

THE JUDICIARY

June 2020 | Q1 ISSUE



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Editor

It has been a challenging few months for our country as we try to come to terms with the threat of the coronavirus pandemic. But, true to our enduring spirit as a nation, we have refused to sit back and be victims and we have ploughed ahead with the business of life.

The threat of the pandemic has made it necessary for all of us to make adjustments in the way we live and work, and the courts have been no exception.

Whilst the national lockdown in response to the coronavirus pandemic slowed the work of the courts somewhat, the Judiciary has put in place a number of measures to ensure that the delivery of justice does not grind to a halt. Some of these interventions include the increased use of technology to improve access to the courts under the national state of disaster regulations.

As the restrictions continue to be eased on the operation of all sectors of the economy, the Judiciary has put measures in place to safeguard the wellbeing of court users and officials as the courts gradually reopen to hear matters. We urge all court users to follow the safety protocols we have put in place in all our buildings, including: temperature screening before entering court buildings, wearing a face mask at all times whilst



inside court buildings, washing and sanitising hands regularly, as well as observing social distancing inside court buildings.

The coming months will be busy for the courts as we try to work through the backlog of cases resulting from the national lockdown. As the Judiciary, we are committed to delivering justice in an efficient manner and in line with the established norms and standards for the exercise of judicial functions.

We welcome the support pledged by the Minister of Justice and Constitutional Development, Mr Ronald Lamola, in assisting the Judiciary to deal with the adverse effects of the pandemic to the courts. We will overcome. Inja yawaqeda ngolimi.

Enjoy the newsletter!

Judge President Dunstan Mlambo
Chairperson: Judicial Communications Committee



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The Chief Justiceship, therefore, encourages fellow Judicial Officers and the broader South African public to show more compassion and generosity, particularly at such a time as this.

ALLEVIATING HARDSHIPS IN THE TIME OF A PANDEMIC

Statement by CJ and DCJ



The Chief Justice and the Deputy Chief Justice realise that the lockdown is likely to cause severe financial hardship to millions of South African households and families.

Therefore, it is absolutely necessary for all South Africans who are able to do so to make whatever contribution they can to the alleviation of these hardships in any way they consider most effective.

One way of doing so would be to identify and assist families in dire need of basic necessities or financial assistance without contravening the lockdown regulations. Some of the practical steps that may be taken include sending money to identified families through electronic transfer such as eWallet, CashSend etc or, once again in strict compliance with the lockdown regulations, arranging to meet at a store with a representative of an identified family and buying basic necessities for them.

Another way would be to pay money into the Solidarity Fund from one's reserves or to commit a percentage of one's salary to that fund or a combination of the above, as one's personal circumstances may permit.

The Chief Justice and the Deputy Chief Justice have, separately and independently of each

other, identified needy or vulnerable families that they are assisting and will continue to assist during the lockdown and beyond if the need persists.

Judges and Magistrates do not owe their positions to any central command structure that could take decisions relating to their salaries on their behalf and instruct them on what sacrifices to make in relation thereto. They are completely independent in that respect. The Chief Justiceship, therefore, encourages fellow Judicial Officers and the broader South African public to show more compassion and generosity, particularly at such a time as this.

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THE SUPREME COURT OF APPEAL

ADJUDICATING AND SERVING JUSTICE IN UNCHARTERED TERRAIN DURING UNPRECEDENTED TIMES: COVID19

The Republic of South Africa like the rest of the world was plunged into a crisis as a result of COVID19. All institutions, governmental and non-governmental had to make means to continue with work under very difficult times and threat to the well-being of all the citizens especially those above sixty years of age, as the medical experts warned.

The Supreme Court of Appeal was no different. Subject to Practice Directives issued by the Chief Justice of the Republic of South Africa, Chief Justice Mogoeng Mogoeng, in a Court Directive issued on 24 April 2020, the President, Justice Mandisa Maya called upon all justices of the SCA to stay home but continue with

their work as they would have done in Bloemfontein: Business as usual but under unusual times.

These Practice Directives provided inter alia that the court building shall remain open for essential services, and that remote hearings shall be conducted during the May 2020 court term. The subsequent directives of 29 April 2020 elucidated how the proceedings would be conducted via video and or audio hearings, with the presiders managing each sitting as they would have in the normal run of the mill.

In anticipation of the May hearings, Justice Maya facilitated and coordinated the training of all twenty-five justices across the country which took place two weeks before the court term commenced, on 4 May 2020.

The training was conducted in virtual form with several dry runs divided in groups of five justices, a Secretary, researchers and the IT specialist per session. All justices participated. Two days before the term commenced, the President and all justices participated in a virtual meeting of all including the acting justices as they would have done in Bloemfontein, to chart the way for the term and further assess the viability of virtual hearings/proceedings. The meeting was a success and a taste of what would be experienced in the 28 days of the second term.

The resolve from all to achieve justice was proportional to the courage to pursue it even when this was uncharted terrain in unprecedented times.

The first cases were heard on 4 May 2020. Of these, the one highlighted is Carel Wynand Roux and others v Theunis Christoffel Botha and others (Case No: 427/2019) because the President like the captain of

the ship on her first maiden journey, sat behind the cameras and observed how the hearing was conducted. She switched on at 9h00 instead of 9h30 like all the panel members.

She literally called each of the panel members that were not yet connected to start to connect. By 9h45 all panel members, both counsel, the instructing attorneys, the litigants who were granted permission to observe the proceedings from the comfort of their homes in the Western Cape as well as the media were all on board when the clerk of the court introduced the matter.

This case was about two neighbours in the Breede River Valley in the Western Cape who had been fighting more than seven years over the location and extent of certain servitudes over a piece of land previously owned by two brothers who had bought it from their late father. 25 years later with this land in the family, the younger brother sold his portion to a purchaser outside the family as a result, dispute after dispute arose between the neighbours. The proceedings were conducted by the Justice Navsa, Mocumie, Makgoka JJA & Govern and Ledwaba AJJ. The matter was introduced by the clerk of the judge and all parties welcomed by the presider, Justice Navsa. The hearing took almost an hour and a half. Judgment was reserved. The order to be handed down electronically.

Of significance is the matter of: The National Commissioner of Police v & The Minister of Police v Gun Owners of South Africa (Gun Free South Africa as amicus curiae (561/2019). This was the first virtual hearing to be live streamed in SA on Facebook and YouTube, at the request of the parties, subject to the court directives regarding avoiding disrupting the proceedings. The media also joined on the platform to observe the proceedings. The presider was the President, Justice Maya with panel members: Zondi, Schippers, Plasket JJA and Eksteen AJ. All South Africans across the country watched the SCA in motion for the very first time. Access to justice: Justice seen! Justice experienced!

Now, a few days before the end of the term, the President, true to her inclusive and collegial leadership style, took a step back to look at the term when it started to take stock. On the 28 May 2020, she wrote to her colleagues proudly,

'Dear Colleagues...

The last matter on the May 2020 term roll was heard yesterday [27 May 2020]. All the matters which the litigants requested to be heard, 47 in all, were adjudicated successfully. So we were able to dispose of our entire roll (except for those matters in respect of which the parties opted for open court hearings in due course). As far as I know, no other court in the country has been able to do that and the courts that have sat dealt only with urgent matters. I know that there was some hesitation from some of us in the beginning.

This was understandable considering that no virtual court had been run anywhere in the world before the Covid-19 pandemic and it was uncharted terrain. But once we decided to go ahead with the new method everyone gave it their all. We worked under really difficult circumstances with all the glitches and technological deficiencies but we pulled it off, using our own home facilities to dispense justice, and helped of course by Gareth, Paul (who has manned the front office since Day 1 of the lockdown) and the rest of our support staff. We may fight and scratch one another at times (which family doesn't?) but when it comes to our work and the good of our court we are unbeatable.

Thank you.

I have no doubt that there will be a marked improvement in the coming term and I will ensure that the OCJ IT officials deliver on their promise to improve our connectivity and procure a Zoom license.

*Best wishes,
Mandisa'*

A follow-up training to improve on and sharpen the skills of the justices on virtual hearings on Microsoft Teams will be conducted during the third term on the 20th August 2020. ■

► **By: Baratang Constance Mocumie**
Justice of the Supreme Court of Appeal, RSA
28 May 2020



COURTS MAKE ADJUSTMENTS FOR ALERT LEVEL 3

Since the announcement of government's risk adjusted strategy to gradually ease the regulations under the national state of disaster in response to the coronavirus (COVID-19) pandemic, the leadership of the Judiciary has been putting measures in place to prepare for increased traffic at the courts.

Court buildings across the country have undergone a process of decontamination as a measure to curb the spread of COVID-19.

The decontamination of the buildings took place ahead of the announcement by President Cyril Ramaphosa that the country would move into alert level 3 of the national state of disaster as from June 1.

Other measures that have been put in place include:

“

in response to the coronavirus (COVID-19) pandemic, the leadership of the Judiciary has been putting measures in place to prepare for increased traffic at the courts.



In the Port Elizabeth High Court building, red and white barrier tape is placed in strategic areas of the courtrooms to control the movement of people. There are also strips placed on benches in the public gallery indicating a 1.5m space between seats for members of the public. Red strip tape is placed on the tables where prosecutors and defence counsels are stationed, keeping them 1.5m apart, and a barrier tape is used in the dock to keep prisoners apart during court proceedings.

- Temperature screening of everyone entering court buildings;
- The sanitising of hands before a person can enter the building;
- Availing of hand sanitisers in strategic points inside court buildings;
- Putting in place social distancing measures inside court buildings; and
- Making the wearing of face masks compulsory inside court buildings.

As the courts gradually open up to hear more matters, court users are urged to ensure that they follow good hand hygiene practices, social distancing and diligence in the wearing of face masks whilst inside court buildings.

- Be Informed
- Be Prepared
- Be Smart
- Be Safe
- Be READY to fight #COVID-19.

Remember, COVID-19 spreads when someone who has COVID-19 coughs or exhales and releases droplets of infected fluid. Most of these droplets fall on nearby surfaces and objects, such as desks, tables or telephones. People could catch COVID-19 by touching contaminated surfaces or objects, and then touching their eyes, nose, or mouth. If they are standing within 1 meter of a person with COVID-19 they can catch it by breathing in droplets coughed out or exhaled by them. In other words, COVID-19 spreads in a similar way to flu. Most persons infected with COVID-19 experience mild symptoms and recover.

However, some experience more serious illness and may require hospital care. Risk of serious illness rises with age: people over 40 seem to be more vulnerable than those under 40. People with weakened immune systems and people with conditions such as diabetes, heart and lung disease are also more vulnerable to serious illness.



COVID-19
READINESS
IN OUR
COURTS

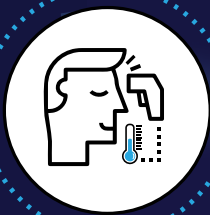




OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

PREVENTION COVID-19

PLEASE NOTE THAT BEFORE ENTERING ANY COURT OR OCJ BUILDING YOU WILL BE REQUIRED TO:



UNDERGO TEMPERATURE SCREENING

Should your body temperature be 38°C or higher, you will not be granted access into the building and will be required to return home to observe self-isolation protocols.

PUT ON YOUR FACE MASK

Keep your face mask on at all times whilst inside the building.



SANITISE AND WASH YOUR HANDS

Please ensure your hands are sanitised before entering the building. Whilst inside the building, please wash your hands regularly with soap and water.

OBSERVE SOCIAL DISTANCING

Please keep a distance of around 1.5 metres between yourself and other people. A limited number of people will be allowed in elevators to observe the 1.5 metres social distancing protocol.





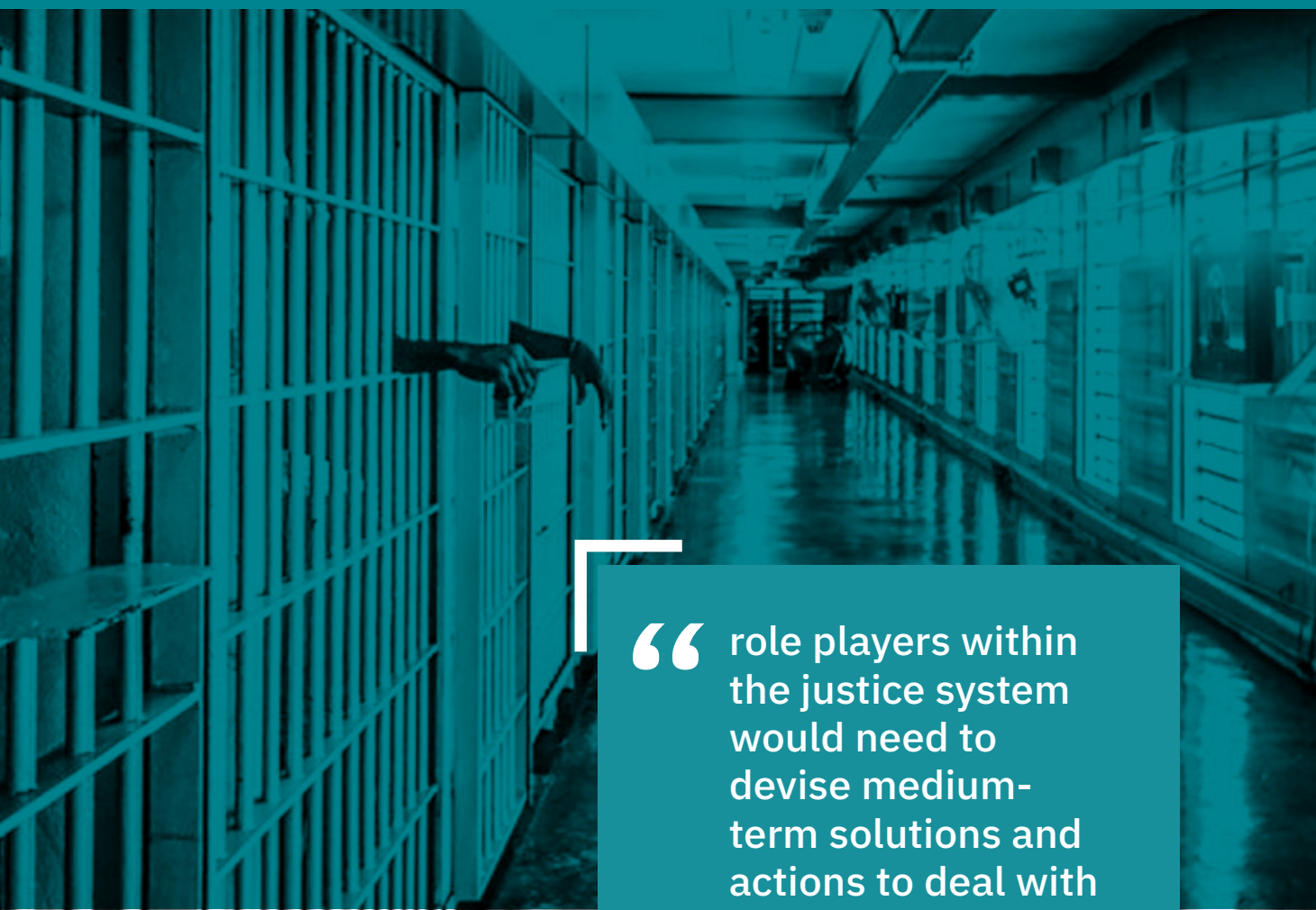
“ The Constitution mandates us to establish a single judicial system that is in line with the provisions of Section 166 of the Constitution

MINISTER LAMOLA PLEDGES CONTINUING SUPPORT TO THE JUDICIARY

Addressing the Parliamentary Portfolio Committee on Justice and Correctional Services in May, Justice and Correctional Services Minister Ronald Lamola said the Department of Justice and Constitutional Development would continue supporting efforts that give South Africans the assurance that the country’s constitutional democracy is guarded by an independent Judiciary.

“The Constitution mandates us to establish a single judicial system that is in line with the provisions of Section 166 of the Constitution. This is a continuous responsibility that requires the Executive branch of State to work together with the Judiciary in this regard,” said Minister Lamola.

He noted that access to courts as well as the optimal functioning of the courts are important for the transformation of the judicial system. To this effect, he highlighted the importance of adopting technology in court processes in order to improve efficiencies in courts.



“ role players within the justice system would need to devise medium-term solutions and actions to deal with the adverse effects of the pandemic to the justice system

“...e-filing is meant to fully exploit ICT advancements to minimise not just the physical movement of people and paper-based court documents from parties to the courts, but also to leverage the benefits of electronic storage within the courts – that is, faster document filing and retrieval, eradication of the misplacement of case files, concurrent access to view the same case filed by different parties,” said the Minister.

Minister Lamola also spoke about the impact of the coronavirus (COVID-19) pandemic on the functioning of the courts. He noted that role players within the justice system would need to devise medium-term solutions and actions to deal with the adverse effects of the pandemic to the justice system, including:

Assessing the implications (short- and medium-term) of the COVID-19 pandemic for the needs of the people

as it relates to justice services; How the delivery of justice services will be increased after the pandemic; Identifying the main challenges to ensuring the accessibility of justice services during the National State of Disaster period and the period thereafter; and Identifying adaptations necessary at the courts to ensure that court services can still be delivered in the current period while ensuring the safety of judicial officers, court users and court officials. ■



“

The Office of the Chief Justice (OCJ) has outlined plans for the next five years on how it will support the Judiciary in the pursuit of quality and accessible justice

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OCJ OUTLINES ITS SUPPORT TO THE JUDICIARY

The Office of the Chief Justice (OCJ) has outlined plans for the next five years on how it will support the Judiciary in the pursuit of quality and accessible justice. The plan is contained in the Department’s Strategic Plan 2020/21 – 2024/25.

The OCJ is a Government Department established through a Presidential proclamation in 2010. Its mandate is to render support to the Chief Justice as the head of the Judiciary, as provided for in section 165(6) of the Constitution, read together with the Superior Courts Act (2013).

The OCJ’s Strategic Plan was an outcome of an extensive consultative process involving the leadership of the Judiciary, the Ministry of Justice and Correctional Services, all OCJ senior managers, and various governance structures of the Department.

The Strategic Plan commits the OCJ to pursuing quality and accessible justice for all as entailed in the OCJ impact statement.

Among others, the Strategic Plan outlines plans to improve court efficiency with the aim to ensure that Superior Courts deliver their services in an efficient manner. This includes the support which the OCJ provides to judicial functions and court administration related functions, mostly focusing on the quasi-judicial functions. This outcome contributes to Chapter 14 of the NDP “promoting accountability and fighting corruption” and Priority 6 of the MTSF, which focuses on “Social Cohesion and Safer Communities”.

An efficient court system contributes to building safer communities, which is one of the focus areas of the MTSF. In addition, building an efficient court system that is free from corruption and promotes integrity is in line with the MTSF impact “all people in South Africa are safe”.

Enhanced judicial education and support is another area the OCJ will focus on over the medium term. The aim of this outcome is to ensure that the OCJ provides administrative and technical support that enables the Judiciary to deliver on its Constitutional mandate.

This support includes judicial training, administrative and secretariat support to the Judicial Service Commission, administration of Judges’ Registrable Interests and administration of Judges’ conditions of service. The outcome contributes to Chapter 14 of the NDP “promoting accountability and fighting corruption” and Priority 6 (Social Cohesion and Safer Communities) of the MTSF.

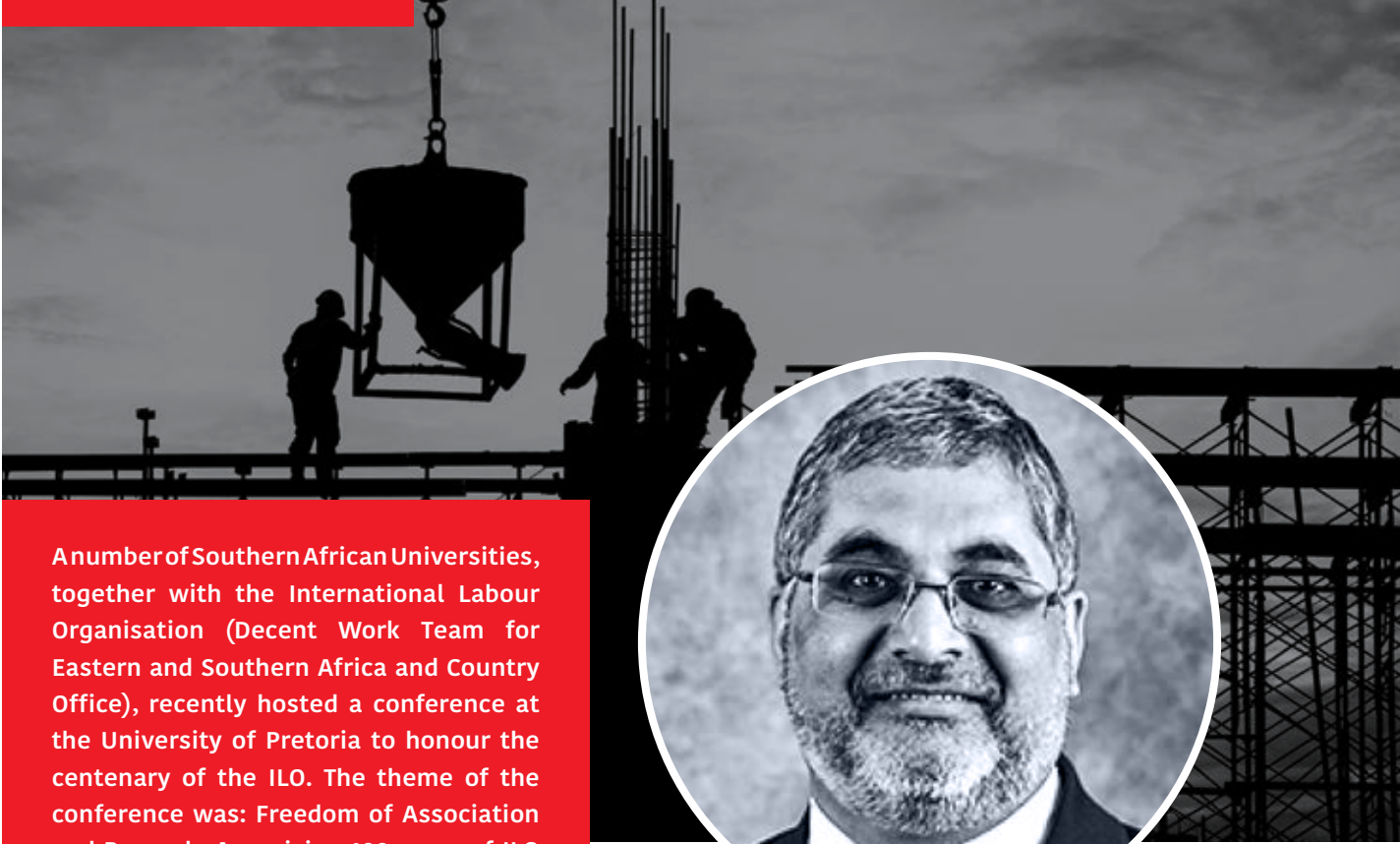
The Secretary General of the OCJ, Ms Memme Sejosengwe, in her statement in the Strategic Plan points out that the five year plan demonstrates how the department contributes to the priorities of Government as outlined in the National Development Plan (NDP) and the Medium-Term Strategic Framework (2019 to 2024).

“This plan outlines how the mandate of the OCJ will be implemented over the five-year period. The Strategic Plan was developed in consultation with relevant stakeholders to ensure that the OCJ becomes a centre of excellence in discharging its mandate. To give effect to the aforementioned, the OCJ has aligned its strategies with the priorities of both the Government and the Judiciary.

“The OCJ has translated the key identified priorities into measurable deliverables (Impact, Outcomes, and Outputs) that will be implemented and achieved for the realisation of the mandate of the department and the contribution the NDP priorities. This will ensure an effective and efficient court system that focuses on providing quality and accessible justice for all,” noted Ms Sejosengwe. ■

“
An efficient court system contributes to building safer communities, which is one of the focus areas of the MTSF





A number of Southern African Universities, together with the International Labour Organisation (Decent Work Team for Eastern and Southern Africa and Country Office), recently hosted a conference at the University of Pretoria to honour the centenary of the ILO. The theme of the conference was: Freedom of Association and Beyond: Appraising 100 years of ILO Engagement in Southern Africa.

The Judge President of the Labour and Labour Appeal Courts of South Africa, Justice B. Waglay presented a paper at the Conference titled “The Impact of the ILO on South African Labour Law”. Below is the text of the paper.

A CENTENARY OF THE ILO

Introduction

The International Labour Organization (ILO) was founded in 1919 as a specialised agency within the League of Nations under the Treaty of Versailles.¹ However, and unlike other agencies which were dissolved together with the League of Nations after the Second World War, the ILO survived. It survived and became part of the United Nations (UN). One of the most crucial task of the ILO is to draft Conventions on labour standards with a view on ensuring peace, social justice and the elimination of unfair competition based on exploitative and inhumane conditions of labour² and to oversee the development of international labour law.³ It is known for

its tripartite structure that brings together governments, employers’ associations and trade unions at all levels of its decision-making process.⁴

Since its inception, the ILO has adopted some 189 Conventions⁵ and made some 200 Recommendations⁶ to give effect to a host of fundamental employment rights such as the prohibition of forced labour, social security, child labour, the right to organise in a trade union, elimination of discrimination and most importantly freedom of association. The ILO has survived to become an important agency under the UN.⁷ It has survived the tensions that took place in the international arena: the

1 See the history of the International Labour Organization on <https://www.ilo.org/global/about-the-ilo/history/lang-en/index.htm>.

2 Darcy Du Toit et al, Labour Relations Law: A Comprehensive Guide, Sixth Edition, 2000. See also the Role of the ILO on <http://www.industrial-union.org/the-role-of-the-ilo>, published 18 May 2017.

3 See International labour standards: A global approach, 75th anniversary of the Committee of Experts on the Application of Conventions and Recommendations. Available at https://www.ilo.org/wcmsp5/groups/public/-/ed_norm/-/normes/documents/publication/wcms_087692.pdf.

4 See Tripartite constituents on <https://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang-en/index.htm>.

5 With this conventions, eight of which are fundamental. Available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>.

6 See Up-to-date Conventions and Recommendations on <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12020:0:NO::>

7 Ibid footnote 4.

cold war and decolonisation. The ILO was able to continue to exist despite all the socio and political turmoil and tragedy in the world and it still has the capacity to adapt and to realign its objectives to fit the current and future change affecting employment related issues.

As Maupain correctly argues, the striking feature of the ILO is the remarkable resilience it has demonstrated through the most chaotic and murderous century in human history and the corresponding radical transformations of its political, economic and technological environment.⁸ The ILO's surviving feature is its capacity to effect a radical transformation of its objectives and purposes thereby adapting to the new socio-economic and political environment.⁹ This unique feature is the reason behind its longevity. To this end, the ILO decent work agenda and south-south triangulation bear testimony of the re-orientation policy of the ILO.

1. The role of the International Labour Organization on the South African Labour law

1.1 The Decent Work Agenda

The ILO's decent work agenda is a universal objective that has been included in major human rights declarations and, as part of the UN system realigns its objective to fit within the UN framework of decent work for all. It has developed an agenda for the community of work: looking at job creation, rights at work, social protection and social dialogue, with gender equality as a crosscutting objective.¹⁰ The decent work agenda involves opportunities for work that are productive and deliver a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organise and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.¹¹

The principal goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.¹² The ILO's Decent Work Agenda is in my view, a balanced and integrated programmatic approach to pursue the objectives of full and productive employment and decent work for all at global, regional, national, sectoral and local levels.

1.2 Shorfalls v success stories of the International Labour Organization

1.2.1 Criticism

Notwithstanding the ILO's survival over the last century and its considerable literature to setting labour standards so as to provide decent living conditions to workers, there is a mixed reaction about its achievements. One of the criticisms is that in the ILO literature there is the polarisation of the debate in the north. There has arguably, in the past been an under-representation of scholars from middle and low-income countries and the unequal treatment of the ILO's tripartite constituents. Much of the existing ILO literature is still dominated by North American and Western European scholars, and the input of employers' representatives has received far less attention than the role played by government and workers' delegates within the ILO history.¹³ There is therefore a need to make significant changes from its past to address the eurocentrism of the early literature and I believe that this is being continually addressed.

1.2.2 South African Legal framework : a case study

The above challenges notwithstanding, ILO's through its conventions plays a determining role in setting labour standards worldwide, which is one factor to which



8 Francis Maupain A Second Century for What? The ILO at a Regulatory Crossroad International Organizations Law Review (2019) 1-53.

9 Jasmien Van Daele "The International Labour Organization (ILO) in Past and Present Research" International Review of Social History, Vol. 53, No. 3 (December 2008), pp. 485-511 at 491.

10 Available at <https://www.ilo.org/global/topics/decent-work/lang-en/index.htm>.

11 Ibid.

12 Report of the Director-General: Decent work - ILO- ILC87. Available at <https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

13 Rodríguez García "The International Labor Organization: Past and Present International Labor and Working at 226.



the fervent critics of ILO unconditionally agree. South Africa is a good example of a country that can attest to the role played by the ILO in drafting its new labour legislation during the transitional period. It should be noted that when South Africa joined the ILO in 1994, it adopted a tripartite negotiation forum similar to that of the ILO where government, business and trade unions represented in the National Economic Development and Labour Council (NEDLAC) meet and discuss employment related matters. NEDLAC is, therefore, the vehicle through which all labour market actors meet to consult and agree on economic, labour and development issues facing the country.¹⁴ It is at this unique forum that employment related matters are discussed.

I remember that one of the discussions that took place in the negotiation of the present Labour Relations Act 66 of 1995 (LRA), was to align the law on strike to that of the ILO Convention 87 of 1948 ‘Freedom of Association and the Right to Organise Convention’ and Convention 98 of 1949 ‘The Right to Organise and Collective Bargaining Convention’. Under the previous labour legislation, the right to strike was curtailed and employees that participated in a strike action were often dismissed.¹⁵ A report by the ILO’s Fact Finding and Conciliation committee, on an investigation into the old labour

legislation of South Africa requested that workers be given the right to strike in order to promote and defend their socio-economic interests.¹⁶

In order to give effect to the ILO’s request, the preamble of the present labour legislation—LRA states that its purpose is to give effect to obligations incurred by South Africa as a member state of the ILO ¹⁷ to provide a framework within which employees and their trade unions, employers and employers’ organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and to formulate industrial policy.¹⁸ Although the right to strike is not explicitly mentioned in the two core Conventions relating to freedom of association, the Committee on Freedom of Association has indicated that the right of employees to strike is an essential element of the right to freedom of association, and one of the essential elements of trade union rights.¹⁹ The right to strike is therefore implied from articles 3, 8 and 10. The LRA also makes provisions for the right to collective bargaining in Chapter 3 and the right to strike and lockout in chapter 4.

The ILO has accepted that the right to strike is not absolute and could be restricted and that the right to

¹⁴ See more information about NEDLAC at <http://nedlac.org.za/>.

¹⁵ Mohamed Alli Chicktay “Defining The Right to Strike: A Comparative Analysis of International Labour Organization Standards and South African Law Obitier, Volume 33, Issue 2, Jan 2012, p. 260 – 277 at 264.

¹⁶ Ibid.

¹⁷ Section 1 (b) of the Labour Relations Act 66 of 1995.

¹⁸ Section 1 (c) of the Labour Relations Act 66 of 1995.

¹⁹ Ernest Manamela and Mpfari Budeli “Employees’ right to strike and violence in South Africa” [Comparative and International Law Journal of Southern Africa, Volume 46, Issue 3, Nov 2013, p. 308 – 336 at 315](#)

strike may be limited in respect of certain groups or categories of workers, such as certain public officials and workers in essential services.²⁰ Similarly, the LRA recognises that a strike that does not follow due process could be declared unprotected.²¹

“ There is therefore a need to make significant changes from its past to address the eurocentrism of the early literature and I believe that this is being continually addressed.

I do not intend to canvass all aspects of our labour law that have aligned themselves with the ILO’s Conventions. Suffice to say that ILO experts assisted in the drafting of the LRA and international standards had influenced several provisions of the LRA. For instance, the right not to be unfairly dismissed resonates in the ILO Convention (no.158), Termination of Employment (1982) which provides that, employers must have valid reasons before terminating a contract of employment. The right for a dismissed employee to refer a dispute to either the Commission for Conciliation Mediation and Arbitration (CCMA) or the Bargaining Council is similar to article 7 of the Convention 158 which gives the opportunity for a dismissed employee to defend his/herself.

In a similar vein, the ILO Convention concerning Discrimination in Respect of Employment and Occupation or Discrimination (Employment and Occupation) Convention (ILO Convention No.111) requires member States to enable legislation which prohibits all discrimination and exclusion on any basis including of race or colour, sex, religion, political opinion, national or social origin in employment. This Convention is given expression by the adoption of the Employment Equity Act 55 of 1998 (EEA) and section 187 of the LRA. The list is not exhaustive. These few examples demonstrate that ILO has played and continues to play an important role in

shaping the South African labour law landscape. It is also a fact that South African Courts rely not only on binding but also on non-binding conventions and take heed of the pronouncements of the expert committees and the contents of ILO recommendations.²²

In the matter of *S v Makwanyane* 1995 3 SA 391 (CC) the Constitutional Court held that binding and non-binding conventions are helpful in the interpretation of the provisions of laws.²³ In casu, the Court further pronounced that:

specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.

Similarly, the Constitutional Court in *Bader Bop* held that, a minority trade union could strike in order to gain organisational rights.²⁴ The Court emphasised that the jurisprudence of the ILO’s Freedom of Association Committees was an important resource in developing labour rights. This signifies that the Courts here not only see themselves as able to apply the ILO’s conventions but also look for guidance from the recommendation made by the working groups.

The ILO’s Conventions and Recommendations therefore play an important role in shaping South African labour law jurisprudence. It further evinces the relevance of the ILO and its capacity to maintain its influence here and throughout the globe. The recent ILO Centenary Declaration for the Future of Work adopted by the Conference at its 108 Session in Geneva on 21 June 2019 demonstrates that the ILO maintains its relevance by adopting strategies that address the type of work due to technological innovation. The adoption of such a declaration is vital for a country like South Africa which is already witnessing the devastating effects of the fourth industrial revolution. In fact, some sectors like the banking sector have digitalised most of their services. As a result, some 2000 employees have been retrenched. A top commercial bank, for instance, has closed 104 branches countrywide and retrenched almost 1200 employees as part of its efforts to digitise its retail and business bank.²⁵

20 See Chapter V of the Labour Legislation Guidelines, Substantive provisions of labour legislation: The right to strike. Available at <https://www.ilo.org/legacy/english/dialogue/ffpdial/llg/noframes/ch5.htm>.

21 Strike action can lose its protected status because of various factors. See for example, Alan Rycroft, What can be done about strike-related violence? 10 July 2007. Available at https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Rycroft.pdf/eda46151-176d-4091-a689-f1042e03e338.

22 Kujinga T and Van Eck S “The Right to Strike and Replacement Labour: South African Practice Viewed from an International Law Perspective” PER / PELJ 2018(21) 1-34.

23 1995 3 SA 391 (CC) at para 35.

24 National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd and Another [2003] 2 BLLR 103 (CC) Para 30.

25 Staff Writer, These 104 Standard Bank branches are closing – here’s where you should go instead

4 June 2019. Available at <https://businesstech.co.za/news/banking/321239/these-104-standard-bank-branches-are-closing-heres-where-you-should-go-instead/>.

See also Staff Writer Standard Bank to cut 1,200 jobs as part of digital shift 14 March 2019. Available at <https://businesstech.co.za/news/banking/305404/standard-bank-to-cut-1200-jobs-as-part-of-digital-shift/>.



The ILO's declaration to promote the acquisition of skills in order to address the anticipated skills gaps is a solution which we may need to consider implementing because the vast majority of job seekers in South Africa are semi or unskilled. If those in employment are unable to upskill themselves to meet the demands of the technological innovations, they will, if retrenched increase the growing number of unskilled job seekers thereby increasing the unemployment line. The ILO's suggestion calling upon members to work individually and collectively, on the basis of tripartism and social dialogue, and with its support to further develop its human-centered approach to the future of work by: strengthening the capacities of all people to benefit from the opportunities of a changing world of work through: inter alia effective lifelong learning and quality education for all; and effective

measures to support people through the transitions they will face throughout their working lives;²⁶ is an approach which the country can benefit from if implemented.

Equally important is the adoption at the ILO 108 Session in Geneva on 21 June 2019 of Convention 190 on Violence and Harassment. The Convention provides a broad definition of what violence and harassment in the world of work means and where it can take place, and says that everyone in the world of work has the right to be free from violence and harassment, including gender-based violence. It requires governments to take measures to protect workers from violence and harassment, especially women. This new Convention is praised and seen as a historic victory for the battle for gender equality since an estimated 35 per cent of women i.e. 818 million, worldwide experienced sexual or physical violence at home, communities and/or in the workplace.²⁷

South Africa has in place a Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, but this Code only provides for the procedure on how to deal with sexual harassment cases. The only substantive law on sexual harassment is the Protection from Harassment Act 17 of 2011 which deals with harassment on a general note. There is no current legislation specifically related to sexual harassment in the workplace: here the ILO's recent Convention on Violence and Harassment could provide some direction to design our law on the subject. The issue is a pressing one if one takes into account that the new Convention as it should, extends sexual harassment to gender-based violence occurring outside the workplace. There is rightly a recognition that domestic violence affects employment, productivity and health and safety and that low productivity at work may well be consequent upon domestic violence.

This new Convention²⁸ is adopted at a time when countries including South Africa, face an unprecedented violence mainly against women and children.²⁹ Hence, President Ramaphosa's call to tackle gender-based violence by way of mass media campaigns; gender-sensitivity training for law enforcement officials, prosecutors, magistrates and policymakers; to include in the school curriculum women's rights and gender power; and to train and deploy prevention activists to all of municipalities; strengthening the criminal justice system; enhancing the legal and policy framework; ensuring adequate

²⁶ Heinz Koller: ILO Centenary Declaration is a roadmap to develop skill sets for today's rapidly changing world of work 23 August 2019. Available at https://www.ilo.org/moscow/news/WCMS_716336/lang-en/index.htm.

²⁷ Historic victory in battle for gender equality: ILO Convention to End Violence and Harassment in the Workplace adopted, 21 June 2019. Available at <https://www.uniglobalunion.org/news/historic-victory-battle-gender-equality-ilo-convention-end-violence-and-harassment-workplace>.

²⁸ ILO Convention 190 on Violence and Harassment.

²⁹ South Africa is the country with the highest number of cases of violence against women in the world (<https://www.cesvi.eu/what-we-do/protection-of-infancy/south-africa-against-violence-women-and-children/>).

care, support and healing for victims of violence; and improving the economic power of women,³⁰ may perhaps point to our President's response to the ILO's call that governments, employers' and workers' organizations: labour market institutions, should take measures, to address the impacts of domestic violence. Domestic violence is a scourge in any society which should be crushed at all costs.³¹

Also important is the ILO Convention on Domestic Workers, 189 of 2011. This Convention recognises that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights. It recognises that in developing countries with historically scarce opportunities for formal employment, domestic workers constitute a significant proportion of the national workforce and yet remain among the most marginalised. Perhaps it is against this background that we should understand the recent adoption of the National Minimum Wage Act 9 of 2018. The primary motivation behind the adoption of this Act appears to be the need to address the huge income disparities that characterised the South African Labour Market. The Act fixes the hourly rate for the vulnerable workers such as domestic workers by providing a fixed hourly rate it seeks to achieve a better working conditions for these vulnerable workers.

Finally on this issue, with the adoption of the various Conventions and the subsequent domestication of the ILO Conventions in South Africa what we seek to achieve is a single goal: the attainment of social justice. This is echoed in the ILO's Constitution for the search of social justice in the workplace. As Maupain correctly argues, social justice is a process whereby the values and principles abstractly identified by the ILO Preamble should be given a specific content and meaning, with due account taken of relevant circumstances.³² This process involves the free confrontation and reconciliation of the respective interests of the employers and the workers, with the government ideally acting as an arbitrator and catalyst for the common good.³³

The call for social justice was reiterated by the ILO Declaration on Social Justice for a Fair Globalization at its 97th session in Geneva on 10 June 2008.³⁴ It builds on the values and principles embodied in the ILO's Constitution and reinforces them to meet the challenges of the 21st century. There is recognition that global economic integration has caused many countries and sectors to face major challenges of income inequality, continuing high levels of unemployment and poverty, vulnerability of economies to external shocks, and the growth of both unprotected work and the informal economy, which impact on the employment relationship and protection. In order to promote good employment conditions in a globalised world, the Declaration reposes four interrelated strategies which I don't wish to record because of time constraints but once implemented could attempt to address the challenges.

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There is rightly a recognition that domestic violence affects employment, productivity and health and safety and that low productivity at work may well be consequent upon domestic violence.

All these objectives, in this era of globalisation require the equitable redistribution of the fruits of the prosperity expected from the open borders among those who have contributed to or have been affected by it within these borders but positive results are extremely slow in happening. Dealing specifically with our issues, South Africa has one of the worst unemployment rates worldwide proportionally to the number of people who are looking for work.³⁵ While unemployment here has always been substantial, one of the reasons for the

30 South African Government News Agency: Emergency plan to protect women and children 19 September 2019. Available at <https://www.sanews.gov.za/south-africa/emergency-plan-protect-women-and-children>.

31 See for example RABBI YAakov GLASMAN, Stamping out the scourge of domestic violence, 25 November 2019. Available at <https://ajntimesofisrael.com/stamping-out-the-scourge-of-domestic-violence/>.

32 Ibid footnote 8.

33 Ibid page 7.

34 Available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.

35 By December 2014, South Africa was reported to be having the highest unemployment rate worldwide. Kate Wilkinson, FACTSHEET: Unemployment statistics in South Africa explained, 03 December 2014. Available at <https://africacheck.org/factsheets/factsheet-unemployment-statistics-in-south-africa-explained/>. For current statistics, see Statistics SA, Unemployment rises slightly in third quarter of 2019. Available at <http://www.statssa.gov.za/?p=12689>.

present state of unemployment can be attributed to be the slow-down or the virtual absence of economic growth. It is not just South Africa that is suffering from the slow-down, it is a global phenomenon. It is argued that the slow-down has its genesis in the Wall Street meltdown of 2008.³⁶ The world is yet to recover from that. South Africa as part of the global market is no exception in going through tough economic times but the near absence of growth of the South African economy can be attributable to amongst other things the drastic reduction of the markets for its manufactured good. It is said that when markets slow-down self-adjustments are made with prices rising, this has not happened, markets have shrunk and commodity prices have also shrunk. Added to this is that even the gods are conspiring against us. In the past couple of years, our country has suffered the most severe drought reducing a number of farms to barren land and scarce resources have been required to be diverted towards providing water and other necessities to drought stricken areas and people who live there.

The instability of the ruling party has compounded this problem. If economists are to be believed, we are already in recession. The prognosis is not good. The present rate of economic crisis is said to stay with us at least till the end of the current financial year. Also, one had hoped that all the action in the merger and acquisition market would lead to some economic growth. International companies, leading businesses of the world are finding

their way into South Africa buying our biggest and largest enterprises, but this has not translated into economic development of any substance. The mergers reflect how the world is becoming smaller and smaller and businesses are starting to cannibalise each other, the hope that the conduct of one business seeking to purchase another will lead to a positive impact on employment has not materialised.

I must add that but for the role of the Competition Commission the position would have been life threatening. The greater and greater role played by the Competition Commission using its Public Interest jurisdiction has at least insulated large scale job losses in new mergers. Absent the interference in terms of the Competition law there would have been a serious negative impact on South African society. The Competition Commission has had an immense impact on restricting job losses and promoting localisation of supply chain thereby creating more jobs. However, as the entities established in terms of the Competition Act bring its influence to bear on fair labour practices and fair trade practices and to promote localisation of supply chain, with the amalgamation of big business or business coming into our country there has not been a significantly positive employment and trade practice.

³⁶ Ravinder Rena & Malindi Msoni (2014) Global Financial Crises and its Impact on the South African Economy: A Further Update, Journal of Economics, 5:1, 17-25, DOI: [10.1080/09765239.2014.11884980](https://doi.org/10.1080/09765239.2014.11884980).

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An efficient court system contributes to building safer communities, which is one of the focus areas of the MTSF



Besides the constitutional entrenched imperative of fair labour practice or the public interest grounds entrenched in Competition Law and the importance of employment what is most challenging is the concept of decent work which is the central and defining issue of our time. We need to find a way to create more jobs and jobs which are consistent with the norms of our constitutional democracy.

It is important that creating jobs and decent work are seen as two sides of the same coin. In fact, every society should demand that jobs and decent work be brought into focus with the aim of forming a single objective. This is crucial not only for South Africa but for the global economy because as the world becomes smaller and businesses become international we will find worker migration becoming a serious factor. As economies integrate in an ever-evolving global economy and markets open, this may result in poorer countries losing their skilled work force to developed countries and impoverished economies become stranded with the abundance of unskilled work force which we hope doesn't happen here.

Additionally, there is also new forms of employment relationship which is being created, in such instances, a more nuanced understanding needs to be developed to meet the demands created by the new and sometimes legal but fictitious employment relationships, which is cause of so much debate today. We have to deal with challenges on how to balance the rights dispensation that is inherent in the decent work concept with the economic component because as businesses become more competitive, society will have to face the reality that challenges to one's financial security based on economy, necessity will become more and more prevalent with one side making demands for more controls and the other will try to make sure that controls are removed so that market forces dictate economic security.

Some will want to argue that the modern issue is no longer economic protection in the form of customs duties and protection of outside competition but managing our industries against the international economic imperatives that prevail. While there can be no question anymore that markets matter there is recognition that labour is not a commodity to be manipulated by the

market forces. There is acceptance in the world today that human values matter. The question is not just how cheap we can purchase a garment or a motor vehicle for, but whether the worker is treated fairly in the process of making that garment or that motor vehicle. The whole concept of decent work will directly emphasise smart work practices. It is this, which, in my view, is beginning to play a significant role on job security and increase production and profit.

The slow-down in global economic growth has also led to substantial anti-establishment sentiments. This continues to fester with long-term effects in both developed and developing countries. Greece is but one example. We are living in a world where there is a rebellion, a rebellion against the status quo. Brexit is an example of it the rise of Donald Trump is also another reaction against the status quo. South Africa is not insulated from this world rebellion the rise of student protests, service delivery protest and the proliferation of new trade unions challenging the established relationships between unions and employer associations bear testimony to this.

Against this background those of us involved in the world of work from the outside must accept that where we see the challenges that are faced by the realities of trade and industry and feel unable to influence it we can still try to nudge it, encourage positive movement by pointing to the right direction, but ultimately it requires the actors in the labour market to step up and forge a labour relations regime that is practically founded on cooperation to create a partnership between business and labour and with the government.

Conclusion

To sum up, the impact of the ILO on the South African labour law would remain present as long as the ILO is proactive and continues to adopt a pre-emptive approach to changes that affect workers. ILO's capacity to reinvent itself and to contextualise its approach is the reasons it has been able to survive all the turmoil that took place in the international arena. It may have been the socio-political tensions the ILO had faced in the past but now the challenges are more of a technological nature. The responses to these various challenges have shaped the international labour standards and will no doubt continue to do so. ■



JUSTICE MAYA RECOGNISED BY DUKE UNIVERSITY

Supreme Court of Appeal President, Justice Mandisa Maya has been selected as the 2020 recipient of the Law Alumni Association's (LAA) International Alumni Achievement Award.

She obtained an LLM, on a Fulbright scholarship, from the Duke University School of Law in North Carolina, U.S.A. in 1990.

“ The International Alumni Award recognises and honours an international graduate of the Duke University School of Law who has exemplified the highest standards of professional excellence, personal integrity,

The International Alumni Award recognises and honours an international graduate of the Duke University School of Law who has exemplified the highest standards of professional excellence, personal integrity, and concern for the common welfare in his or her own profession and home country.

The LAA said the following on bestowing President Maya with the Award:

“The nominating committee was impressed by your significant professional achievements, including your appointment in 2017 as the first woman President of the Supreme Court of Appeal of South Africa.

The committee also highlighted your leadership in the promotion of cultural and gender rights in South Africa. Through your esteemed legal career and commitment to serving your community, you embody the qualities we seek in award recipients. It is a great tribute to you that the Law Alumni Association chose you to receive this award, and Duke Law School is honoured to add your name to the distinguished list of predecessors...”

Duke Law School is an ambitious and innovative institution whose mission is to prepare students for responsible and productive lives in the legal profession by providing a rigorous legal education within a collaborative, supportive, and diverse environment.

As a community of scholars, the Law School also provides leadership at the national and international levels in enhancing the understanding of law, and in improving the law and legal institutions through public service, research, and scholarship of the highest calibre, reflecting, where appropriate, contributions from scholars in other disciplines within Duke University. ■

We congratulate Justice Maya on the Award!

“

Through your esteemed legal career and commitment to serving your community, you embody the qualities we seek in award recipients. It is a great tribute to you that the Law Alumni Association chose you to receive this award

JUDICIAL RETIREMENTS & SPECIAL APPOINTMENTS/ COMMISSIONS

JUDICIAL RETIREMENTS



Judge R D Mokgoathleng,

Gauteng Local Division,
Johannesburg, with effect
from 5 May 2020.

Photo source: <https://bit.ly/3f5xhoX>



Judge J C Froneman,

Constitutional Court, with effect
from 31 May 2020.

Photo source: <https://bit.ly/3f4YA2v>



Judge L E Leach,

Supreme Court of Appeal,
with effect from 1 June 2020.

Photo source: <https://bbc.in/3dZ0Hn7>



Judge S Gyanda,

Kwa-Zulu Natal Local Division, Durban,
with effect from 1 June 2020.

Photo source: <https://bit.ly/3e3gpK>



**Deputy Judge President
P M Mojapelo,**

Gauteng Local Division, Johannesburg,
with effect from 13 June 2020.

SPECIAL APPOINTMENTS/COMMISSIONS



**Deputy Chief Justice
R M M Zondo**

The High Court in February granted the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State, chaired by Deputy Chief Justice Raymond Zondo, a thirteen month extension to complete its work by 31 March 2021.



Retired Judge J Z B Shongwe

Chairperson of the Commission of Inquiry into the Minibus Taxi-Type Service Violence Fatalities and Instability in the Gauteng Province.

Photo source: <https://bit.ly/3gv9Vt1>



Retired Judge J A Heher

Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of the State.

Photo source: <https://bit.ly/2Z08xc2>



Retired Judge F D Kgomo

Appointment by the Minister of Police to perform service in terms of Section 17L of the South African Police Service Act, 1995 (Act No. 68 of 1995). for a period of 5 years with effect from 6 October 2017.

Photo source: <https://bit.ly/38xFZd4>



Retired Judge G M Makhanya

President of Special Tribunal with effect from 9 September 2019 for the duration of his service. Appointed under section 7(2)(b) (i)-(ii) read with paragraph (c) of the Judges' Remuneration & Conditions of Employment Act, 2001 (Act No. 47 of 2001).

Photo source: <https://bit.ly/2DfnMW8>





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