

An analysis of the planning and implementation of the training of Equality Court personnel relating to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

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OPSOMMING

'n Ontleding van die beplanning en uitvoering van die opleiding van gelykheidshofpersoneel itv die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie 4 van 2000

Hierdie artikel, in vier dele, fokus op een voorgestelde kenmerk van doeltreffende wetgewing; dat die afdwingingsmeganisme moet bestaan uit gespesialiseerde liggame en dat die voorsittende beamptes van hierdie liggame opleiding moet ontvang om spesialiskennis te verwerf. Die onderliggende tema van hierdie artikel is die (huidige) onvermoë van die Suid-Afrikaanse staat om hierdie kenmerk van effektiewe wetgewing te realiseer. Ek beskou die konsep "Staatsonvermoë" vanuit die hoek van die opleidingsprojek van die Department of Justice om voorsittende beamptes op te lei in terme van die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie 4 van 2000. Ek leen beginsels uit die dissipline van Publieke Administrasie en stel 'n raamwerk daar waarteen hierdie opleidingsprojek gemeet word. Ek ontleed dan in watter mate die projek in sy doel geslaag het. Ek verskaf 'n gedetailleerde kronologiese bespreking van die problematiese aspekte van die projek, wat insluit 'n ooroptimistiese besigheidsplan, ondoeltreffende monitering van vordering op die projek, bestuursinergie, oormatige sensitiwiteit tot sommige belanghebbers se vrese; en onvoldoende finansiële steun.

Part 3

1 Introduction

In the first part of this article,¹ I discussed the concept "state incapacity", first as a general concept, and then as it translates to South Africa (SA). I also provided a framework against which I will measure the Department's

* This article is based on relevant parts from my doctoral thesis entitled "A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000".

1 See Kok 2010 (1) *De Jure* 38–48. Parts 3 and 4 appear in this issue and parts 1 and 2 appeared in the 2010 (1) issue.

effort. In parts 2 and 3 my focus becomes much more specialised when I analyse in some detail one particular government project, namely the training of equality court personnel undertaken by the Department of Justice. I discuss the initial project undertaken from 2001 to 2003 in some detail and provide an overview of more recent events. In these two parts, I provide a detailed chronological discussion of the main problematic aspects of the training project. In part 2,² I discussed the initial business plan that was overly ambitious, the ineffective oversight body that was established, excessive sensitivity that was displayed towards the judiciary, inadequate budgetary support that was given to the project, bureaucratic bungling, an absent impact assessment, an ill-considered Australian study visit, and the inexplicable delays that occurred during the development of training material. In this part I discuss the inadequate nature of the training seminars.

2 Inadequate Trainers' Seminars for Judges, Magistrates and Clerks

At the sixth Training Management Team (TMT) meeting, after a meeting between the Judicial Services Commission (JSC) and heads of court, the TMT was informed that judges and magistrates would be trained during April 2000. At that stage it was envisaged that an initial trainers' seminar would be held from 17–21 April 2001, where a uniform approach to training would be developed. This first session would then have been followed by a second seminar from 30 April–4 May, when the actual training of practitioners would have taken place. At the same meeting, the TMT was informed that clerks could be trained during March 2001. Exact dates for training would be set in consultation with Justice College so as not to clash with other training. Various options were put to the Director General: Senior clerks could be trained; new clerks could be appointed; new posts could be created for people with paralegal skills; recent graduates could be employed in "learnerships", or a selection could be made from existing clerks to be trained as equality court clerks. All of these options would create difficulties: cluster heads would not want to release competent clerks for training; clerks were already overstretched with training taking place on a number of Acts and, should clerks be taken out of their existing positions their duties would have to be filled by clerks who already have too many obligations or new clerks would have to be employed; learnerships would probably leave at the end of their one year stint, which would mean that training would have to take place annually; learnerships would also not receive the practical training component of candidate attorneys; and existing clerks would probably struggle with some of the conceptual issues in the Act. The TMT suggested that the various options be put to the Director General for a decision. Pending the decision by the Director General specific dates were not set for the training of clerks.

² See Kok 2010 (1) *De Jure* 49–75.

At the seventh meeting the Project Manager reiterated that in principle the JSC, MC and heads of court had accepted the policy directive/framework for training. The acting chairperson of the JSC was requested to make the necessary amendments to the document to align it with judicial independence. ELETU had typed up his handwritten amendments. The diskette containing the framework, as further amended after the previous TMT meeting, had been misplaced and the TMT could not be provided with the amended version. At this stage it was apparently still the intention that the directive/framework for training would be promulgated in the *Government Gazette*.³

Uncertainty arose at the seventh meeting as to the role of the training design document in the training process. The TMT resolved that Mr Mukhavhuli would procure copies of the minutes of the first six TMT meetings and the training design document and would set up a meeting between the Project Manager and Mr Keet to discuss how the document would relate to the upcoming training seminar for judges and magistrates. The role of this “training design document” remained unclear.

The Project Manager informed the seventh meeting that the first training seminar on the Act would proceed from 16–21 April 2001. The TMT discussed the format of the training and tentatively suggested the following:

Tue 17 April	Morning:	Social context training
	Afternoon:	International and comparative law conceptions of equality
Wed 18 April	Morning:	Follow-on from Tuesday afternoon session
		South African constitutional framework of equality
	Afternoon:	Overview of the Act
Thur 19 April		Application of the Act
Fri 20 April		Application; case management; referrals; other skills and techniques
Sat 21 April		Judicial independence

The TMT agreed that *curricula vitarum* of suggested trainers had to reach the Project Manager by 2 April 2001. A decision would then be made as to who would be involved in training the trainers. The team also agreed that the seminar had to be structured in such a way that sufficient time would be spent on imparting teaching skills.

The Project Manager informed the seventh meeting that the results from the tender process relating to the provision of training were disappointing. It was decided that the Centre for Applied Legal Studies at the University of Witwatersrand (CALS at Wits) would become the civil society partner of the Department relating to the training of Judicial Officers while

³ Par 3.1 of the minutes to the seventh meeting.

the University of the North West (as it then was) would become the civil society partner together with Justice College relating to the training of clerks.

The eighth TMT meeting took place after the first “national seminar for equality court judicial educators” took place from 16–21 April 2001 at Aloe Ridge Hotel. The Project Manager and Judges Farlam and Zulman informed the meeting of the seminar. Most of the participants considered the seminar to have been a success.⁴ The main complaint centered on the fact that participants were not trained on how to train. The team agreed that the follow-up seminar would focus in some depth on training needs. The team also agreed that CALS and the University of the North West would have to draft trainers’ guides to the bench book and resource manual.

A serious issue that arose during the seminar was a widely held view among participants that the provisions in the Act relating to the designation of presiding officers were unconstitutional. A letter was sent to the Minister explaining that the Act should ideally be amended to avoid the unhappy situation of having the Act held up in courts, awaiting a final verdict on its (un)constitutionality.⁵ The team expressed concern that

4 The executive summary of the seminar tabled at the meeting indicated that of the 22 participants that returned the evaluation form, one rated the seminar as excellent, 15 rated it as good, 4 rated it as average and 4 rated it as poor.

5 The letter read as follows: “[Farlam JJ] has been requested by the Judicial Officers attending the national seminar for equality court judicial educators, consisting of a substantial number of Judges and magistrates from all over the country, to inform you that it is their considered view that certain provisions of the Act are likely to be declared unconstitutional in that they infringe upon the independence of the judiciary and the principle of the separation of powers. The provisions in question are ss 31(1)(a), 31(2)(a), 31(3), 31(4) and 31(5), read with s 16(1)(b). The decision as to whether a particular High Court Judge or magistrate is “suitable” to hear a particular case or type of case is one which should be made by the Judge President or Deputy Judge President or the Chief Magistrate or Regional Court President of the court to which the particular judicial officer is attached. It is understood that you have indicated that it is your intention to apply s 16(1)(b) as if, instead of the expression “after consultation with”, the expression “in consultation with” were used. There are, however, two difficulties with this approach: firstly it would not bind any of your successors and secondly it is considered, as has been said, that the decision as to whether a particular judicial officer is “suitable” to hear a particular case or type of case is one which should be made by the relevant Judge President or Deputy Judge President or Chief Magistrate or Regional Court Magistrate alone and not in consultation with anyone else. It is further the opinion of the Judicial Officers attending the seminar that the Act should be amended as soon as possible so as to remove the provisions which may well render the Act unconstitutional. In this regard it is considered that if the Act is not so amended its constitutionality will be challenged by some discontented litigant against whom an order has been made by an equality court. Such a constitutional challenge will paralyse the whole system of equality courts until it is resolved and will, as has been said, probably be successful. In this regard it is relevant to refer to the experience in Australia where a system of national equality tribunals (conducted by the Human Rights and Equal Opportunity Commission) was undermined for over two years because of a successful constitutional challenge: see *Harry Brandy v Human Rights*

continued on next page

should the Act have to be amended it could delay implementation considerably and, if the time lag between the training and implementation became too long, the training would likely have to be repeated. The TMT requested Prof Gutto to set up a meeting with the Minister, to be attended by Prof Gutto; Mr Raulinga; Ms Sejosengwe; the Project Manager; and Judges Farlam and Zulman to discuss the proposed amendment.

The eighth meeting was informed that a seminar would take place for the training of clerks from 10 to 15 June 2001 in Pretoria. The University of the North West would coordinate the training in partnership with Justice College. Invitations had been sent to cluster heads to nominate seminar participants.

The Project Manager tabled an “executive summary report & evaluation on the national seminar for equality court judicial educators” at the eighth TMT meeting. The report indicated that 70 people attended the seminar of which 55 were judges or magistrates.⁶ The report envisaged that “phase 2 of trainers’ course” would take place during the last week of July 2001 and “phase 3 of trainers’ course” would take place during October 2001.⁷ Decentralised training of Judicial Officers, where Judicial Officers trained at the trainers’ seminars would be involved as trainers, was envisaged to take place in August–September 2001 (phase 1), October–December 2001 (phase 2) and January–February 2002 (phase 3).⁸

The executive summary and report listed the following main concerns raised by seminar participants: not getting materials (supposedly the bench book) in advance; time allocated to topics; the size of breakaway groups; the need for more and elaborate practicals, including moots; and the fact that too much time was spent on rather long presentations at plenary.⁹ At the end of the seminar participants expressed a strong need for ELETU to establish an information service on equality issues such as national and international case law and policy debates.¹⁰ The participants also expressed a strong desire to participate in additional trainers’ seminars.¹¹ Key topics that were identified included judicial training

and Equal Opportunity Commission (1995) 183 CLR 245 (HC). It must be emphasised that it is accepted without reservation that it is not your intention to infringe the independence of the judiciary or the separation of powers but it is considered that a constitutional challenge against the Act is nevertheless likely to succeed. All the participants in the seminar are anxious that the noble aims of the Act are realised. It is for this reason that it was decided that this letter be addressed to you. As a matter of courtesy a copy of this letter is being sent to Mr Justice Chaskalson, the Acting Chairperson of the Judicial Service Commission, Mr Justice Ngoye, the Chairperson of the Magistrates’ Commission, as well as Mr Justice Hefer, the Acting Chief Justice”. Farlam J drafted the letter in his capacity as the chairperson of the organising committee.

6 Executive Summary Report and Evaluation, National Seminar for Equality Court Judicial Educators (Executive Summary Report) p 3.

7 *Ibid.*

8 *Ibid.*

9 *Idem* 5.

10 *Ibid.*

11 *Idem* 5–6.

techniques, social context awareness training, international and comparative law, practical exercises and/or moot courts, the Act's relationship with the Employment Equity Act and alternative forums of dispute resolution under the Act.¹²

An executive committee¹³ of the TMT met after the Aloe Ridge seminar to evaluate the seminar.¹⁴ This committee agreed to the following "way forward":¹⁵

- (1) Programme to be finalised well in advance and distributed at least ten days before the seminar and materials to be distributed at least a week before the seminar.
- (2) More break-away sessions with much smaller groups (about six groups of eight) and constituted before the seminar through a preregistration form asking participants to chose (sic) sessions in order of priority. A caution to be included that where there are electives, people's preferences are not guaranteed.
- (3) Facilitators and rapporteurs to be selected in advance and properly trained or prepared for their role at least a day before the seminar. The training is to cover:
 - How to facilitate.
 - Key points to be dealt with in the breakaway session.
- (4) Guidelines for proceedings in the groups to be prepared in advance and provided in writing to break-away groups.
- (5) More and realistic hypotheticals to be prepared by CALS/Faculty
- (6) Sessions to deal with points and counter points with emphasis on role-play or simulations to enhance experiential learning.
- (7) A major (flagship) moot court to be organised in advance and participants allowed to prepare for it using other sessions in the week to conduct research. Other moot or opportunities for arguing points and counterpoints to be provided throughout the training.

Judgment for the main moot to be prepared in groups (break-away sessions) after hearing all arguments during the court session at plenary.
- (8) Session on alternative fora: Someone to prepare a guide on all key alternative fora including addresses and contact numbers. This topic to be dealt with as follows:
 - Plenary discussion involving representatives from Chapter 9 institutions and other key alternative *fora*.

¹² *Ibid.*

¹³ The committee consisted of Judges Farlam and Zulman and the Project Manager. Raulinga could not attend the meeting but endorsed the minutes and recommendations of the executive committee afterwards.

¹⁴ The minutes of this meeting were distributed at the eighth TMT meeting as pp 6–12 of the "executive summary report & evaluation, national seminar for equality court judicial educators, Aloe Ridge Hotel, April 16–21 2001".

¹⁵ Executive Summary Report pp 8–9. It is questionable to what extent these guidelines were adhered to in follow-up training seminars.

- Breakaway sessions to deal with hypotheticals involving alternative *fora* and the question of referrals.
 - Copy of Resource Book for Clerks/Registrars of the Equality Court to be supplied to all TMT members.
- (9) Session on International & Comparative Law: Compendium of materials on this topic to be prepared and provided to participants in advance. Experiential session to be organised.
- (10) Session on social context awareness to be organised and integration of social context/diversity awareness in rest of seminar and materials. More in depth social context awareness training to be done at provincial level.
- (11) Hypothetical involving the Employment Equity Act to be included.
- (12) Next seminar with the same group, to be three days and one evening. The evening to be utilised for registration and keynote address.

The executive committee agreed that CALS at Wits would be awarded the tender for the train the trainer programme and for the decentralised training of presiding officers in the Gauteng province.¹⁶ The University of the North West was awarded the tender for training of clerks of the equality courts with Justice College as an equal partner relating to implementation. The University of the North West was also awarded the decentralised training programme of presiding officers in the North West province.¹⁷ The executive committee agreed that a tender for decentralised training of presiding officers in the other provinces would be reissued.¹⁸

The executive committee agreed to the following provisional work plan following on the Aloe Ridge seminar:¹⁹

Clerks

June 2001	Trainers' seminar for clerks
July 2001–January 2002	To be negotiated with key role players

Presiding officers

Mid–end July 2001	Phase II of train the trainer programme
August–September 2001	Launch of decentralised training programme in the provinces

¹⁶ *Idem* 9.

¹⁷ *Idem* 9.

¹⁸ *Ibid.* The tender for decentralised training seems to never have been issued. At the ninth TMT meeting the Project Manager informed the meeting that a tender would be issued "shortly". At the tenth meeting the TMT was informed that the Western Cape had started to plan its provincial training programme. Further TMT/TMB meetings was then informed of various provincial initiatives without any indication that a successful tenderer was coordinating the training sessions. The minutes of the eleventh TMT meeting indicate that the Project Manager requested the TMT to authorise her to grant R100 000 to each province to give effect to provincial training programmes.

¹⁹ Executive Summary Report pp 10–11.

October 2001	Phase III of train the trainer programme
November 2001–January 2002	To be negotiated with civil society partners and key stakeholders

By the time the ninth TMT meeting took place the trainers' seminar for clerks had taken place and Mr Behari of Justice College and the Project Manager provided feedback to the team on the seminar. The majority of participants rated the seminar as "excellent" or "good" but felt that more training was needed on training methodology and the court process. The Department of Justice would meet with the University of the North West to plan the "way forward".

Prof Gutto distributed a draft programme relating to phase II of the trainers' seminar (Presiding Officers). He said that phase II would consist of a large number of hypotheticals and moot courts during which the focus would be on procedural issues and the application of the Act. TMT members provided a number of suggestions relating to the draft programme.²⁰ Prof Gutto requested TMT members to provide him with additional comments by the end of the week to enable CALS to finalise the programme. He also informed the TMT that Zulman J had been seconded to CALS for the purpose of the training of Judicial Officers. It was noted that an amount of R180 000 had been overspent on phase I. This apparently happened because of a number of last minute arrangements that had to be made; it being the first time that a training seminar had been arranged; and a degree of "overkill" to legitimise the process.²¹ This overspending impacted on the budget for phase II of the training. The team was informed that CALS and the Project Manager had been in discussion relating to the budget for phase II. After discussion the TMT resolved that CALS could proceed with budgeting for the seminar up to a maximum of R525 per participant per day. It was envisaged that about 40 people

20 Suggestions included the following: The Project Manager thought that more attention should be given to training methodology (Gutto was of the view that the hypotheticals and moot courts will provide sufficient room to also focus on training methodology); information should be provided on labour issues; international and comparative law aspects need to be reinforced; a session could be added on "how to develop hypotheticals"; to focus on training methodology, after each hypothetical the participants should be told why the hypothetical was drafted in that particular way; a proper link must be made with phase I in that phase II must consolidate the process and must cover the ground not covered during phase I; it should be made clear that the participants will be released after phase II to become trainers; videos should be shown in context and after proper discussion of the content; greater emphasis could be placed on social inequalities as this was not done during phase one; a lunch could be held on eg the outskirts of Mamelodi or Soweto to allow participants to share in the living conditions of fellow South Africans; a "where are we going" session should be included.

21 Eg the Executive Summary Report distributed at the eighth TMT meeting mentions on p12 that "the cost has also been increased by the fact that Judges prefer to have seminars in hotels out of town and not University facilities as originally planned". Two Australian Judges were invited and attended the first seminar, which would also have inflated costs. Executive Summary Report 4 reflects that AUSAID had originally offered to fund the visit but had then run out of funds.

would attend phase II. At this early stage the primary aim of the initial training seminars seems to move to the background. If the aim of the initial seminars was to equip Judicial Officers as trainers, why was the same group of participants not invited to the second seminar? Why was a smaller group agreed upon?

During the same meeting the Project Manager reported that a tender would be issued shortly relating to decentralised training. The project manager had met with potential partners. She hoped that local universities would tender for the regional training. She indicated that Gauteng would probably act as a pilot project. After some discussion the team agreed that during phase II of the trainers' seminars, participants from the various provinces would start to plan provincial training and that it was imperative that participants (during phase II) know what their responsibilities would be regarding provincial training.²²

The tenth TMT meeting took place after phase II of the trainers' seminar (Judicial Officers). Zulman J distributed a report that contained feedback from the participants. The majority of participants rated the seminar as a success. Most TMT members were less optimistic about what was achieved at the seminar while Gutto took a more optimistic view. Ms Van Riet was concerned about the number of magistrates that attended and noted that Justice College staff did not attend. After some discussion it became clear that a misunderstanding occurred as to budgeting for Justice College staff and that was the reason for them not being invited to the seminar.²³ The Project Manager said that Justice College staff formed part of the core of people that had to be trained on the Act and that it was unfortunate that they did not attend. It was agreed that Mr Behari, who did attend the training, would arrange a seminar for Justice College staff. Prof Albertyn doubted that participants grasped the relevant issues but admitted that it would have been difficult to measure. She thought that the participants would have had a better ability to apply the Act after two training sessions. Judge Traverso thought that the content of the hypotheticals could have caused difficulty as not many participants would necessarily have been exposed to the subject nature of the hypothetical insurance. Gutto thought that the participants may not have had sufficient time to study the hypothetical insurance while Zulman J thought that they had enough time but perhaps did not study the Act in sufficient detail. Pillay thought that strong facilitators sometimes inhibited group participation. She thought that participants were left with piecemeal information and that a clearer picture should have emerged during phase II of "where the Act was". The Project Manager agreed that gaps still existed, for example she thought that a large group of participants did not grasp the

22 My own notes contain an indication that a TMT member expressed the opinion that the Project Manager had not spent enough time cultivating the judge presidents and cluster heads and that they had to be brought on board to understand the training process. An opinion was also expressed that the Minister had not played a hands-on role in the implementation of the Act.

23 R70 000 was spent during phase I to pay for travel and accommodation costs for two foreign speakers. CALS was told to decrease the budget for phase II.

indirect discrimination concept. She thought that the time lag between the two seminars was too long. This makes nonsense of her statement in the Executive Summary and Report relating to the first seminar that “enough Judicial Officers now exist for the first group of equality courts to be announced by the Minister in terms of the Act”.²⁴ Albertyn said that participants did not view the hypothetical as an equality law issue and that the assumption that participants would have internalised the concepts explained at phase I, turned out to be false. She agreed that too much time had passed from the phase I seminar to the phase II seminar. Van Riet thought that more time had to be spent on training methodology while Farlam J thought that a genuine attempt had been made at the phase II seminar to address training skills. Farlam J was disappointed in phase II in the sense that participants did not seem to have fixed in their minds what they had learnt during phase I and that they had not digested the phase I training. Zulman J was concerned about the lack of participation from Gauteng-based judges. Gutto said that looking back, the process had taken steps forward and that the project had achieved some goals. He said he would have been surprised if people had been fully conversant with the Act after two seminars. He thought that a basic awareness of the Act had been created. He acknowledged that deficiencies still existed that would have to be addressed.²⁵

Zulman J distributed a short document at the tenth meeting,²⁶ setting out his proposed course of action to initiate provincial training and expressed his concern that the training process would lose momentum if action was not taken soon. After discussion²⁷ the team agreed that Zulman J should visit the provinces and meet with judge presidents, cluster heads and Judicial Officers that had attended the training programmes. He would be accompanied by Raulinga and the Project Manager. Zulman J

24 At 12.

25 A letter by a magistrate from KwaZulu-Natal was distributed at the eleventh TMT meeting that was somewhat critical of the approach followed at the second training seminar, and the approach followed by his fellow presiding officers to the hypotheticals discussed at the seminar.

26 The document simply read “1. Visit main centres of the RSA. 2. Meet with Judge presidents, cluster heads, Judges and magistrates from the centre in question trained at Aloe Ridge and Helderfontein Estates. 3. Purpose of visit to discuss and advise the aforementioned in regard to the setting up of a training programme by them in their particular centre and the budgeting in respect thereof. 4. Immediate cost – travel costs of Zulman JA to travel to and from the various centres from Johannesburg”. The Project Manager apparently also sent a letter to each of the judge presidents, dated 8 Aug 2001, in which the judge presidents were requested to set up provincial training managements teams. These teams were to conduct an assessment of training needs, draw up an implementation plan indicating how training would be implemented in the province and who would be trained, determine dates for training and to forward the implementation plan to the Project Manager’s office by mid-Aug 2001.

27 My own notes reflect that some TMT members expressed concern about a lack of communication between Zulman J, the Project Manager/ELETU, and the judge presidents/cluster heads and that it appeared that “everyone is doing their own thing”.

and Raulinga would be involved in “selling” the training programme while the Project Manager would be required to answer detailed questions on budgets, work plans and the like.²⁸ A deadline of three weeks was set during which all the provinces had to be visited and provincial training programmes developed.

At the same meeting Judge Traverso enquired about the provisions in the Act dealing with the designation of presiding officers. The Project Manager informed the meeting that the Minister had requested a legislation team to draft an amendment to the Act.²⁹ Farlam J noted that it had been suggested to the Minister that the judge-Presidents and cluster heads should decide who should staff the equality courts.

At the eleventh meeting Behari informed the team that a dispute had arisen between the Department of Justice and the University of the North West regarding payment to the University for phase I of the trainers’ seminar (Clerks).³⁰ A meeting took place between Justice College represented by Behari and Lamprecht, the Centre for Human Rights at the University of Pretoria (CHR) represented by the author and ELETU represented by the administrative secretary, Mukhavhuli. This meeting resolved that should the deadlock between the University of North West and the Department continue, CHR and Justice College had sufficient resources to coordinate and present phase II of the trainers’ seminar (Clerks). The TMT found this suggestion unsatisfactory. Gutto suggested that the Department be given some time to attempt to resolve the deadlock and only if this could not be done, that the TMT authorise CHR and Justice College to proceed with training. The Project Manager pointed out that the agreement with the University of North West was a co-sourcing agreement and that Justice College could at least plan phase II. The TMT agreed that Behari and Mukhavhuli could coordinate phase II but that invitations to participants must not be sent out until the deadlock with the University of North West had been resolved.

28 At the twelfth meeting Zulman J distributed a report on a number of centres he had visited. “Annexure A” to this report contained a list of topics that was discussed at the various provincial visits: “1. Appointment of a regional chairperson and regional symposium planning committee. 2. Date/s of symposium. 3. Total number of invited participants. 3.1 Judges. 3.2 Magistrates. 3.3 Facilitators. 4. Venue/s. 5. Time and number of sessions. 6. Refreshments during sessions (teas etc). 7. Content of each session and name of facilitator to conduct each, eg: 7.1 A detailed consideration of each of the provisions of the Act; 7.2 A discussion of potential problem areas in the Act; 7.3 The relationship between the Act and the Employment Equity Act; 7.4 Discussion of the role of alternative *fora*; 7.5 Presentation and discussion of a video of a moot on the Act or alternative hypothetical/s on the Act; 7.6 Social awareness training; 7.7 Training of registrars and clerks; 7.8 Presentation and discussion of social awareness video/s; 8. Materials required for distribution. 9. Preparation of a draft budget. 10. General.”

29 At the 11th meeting the Project Manager informed the TMT that the Director General had set up a task team with Mr Dean Rudman as team leader. The Project Manager was appointed as a member of the task team. The task team was mandated to propose a draft amendment to the Act.

30 The Project Manager explained that the deadlock revolved around the tender process and alleged overcharging by the University of North West.

Zulman J and Raulinga informed the TMT that a number of clerks from some centres did not attend phase I of the trainers' seminar. Team members were dissatisfied with the way in which invitations to the seminar were sent and how receipt of the invitations was monitored. The Project Manager said that according to the information in her possession only a select number of clerks from KwaZulu-Natal failed to attend the training due to a misunderstanding that arose in the relevant regional office. She had already discussed the issue with the KwaZulu-Natal bench and agreed that a local remedial training seminar would be held for those clerks.³¹

Zulman J thought that phase II should involve participants that were not trained during phase I. The Project Manager had to remind him that the project proposal was drafted according to a "train the trainer" principle and that after phase II had been completed, the trained participants would then become a training resource. The Project Manager reminded the TMT about the training policy framework formulated by the TMT and accepted by the Minister, JSC and MC.

At the same meeting Zulman J provided feedback on the provincial centres he had visited. Raulinga accompanied him on all of the visits while the Project Manager accompanied them to KwaZulu-Natal. The provinces were asked to establish local training committees. Raulinga reported that the Free State had set dates for training and the Project Manager reported that KwaZulu-Natal had set dates for training. Traverso J presented a draft programme for training to take place in Cape Town.

The Project Manager distributed an amended work plan at the eleventh meeting and requested the TMT to authorise her to grant R100 000 per province to enable the provinces to plan and implement local training seminars. Albertyn said that the letter to be sent to each of the provinces had to contain clear guidelines on how the R100 000 was to be spent. The TMT resolved that a subcommittee be set up between Raulinga; the Project Manager; and Van Riet to coordinate and plan the transfer of funds, spending guidelines, the allocation of an account code to each of the provinces, provincial variations and the presentation of a business plan by each of the provinces.³²

31 Behari from Justice College and I conducted a condensed training seminar for clerks from KwaZulu-Natal, the Northern Province and the Eastern Cape in Durban from 22–24 Oct 2001.

32 The letter that was drafted and apparently sent to the various judge-presidents did not contain precise guidelines relating to training and the content of training seminars. The letter read as follows: "ELETU wishes to confirm that R100 000 has been allocated to your province for the decentralised equality courts training programme (judges, magistrates, clerks and registrars). Kindly take note that this amount can be spent as follows: Training consultants, venue, accommodation, catering, transport and administrative expenses (stationary, telephone, video, photographer and printing). Further kindly take note that any services or purchases over R30 000 from a single supplier should be subjected to the tender procedures. Amounts less than that require three quotations. Kindly submit your claims for relevant expenses directly to [name] quoting responsibility code [number], major account [number], minor account [alphabet letters] and sub-minor account [number]. Should your budget exceed this amount, kindly indicate so that an adjust-

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At the twelfth meeting the Project Manager informed the TMT that the impasse with the University of North West had not been resolved but that the University had been informed that the planning and implementation of phase II (Clerks) could not be postponed indefinitely. She reported that phase II of the trainers' seminar would take place from 13–15 November 2001 in Pretoria for a group of approximately 85 clerks and registrars.

Zulman J reported on decentralised training. He had visited a number of additional centres and attended a number of training seminars.³³ Raulinga and the Project Manager accompanied him on most of the visits.

At the thirteenth meeting the Project Manager, Ballakistan and the author provided feedback on phase II of the trainers' seminar (Clerks). Ballakistan expressed concern that if a long delay would follow the implementation of the Act, the training would have to be repeated. Some discussion followed relating to the proposed amendment to the Act. The Project Manager confirmed that as soon as sections 16 and 31 of the Act were amended, it would come into force. Farlam J said that pressure was building and that the Act had to be brought into operation soon to maintain momentum. Zulman J agreed that the Act had to be brought into operation as soon as possible as the training and enthusiasm would wane if too much time passed between the seminars and the implementation of the Act. Zulman J reported on a number of provincial seminars that had taken place since the last meeting.

The Project Manager's report tabled at the fourteenth TMT meeting indicated that Mpumalanga "and other provinces", these provinces were not identified, had indicated that they were ready to proceed with decentralised training for clerks and registrars. The report indicated that the provinces had been asked to submit work plans and that as soon as the budget allocation to ELETU had been finalised, they would be "advised" – presumably they would be told to proceed with training. The Project Manager reported at the same meeting that according to the training policy guidelines that had been drafted, an annual trainers' conference had to be held. Funding for this purpose had been secured. The TMT approved the symposium for 24–26 April 2002. The Project Manager also referred to the proposed business plan for the period February 2002 – January 2003. She explained that the budget as set out in this plan had been drafted in October 2001 and had been overtaken, to a degree, by events. She explained that the project now mainly resided in the provinces and that the only key national events that remained were the annual trainers' symposium and the "judicial information service for equality courts" (JISEC).

ment could be arranged. Kindly liaise with the cluster head in your province regarding development and execution of your provincial training programme . . .".

³³ He visited Ngoepe JP in Johannesburg; Galgut, McCall and Nicholson JJ in Durban; Jafta, Maya, Kruger, Miller and Schoeman JJ in Umtata; Pickard and Ebrahim JJ in East London; Somalyo, Kroon and Pillay JJ in Port Elizabeth; Goldstein and Claassen JJ in Johannesburg; Hartzenberg and Van der Westhuizen JJ in Pretoria; Steenkamp and Kgomo JJ in Kimberley; Friedman and Mogoeng JJ in Mmabatho; Chief Magistrate Ngobeni in Pretoria and Hetisane in Johannesburg. He also partially attended training seminars in Cape Town and Bloemfontein.

Although the minutes do not clearly reflect it, by the time the fifteenth meeting took place on 15 June 2002, the project was in a serious crisis. No training had taken place since January 2002 and very few clerks and registrars had been trained.

At the fifteenth meeting the Project Manager tabled a report on the national trainers' symposium that had been held about a month earlier. At the symposium's closing session, titled "the way forward", a number of questions were posed. The meeting resolved the following answers to the questions:

"Is the implementation of the Act relevant to the issue of training?" – This issue provoked some debate. The Training Management Board (TMB) raised its concern about the delay in bringing the Act into operation. The Project Manager could not contact Basset before the meeting. Apparently the draft amendment to the Act had not been tabled at cabinet level yet. Traverso J said that her impression was that the amendment had been agreed to in January. Gutto said that this issue had to be prioritised. He suggested that the Chairperson must take it up with the Minister's office. Zulman J said a letter must be written to the Minister. Farlam J was concerned that an important Act, mandated by the Constitution, was gathering dust. Gutto said that the Chairperson must write a letter that he would present to the Minister over the weekend. Farlam J said he was prepared to speak to the Minister. Gutto said a letter constitutes a record that the board is concerned about the delay. The TMB resolved that Farlam J should handle the matter as he deemed fit. Mudau suggested that further training should be held in abeyance until the proposed amendment had been finalised because those trained before the amendment were effected may require retraining on issues changed by the amendment and also because the Act in its current form led to negative sentiment. Van Riet agreed with Mudau. She thought that training opportunities should not be wasted but added that Justice College usually did not undertake training on an Act until the regulations had been finalised.³⁴ Farlam J said that clarity must also be obtained on the rules of the equality courts. The Project Manager said that draft regulations had been ready since August 2001. After the proposed amendments were tabled the regulations were altered accordingly. The Project Manager stated that although she shared the TMB's concern regarding the delay in finalising the proposed amendment, training should proceed without waiting for the amendment to be effected and that the existing draft regulations should be used at the training seminars.³⁵ The TMB agreed that training would proceed in the meantime and that the draft regulations would be used at the decentralised training sessions.

34 At this stage the regulations pertaining to the prohibition of unfair discrimination had not yet been promulgated.

35 The Project Manager noted that North West had arranged a training programme for clerks that was scheduled to proceed in May (and was presumably rescheduled to a later date). Mpumalanga had also expressed a desire to commence with the implementation of their local training programme.

“Should the education programme aim to expand the number of Judicial Officers trained, and/or intensify the training of those who have already received some training?” – The Project Manager reminded the TMB that the existing policy guidelines contained the content and minimum time of training.³⁶ She however suggested that before more intensive training of groups that had been trained commenced, everybody should be exposed to some training on the Act and the principles that underlay it. Mudau mentioned that the key complaint at the Gauteng training was that the participants were not familiar with the Act and that they attended the sessions without any insight into the Act. These groups would also have to be trained again on the regulations. If funding could be made available the same group of participants should be invited to further training programmes. It was agreed that the priority was to reach all the Judicial Officers first and then to consolidate the training of those already introduced to the Act and the principles underpinning it. Sadly, the project never moved onto the “consolidation” of training. The TMB resolved that ELETU must furnish the board with a full list of trained magistrates and trained judges, trainers, and training programmes.

“What are the training priorities for those who have attended the first round and after the implementation of the Act?” This issue was not resolved and not dealt with satisfactorily. The project never moved beyond an “awareness raising” exercise for judicial officers.

“How do we ensure uniform content and quality training?” – It was agreed that the core elements, taking into account the approved training policy guidelines, must be communicated to the provinces and that room be allowed for provincial peculiarities.

“What materials are necessary for training?” – It was agreed that videos, experiential learning, hypotheticals, role-play, moots and the equality court bench book and resource manual must continue to be used.

“Who should control the equality court education programme?” – The Project Manager drew the TMB’s attention to the fact that matters relating to the roles and responsibilities of all role players involved in the project were clearly set out in the project’s founding documents namely the project business plan and the approved training policy guidelines (originally referred to as the training directives.) In terms of these documents, the Director-General seem to have been responsible for the effective implementation of the education programme.³⁷

The TMB proceeded to discuss decentralised training in some detail.

Farlam J informed the board that Zulman J had been seconded to the project until the end of 2002 on the basis that large numbers of magistrates had not been trained yet and that it was imperative that as many magistrates as possible had to receive training as soon as possible.

36 The policy guidelines may well contain the content of the training programmes but nothing is said about the minimum time of training.

37 See part 4 of this article for an analysis of the lines of accountability as set out in the founding documents.

Zulman J had again set up an office at CALS so that he could assist regional training committees.

Zulman J thought that magistrates that had not been trained had to be targeted and that judges had to be drawn in on a voluntary basis. Magistrates would be involved in the bulk of cases and they would not have much choice when told to attend training sessions. Training sessions had to be well planned, well in advance. He suggested that training should not take place over weekends and should take place in court time, where possible in the court buildings. Training should be practical and should consist of a formal programme focused on the Act. Academics and practitioners had to be involved. Judges should be encouraged to attend these sessions. There was no need for generalised training and no need for overseas guests unless funding could be obtained from elsewhere. The country should be divided into convenient districts and the existing training committees should be used. He emphasised that it was important to establish who had not been trained.

After discussions on the content of training seminars and the duration of the programmes, the Project Manager expressed concern about the TMB's vacillation on the issue of uniform training standards, particularly on the issues of duration of training and critical areas that had to be covered. She noted with concern that despite the existence of the training policy guidelines developed by the TMB and approved by the JSC and MS, confusion reigned as to what would constitute adequate training for an equality court presiding officer or clerk. Only the Project Manager could be faulted for this confusion. If these "training policy guidelines" were so important to the training of Judicial Officers, why did she not emphasise the role of these guidelines to attendees at the first two training seminars, and to the provincial training committees? She noted that TMB members seemed confused about these standards, which was, *inter alia*, demonstrated by the manner in which some TMB members dealt with this issue when it was raised at the trainers' symposium. She noted that, as having these guidelines printed in the bench books did not seem to alleviate the confusion, the training guidelines should be published in a separate booklet for easy reference. How a separate booklet was to solve the problem is difficult to understand. The Project Manager did not clearly communicate the aim and purpose of the training seminars and perhaps had not clarified the aim of the training seminars in her own mind.

Zulman J stated that the ongoing training was commendable but that a coordinated programme had to be put in place. He said that decentralised training was a fiction as the Act was a uniform national Act. Regional committees had not read the training guidelines in the bench book and some areas' training programmes were planned according to the availability of particular trainers. He wanted to know who was invited to the training session in the Eastern Cape. The Project Manager said that a second group of magistrates had been invited, that cultural issues would be discussed at the seminar, that she had not seen the programme and that she sensed from Pillay J that he would be open to suggestions. The Project Manager noted that it was June already and that provinces are and should be using their initiative if the goal of reaching every presiding

officer and clerk by the end of the year was to be reached. Farlam J said that the autonomy principle had been accepted in principle and that Zulman J should contact Pillay J to talk about the suggested training programme in the Eastern Cape.

Gutto said that Zulman J's return to the project must be communicated to the provinces and that provinces must consult him for assistance when arranging training. He endorsed the principle that the TMB should consider how to ensure uniformity of quality, content and duration and that this must be communicated to the provinces. He was of the view that the TMB would be redundant if it would simply be informed of training seminars; clearer guidelines had to be sent to the provinces. The TMB agreed that such a letter with training proposals had to be sent to all the provinces. Pillay suggested that the guidelines had to identify the core content while leaving room for province-specific detail.

Raulinga said that the training of clerks and registrars should be prioritised. Farlam J said that Raulinga must liaise with Behari about the future training of clerks and registrars. Van Riet said Behari had been involved in the training of clerks in North West and would be willing to assist. The TMB resolved that when the provinces were informed of Zulman J's involvement, the role of Justice College in the training of clerks should also be set out.

The board agreed that a letter must be sent to each of the provinces, setting out Zulman J's involvement in the training of presiding officers, as well as the involvement of Behari, Ballakistan and Prinsloo in the training of clerks. Farlam J suggested that the chairperson of each regional committee assign a member of the committee to oversee the training of clerks and registrars. The Board agreed. It is not clear whether this ever happened. The training of clerks was eventually tasked to Justice College.

The discussion moved to the "core elements" of training programmes. Zulman J said that the Act and the Regulations must receive priority – issues such as jurisdiction, the Employment Equity Act,³⁸ unrepresented complainants, other *fora*, and practical detail. Gqiba suggested that Zulman J must draft a document setting out the core elements and send it to the provinces. Gutto said that the bench book covered all of the elements that Zulman J was concerned about and that as far as possible training had to cover all of the elements contained in the bench book. Van Riet thought that the bench book should not be used for training and that Zulman J should draft a curriculum for the training. The Project Manager reminded the meeting that policy guidelines had been drafted and agreed to by the TMT at the start of the process and that these guidelines were used to draft the curriculum and the bench book. She suggested that Zulman J should study these guidelines and make suggestions relating to aspects he thought should be revised by the TMB. Raulinga said that when Zulman J visited the provinces he presented a number of core points to them and that he should have regard to these points when he reviewed

38 Act 55 of 1998.

the training policy guidelines. The Project Manager repeated her view that the training policy guidelines should be printed in an A5 booklet format to ensure that those people involved in equality court training management would consult it regularly.

The TMB resolved that each province had to prepare and submit a comprehensive budget for the R100 000 allocated to it as agreed at the trainers' symposium to ELETU and that the Project Manager had to write to the provinces in this regard. The letter had to contain guidelines on financial and procurement management. Each province would receive R100 000 which would be available until the end of 2002. Mudau said that the allocation per province was unfair towards provinces such as Gauteng, with large numbers of magistrates to be trained. The Project Manager said where provincial budgets were exceeded, negotiations with the Department would follow.

The sixteenth meeting achieved very little as the Project Manager was absent. A Project Manager's report was also not tabled. The TMB agreed that in the Project Manager's absence the item "follow up to the national symposium" on the agenda could not be dealt with. Zulman J presented a written report to the TMB on decentralised training activities that had taken place. According to the information he had received from regional court presidents and cluster heads, 1631 magistrates in the country had received training while 1106 had not.³⁹ Zulman J was however, not satisfied that the information was necessarily correct. He attempted to reconcile these figures with the information in ELETU's possession but was unable to do so. The Project Manager apparently undertook to extract the necessary information from the files in her office and provide it to Zulman J to allow him to cross-check the figures again, but she had not done so by the time Zulman J had written his report. In the same report Zulman J noted that "some confusion" existed "as to how the R100 000 promised for training in the various areas is to be dealt with".

At the same meeting Behari reported that about 100 clerks had been trained. It is not clear whether he referred to recent training activities, or the total number of clerks trained to date. It seems as if he referred to the latter. The TMB resolved that each provincial training committee had to

³⁹ In the letter he had written to heads of court, Zulman J mentioned that the training of clerks was being attended to by Justice College and that Justice College would be in contact with the heads of court. However at the 15th TMB meeting it was agreed that the chairperson of each provincial training committee had to assign a member of the committee to oversee the training of clerks and registrars. A copy of a memorandum from the Project Manager to each of the provincial training coordinators was distributed at the 17th TMB meeting. This memorandum indicated that the funding provided to each province "also covers clerks/registrars". These documents seem to imply that each provincial committee would have had to take the initiative in coordinating the training of clerks, not Justice College. It is also not clear why Zulman J had to be presented with the number of presiding officers who still had to be trained before provincial seminars could be arranged – surely he could have written to the heads of court and could have requested them to arrange training seminars urgently for those magistrates who had not yet been trained?

include the head of clerks/control officer/office manager and that this person had to contact Justice College regarding the training of clerks. The Project Manager's report relating to the fifteenth meeting was distributed at the sixteenth meeting. This report indicated that the North West province was the only province that had commenced with plans for decentralised training of clerks. The province had submitted a comprehensive business plan to ELETU prior to the trainers' symposium but ELETU did not confirm that they could proceed as the plan required approximately R100 000 for the training of clerks alone. The Project Manager entered into discussions with Mogoeng J who then met with the team coordinating the training to explore ways of reducing the envisaged expenditure. The report also indicates that the Project Manager had received "several calls" regarding the way forward. She had referred all the callers to the decision made at the trainers' symposium to proceed with decentralised training seminars and that R100 000 had been provisionally allocated to each province for the training of both clerks and presiding officers.

The invitation to attend the seventeenth meeting included the Project Manager's report relating to the sixteenth meeting. The margins on this document were incorrectly set when the document was printed and it is difficult to follow. The report indicated that Eastern Cape, North West, KwaZulu-Natal and Gauteng had or were planning a second round of training seminars. The list that indicated which magistrates had received training, were revised following a meeting with Zulman J. The Project Manager had requested account details for the transferring of R100 000 to each province. The report ominously states that this process had been "slow". It appears that more than one letter went out to the provinces, each containing new instructions on the utilisation of these funds.⁴⁰ The report concludes that project work had progressed more satisfactorily since the permanent appointment of two assistants in the ELETU office. The report noted that decentralised training "had picked up" while the training of clerks was "being addressed".

It is difficult to establish what transpired at the seventeenth, and as it turned out, the last, meeting of the TMB from the official documentation.⁴¹ Zulman J reported that he had still not been able to reconcile his own and ELETU's lists of trained presiding officers.⁴² It seems as if the meeting was informed that it was the Department of Justice's understanding that Justice College would train the clerks. Traverso J informed the meeting that training in the Cape for magistrates had stalled as the head of the steering committee had apparently lost interest. The TMB was informed of administrative problems that had occurred relating to training in the

40 Zulman J distributed a report at the 17th TMB meeting which included a copy of a letter sent to the Project Manager from McCall J (Durban), in which he expressed his dismay at the confusion relating to the procedure to be followed to obtain funding for the provincial training seminars.

41 I was not present at this meeting and the minutes were drafted in telegram-like style.

42 The Project Manager's report tabled at the same meeting indicates that the lists had been reconciled.

Eastern Cape, KwaZulu-Natal and North West. Traverso J expressed unhappiness about having to send clerks from the Cape to Pretoria for training. She thought that Justice College had arranged this training but it transpired at the meeting that ELETU had arranged it. The Project Manager reported that after a meeting with Zulman J relating to the slow progress on the training of clerks she had decided to arrange a training session in Pretoria as a stop gap measure. Mokgoro J stated that these problems seemed to relate to inadequate coordination. She thought that Zulman J had to visit the centres and had to deal with the issues that had developed.

The Project Manager's report relating to the seventeenth meeting indicated that "review seminars" had taken place in the Eastern Cape, Gauteng, Free State and North West and that events had been planned in KwaZulu-Natal, Northern Province and Mpumalanga. The Project Manager anticipated that she would establish from Northern Cape and Western Cape whether events had been planned and whether they required assistance. The seminars targeted presiding officers who had not been trained yet. This means that at least some presiding officers would have received their "training" on the Act in 2001 at one seminar, not to be exposed to the Act again. "Administrative hiccups" were experienced in KwaZulu-Natal when three different and conflicting communications were received by the training committee on what had to be done. North West also experienced difficulties relating to the training of judges. The report noted that the lists of trained and untrained magistrates had been finalised and sent to the cluster heads for confirmation. The training of clerks still lagged. North West's training seminar for clerks proceeded from 7–9 October 2002 with a second group of clerks to be trained from 14–16 October 2002. The Project Manager had also arranged a national seminar for clerks from 14–16 October 2002 and asked the author, Behari and Magistrate Abrahams (Durban) to assist. The Eastern Cape was also planning to stage a training seminar for clerks from 14–16 October. ELETU had requested Behari to liaise with provincial coordinating committees to accelerate training of clerks. He had undertaken to ensure that all provinces would train an additional twenty clerks by November 2002.

Behari distributed a document at the meeting that related to the training of clerks and the relationship between ELETU and Justice College. The document contained a number of e-mail messages between Behari and the Project Manager. From these e-mail messages it appears that the Project Manager was of the view that Justice College was responsible for the training of clerks and registrars although ELETU would ultimately be responsible for project delivery. This seems to contradict an earlier TMT decision that the provincial training committees would be responsible for initiating the training of clerks.⁴³ In an e-mail dated 25 September 2002

43 At the 15th TMB meeting it was agreed that the chairperson of each provincial training committee had to assign a member of the committee to oversee the training of clerks and registrars. A copy of a memorandum from the Project Manager to each of the provincial training coordinators was distributed at the 17th TMB

from the Project Manager to Behari she confirms the following arrangement: Behari would liaise with provincial training committees to plan and implement training seminars for clerks and registrars and would ensure that each province would train twenty participants by 31 October 2002. A seminar was also to be arranged for 14–16 October for a new group of participants and would be used to “consolidate any gaps that may exist in decentralised training”. The e-mail also indicates that the Project Manager would meet with van Riet about “improving ELETU’s business relationship with Justice College”. Behari indicated in the document that he would be able to meet the agreed-to deadlines regarding the training of clerks.

The TMB agreed to meet again on 4 December 2002 but this meeting was postponed due to a “cash flow problem”. No further TMB meetings were called.

As it then stood at the end of 2002, according to the minutes of the various TMT/TMB meetings, documents distributed at these meetings, and documents sourced from the ELETU offices,⁴⁴ the following training seminars had taken place:

- two national “train the trainer” seminars for judges and magistrates (April 2001 and July 2001 respectively);
- one round of provincial training seminars for judges and magistrates during late 2001/early 2002;
- a so-called “annual’ trainers” symposium (April 2002);
- a second round of provincial training seminars for judges and magistrates during the latter half of 2002. The second round of seminars mainly involved judges and magistrates not trained during 2001;⁴⁵
- national training seminars for clerks took place during June 2001, November 2001 and October 2002.

The Act came into force on 16 June 2003, which meant that at the very least about eight months passed between the last training seminars and the coming into effect of the equality courts. In many instances court personnel would have been “trained” eighteen months prior to the coming into effect of the equality courts.

meeting. This memorandum indicated that the funding provided to each province “also covers clerks/registrars”. These documents seem to imply that each provincial committee would have had to take the initiative in coordinating the training of clerks, not Justice College.

44 The Project Manager graciously allowed me access to the ELETU offices and allowed me to make copies of material I deemed relevant to my doctoral research.

45 Par 2.1 of the Project Manager’s report dated 19 June 2002 refers to a training seminar in the Eastern Cape where participants would be magistrates “not trained previously”. Par 2.1.1 of the Project Manager’s report dated 8 Oct 2002 notes that “[the second round of] training seminars targeted people who have not yet been reached”. The minutes to the 15th TMB meeting reflects that it was decided that the education programme was to “reach all first and then to consolidate the training of those already introduced to the Act and the principles underpinning it”. The training programme never turned to “consolidation”.

3 An Overview of More Recent Events

By February 2004, Justice College had become responsible for the training of equality court magistrates, clerks and registrars.⁴⁶ At that point, 60 designated courts had been set up.⁴⁷ “Phase B” envisaged the designation of a further 160 courts, and Justice College were to have trained the relevant personnel between April and June 2004.⁴⁸ “Phase C” entailed the designation of the remaining courts and the personnel for these courts were to be trained early in 2005.⁴⁹ Cluster heads identified magistrates to be trained and court managers identified clerks to be trained.⁵⁰ Training for clerks occurred over three days and for magistrates over four days.⁵¹ The training that took place was attendance-based with no form of assessment,⁵² except class exercises and class presentations.⁵³ By September 2006 Justice College had trained “most” of the clerks and magistrates.⁵⁴ Since ELETU’s demise, no further formal training of judges on the Act has been arranged nationally or centrally,⁵⁵ but at that point a sufficient number of judges had been “trained” to enable each High Court in the country to have judges available for equality court hearings.⁵⁶

In October 2006, a Parliamentary Joint Committee held hearings on the impact of the Act.⁵⁷ During these hearings, the Chief Director: Policy, Research, Coordination and Monitoring reported that at that point 220

46 Various e-mail correspondences with the relevant Justice College trainer during Feb 2004.

47 *Ibid.*

48 *Ibid.*

49 *Ibid.*

50 E-mail correspondence with the relevant Justice College trainer; 28 Aug 2006.

51 *Ibid.*

52 Various e-mail correspondences with the relevant Justice College trainer during Feb 2004.

53 E-mail correspondence with the relevant Justice College trainer; 28 Aug 2006.

54 *Ibid.* From 26–29 Sept 2006, 16 magistrates were trained in the Eastern Cape; from 16–19 Oct 2006, 13 magistrates were trained in Mafikeng; from 23–27 Oct 2006, 35 magistrates were trained in Johannesburg and from 6–9 Nov 2006, 14 magistrates were trained in Durban – e-mail correspondence with the relevant Justice College trainer, April 2007.

55 Provincial training seminars may have been arranged. Telefaxes sent to Farlam J dated 15 Feb 2005 and 29 Aug 2006 respectively; and telephone conversations with Farlam J during Feb 2005 and Aug 2006.

56 E-mail correspondence with relevant Department of Justice official, 30 Sept 2004. Annexure “D” (“trained Judges”) of a “progress report on the implementation of PEPUDA”, hand-delivered to the author on 7 July 2007, contains a column headed “date trained” for the lists of judges of the various divisions of the High Court. For most of the divisions, the column simply states “no records of date and year trained”. For Grahamstown, Umtata and Cape Town, the date reflected reads “2019/06/03”, which seems to indicate 19–20 June 2003, if compared to the date format of other columns in the document.

57 Joint Monitoring Committee on the Improvement of the Status of Youth, Children and People with Disabilities; Joint Monitoring Committee on the Quality of Life and Status of Women; and Portfolio Committee on Justice and Constitutional Development; 16–19 Oct 2006. <http://www.pmg.org.za/viewminute.php?id=8330> accessed on 2007-05-15.

equality courts existed. In terms of the Department of Justice's medium-term strategic framework target, an equality court should be set up in all 366 magisterial districts, which target would apparently have been met before the end of the 2007 financial year. A "draft equality review report" was prepared pursuant to the October 2006 hearings and tabled at a meeting of the Justice and Constitutional Development Portfolio Committee on 27 March 2007.⁵⁸ This report indicated that by April 2008 every magisterial district would have an equality court – 366 in total. The Chief Director also reported at the October 2006 hearings that clerks had felt, that the training they had received up to that point did not capacitate them to assist complainants. A meeting would have taken place in October 2006 with Justice College, the trainer of clerks, to discuss this issue. Training for clerks consisted of four days during which the following topics were covered: social context, jurisdiction, *locus standi*, the regulations, section 21 remedies, the development of equality rights and the analysis and application of case law.

At the "Equality Indaba Two Workshop" held at their premises on 23 November 2006, the SAHRC reported on a monitoring project of the 24 operational Gauteng equality courts (magistrates' courts) that it undertook during September 2005.⁵⁹ It performed this task in terms of section 184(c) of the Constitution and section 25(2) of the Act.⁶⁰ The survey was carried out from 8 to 30 June 2005 and focused on accessibility to the courts for people with disabilities; advertising material at the courts; whether people at the reception areas at the courts were aware of the existence of the equality court in the same building; the number of complaints lodged and adjudicated upon since their inception; infrastructure; whether the court officials had received sufficient training; the structure of the courts; and which challenges were faced by equality court clerks in facilitating the operation of these courts.⁶¹ The study showed that most of the courts did not have promotional material available and no signage in the building directing people to the equality courts; most of the courts lacked resources such as computers and stationary; and most of the officials at reception were not aware of the equality court situated in the same building.⁶² As to training specifically, most of the officials interviewed, clerks and magistrates, complained about the nature of the training they received on the Act and felt that they were not equipped to deal with equality court matters due to insufficient training.⁶³ Most of these officials felt that refresher courses should be organised.⁶⁴ A document distributed at the same

58 <http://www.pmg.org.za/viewminute.php?id=8875> accessed on 2007-05-15.

59 Mere "A Report on Monitoring Equality Courts in the Gauteng Province (2005)" Research and Documentation Equality Unit, South African Human Rights Commission, undated, distributed at "The Equality Indaba Two Workshop", held at the South African Human Rights Commission on 23 Nov 2006.

60 *Idem* 2.

61 *Idem* 2–3.

62 *Idem* 3–4.

63 *Idem* 6.

64 *Ibid.*

workshop entitled “Equality Court Survey Report” contained data on a survey conducted by the SAHRC at operational equality courts throughout the country during 2005 and 2006. In some instances the report indicated that appointed court personnel had not received any training.⁶⁵ Where court personnel reported on the length of training, it ranged from “unable to recall”; or “one day” to “a month”.⁶⁶ Where provided, the average length of training in most cases seemed to be about three days. These two documents read together tend to suggest that the current training programmes are also not as effective as they may have been.

During March 2007, an *ad hoc* committee of Parliament reviewed the so-called “Chapter Nine Institutions”.⁶⁷ At these hearings, the SAHRC reported that their research had shown that training of equality court personnel had sometimes been poor and sometimes had occurred a long time ago and had been forgotten, and that many officials did not understand their duties and responsibilities. Many complainants were told to approach the Legal Aid Board or an attorney, instead of the Clerk of the Court assisting the complainant in completing the prescribed form to lodge a complaint at the equality court. According to the minutes of this hearing, the SAHRC reported that training on the Act had terminated by March 2007.

65 The report’s data is not always easy to interpret and the data had not been recorded in a consistent format for the nine provinces. The following seems to be the position. Free State: At 4 of the 12 operational courts, court personnel had received training. Gauteng: At 2 of the 23 operational courts, court personnel had not received training. Eastern Cape: All court personnel at operational courts had been trained. However, what is disturbing is that, based on the SAHRC’s data, only 2 equality courts are operational in the Eastern Cape. KwaZulu-Natal: 21 equality courts are operational. At 5 courts the presiding magistrate had not been trained and at 3 courts the clerk had not been trained. Limpopo: At 7 of the 20 operational courts the presiding officer had not been trained while at 6 of the courts the clerk had not been trained. North West: At 5 of the 18 operational equality courts the presiding magistrate had not been trained and at 1 court the clerk had not been trained. Mpumalanga: If I have interpreted the data correctly, at 16 of the 19 operational courts the presiding officers had not been trained while 3 courts operate without a trained clerk. Western Cape: 41 equality courts are operational. 8 courts function without a trained presiding magistrate and at 8 courts the clerk had not been trained. Northern Cape: 1 of the 21 operational courts is staffed by an untrained presiding magistrate while 12 of the courts do not have a trained clerk.

66 Annexure C (“[trained] magistrates”) of the “progress report on the implementation of PEPUDA” referred to above contains a list of magistrates designated in terms of s 16(1)(d) of the Act. Next to the name of each of these magistrates appears the date of training of that magistrate. In most cases, training occurred in 2001 or 2002. Where specific dates are provided, training usually occurred over 2 or 3 days. In the North West province, training occurred either in 2003 or 2006 (only the years are provided for North West; dates are not provided). In the Northern Cape, training occurred either in 2004, 2005 or 2006 (only the years are provided for the Northern Cape; dates are not provided). The year that features most often is 2004. In the Western Cape, training in some cases occurred as far back as Oct 2001 or Feb 2002, but in most instances occurred in Feb 2005 or March 2006.

67 Ie, the state institutions supporting constitutional democracy and established in terms of Ch 9 of the Constitution of the Republic of South Africa, 1996. <http://www.pmg.org.za/viewminute.php?id=8738> (accessed on 2007-05-15).

Towards the end of February 2007 the Minister of Justice and Constitutional Development tabled the South African Judicial Education Institution Bill⁶⁸ in Parliament. The South African Judicial Education Institute Act⁶⁹ came into force on 23 January 2009. The Preamble to the Act suggests that the Act was drafted, *inter alia*, because there is a need for the education and training of Judicial Officers in a quest for enhanced service delivery and the rapid transformation of the judiciary. The Preamble also records that the need for education and training of aspirant, newly appointed and experienced Judicial Officers had long been recognised and that the principle is practised and entrenched in many judicial systems. The Act creates the South African Judicial Education Institute which is responsible for the judicial education and training of aspiring and existing Judicial Officers.⁷⁰ A Council is responsible for the governance of the Institute and comprises of the Chief Justice as chairperson, the Deputy Chief Justice, the Minister of Justice or her nominee, a judge of the Constitutional Court, a person or judge nominated from the JSC, the President of the Supreme Court of Appeal, two judge-presidents, two other judges of whom one must be a woman, five magistrates of whom at least two must be women and of whom two must be Regional Court Magistrates, a retired judge, one advocate designated by the General Council of the Bar of South Africa, one attorney designated by the Law Society of South Africa, two university teachers of law designated by the South African Law Deans Association, two members of the public who are not involved in the administration of justice and one traditional leader designated by the National House of Traditional Leaders.⁷¹ The Council must appoint a Director as head and executive officer of the Institute, subject to the direction of the Council.⁷² The Director has a seat on the Council as well.⁷³

4 Conclusion

In this part of the article, the inadequacy of the training seminars conducted under the auspices of ELETU in preparing equality court personnel to process and adjudicate complaints lodged in terms of the Act has been illustrated.

It is presumed that in future, training on the Act will be conducted by the South African Judicial Education Institution referred to above, once it has been established.⁷⁴ A possible future research project could then entail

68 [B 4B-2007].

69 Act 14 of 2008.

70 S 3 of the Act.

71 S 7.

72 S 12.

73 S 7(1)(h).

74 The "draft equality review report" records on p 13 of the document that the Portfolio Committee on Justice and Constitutional Development recommends that the office of the Chief Justice, together with the JSC, the MC and Justice College must ensure that continuous training in respect of the Act takes place and that all Judicial Officers must be reached. The Institute to-be-established seems to be well-placed to be mandated to complete this task.

a comparison between the efficiency and effectiveness of training programmes on the Act, established under the auspices of the Institute, and the implementation of ELETU's training programmes.

Part 4

1 Introduction

In the first three parts of this article,⁷⁵ State "incapacity", first as a general concept, and then as it translates to South Africa was set out in the context one particular government project, namely the training of equality court personnel undertaken by the Department of Justice. The initial project, undertaken from 2001 to 2003, was discussed in some detail and an overview of more recent events was provided. In part four, the extent to which the Department of Justice succeeded in its mandate to ensure that a cadre of well-trained equality court personnel was established is considered. Principles are borrowed from the discipline of public administration in analysing the planning and implementation of the training project.

2 Analysis of the Planning and Implementation of the Training Project

From the exposition of the planning and implementation process contained in parts 2 and 3 of this paper, a number of troublesome patterns appear. Based on my analysis of the available documentation, although some training of Judicial Officers and clerks occurred during the lifetime of the ELETU project, it was a relatively chaotic and poorly planned and executed event. The analysis also shows that the budget allocated to the project was wholly insufficient and the Department of Justice, which includes the Minister and the Director-General, did not accord a high priority to the Act.

What should have happened seems easy enough to imagine. The training project should have been budgeted for via the Treasury and should not have been reliant on donor funding. The various heads of court should have been engaged with from a very early stage and their complete support obtained. Equality law experts and Justice College trainers should have been briefed to draft training material before any trainers' seminars were held. Each judge president should have acted as chairperson of a provincial or sub-provincial training committee and these committees should have been supplied with explicit guidelines as to what should be included in the training seminars and who to invite as trainers. The Project Manager should have followed up with each of the provincial committees on a regular and sustained basis to ensure that training would have taken place at regular intervals. By the end of 2000 a sufficient number of

⁷⁵ See Kok 2010 (1) *De Jure* 38–48, 49–75 & Kok 2010(2) *De Jure*.

equality court personnel should have been trained to allow the coming into effect of the Act.

Drawing on Hansen's typology, Budlender identifies three causes of constitutional violations by a State: inattentiveness, incompetence and intransigence.⁷⁶ Inattentiveness results from a failure to appreciate the nature and extent of the (constitutional) obligation; incompetence results from inadequate State machinery; and intransigence results from a State's decision not to comply with its obligations.⁷⁷ The same causes could be used to describe a particular State's performance generally. As to the training and public awareness activities relating to the Act, the State's performance would have to be described as a mixture of inattentiveness and incompetence. The required degree of supervision and control by the Director-General and Minister of Justice was lacking, and ELETU's full-time staff was not up to the task of coordinating the various training activities and ensuring that continuous training took place. The result was a sub-optimally trained cadre of equality court personnel.

In analysing the defects in the training programme, I will rely on the four "management principles" set out in part 1 of this article: plan; organise; actuate; and control the activities.⁷⁸

2 1 Plan: determine the objectives

Fukuyama argues that one of the sources of organisational ambiguity is that organisational goals "are often unclear, contradictory, or otherwise poorly specified".⁷⁹ The "train the trainer" seminars were supposedly held to equip the attendees to go back to their provinces and conduct the training themselves. This ostensible "organisational goal" was not articulated explicitly enough and many provincial seminars were arranged where many members of the training faculty were *not* "trained trainers", but academics, and the involvement of trained judges and magistrates was usually limited to opening the proceedings or facilitating the moot

76 Budlender "Implementing judgments on the positive obligations of states" 2006 *Interrights Bulletin* 139.

77 Budlender 2006 *Interrights Bulletin* 139.

78 Pollitt *The Essential Public Manager* (2005) 122–123 states that the most frequently used criteria to assess public management projects are effectiveness, cost effectiveness, overall impacts, efficiency, economy, responsiveness, and procedural correctness. Van der Waldt *Managing Performance in the Public Sector* (2004) 10–12 suggests that good governance has eight major characteristics: participation (direct participation by citizens or through legitimate institutions or representatives), rule of law (fair legal frameworks, impartial enforcement of laws), transparency (follow rules and regulations when taking decisions, information freely available), responsiveness (serve stakeholders within a reasonable timeframe), consensus oriented (mediation of different interests), equity and inclusiveness (all members feel stake in outcome), effectiveness (results that meet needs) and efficiency (best use of resources at disposal), and accountability. I am mainly concerned with the criterion of *effectiveness*, ie to what extent did the training programmes meet the objectives set out in the initial business plan?

79 Fukuyama *State Building: Governance and World Order in the Twenty-First Century* (2005) 69.

court video session.⁸⁰ To this extent, at least, the initial two training seminars failed.

If the training had truly been aimed at empowering presiding officers to play their part in facilitating societal transformation by applying the Act, one would have expected a stronger emphasis on social context training.⁸¹ To the TMT's credit, a number of team members at various stages suggested or commented on the need for social context training,⁸² but this insight was unfortunately not carried through to all of the provincial training seminars.⁸³

80 I sourced the content of national and provincial training seminars from minutes to the TMT/TMB meetings at the ELETU offices. Academics from UCT, WITS and UOFS feature prominently. According to my handwritten notes relating to the 11th TMT meeting Zulman J remarked that McCall J (KwaZulu-Natal) had telephoned him and enquired whether it was expected that KwaZulu-Natal Judges would now train fellow presiding officers. McCall J said that KwaZulu-Natal Judges did not feel equipped to train.

81 Cf Albertyn & Goldblatt "Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality" 1998 *SAJHR* 248 261: "This contextual approach clearly affects the type of evidence and argument that is needed by the Court. Statistical and sociological evidence is crucial as is socio-economic analysis in many cases. This approach also poses greater challenges to Judges to ensure that they are able to step outside their own experiences and critically consider situations that are either not before them or that they have not previously encountered." Bohler-Muller "What the equality courts can learn from Gilligan's ethic of care: A novel approach" 2000 *SAJHR* 623 639 suggests that equality court officers be trained "to deal with the substance and values of cases in a constitutional, contextual and concrete manner without needing recourse to rigid rules or universal truths". At 640 she suggests that equality courts should listen to all voices and consider all circumstances before reaching a conclusion that is least harmful to the most vulnerable litigant. Bohler "Equality courts: Introducing the possibility of listening to different voices in South Africa?" 2000 *THRHR* 288 290 argues that "these new equality courts should create a space in which to make empathetic judgments based on the circumstances of the individuals who convey their suffering to the court" and that "a wise Judge . . . would listen to the stories of the characters involved and make a judgment which takes into consideration the histories and complexities of that particular case and those particular characters". She concurs with Massaro "Empathy, legal storytelling, and the rule of law: New words, old wounds?" 1989 *Michigan LR* 2099 2116 that calls for individualised justice; that Judges "should focus more on the context – the results in *this* case to *these* parties – and less on formal rationality – squaring this with results in other cases". These kinds of viewpoints were probably not raised often enough at training seminars; certainly not the training sessions that I participated in or attended. Also cf Fuller "The forms and limits of adjudication" 1978 *Harvard LR* 353 391: "[A]nother kind of 'partiality' is much more dangerous. I refer to the situation where the arbiter's experience of life has not embraced the area of the dispute, or, worse still, where he has always viewed that area from a single vantage point. Here a blind spot of which he is quite unconscious may prevent him from getting the point of testimony or argument".

82 Eg the minutes of the following TMT meetings: par 3.3 of the 5th meeting; par 3.3 of the 7th meeting; par 6 of the 8th meeting; par 6 of the 12th meeting and par 4.1.2 of the 14th meeting.

83 Of the 10 2001 training seminars (Judges and magistrates) that I could source, 4 seminars did not include social context training while 5 seminars devoted 1 hour

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2 2 Organise: Distribute the word; establish and recognise needed relationships

The Department of Justice wished the training project to be seen as judge-controlled and therefore the Project Manager did not have, or did not exercise, any real authority over the various provincial training committees in the traditional sense of “the legal right to command action by others and to enforce compliance”.⁸⁴ What the Project Manager should have done was to achieve compliance with the goals set out in the business plan by other means such as persuasion and repeated, diplomatic requests.⁸⁵ She should have engaged with the heads of court⁸⁶ and should have enlisted their support from the moment it became clear that equality court personnel would have to be trained in terms of the Act.

It does not seem as if clear lines of accountability were established relating to the implementation of the training programmes.⁸⁷ A business plan distributed at the eleventh TMT meeting stated that the execution of the project was fully supervised by the Project Manager and that she set the timeframes with the assistance of the executive committee, the JSC, the MC and the TMT.⁸⁸ The plan also stated that ELETU submitted bimonthly reports to the Director-General and the Minister.⁸⁹ The Project Manager accepted ultimate responsibility for project management.⁹⁰ The Project Manager’s report tabled at the thirteenth TMT meeting thanked the Director-General for his “hands off approach” to the project. This phrase is illuminating. In light of the long lapse between the enactment and coming into force of the Act, the long lapse between training seminars and the implementation date and the long time that elapsed before the

to social context training and 1 seminar devoted 1.5 hours to social context training. Of the 5 2001 training seminars (clerks) that I could source, 3 seminars did not include social context training while 2 seminars included 1 hour of social context training. At the June 2001 seminar for clerks, 45 minutes out of 3 days were devoted to social context training and at the Nov 2001 seminar, 1.5 hours out of 3 days were devoted to social context training.

84 Terry & Franklin *Principles of Management* (1982) 219.

85 *Ibid.*

86 At the level of judges, she should have engaged with the various judge presidents. The judge president of each Division acts as leader and manager of the team of judges in that division – Calland *Anatomy of South Africa* (2006) 206. Chief magistrates and cluster heads should have been drawn in as well in relation to the training of magistrates. (A number of magisterial districts are grouped together with a chief magistrate as the head. Some provinces would have more than one chief magistrate. One would then be the cluster head for the province.) As to the training of clerks, regional offices of the Department of Justice are empowered to send instructions to office managers at the various magistrates’ courts to ensure that clerks attend training sessions. (My thanks to Jakkie Wessels, regional magistrate, who provided me with the information about the court structure, in an e-mail dated 8 May 2007.)

87 *Cf* van der Waldt *supra* 30 & 134 as to the importance of ensuring accountability by heads.

88 The business plan par 4.

89 *Idem* par 5.

90 *Idem* par 6.

amendment to the Act was effected, it would appear that the Director-General either took no interest in the implementation process, or abdicated his responsibility relating to the implementation to the Project Manager.⁹¹ The bimonthly reports were either not read, or not read carefully. When the Project Manager apparently lost interest in the project,⁹² the Director-General did not notice it.⁹³ The long time lapse between the training seminars and the eventual implementation date of the Act would also suggest a lack of coordination between ELETU and the Department. One would think that the Project Manager would have interacted with the Department more closely to ensure a close fit between the training seminars and the coming into effect of the equality courts. The Minister explained the delay in the coming into effect of the Act as “bureaucratic bottlenecks, management inertia and financial considerations”.⁹⁴ “Management inertia” need not necessarily imply bad faith but at the very least it tends to suggest a lack of interest in or prioritisation of the Act. “Financial considerations” tend to suggest that the project was under-funded.

The training of clerks and registrars lagged behind the training of magistrates and judges. By the end of 2001 about 85 clerks and registrars had been trained, while approximately 600 magistrates and 90 judges had been trained.⁹⁵ The communication and coordination between Justice

91 Ultimately, of course, accountability ends with the political head of the Department of Justice. Mafunisa “Ethics and accountability in public administration” in Kuye, Thornhill, Fourie, Brynard, Crous, Mafunisa, Roux, van Dijk & van Rooyen *Critical Perspectives on Public Administration: Issues for Consideration* (2002) 195.

92 The 16th TMB meeting proceeded in the absence of the Project Manager. The minutes to the 16th meeting reflects that at least some members of the TMB had become critical of her performance at that point. She had apparently also become involved with an NGO in an unknown capacity. The “Project Manager’s report” dated 21 Aug 2002 reflects at par 4 that “the Project Manager now works . . . from her NGO office where resources are better”. McCall J’s e-mail to Zulman J dated 3 Oct 2002 distributed as part of Zulman J’s report to the 17th TMB meeting refers to the Project Manager’s regular unavailability.

93 At best, the Project Manager saw her role as that of a facilitator and not as project leader. In her Project Manager’s report relating to the 15th TMT meeting, in which she discusses the National Symposium for Equality Court Educators that took place from 24–26 April 2002, she states on p 5: “The TMB’s attention is drawn to the specific issues that came up during the symposium *and which require the TMB’s leadership*” (my emphasis). One would think that the Project Manager would or should have played a more pro-active leadership role in this regard.

94 Typed speech that the Minister presented at the Helderfontein training seminar on 24 July 2001 (Copy in my possession). I was not present at the seminar and I do not know if this part of the speech was read at the seminar or not.

95 A document entitled “Seminars organized under Equality Legislation Education and Training Programme 2001–2002” distributed at the 14th TMT meeting stated that by year-end 2001 602 magistrates and 99 judges had received training while 56 clerks and 29 registrars attended training sessions. The figure for clerks and registrars is probably inflated as the same clerks and registrars who attended the first training seminar (10–15 June 2001) were supposed to have been invited to attend the second seminar (12–14 Nov). (The figure for trained magistrates and judges is probably also somewhat overstated for the same reason.) But, even given the relatively small number of clerks trained, it would still have been possible to

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College and ELETU in this regard were insufficient. The minutes to the TMT/TMB meetings reflect some uncertainty as to which institution would ultimately be responsible for the training of clerks. The minutes of the fifteenth meeting indicate that the TMB resolved that each of the chairpersons of the provincial training committees would have to assign a member of the relevant committee specifically to coordinate the training of clerks. The minutes to the sixteenth meeting reflect that each provincial training committee had to include the head of clerks or control officer or office manager and that this person had to contact Justice College to coordinate the training of clerks. The minutes to the seventeenth meeting state however, that Justice College would ultimately be responsible for the training. Towards the end of 2002 a number of training sessions for clerks and registrars took place.⁹⁶

2 3 Actuate: Ensure that the members of the group carry out their prescribed tasks willingly and enthusiastically

Fukuyama points out that many aspects of organisational theory revolve around one central problem: delegated discretion.⁹⁷ Efficiency sometimes requires the delegation of discretion in decision making and authority but the very act of delegation creates problems relating to control and supervision.⁹⁸ The history relating to the training programmes bears out this problem. The Project Manager did not liaise with the provincial training committees on a sustained, energetic basis and the training was suboptimal. The available documentation indicates that the Project Manager was of the view that after the initial national training seminars took place,

put into operation a small number of pilot equality courts towards the end of 2001/start of 2002.

96 Memorandum to the chairperson of the TMB from Behari, Justice College, dated 10 Aug 2002, distributed at the 17th TMB meeting. The situation has improved somewhat in the meantime. Lane "South Africa's equality courts: An early assessment" <http://www.csvr.org.za/papers/paprctp5.htm> (accessed 24/02/2006) 10–11 reports that by Sept 2004 about 800 magistrates had undergone a three-day training course on "equality matters" and "the unique procedures of the equality courts". Another 250 magistrates were trained in Nov 2004. By May 2004 about 700 clerks had been trained and a further 330 clerks were trained in Nov 2004. Lane notes that the clerks' reaction to the training had been "lukewarm" and complained that the training was far too short. What I have not been able to establish from the relevant trainer at Justice College is (a) what training material was used?; (b) once a clerk/magistrate has been on the Justice College course, is that clerk/magistrate then deemed fully trained and may then preside in an equality court?; (c) were clerks/magistrates trained under ELETU's auspices (2001–2002) trained again by Justice College, or were they deemed fully trained and designated to sit in the first equality courts?

97 Fukuyama *supra* 59–60. Also *cf* van der Waldt *supra* 30.

98 Fukuyama *supra* 59–60. *Cf* Rousseau *The Social Contract* (1968) 92: "The governors have too much to do to see everything for themselves; their clerks rule the state". Manning *Delivering the Dream* (2006) 3 conveys the same idea across, if less eloquently: "Politicians . . . are in the hands of the bureaucracy. They give orders, but results are produced by the executives they appoint. The real action is far from the Presidency, the Cabinet room, or any ministerial office."

decentralised provincial training seminars were to be held and arranged locally.⁹⁹ It is not at all clear, however, on what basis and how often the provincial committees were contacted, either by letter, e-mail or telephone to ensure that decentralised training commenced and continued.¹⁰⁰ Available documentation suggests that the Project Manager played a *reactive* role and did not proactively ensure effective provincial training.¹⁰¹

2 4 Control: Control the activities to conform to the plans

After the initial training of judges and magistrates that took place during April and July 2001, the project seemed to start losing direction. Perhaps understandably some time elapsed before the *initial* training seminars for judges, magistrates and clerks took place. A consultative process had to be followed and the judiciary's support and buy-in needed to be obtained. The Department also wished to be seen to support judicial independence.¹⁰² The JSC and MC could only be engaged with towards the end of 2000/early 2001 and dates for training were set in consultation with these bodies. But why the *follow-up* national seminars and provincial seminars took place more than six months after these initial seminars is difficult to explain. Inexplicably, the second round of provincial training seminars

99 Pars 2.1 and 2.2 of the business plan distributed at the 1st TMT meeting anticipated "decentralized training activities" that would be coordinated nationally and implemented provincially. The minutes to the 14th meeting notes that the Project Manager informed the TMB that the "project now mainly resides in the provinces". I located a document in the ELETU offices dated 20 Sept 2001 that was drafted by the Project Manager and was intended for the Director-General, in which she listed as one of the "project achievements": "memorandum to Judges president and cluster heads explaining framework and process for decentralised equality court training and specifically requesting the (sic) to initiate planning prioritising the establishment of provincial training management teams, drawing up of integrated provincial implementation plans and determination of dates for training". In this same document, at par 2.2.6 the Project Manager reported that she had visited 5 provinces to date. Par 2.2.7 of the document states that she interacted on an ongoing basis with the provinces to ensure that decentralised training commenced. However, in the documents I could locate, there is very little if any evidence of ongoing communication with the provinces to ensure continuing training activities.

100 I could only locate 4 letters from the Project Manager to the heads of the provincial training committees, dated 8 Aug 2001, 27 Sept 2001, 13 Aug 2002 & 27 Aug 2002 respectively. Only the first letter dealt with substantive issues: Conducting a needs assessment, drawing up a business plan, determining dates for training; and forwarding the business plan to ELETU. The last 3 letters only related to the accounting procedures that had to be followed.

101 Par 2.1 of the Project Manager's report dated 19 June 2002 notes that "with regard to judicial education, *the Project Manager has received several calls regarding the way forward*. She had referred all callers to the decision at the symposium to proceed with decentralised equality court education activities . . ." (my emphasis). Par 2.1.3 of the Project Manager's report dated 8 Oct 2002 noted that "the Project Manager has successfully handled all problems *that were brought to her attention*" (my emphasis).

102 Eg par 3.4 of the 1st TMT meeting: "Agreed that the role of government was *facilitatory . . .*" [as it related to the provision of training to equality court personnel]. (My emphasis)

took place eight to twelve months after the first round of training, and another six months passed after the second round of training before the Act came into force.¹⁰³

The initial business plan envisaged national “train the trainer” seminars whereafter these trained judges, magistrates and clerks would train their peers. Presumably judges and magistrates with a particular interest in equality issues were invited to the national “train the trainer” seminars. Once these individuals were trained, it was a matter of engaging with them on an ongoing basis to ensure that decentralised training seminars were arranged. But this part of the project started to break down at the second national seminar, when not all the participants from the first seminar attended the second, follow-up training seminar for trainers.¹⁰⁴

The training probably did not even familiarise the participants with the Act to a sufficient degree. In my view the training programmes entailed little more than awareness-raising sessions: Most of the participants received one day of training,¹⁰⁵ with as little as two hours of the training devoted to unlocking the Act’s provisions. No attempt at any form of assessment was made at any of the training seminars.¹⁰⁶ Even on the Project Manager’s version, judges only received “some introduction” to the Act while a significant number of magistrates were “reached”.¹⁰⁷ An e-mail sent by magistrate Abrahams (Durban) to Zulman J and distributed at the seventeenth TMB meeting is illuminating. Abrahams was a member of the provincial training committee (KwaZulu-Natal). In the e-mail he submits the following strong, and in my view correct, argument:

“[The groups that received training in November 2001] I am advised . . . are not to be considered for any further training, and are now to be considered “trained”. I do not share this view, and I explain why:
(1) That programme was the first conducted by us and it could be that

103 The Project Manager blamed it all on the judges. In a memorandum from the Project Manager to the Director-General dated 13 Dec 2001 she explains that dates had to be moved “to accommodate a number of consultative processes that had to be undertaken in recognition of judicial independence and because judicial education is not yet incorporated in the normal work calendar for Judicial Officers (particularly High Courts)”. In the Project Manager’s “final project report” dated Jan 2002 (par 4.1) she explains that delays in the implementation process were primarily due to having entrusted decision making to the judiciary and that the judiciary often made decisions based on their circumstances which often resulted in postponement of activities.

104 Cf Zulman J’s observation at the 10th TMT meeting that some Gauteng-based judges did not attend the second seminar after having been “invested in during phase one.”

105 The Project Manager stated that “the number of training days for each person was far less than what had been planned in the Business Plan. This was due to time constraints experienced by the judiciary”: Project Manager’s report to the 14th TMT meeting; par 3.1.

106 Attendance-based “training” is a misnomer as no guarantee exists that attendees actually take in much of what is presented. Cf Hunt “Stemming the tide of rising harassment litigation: Is training the answer?” 2002 *The Hennepin Lawyer* 18 21.

107 Project Manager’s report to the 13th TMT meeting; par 5.

our committee emphasised the theoretical and academic focus at the expense of the practical aspects. The result is that we were only able to work through one hypothetical scenario, and superficially at that. (2) At the end thereof, it was understood that there would be refresher courses and whenever enquiries were made to me, I confirmed this stance. I have been directly involved with publicising the training programme amongst the lower court judiciary . . . since September 2001, and I continue to do so to date. I also interact with the initiates practically on a daily basis, and I am painfully aware of the shortcomings of that first training programme, as well as their grasp of the content thereof. (3) Almost ten months have passed since then and it would be manifestly unfair to consider . . . that these groups would be the “trained”, in fairness to themselves, ourselves, and our responsibility to the community. (4) Above all, this approach will taint the integrity of the whole programme, and will be contrary to the requirements of s 180 of the Constitution since s 16(2) of [the Act] is legislation contemplated by that provision.”

The Gauteng training that took place in December 2001 at Gallagher Estates is an example of the insufficient nature of the training. The author formed part of the training faculty at these seminars and attended some of the sessions for the whole day. The organiser arranged for questionnaires to be distributed to the participants.¹⁰⁸ The author managed to locate a file in the ELETU office that contained the feedback from those magistrates that completed and returned the questionnaires. On the whole their comments indicate that the one-day seminar served as an awareness-raising session but that as a *training* event, it was insufficient.¹⁰⁹

After the initial provincial seminars took place towards the end of 2001, the immediate coming into effect of the Act was to be expected in early 2002, as a sufficient number of judges, magistrates and clerks had been exposed to the Act making a number of pilot courts feasible. Inexplicably the Act came into effect only a year and a half later. This meant that

108 Participants were, *inter alia*, asked the following questions: “A. What are your views as to (i) the format of the training session; (ii) the presentation on your date of attendance; (iii) the Moot Court discussion; (iv) any other discussion. B. Which of, or which part of, the training sessions did you regard as most valuable, and why? C. Do you have any suggestions or comments as to aspects which were not dealt with: (i) as to the subject matter generally; (ii) as to the presentations specially. D. As far as future training goes, how should you like to see the sessions structured and what should they cover. E. Any general comments on the legislation which you would like to make?”

109 Also see the views of the magistrate responsible for the coordination of Gauteng training, as reflected in the minutes to the 15th TMB meeting: “Mr Mudau supported the need for more intensive training, indicating that in Gauteng the key complaint was the participants felt that the one-day seminars were too short and did not adequately familiarise them with the Act and provide them with in depth insight into it . . .”. In his report to the Project Manager, Mudau noted that “many respondents are of the view . . . that a day is not adequate for such important training”. (Author sourced the report in the ELETU offices; copy in my possession).

participants in the initial provincial seminars received training on the Act, in most cases for a single day, a year and a half before the Act came into force. By contrast the initial business plan envisaged an initial *three week* programme and annual refresher courses.¹¹⁰

One of the “risks and assumptions” listed in the initial business plan was that “government [would] continue to treat the issue of ending discrimination and achieving equality as a national priority”.¹¹¹ It is difficult to avoid the conclusion that the Department of Justice did not give any priority to the Act’s implementation or to the obligations relating to the training of equality court personnel and presiding officers:

- The Act was passed in early February 2000 yet the first attempt at coordinating a national training programme only took place in September of that year when the first TMT meeting was called.
- After it transpired at the first national training seminar for judges and magistrates that most of the participating presiding officers thought that aspects of the Act were unconstitutional, it took almost two years before the suggested amendments were effected.¹¹²
- The Department did not fund the implementation process and USAID was requested to provide funds. Only two full-time personnel coordinated the training project and they were paid from USAID funds.¹¹³
- It was resolved at a meeting of the Equality Review Committee on 3 February 2001 that a firm commitment be given by the Department that the Act would be implemented on 16 June 2001; that priority attention be given to the Act; that a Director be designated to handle the implementation of the Act as a matter of urgency; that the Chairperson of the ERC write to the Director-General to request him to give a firm assurance of the Department’s commitment to implement the Act on 16 June 2001 and to give the necessary support structure to the ERC; and that it be recommended that the Director-General encourage the various directorates involved in the implementation of the Act to prioritise the implementation of the Act and that everything necessary be done to implement the Act by 16 June 2001.¹¹⁴ As it turned out, the Act came into force on 16 June 2003, two years later than requested.

3 Conclusion

From a socio-legal perspective, the author painted a detailed picture of the planning and implementation of the training of equality court personnel,

110 Par 2.3 (incorrectly marked 2.2) of the business plan distributed at the 1st TMT meeting.

111 Par 10.4 of the business plan, distributed at the 1st TMT meeting.

112 The seminar took place in April 2001. The amendment came into force on 15 Jan 2003.

113 Par 1 of the “Executive Summary Report & Evaluation, National Seminar for Equality Court Judicial Educators, Aloe Ridge Hotel, Gauteng, April 16–21, 2001”, distributed at the 8th TMT meeting.

114 Pars 3.8, 3.12 and 4.2 of the minutes of the ERC meeting. (Copy in my possession)

because an analysis of the provisions and reflection on the nature of the Act and the stated purpose of the Act is insufficient. The social factors surrounding the Act should also be taken into account when assessing the full scope of “living discrimination law” in South Africa.¹¹⁵ What is “living” discrimination law?

Ehrlich, “with and through Roscoe Pound . . . among the founders of modern American sociological jurisprudence”,¹¹⁶ talks of *lebendes recht* or “living law”, by which he means the rules actually followed in social life.¹¹⁷ Macaulay describes Ehrlich’s concept of the “living law” as follows:¹¹⁸

The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law.

Ehrlich seems to suggest that scholars employing sociology of law should study “the whole of law in its social relations” and by “law” he means not only “state law”, in other words court cases, legislation and the common law, but the entire “Social Order” made up of institutions such as marriage, family, possession, contract and succession and the rules governing such institutions.¹¹⁹ Such an expansive study is an impossible task to perform in a single article. What the author attempted to do was to illustrate that “living discrimination law” in present day South Africa cannot be read to merely exist in terms of sections 9(3) and 9(4) of the Constitution and the provisions of the Act, it also consists, *inter alia*, of poorly capacitated equality courts. The current state of awareness of the existence of the Act and perceptions relating to discrimination and the achievement of equality among ordinary South Africans could also be seen as another aspect of the “Social Order” making up a part of the “living discrimination law” in present day South Africa.¹²⁰

Another, at least implied, argument that emerges from this detailed picture is the contingent nature of most, if not all, planned schemes, whether of the “grand” kind referred to in the first part of this article, or much smaller schemes, such as the training initiative discussed in parts 2 and 3. The author illustrated the perhaps trite point that laws have or do not have an effect because of what humans do or not do, and because of the way particular humans interact with other humans. There was nothing

115 Cf Curzon *Jurisprudence* (1995) 152–153 where he discusses Ehrlich’s concept of the “living law”. As Curzon explains it, the “living law” is an “amalgam of formalities, current social values and perceptions”.

116 Rheinstein “Sociology of law. Apropos Moll’s translation of Eugen Ehrlich’s *Grundlegung der Soziologie des Rechts*” 1938 *Int J Ethics* 232.

117 Ehrlich *Fundamental principles of the sociology of law* (1936) 21; Cotterrell *The Sociology of Law: An Introduction* (1992) 29.

118 Macaulay “The new versus the old legal realism: ‘Things ain’t what they used to be’” 2005 *Wis LR* 368.

119 Ehrlich “The sociology of law” 1922 *Harv LR* 130–145.

120 Curzon *supra* 153.

inherently misguided about the legislature's insistence on properly trained equality personnel; if anything it was an essential element to ensure effective implementation of the Act. But the mere fact that parliamentarians decided that training was a good idea did not guarantee compliance; it depended heavily on the personnel chosen to oversee the training. Put differently, the training programme was not destined to fail; had different personalities been involved, it may well have turned out differently.

However, the main focus in this article remained *management failure*. If further socio-legal or public administration research is undertaken on the Act or future training programmes on the Act, it would be useful to have a contextualised and relatively complete picture of the first of these failed training initiatives, as a standard against which future results could be measured. The preceding pages constitute as a quasi-empirical study,¹²¹ written from the perspective of a lawyer, to add to other studies of management, which could potentially lead to better-refined management theories or better-refined critiques of management theories.¹²²

121 Roux "Introduction to public policy analysis: Concept and methodology" in Kuye *et al supra* 84 distinguishes between "empirical", "evaluating", "normative" and "integrated" analysis. An "empirical" analysis is retrospective and descriptive and the primary focus is on the real facts involved.

122 Cf Kuye "The state of research and scholarship in public administration" in Kuye *et al supra* 2.