Aggregating pro bono hours – a case study from South Africa - Pro Bono Committee, May 2018

Tuesday 15 May 2018

Odette Geldenhuys
Webber Wentzel, Cape Town
odette.geldenhuys@webberwentzel.com

Different law societies in South Africa began adopting compulsory pro bono rules beginning in 2003. Currently, three out of the four regional law societies have the same pro bono rules while The Cape Law Society's pro bono rules differ in certain aspects. Both sets of rules require attorneys to perform pro bono services of not less than 24 hours per calendar year.

Attorneys and law firms have approached these rules in different ways. Webber Wentzel is one of South Africa's large law firms and it decided to aggregate the pro bono hours of its professionals into a full-time Pro Bono Department. The Pro Bono Department was established in 2003 with one full-time partner and it has grown to four and a half full-time partners and one senior associate. During each eight-month rotation of candidate attorneys (trainee attorneys), between two to four candidate attorneys are placed in the Pro Bono Department. The Department is responsible for meeting the firm-wide regulatory pro bono obligation. Importantly, this approach does not exclude other practitioners from doing pro bono legal work and year-on-year fee earning practitioners do a healthy number of pro bono hours.

The overwhelming benefit of the aggregation model is that the full-time pro bono attorneys are dedicated to the successful conclusion of matters, similar to practitioners in fee-earning matters. Such ongoing involvement also means that long-running matters with public interest impact are taken on with the knowledge that dedicated resources are available in the form of full-time pro bono attorneys. Concentrating the firm's pro bono hours in this manner has resulted in the development of expertise in a wide range of practice areas, such as land restitution and redistribution, the role of traditional leaders in a democratic dispensation, unconstitutional credit practices, unfair discrimination in the workplace and in relation to LGBTQIA (lesbian, gay, bisexual, transgender, questioning, intersex and allies) persons, and rule of law matters.

As an example, during 2017, issues faced by LGBTQIA persons were raised in Seshego, a rural area North of Johannesburg where English is the first language of only about two per cent of the local population. In this conservative hinterland, Nare Mphela found herself. A pupil in a local high school, no-one could understand why Nare wore the girls' uniform if she is a boy. Nare, who is biologically male by birth but self-identifies as female, did not have the language to engage with others about this self-identification, which she had no choice in. She was the victim of ongoing discrimination on the basis of her gender identity at her school. The school's principal taunted her, used hurtful and harmful speech and physically violated her. Despite numerous requests to intervene, the provincial Department of Education failed to do so.

In 2017, the first ever Equality Court sat in the Seshego Magistrates Court to hear about the discrimination against Nare, who was represented by Webber Wentzel's Pro

Bono Department. South Africa's Equality Courts are established under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Act). The purpose of the Act is to give life to section 9 of the South African Constitution, which is the equality clause and provides as follows:

1. everyone is equal before the law and has the right to equal protection and benefit of the law;
2. equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken;
3. the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;
4. no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination; and
5. discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Following many long-distance trips later by Department attorneys, the court found in her favour and emphasised the right to dignity and the right to equality. It was a major victory, not only for Nare but also for other LGBTQIA minors, specifically transgender pupils who are in the education system, as well as for the relevance of South Africa's Equality Act and its Constitution. The relief granted by the Court included a public apology to Nare; an order that the principal attend gender sensitivity training; and monetary awards for special damages for the impairment of her dignity, to complete her high school education and to undergo psychological sessions.

Another pro bono matter that was also only possible because of the aggregation of hours was one which resulted in a change to the South African law concerning salary attachments for debts. What started with one complainant in late 2013 became a public interest application with a university legal clinic and 16 applicants. The case related to creditors abusing the debt collection mechanism of salary attachments for debts – emoluments attachment orders or 'garnishee orders' – as the applicable legislation was unclear as to which jurisdiction had to be used to obtain such orders and the law provided that these orders could be issued by a clerk of the court.

The individual applicants, who all had one or more emoluments attachment orders against their salaries, argued that one's salary allowed one to access certain basic constitutional rights such as schooling, housing and health and, therefore, decisions about an individual's income could not be made administratively but that it required judicial oversight. Three and a half years later, after a successful hearing in the High Court, a successful confirmatory judgment in the Constitutional Court (South Africa's highest court), parliament unanimously passed the necessary amending legislation in mid-2017.