticism and must never be resisted. No one can be a democrat who does not accept the first of these, but no democrat need accept the second. Mill and many others have combined a belief in democracy as the best — or least harmful — form of rule with a passionate conviction that there are many things which not even a democratic government may do. This combination of attitudes makes good sense, because, though a democrat is committed to the belief that democracy is better than other forms of government, he is not committed to the belief that it is perfect or infallible or never to be resisted' (at 79–80).

'Whatever other arguments there may be for the enforcement of morality, no one should think even when popular morality is supported by an ''overwhelming majority'' or marked by widespread ''intolerance, indignation, and disgust'' that loyalty to democractic principles requires him to admit that its imposition on a minority is justified' (at 81).

A significant contribution to this debate was made by Professor Dworkin in his essay 'Liberty and moralism' published in *Taking Rights Seriously* (1978) 240. Dworkin's contribution is significant because it postulates a test for the justification of depriving a person of his or her liberty on grounds of morality. Dealing with the question of homosexuality, he observed (at 254):

'Even if it is true that most men think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures because they are effeminate), rationalization (based on assumptions of fact so unsupported that they challenge the community's own standards of rationality), and personal aversion (representing no conviction but merely blind hate arising from unacknowledged self-suspicion). It remains possible that the ordinary man could produce no reason for his view, but would simply parrot his neighbor who in turn parrots him, or that he would produce a reason which presupposes a general moral position he could not sincerely or consistently claim to hold. If so, the principles of democracy we follow do not call for the enforcement of the consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another's freedom itself occupies a critical and fundamental position in our popular morality.'

The Constitutional Court has not shied away from jurisprudential debate when elucidating the philosophical underpinnings of various rights in the Bill of Rights (see, in particular, *Bernstein v Bester & others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449, *De*

Lange v Smuts NO 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 39). The court's failure in *Jordan* to address the central philosophical debate sketched above was regrettable. It was surely directly relevant not simply to the subject-matter of the case, but to the centrality of the role of freedom and equality under the Constitution (Constitution of the Republic of South Africa, Act 108 of 1996). That the majority chose not to refer to the debate is perhaps understandable. It would have challenged several of the underpinnings of its reasoning. But the minority would have found significant support from this debate for its ultimate conclusion.

The second observation about the judgment relates to the uncharacteristically callous tone employed by the majority. That tone was one of moral condemnation. While there will inevitably be a divergence of views on the morality of prostitution, the Constitution (which binds the judiciary) is itself infused with moral values. Equality, one of the cornerstones of the Constitution, envisages a society in which all are treated with equal dignity and respect. The essence of this ethos was captured by Ackermann J in *National Coalition for Gay and Lesbian Equality* (supra), para 22:

> 'The desire for equality is not a hope for the elimination of all differences.
> ''The experience of subordination — of personal subordination, above all — lies behind the vision of equality.''
> To understand ''the other'' one must try, as far as is humanly possible, to place oneself in the position of ''the other''.
> ''It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.'' '

These observations by Ackermann J (who was in the minority in the *Jordan* case) stand out in marked contrast to those of Ngcobo J who, speaking for the majority in *Jordan*, observed (para 16):

> 'If the public sees the recipient of reward as being ''more to blame'' than the ''client'', and a conviction carries a greater stigma on the ''prostitute'' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike. In this regard I agree with the joint judgment that, by engaging in commercial sex work,

> prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable.'

The notion that prostitutes cannot be heard to complain because 'it is their own fault' is deeply disturbing. It is a notion that inevitably fosters prejudice and marginalization. The minority, for their part, expressly disagreed that the stigma attaching to prostitutes arises not from the law but only from social attitudes (para 72):

> 'It is our view that, by criminalising primarily the prostitute, the law reinforces and perpetuates sexual stereotypes which degrade the prostitute but does not equally stigmatise the client, if it does so at all. The law is thus partly constitutive of invidious social standards which are in conflict with our Constitution. The Constitution itself makes plain that the law must further the values of the Constitution. It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values when the law serves to foster those values. The law must be conscientiously developed to foster values consistent with our Constitution.'

If the minority is to be criticized, it is because it, too, succumbed to the notion that the criminalization of prostitution entails no affront to dignity. The reasoning in this regard is difficult to fathom:

> 'Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(*a*A) but by their engaging in commercial sex work. The very character of the work they undertakes devalues the respect that the Constitution regards as inherent in the human body. That is not to say that as prostitutes they are stripped of the right to be treated with respect by law enforcement officers . . . The remedy is not to strike down the law but to require that it be applied in a constitutional manner. Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited licence to infringe the dignity of the prostitute' (para 74).

This reasoning is bewildering. It is difficult to imagine how enforcement of the prohibition on prostitution can take place without a necessary invasion of that which is inherently private and which goes to the heart of the right to dignity. The case law amply testifies to the sordid methods of law enforcement. Moreover, sight is lost of the fact that the act in question, sex, is perfectly lawful. There is nothing inherently persuasive to suggest that its commodification carries with it the necessary consequence that participants are not entitled to have their dignity protected.

The judgment in this case will do little to enhance the reputation of a court which today stands with the best in the world.

Grudges in the Supreme Court of Appeal

Recently retired Supreme Court of Appeal judge Peet M Nienaber has given the legal profession in South Africa a curious (though doubtless ultimately useful) glimpse into the battles fought by judges who cling uncritically to convention and who are resistant to change. Judge Nienaber retired as a judge in September 2002, after more than 20 years on the bench (12 in the Supreme Court of Appeal). Shortly thereafter, in a speech at the International Bar Association meeting in Durban in October 2002 (later printed as 'Dialogue with the deaf — Or is someone listening? (2002) 15 (3) *Advocate* 37), Judge Nienaber publicly voiced some reflections on the appellate and judicial process.

He traversed familiar territory in acknowledging that appeal judges, after reading the judgment of the court below, the record and the opposing parties' written argument, form 'some sort of impression of where the balance lies' ('Dialogue' at 37). This 'vague, general feeling of what will be fair in all the circumstances' is later confirmed, Nienaber says, by 'the judge's legal instinct, his sixth sense, based on his background and years of experience in practice' (ibid).

Nienaber's candid acknowledgment of the judicial process confirms the by now well-accepted insights of the American Realists of the late nineteenth and early twentieth centuries. These insights — once considered heretical in South Africa in so far as they emphasized that judges do not mechanically apply some existing body of rules called 'the law', but in fact exercise a measure of moral choice in decision-making — became established truths after the 1960s through the courageous work of particularly Anthony Mathews and John Dugard (see the latter's *Human Rights and the South African Legal Order* (1978) at 366–8).

But the bite of Nienaber's article lies elsewhere. For he also casts doubt upon the judicial impartiality of at least some of those he left behind when he purports to explain what happens after judges of appeal form this initial 'impression'. He suggests that there are 'four factors or permutations to be taken into account' in dislodging a prima facie view. These are (i) the facts and nature of the case, (ii) the type of appeal procedure, (iii) the quality of counsel and (iv) the degree of open-mindedness of the judge concerned ('Dialogue' at 37).

As to (i), Nienaber observes that '[s]ome cases are simply lost causes'. Nevertheless, 'a good advocate will always make a difference to the process even if not always to its eventual outcome' (at 38). As to (ii), Nienaber recognizes that the amount of preparation and forethought expended by members of the bench bears upon the ultimate outcome. He places stress on (iii), the quality of advocacy, claiming that 'in about five out of ten appeals the efforts of counsel will not substantially alter the ultimate outcome; in three out of ten bad advocacy can lose an appeal; and in two out of ten good advocacy can win it' (ibid).

The apparent point of the whole exercise, however, emerges from the barb that accompanies his discussion of (iv). He points out that at provincial level prior discussion of the case amongst the judges concerned is essential, since 'the pressure of work requires that judgments, certainly in criminal appeals, be given contemporaneously'. In the Supreme Court of Appeal, by contrast, judgments are generally reserved. Nienaber states that when he joined the court in 1990 there was a 'firm tradition, if not a convention, *not* to discuss matters in advance' (at 38, emphasis in the original). He then delivers the following thrust (ibid):

> 'It is my impression, I may be wrong, that there are groupings amongst some of the judges who thrash out matters amongst themselves before the hearing and then form a combined and united front at it. That does not mean that there is silence in court. There are vigorous exchanges but one sometimes sensed that the purpose was not so much to elicit answers but to assert, rather than test, positions rather than propositions. Whether this is true, and if so, whether it is a lasting trend or merely a temporary aberration, is difficult to say. But if it is the former the result will be that it will become that much more difficult for counsel to change the course of an appeal if the consensus of the workshop is against him.'

The suggestion is extraordinary: that there is a caucus within the Supreme Court of Appeal that reaches its conclusions in advance and then gives the impression of individual open-mindedness before voting en bloc — something, Nienaber suggests, that has been achieved only by breaching a convention against the advance discussion of cases.

Perhaps more extraordinary than the claim he makes is that Nienaber himself is not even sure whether his claim is correct — for he says candidly that his remarks derive from impression, which may be wrong. But in a collegial institution impressions can surely be verified in the event that there is doubt. One must ask whether Nienaber raised his concerns with his colleagues before he cast the

slur. For other judges of the Supreme Court of Appeal, when asked about his allegations, say that he is quite wrong on both counts. They say that there is no such caucus. Moreover, at the time to which Nienaber refers the convention he invokes was no longer in existence. Indeed, it was well known that although such a convention had previously existed, it was debated amongst the judges after the appointment of Chief Justice Mahomed in 1997 and thereafter fell away. Surely Nienaber must have been aware of the debate and of the change? The question, then, is why Nienaber chose to launch an attack upon an unidentified sector of the court, giving vent to an 'impression' that he recognized might be incorrect, and which proceeded from a premise that was not correct.

Some years ago Nienaber committed himself to what this chapter at the time lamented as a myopic view of the judicial office, and engaged in a reactionary counter-attack upon critics of the Appellate Division's functioning under apartheid (see 2000 *Annual Survey* 877ff). At that very time the court itself was changing, and newer appointments shifted its balance away from the doctrinal Roman-Dutch historicist approach favoured by Chief Justices Rumpff and Rabie and senior judges like C P Joubert, to a more principled and pragmatic, outcome-oriented tenor. In the more recent law reports from the late 1990s a number of instances appear in which Nienaber found himself on a split bench, and at times in the minority, in particular from 2001 when a wave of new judges was appointed. (Examples are *Brummer v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 389 (SCA), *Vereins- und Westbank AG v Veren Investments* 2002 (4) SA 421 (SCA) and *Minister van Veiligheid en Sekuriteit v Japmoco BK h/a Status Motors* 2002 (5) SA 649 (SCA).) Future readers of the law reports will no doubt determine for themselves whether Nienaber was merely outvoted, or also out-gunned, on later such occasions. To the pragmatic shift in the jurisprudence of the Supreme Court of Appeal must be added the impact of the Constitution, which before 2001 was barely mentioned in its judgments.

It is difficult to avoid the conclusion that, with the recent changes to the composition and outlook of the Supreme Court of Appeal, Nienaber was uncomfortable in finding himself amongst judges who did not subscribe to his judicial views. His audience at the IBA was unlikely to have had the advantage of acquaintance with the law reports. On the other hand, his readers in *Advocate* are more likely to have asked whether he felt himself superseded in a changing court.

Judges and the environment

During 2002 South Africa hosted the World Summit on Sustainable Development. The summit included the Global Judges' Symposium on Sustainable Development and the Role of Law organized by the United Nations Environment Programme. At the end of the symposium, the judges adopted a statement of principles known as the 'Johannesburg Principles'. Agreement was reached on the following principles to guide the judiciary in promoting the goals of sustainable development through the application of the rule of law and the democratic process:

'1 A full commitment to contributing towards the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process;
2 To realize the goals of the Millennium Declaration of the United Nations General Assembly which depend upon the implementation of national and international legal regimes that have been established for achieving the goals of sustainable development;
3 In the field of environmental law there is an urgent need for a concerted and sustainable programme of work focused on education, training and dissemination of information, including regional and sub-regional judicial colloquia; and
4 That collaboration among members of the judiciary and others engaged in the judicial process within and across regions is essential to achieve a significant improvement in compliance with, and implementation, development and enforcement of environmental law.'

The statement of principles is significant not so much for its content as for its authorship. Ordinarily, international agreement is reached by way of treaties or resolutions adopted by international institutions. Judges do not normally participate in such processes. This declaration therefore represents an unusual, but welcome, new direction for judges.

The Legal Profession

Legislation

The Reinstatement of Enrolment of Certain Deceased Legal Practitioners Act 32 of 2002 provides for a process to be followed to restore to the roll of advocates or attorneys deceased persons removed for political reasons. Section 1(1) identifies the conduct that led to the removal from the roll as the ground of eligibility. Reinstatement by a High Court is authorized where 'the court is

satisfied that the conduct that led to that person's name being removed from the roll in question was directly related to that person's opposition to the previous political dispensation of apartheid and to bringing about political or constitutional change in the Republic, or to assisting persons who were likewise opposed to the said apartheid dispensation'. Consultation with the deceased person's family is mandated, and the name of any person reinstated will be submitted to Parliament. The legislation will permit the remedying of obvious injustices. (See generally G J Marcus and J Kentridge 'The striking-off of Abram Fischer QC' in *The Johannesburg Bar: 100 Years in Pursuit of Excellence* (2002) at 45–6).

Misconduct by advocates

The case of *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E) applied the principles established in cases such as *Jasat v Natal Law Society* 2000 (3) SA 44 (SCA) to an instance of misconduct by an advocate (a member of the Independent Advocates' Association of South Africa). With respect to a charge that the advocate had accepted a brief without the intervention of an attorney, the court followed the Supreme Court of Appeal's decision in the matter of *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA). It ordered that the advocate's name be struck from the roll of advocates.

General Council of the Bar of South Africa v Rösemann 2002 (1) SA 235 (C) is dealt with below.

Misconduct by attorneys

The result and reasoning of *Law Society of the Cape of Good Hope v Francois Johannes Budricks* (SCA 24 May 2002 (case no 141/2001), unreported) demonstrate stiffer judicial attitudes towards the risk of loss of clients' money than has previously been on display. The Supreme Court of Appeal has a three-part test for reviewing decisions either to strike an attorney off the roll or suspend him or her from practice in terms of s 22(1)(d) of the Attorneys Act 53 of 1979. First, has the offending conduct been established as a matter of fact? Secondly, if so, what is the value judgment regarding whether the person is not a fit and proper person in terms of s 22(1)(d)? Thirdly, if not a fit and proper person, should the court order removal of the person from the roll of attorneys or merely suspension from practice? This decision emphasizes the signifi-

cance of the answer to the first question for the decision on the second.

On application from the provincial Law Society, the Supreme Court of Appeal reviewed the order of the court a quo which had found the conduct of an attorney to contravene s 22(1)(d), had found the attorney not to be a fit and proper person, and had ordered the attorney suspended from practice for two years and conditionally suspended that order itself for three years. The offending conduct arose from the attorney's implementation of subsidy funds received in terms of an agreement with the National Housing Board.

Hefer AP stated (para 7) that

> '[t]he suspension of [the attorney's] suspension from practice is entirely incompatible with the finding that he was not a fit and proper person to continue practising and resulted in the anomalous situation that a person who had explicitly been pronounced unfit to do so, was allowed to continue to practice. (Logically, a striking off order or an order of suspension from practice should only be suspended if the court finds that the attorney concerned is a fit and proper person to continue to practice but still wishes to penalize him.)'

(Cf *General Council of the Bar of South Africa v Matthys* 2002 (5) SA 1 (E), para 46.) For Hefer AP, a negative value judgement must result in either striking off or suspension from practice. In addition, the court a quo had not sufficiently protected the public and should have considered the possibility of repetition of the conduct complained of (para 7).

Reconsidering the decision of the court a quo, Hefer AP noted that the facts demonstrated a risk of loss by clients of the attorney rather than no risk, even if no loss had actually occurred. In contrast to the court a quo as well as the decision in *Cape Law Society v Parker* 2000 (1) SA 582 (C) (discussed in 2000 AS 888–9), Hefer AP took a 'much more serious view' of the use of trust money without authorization and the consequent risk to clients' funds (para 11). In the view of the court, the proper penalty was striking off.

In *Du Plessis v Prokureursorde, Transvaal* 2002 (4) SA 344 (T) the function of the Law Society as the custodian of the attorneys' profession subordinate to the courts themselves allowed the Law Society to prevail in an application for review against it. While a Law Society's decision to apply to the court for an attorney to be struck off the roll usually involves an investigation, the court here noted that such an investigation is not necessary in order to approach the court with an application for striking off.

Potential misconduct by candidate attorneys

From the viewpoint of the legal profession, *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 is noteworthy in so far as it concerns the professional fitness of a candidate attorney. As noted by the Constitutional Court (para 2), the provincial Law Society took the view that a candidate with two previous convictions for possession of cannabis, and who had declared his intention to continue breaking the law, was not a fit and proper person to be admitted as an attorney. The Constitutional Court found that the admitted legitimate governmental interest served by a prohibition on the possession or use of cannabis could not be achieved by less restrictive means. As noted by Chaskalson P, by the time the case reached the Constitutional Court the aspect of the correctness of the Law Society's decision had fallen away (paras 93–94, and see also 2000 *Annual Survey* 891–3).

Attorney's duty of care to disappointed beneficiaries

Pretorius en andere v McCallum 2002 (2) SA 423 (C) is an example of the legal system rectifying a mistake by one of its own. The attorney did not dispute that, through his negligence in completing the formalities of a will in terms of the Wills Act 7 of 1953, the plaintiffs inherited by intestate succession lesser amounts than their father and grandfather had intended. The attorney had signed the will as a witness but had failed properly to sign the first page. The question for the court was solely whether a duty of care existed with respect to such disappointed beneficiaries. Following the approach in the comparative jurisdictions examined (Canada, Australia, England and the USA), no reason was found against recognizing such a duty.

*Right of appearance of candidate attorney*s

The decision in *S v Zoya* 2002 (4) SA 362 (W) overrules that of Hartzenberg J in *S v Nkosi* 2000 (1) SACR 592 (T). *Nkosi* had required candidate attorneys to have issued to them and to bear certificates in order to be qualified to appear in terms of s 8 of the Attorneys Act 53 of 1979. Instead, the two-judge *Zoya* court emphasized the rule of s 8(1) that after a year's service a candidate attorney was 'entitled' to appear in the regional court as well as in the ordinary magistrates' courts (at 365C–F). Such a decision appropriately both adopts the reasoning of the relevant provincial Law Society and facilitates the right of access to court.

Waiting for Godot, aka the Legal Practice Bill

Echoing its decision of four years ago in *De Freitas v Society of Advocates of Natal (Natal Law Society Intervening)* 1998 (11) BCLR 1345 (CC) (discussed in 1998 *Annual Survey* 885–6), the Constitutional Court in *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC); 2002 (10) BCLR 1092 again found it inappropriate to decide the constitutionality of the referral rule. The substance of this issue has been canvassed in *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA). As the court noted in para 16 of *Van der Spuy*, '[t]he debate has been raging for some years about the place, if any, the referral rule ought to occupy in present-day legal practice in South Africa, its relevance to access to justice, the extent to which it should be enforced and who should enforce or police it'. Nonetheless, the court refused to grant direct access in part because 'both the narrow and the broader issues are currently being canvassed and debated in a number of forums, more particularly within and amongst all the branches of the legal profession' (para 17). This course of action appears wise, especially in view of the submissions of the Minister of Justice and Constitutional Development regarding the Legal Practice Bill. Still, at some point in such a prolonged debate, the court may need to flex its supervisory or its constitutional power. Until such a time as either the Constitutional Court or the legislature pronounces, the legal profession will be faced with skirmishes as well as the opening up of new fronts for attack.

One could classify as a skirmish the court's decision in *General Council of the Bar of South Africa v Rösemann* 2002 (1) SA 235 (C). Here professional misconduct by an advocate was found in his accepting and performing work normally done by an attorney. The ordered sanction was a suspension of two months. Doctrinally, this is presented correctly as a straightforward application of the provincial division decisions in *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) and *Society of Advocates of Natal v De Freitas (Natal Law Society Intervening)* 1997 (4) SA 1134 (N). Those decisions, as well as the decisions in those matters on appeal, affirm the line that the advocate's profession is one of forensic skills and the giving of expert advice while the attorney's profession is one of factual investigation, the issuing and serving of process, the production of documents, witnesses and evidence, and the execution of judgments.

Yet in at least four ways, this case is an exemplar of the waves of change currently pushing up against the seawall separating the attorney's and the advocate's profession. First, the sanction itself — a suspension of two months — is clearly a light one. This is all the more so given that it was preceded by an earlier court order against the respondent in more or less similar circumstances. Secondly, that earlier court order itself is, as the court here points out (at 249H), capable of being interpreted to allow the advocate respondent to perform some of the work of an attorney. While the court here did not follow that interpretation — sticking instead to the strict *Van der Spuy* and *De Freitas* line of division — the mere fact of the interpretation's being plausible and acknowledged to be so indicates that the dividing line between advocates and attorneys is blurring. Thirdly, the court acknowledges that the respondent may have had a bona fide belief in the propriety of some of his actions in part because of advice offered by colleagues in the Independent Association of Advocates of South Africa and because of advice offered by a legal academic (at 248E–H). The court's conclusion on the mens rea issue here also points to the degree to which good faith belief exists in the blurring of this particular professional line. Finally, the matter itself is an example of the blurring. If the conclusions of *Van der Spuy* and *De Freitas* were indeed so clear, would the General Council of the Bar need to be an applicant in a case such as this?

The competition law points raised in *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) qualify perhaps as a new front in this campaign. The case represents the application of new regime of competition rules to the legal profession itself, or more precisely the advocates' section of the profession. Rather than remitting the matter to the Competition Commission after its admitted non-compliance with procedural fairness, the High Court had exempted three rules of the advocates' section of the profession bearing on competition: the referral rule, the prohibition on accepting briefs with non-members, and the rule generally precluding members from accepting briefs on a contingency basis. The Supreme Court of Appeal upheld the Commission's appeal with respect to the last two of those rules, but left the referral rule exempted and termed it 'the law of the land' (para 19) after *De Freitas*.

Appropriately, the Supreme Court of Appeal was candidly realistic in its view of its own powers of perception with respect to applying competition policy to the legal profession (see paras 15

and 18). The court's formal self-limitation to matters of statutory interpretation and their immediate consequences is perhaps especially appropriate where the two parties are clearly engaged in a sharp contest, albeit one over regulatory authority. The court's decision to uphold in part the exercise of remedial power by the court a quo was based instead upon the procedural unfairness the alternative would cause both parties. Apart from its significance for the legal profession, the case poses several interesting issues for administrative law. These include whether a statutory authority granted jurisdiction over a particular matter but also granted exemption authority with respect to that matter may exercise that exemption authority in a way that serves the objectives of the statute but nonetheless contravenes the common law.

Trust accounts and failing banks

The case of *Louw NO v S J Coetzee* (SCA 29 November 2002 (case no 342/02), unreported) reversed the decision of the High Court in *S J Coetzee Inc v Louw NO* 2002 (5) SA 602 (T). Section 78 of the Attorneys Act 53 of 1979 regulates trust banking accounts opened by a practitioner for deposit of moneys they have accepted from their clients in trust. Subsection (2A) requires such accounts to be specifically identified. If the bank goes under, do such trust accounts enjoy any specific protection? The understood answer prior to 2001 was in the negative. However, some attorneys brought the issue up again when Saambou Bank Ltd was placed under curatorship in February 2002, citing the recently enacted s 5(8)(a) of the Financial Institutions (Protection of Funds) Act 28 of 2001. Agreeing with the attorneys, the Transvaal Provincial Division ruled that such accounts did enjoy protection. Saambou's curator then appealed to the Supreme Court of Appeal. Hearing argument that if the decision were upheld, no bank would agree to open a trust account for an attorney, Lewis AJA disagreed with the court a quo on the interpretation of the Financial Institutions Act and upheld the appeal. Attorneys' trust funds receive no special treatment from bank curators.

Trust accounts and failing lawyers

In the case of *Natal Law Society v Stokes & another* 2002 (3) SA 189 (N) not only was the first respondent, an attorney, sequestrated in November 2000 but he also chose to flee the country. As a result, his files were in the sights of both the curator appointed for the Law Society for the trust account and the trustee of the insolvent estate.

The trustee obtained possession of the 8 000 files (many relating to matters with the Road Accident Fund) first. The curator wanted the court to order the upliftment of the files. Noting that the authority for the appointment of the curator was discretionary and that this situation was a complex one (at 192G–I), the court allowed the trustee to retain possession and merely ordered the trustee to grant the curator access to the files in order for the curator to perform his obligations. Reasoning in part that an attorney was less of an artist and more of an intellectual journeyman, the court thus viewed the practice of an attorney as a going business concern.

POLICE

Legislation

Section 57 of the South African Police Service Act 68 of 1995 has been repealed. This section, which was taken over from the previous Act, the Police Act 7 of 1958, restricted the ability of litigants to pursue an action against the police service by providing that the legal proceedings had to be instituted before the expiry of a period of 12 calendar months after the date upon which the claimant became aware of the alleged act or omission or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever was the earlier date.

The purpose of this section was said to be that it afforded the Minister of Safety and Security an opportunity to investigate claims against the Department while the facts were fresh and the evidence still available. It was thus aimed at allowing the Minister to take steps to collect evidence and at affording him an opportunity to avoid litigation by settling legitimate claims. See in this regard *Tshabalala v Minister van Veiligheid en Sekuriteit* [2001] 3 All SA 620 (W).

This section has been abolished in terms of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002. The preamble to the Act sets out the justification for this repeal inter alia as follows:

> 'RECOGNISING THAT certain provisions of existing laws provide for —
> * different notice periods for the institution of legal proceedings against certain organs of state in respect of the recovery of debts;
> * different periods of prescription in respect of such debts;
>
> . . .
>
> AND RECOGNISING the need to harmonise and create uniformity in respect of the provisions of existing laws which provide for—

* different notice periods for the institution of legal proceedings against certain organs of state for the recovery of a debt, by substituting those notice periods with a uniform notice period which will apply in respect of the institution of legal proceedings against certain organs of state for the recovery of a debt;
* different periods of prescription, by making the provisions of Chapter 3 of the Prescription Act, 1969, applicable to all debts. . . .'

This is a much-needed legislative move in the direction of equality of proceedings in so far as the recovery of debts from whatever source is concerned. It puts to an end a most unfortunate history in which litigants who were subjected to police misconduct found it almost impossible to launch proceedings timeously.

Statistics

Unfortunately no reliable statistics have been produced (as at 31 May 2003) as far as 2002 is concerned. It is to be regretted that neither the Department of Safety and Security nor the Commissioner of the South African Police Service is able to produce accessible and reliable statistics which illustrate the patterns of criminal behaviour in the country.

Case law

In *Stoman v Minister of Safety and Security & others* 2002 (3) SA 468 (T) the commitment of the South African Police Service to a programme of affirmative action was subjected to judicial scrutiny. A black policeman had been appointed to a post instead of the applicant, a white policeman. The latter then approached the court for an order setting aside the decision not to appoint him to the post and rather to appoint the black policeman.

The applicant's case was that he was the most suitable candidate in that he had achieved the highest percentage points in respect of the relevant test for the post. The Minister contended that the relief sought by applicant ignored the fact that the police service was obliged to give effect to the application of the policy of affirmative action, particularly within the context of the Employment Equity Act 35 of 1998. Furthermore, he contended that the black policeman had the necessary expertise and experience to be appointed to the post independently, the superior formal qualifications of the applicant notwithstanding.

Van der Westhuizen J distanced himself from the approach previously adopted by Swart J in *Public Servants Association of South Africa v Minister of Justice* 1997 (3) SA 925 (T), and in particular the

finding that the appointment of a candidate from one race group above a candidate from another race group is acceptable only where the candidates all have broadly the same qualifications and merits. As Van der Westhuizen J said (at 482B–C), '[t]o allow considerations regarding representivity and affirmative action to play a role only on this very limited level would be too restrictive to give meaningful effect to the constitutional provision for such measures and the ideal of achieving equality. All that it would mean is that, for example, race could then be taken into account rather than other preferences which are not related to qualifications or merits.'

Of particular significance to the structuring of a future South African police force is the following dictum (at 482D–E):

> 'A police service, for example, could hardly be efficient if its composition is not at all representative of the population or community it is supposed to serve. This view may depend on how one perceives efficiency, of course. A ruthless and draconian police force may be ''efficient'' in the sense that it rules with an iron fist and ensures some stability and safety over the short term; but it could hardly be efficient in the long run if it does not enjoy the trust, co-operation and the support of the community because the members of the force, including those in commanding positions, are all perceived to be representative of a different group which may be regarded as strangers or even with hostility or suspicion.'

Prisons

Statistics

According to the *Annual Report 2002/2003* of the Office of the Inspecting Judge, as at 28 February 2003 there were 188 307 prisoners who were 'crammed into prisons with a capacity for 110 924 prisoners' (*Annual Report* 24). The prison population of 188 307 prisoners was made up of 130 449 sentenced prisoners and 57 858 awaiting-trial prisoners. The number of prisoners serving sentences of more than 20 years increased from 1 885 in January 1995 to 7 885 in September 2002; those sentenced to between 15 and 20 years rose from 2 660 in 1995 to 8 355 in January 2003; and those with terms of 10 to 15 years from 6 168 in 1995 to 18 956 in January 2003. Over the same period the number of prisoners serving sentences of two to ten years hardly increased, going from 61 181 in January 1995 to 68 418 in January 2003. The number of prisoners serving life sentences increased from 2 951 in 1996 to 5 505 in 2002 (at 29–30).

Deaths in prison are divided into two categories, 'unnatural' deaths (that is, deaths as a result of violence and suicide) and 'natural' deaths (resulting from illness). The number of unnatural deaths remained relatively constant, with 60 such deaths having been recorded in 1995 compared with 54 recorded in 2002. By contrast, natural deaths increased rapidly from 211 in 1996 to 1 389 in 2002. The Inspecting Judge reports that the natural deaths appeared to be caused mainly by HIV/AIDS.

Case law

In *Minister of Correctional Services & others v Kwakwa & another* 2002 (1) SACR 705 (SCA) the court dealt with the rights of unsentenced prisoners. Acting in terms of s 22 of the Correctional Services Act 8 of 1959, the Department of Correctional Services introduced a new system in terms of which privileges were granted on a differential basis to prisoners in specified categories. Pursuant to this new policy, several privileges previously enjoyed by unsentenced prisoners were restricted or withdrawn. The effect of this change on the first applicant was described by Navsa JA thus (para 16):

> '[T]he first applicant had the use in her cell of a television set, a compact disc player and a radio/tape hi-fi combination all of which were owned by her. Prison authorities took the television set away and her compact disc player was removed from the hi-fi combination set. The new privilege system allows A group prisoners to have these as cassette players. Unsentenced prisoners are denied the use of cassette players. The removal of the first applicant's compact disc player and television set should be seen against the fact that the new system denies all unsentenced prisoners access to the prison library. The new system allows all sentenced prisoners access to the prison library. The first applicant complained that although the new privilege system does not provide for study and developmental programmes, the practice in the Pretoria prison is that study programmes for sentenced prisoners are conducted and they are permitted to enrol, at own cost, with outside distance education institutions. No such courses are conducted for unsentenced prisoners.'

Noting that 'the rigidity of the new system does not allow for cases where the circumstances are such that applying the norm would be oppressive', Navsa JA referred to the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders which had recommended standard minimum rules for the treatment of prisoners (para 32). He concluded (ibid): 'Standardisation *per se* cannot be justification for an infringement of prisoners' rights.'

Examining the context in which the applicants found themselves, Navsa JA held that the new system was based on the assumption that an awaiting-trial prisoner would remain in prison for a short time. This was patently not the case. Furthermore, the practice discriminated against unsentenced prisoners in a manner that was unjustified in logic or law (para 32). While it found that it was not for a court to 'fashion a workable privilege system' (para 36), the court held that the flaws in the system developed by the Department were so significant, and the discrimination against unsentenced prisoners so fundamental, that the system in respect of unsentenced prisoners had to be set aside.

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