Human rights, ICT and fees discussed on second day of AGM

On 21 March, Human Rights Day, the first speaker of the 17th annual general meeting (AGM) of the Law Society of South Africa (LSSA) former United Nations High Commissioner for Human Rights, Judge Navi Pillay, delivered the keynote address.

Judge Pillay said that the first lesson she had to learn while serving as United Nations High Commissioner for Human Rights was that she was not passing judgment on anyone but rather advocating to see change on the ground. She headed an office of 1 000 highly qualified experts. In order for one to be an intern in the office of High Commissioner for Human Rights they need to have a Master's degree or be registered for a PhD. She added that her training as an attorney helped her to be able to perform her duties.

Speaking on the rule of law she said: 'Rule of law implies laws that are compliant with the United Nations system framework, which includes the Charter, the Universal Declaration of Human Rights. My training together with you on professionalism, preparation, ethics, honesty, transparency and independence, impartiality, stood me in good stead and when I left six years later these are the values that were highlighted. Some ambassadors said what's good about you is that you listen, so that's important too. Let us listen and hear the other side's point of view. Today is Human Rights Day, March 21st, as a result of 67 peaceful protesters being killed at Sharpeville, the entire world, through the United Nations, adopted this date, March 21st. As the day to celebrate human rights. It's a moment for us to think that if the world paid so much attention to 67 people being killed here on our streets, what should the South African government, what should the South African society and the profession do in reacting to thousands and thousands of killings in conflict today?'

Cybercrime

Deputy Chairperson of the LSSA's E-law Committee, Sizwe Snail ka Mtuze began his presentation by speaking about the Budapest Convention. 'The Budapest Convention is a document of the Council of Europe. It has nothing to do with Africa, however, the Budapest Convention or the Cybercrime Convention as they call it, is known as international best practice. South Africa has signed the Budapest Convention but has not ratified it … . The convention has a list of offences against confidentiality, integrity and availability of computer data systems. Those would be your illegal access, what we call colloquially as hacking, illegal interception that is when someone intercepts your communications. Data interference, like we had in Parliament the other day. System interference that is when someone remotely interferes with the workings of your computer system, and the misuse of devices. … The misuse of devices basically relates to the use of electronic devices for purposes that are not lawful, be it listening devices, be it un-encryption devices, be it password sniffers, be it phishing devices. These are the principles pertaining to the confidentiality and the integrity of personal information that need to be protected,' he said.

Mr Snail ka Mtuze added that there was another category, which is termed computer related offences, where computers are used to commit crimes such as online forgery. 'You always hear about the 419 scams. 419 is actually a section of the Nigerian Code that deals with advance-fee fraud, that's where the number 419 comes from. Then we also have content-related offences, that are another category, mostly your child pornography offences … Then we also have the last categories and that is the offences relating to copyright infringements and other intellectual property,' he said.

With the introduction of corporate liability, Mr Snail ka Mtuze said that companies can no longer claim that only their employees are to be held liable for cybercrime.

Mr Snail ka Mtuze said that in terms of cybercrime in the African perspective: 'The East African community has its own model laws, SADC [Southern Africa Development Community] also has its own model law, they have a model law in e-commerce as well as one on cybercrime. The ECOWAS [Economic Community of West African States] region that is West Africa, also has its own and most interestingly so does the African Union. You will appreciate that there is now an African Union Convention on the Establishment of a Credible Legal Framework for Cyber Security in Africa. It encompasses basically the rules of e-commerce, cybercrime and cyber security.'

Speaking on the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) he said: 'The Electronic Communications Transactions Act guides electronic commerce. … Section 3, which is the interpretation clause basically, says that this particular law has not just been created to give effect to electronic communications but also to accommodate whatever laws that are enforced even before the ECT came. In other words, if we do have a problem in proving e-fraud then we can rely on common law fraud. If we have an issue of not proving a denial of service attack then we can go in and say, well maybe that's theft of use, theft of data. So, this basically allows us, as lawyers, to really test the law and to really go back into the law as it was and to fuse it into the current times that we have.

'Section 85 basically talks about unlawful access. Unlawful access is anyone who accesses an information system even if lawfully, and at that particular stage if his lawful access then becomes terminated and he remains on that computer system, if that particular person does that then that access is also unlawful. So, it is not just a person who has hacked you but it may also be an employee who has a right to access a computer system between particular times and then after that his authority may not be there and he then decides to stay on the system and to use it for other purposes,' he said.

Mr Snail ka Mtuze went on further to discuss other sections of the ECT Act that attorneys should take note of such as ss 14, 15, 45, 86(1), 86(2), 86(3), 86(4) and 86(5).

On the Regulation of Interception of Communication-related Information Act 70 of 2002 (RICA), Mr Snail ka Mtuze said: 'RICA deals with interception and monitoring, it was used in the matter of [*Cwele v S* [2012] 4 All SA 497 (SCA)]. … In *Cwele* there was an interception order that was granted in terms of this Act. RICA has a section in terms of which a designated judge may grant an interception order where there are serious economic crimes taking place, where there is state security leaks. We always talk about RICA Act and we think it has to do with your cell phone and your ID number. RICA is a very powerful Act. It also talks about consent, under which circumstances you can consent to your interceptions being monitored.'

Developments and innovative thinking for law firms

Megan Jones, industry liaison at Infology, a software technology provider for the legal sector, focused on electronic signatures and technology developmentsthat affect law firms. Touching on the ECT Act she said that the Act was promulgated 13 years ago and is out-dated. She added: 'The main objective of this particular Act is to promote legal certainty and confidence in respect of electronic communications and transactions … The important sections in particular are specific definitions about electronic signatures versus advanced electronic signatures, and looking at the actual legal requirements for data messages. Electronic communications are actually defined as communication by means of data messages. A data message is considered as data generated, sent, received or stored by electronic means, and it includes voice when used in automated transaction but also a stored record, and data, quite generally, is actually defined as an electronic representation of information in any form. Looking at the word signature and the actual expanded meaning of signature; we do have a traditional concept of signature in South African law that was developed by our courts and then we also have these different types of electronic signatures, which have been provided for in terms of the ECT Act … This means our data, the electronic representation of information, that is attached to, incorporated, or logically associated with other

data and intended by the user to serve as a signature. … The definition was extended slightly to also define an advanced electronic signature to be an electronic signature, which actually requires a process of being accredited by the Accreditation Authority. … What could qualify as an electronic signature going forward; we have a usual PIN or a password, smartcards at the moment, scan signatures, voice messages, our biometric, such as our fingerprinting etcetera, so all of that is actually now qualified under an electronic signature.

'With regards to advanced electronic signatures, in 2007 these accreditation regulations were published by the Department of Communications. It outlined the process for receiving accreditation as a supplier of an advanced electronic signature. So, what this means in our law is, in order to get an advanced electronic signature you have to go to one of these accredited suppliers to receive it. It was in 2007 that we got these accreditation regulations, but it was only eventually in 2013 where the first two advanced signature technologies were actually approved by the South African Accreditation Authority, so that's the South African Post Office and Law Trust'.

Ms Jones said that there are many functions of electronic signatures. 'Through the general signature we obviously have identity, authorship, the intention to be bound, which must always be there, approval of contents, the association with the contents as well as the personal involvement. Another function it serves can be security and integrity. This can be achieved through encryption, and then obviously an electronic signature can be both, be evidentiary and used for security purposes,' she said.

Ms Jones also spoke about the impact of electronic signatures on non-variation clauses (see 2015 (Jan/Feb) *DR* 57).

In terms of the future of law firms, Ms Jones asked delegates at the AGM, what security technology, information security policies, and procedures they have in place to protect their clients' information? 'We are not plugged into our local company's intranet anymore; we are using our own personal devices. Who knows what protection or lack of protection is on there? New technologies are impacting every aspect in every industry, but particularly on our legal field, which a lot of people have not realised yet – we actually have judicial recognition of this impact in our courts. In [*CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* 2012 (5) SA 604 (KZD)], Steyn J stated that changes in technology or communication have increased exponentially and it's therefore not unreasonable to expect the law to recognise such changes and in effect to put procedures in place to be able to combat and move with those changes as they go along,' she said.

Panel discussion on fees

The last session of the day was a panel discussion on fees. The panellists were attorney Asif Essa; member of the Rules Board, Graham Bellairs; and attorney Anand Nepaul. Giving background on the discussion Mr Essa said that during February 2014, there had been an indaba on legal costs held under the auspices of the Rules Board for Courts of Law and at that indaba there were four issues that were discussed, which were:

- The sustainability of costs in the context of access to justice.
- The structure of and the increase in the tariffs of attorneys in the Supreme Court of Appeal, High Court and the magistrate's court.
- The structure of and increases in the tariffs of Sheriffs in the High Court and magistrate's court.
- The tariff of taxation, or the tariff for taxation of advocate fees in the Supreme Court of Appeal, High Court and magistrate's court.

Discussing the indaba further, Mr Essa said: ‘The meeting had different sessions dealing with different topics and I happened to be one of 12 people in the discussion on whether there should be a tariff for advocate’s fees like there is a tariff for attorney’s fees, and at the end of that discussion the rapporteur indicated to the meeting that there were two views in this session. The two views were, one, that there should be a tariff for advocate’s fees and the other, that there should not be one. Ironically there was one attorney and 11 advocates on that panel. The advocates are totally against the idea of having a tariff. Thankfully, I can tell you that there’s a process in the Rules Board in terms of which there is discussion on the whole issue of a tariff for advocates.’

Kicking off the discussion, Mr Bellairs discussed the potential problems in the implementation of s 35 of the Legal Practice Act 28 of 2014, which requires the determination of tariffs by the Rules Board and mechanism to be put in place by the South African Law Reform Commission for determining tariffs. ‘Section 35(1) requires the Rules Board for Courts of Law to make tariffs in respect of litigious and non-litigious services rendered by legal practitioners who are defined in s 34, and they include sole practitioners, partnerships, juristic entities, law clinics and Legal Aid South Africa. This is an immediate process. The Rules Board has got to now go and determine tariffs. However, s 35(4) requires: The South African Law Reform Commission within two years after the commencement of chapter 2 of the Legal Practice Act to investigate and report back to the Minister with recommendations on, among other things, the following: The desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners. Secondly, the composition of the mechanisms referred to above and the process it should follow in determining fees and tariffs. And thirdly, the desirability of giving users of legal services the options of voluntarily agreeing to pay fees for legal services less or in excess of any amount to be set by the mechanism referred to above.

‘The Rules Board’s obligation to determine the tariffs appears to be immediate, whereas the obligation placed on the South African Law Reform Commission to determine the desirability for the creation of a mechanism to determine fees, and tariffs commences only two years after the commencement of chapter 2, which in turn comes into operation three years after the commencement of chapter 10. It therefore appears that the Legal Practice Act has put the cart before the horse,’ he said.

The next issue Mr Bellairs discussed was the parties who will be bound by these tariffs. He said: ‘It has been noted that the tariffs to be determined by the Rules Board are in respect of both litigious and non-litigious legal services and the question therefore arises, whether persons who do not fall within those definitions will be bound by the tariff. If not, this would be iniquitous and will result in an unequal application of the law as those such as banks, accountants, financial advisors, letting agents, business brokers, the like, falling outside of the section 34 definitions, would be free to charge what they like for non-litigious work, which is not reserved to legal practitioners.’

Mr Bellairs asked, what work is covered by non-litigious work? He said s 33 provides that: Only a legal practitioner in expectation of a fee can appear in courts of law, tribunals and the like and only they may draft pleadings, notices and documents for use in those forums. He added: ‘However, the Act is silent on whether or not non-litigious work is work reserved only for legal practitioners. We are all familiar with the concept of reserved work and two such examples are of course conveyancing and notarial work. There is no definition in the Act of what non-litigious work is and therefore the parameters and extent of the Rules Board in determining tariffs is going to prove difficult.’

Further Mr Bellairs said that s 35(2) of the Legal Practice Act defines certain criteria for determining tariffs. He added: 'These are also problematic, they are multi-fold and include the following, firstly the importance, significance, complexity and expertise of the legal services required. Secondly, the seniority and experience of the legal practitioner concerned. Thirdly, the volume of work required and time spent in respect of the legal services rendered, and fourthly, the financial implications of the matter at hand. These criteria are not divisible and all are to be taken into account at the same time. In other words, they must be considered together. The question arises, how do you take all of these factors into account in determining a tariff, and furthermore, are the criteria subjective or objective? Further, against what parameter would one determine importance, significance, complexity and expertise?'

In conclusion Mr Bellairs asked: 'Will the tariff or tariffs determined by the Rules Board apply universally to all legal practitioners across the length and breadth of South Africa? Are attorneys practising in small towns in isolated areas where communities are relatively poorer than those in the more expensive areas, and the areas in the big cities, required to charge the same fees for the same work? Historically micro-economies have their own cost of living and overheads. Salaries and rentals have reached different levels. How, therefore, can a uniform tariff be fairly applied across these socio-economic areas? If the tariffs are strictly applied without client's initiating a reduction or increase of fees this will result in the large firms having to run at a loss, and clients in rural and poorer areas still not being able to afford their attorney's fees. The point is, that market forces should determine fees charged and payable by attorneys and clients. Tariffs will work against this and not achieve their ultimate objective, which is access to justice.'

Mr Nepaul said that tariffs have been there for a long time and that there are difficulties and dynamics of what goes into a tariff. 'I think there is argument and authority as to retention of tariffs and not to the total abolition of it, but perhaps more interesting than that, as I see it, and perhaps more important than that, would be to deal with the treatment of our attorneys as against counsel when it comes to the very issue of costs, and there has always been this perception that advocates have a seniority and a superiority to members of the sidebar and this fallacy unfortunately still continues,' he said.

He added: 'I think for the sidebar members any recognition that we get that our costs should be on par with the opposition that you have from the Bar would be a substantial increase in the fee that we would be earning. We are being terribly underpaid at the moment in respect of our work when we appear in the High Court as against counsel. … I am sure many of my colleagues at the sidebar have this situation that they have come across. That you have briefed the senior counsel, he has drafted the affidavits, come back, and of course you have got to check it, and then you do find that on checking it that there are errors in it, what fee should you then charge? We are restricted to either time or simply the checking or redrawing of the document on tariff, which is a pittance in regard to what you are going to be billed for by counsel. The other practical difficulty that I have come across, and this emanates from a recent situation that we had, is that the control of costs of advocates lies within their society and their taxing or fee assessment committee, and experience has shown that what really happens there is effectively just simply a rubber-stamping of fee notes produced by their members. We had a practical experience late last year where a particular counsel had agreed on a fee with the client of the attorney of X thousand Rand per day. He went to court in the morning on an opposed motion, the matter was adjourned and after it was adjourned he returned to his chambers and then did a short memorandum. He then charged another X full day fee for that. Obviously, a dispute arose and when the dispute couldn't be resolved the member went off to his taxing committee of his society and produced his fee notes and that committee found that those fees were fair and reasonable and rubber-stamped them.'

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