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44 Exemption from unalterable provisions an underutilised procedure

In principle, every company is required to comply with all of the unalterable provisions of the Companies Act 71 of 2008, except to the extent that its Memorandum of Incorporation imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than otherwise would apply to the company in terms of an unalterable provision in terms of s 15(2)(a)(iii) of the Act. In this article, Paul Truter and Amy Jones discuss that this principle is not absolute.
What the Legal Practice Act means for the future existence of De Rebus

As it has been published in previous issues and the current issue of De Rebus, the Legal Practice Act 28 of 2014 was promulgated in September last year. During the annual general meetings of the KwaZulu-Natal Law Society (see 11) and the Law Society of the Northern Provinces (see 13), late last year, Minister of Justice and Correctional Services, Michael Masutha, spoke comprehensively on the LPA. Minister Masutha announced that the first phase of implementing the LPA, which is chap 10, will be put into place early this year.

Chapter 10 of the LPA establishes the National Forum on the Legal Profession. This forum will be a transitional body, which will be in existence for a period not exceeding three years and will deliberate on issues that may arise once the LPA is looked at in detail by those who will form the body. See page 21 for the Law Society of South Africa’s designated representatives on the National Forum. Minister Masutha emphasised the importance of the National Forum as its negotiations ‘will shape the future legal practice’.

As the profession readies itself for the imminent changes that will be brought about by the LPA, we at De Rebus have considered what the LPA means for the future existence of the publication. Currently the cost of publishing De Rebus, which includes, inter alia, printing the journal and the classifieds, postage and editorial staff costs are funded by the Attorneys Fidelity Fund (AFF). The AFF funds the journal at a nominal annual rate of approximately R 44 per attorney and candidate attorney under the provisions of s 46(b) of the Attorneys Act 53 of 1979. Section 46(b) allows the AFF to provide for funding of programmes that enhance the standards of practice, which includes De Rebus.

The LPA does not contain a section similar to s 46(b), however, s 6 states:

‘(2) The Council, in order to perform its functions properly —

... (f) may publish or cause to be published periodicals, pamphlets and other printed material for the benefit of legal practitioners or the public.’

As can be seen above, s 6(2)(f) does not enforce the publication of a journal as it uses the words ‘may publish’. This could potentially mean that De Rebus may not exist post-LPA if the AFF does not continue to fund it. Our 2013 reader survey showed that a total of 42,3% of respondents indicated they would not be prepared to pay for the journal if in future it would no longer be available for free.

The journal plays an important educational role that will surely be missed by the profession if it is no longer published. Now is the opportune time for practitioners to air their views on the LPA and ensure that De Rebus continues to be published as well as look for other anomalies in the Act. Send us your views on the future funding of the journal at mapula@derebus.org.za

New staff member

De Rebus would like to welcome Isabel Janse van Vuren to its team. She has been appointed as sub-editor and takes over from Kathleen Kriel who was promoted to production editor. Those who wish to advertise in the classifieds can contact Ms Janse van Vuren at yp@derebus.org.za

Would you like to write for De Rebus?

De Rebus welcomes article contributions in all 11 official languages, especially from legal practitioners. Practitioners and others who wish to submit feature articles, practice notes, case notes, opinion pieces and letters can e-mail their contributions to derebus@derebus.org.za.

The decision on whether to publish a particular submission is that of the De Rebus Editorial Committee, whose decision is final. In general, contributions should be useful or of interest to practising attorneys and must be original and not published elsewhere. For more information, see the ‘Guidelines for articles in De Rebus’ on our website (www.derebus.org.za).

- Please note that the word limit is now 2000 words.
- Upcoming deadlines for article submissions: 17 February and 17 March 2015.
Certified copies from the Master of the High Court

I read with astonishment the contents of Mr Messias’ letter 2014 (Sept) DR 4, so would the parties in the Moseneke and Others v Master of the High Court 2001 (2) SA 18 (CC). Refusal to supply a certified copy of a will takes me back to the days when black intestate estates were administered under the Black Administration Act 38 of 1927. On the same grounds one would be refused a copy of the liquidation account. We may be approaching the stage where the only copies available from the Master’s office are those necessary to transfer immoveable property in terms of s 42(1) of the Administration of Estates Act 66 of 1965; even these are often obtained only through the attendance of an agent.

The function of the Master, from the point of view of justice, is as an office of record. His other functions, from the point of view of justice, is as an office of record. His other functions, from the point of view of justice, is as an office of record. His other functions, from the point of view of justice, is as an office of record. His other functions, from the point of view of justice, is as an office of record. His other functions, from the point of view of justice, is as an office of record. His other functions, from the point of view of justice, is as an office of record. His other functions, from

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I have been using since school...
Tenant law

I recently represented a client who is a tenant in a block of flats. A letter was sent out by the body corporate of his block of flats requesting all residents to paint their security gates. After, he approached the trustees, he was informed that the word ‘resident’ also includes tenant. He subsequently referred the matter to me. I wrote a letter to the trustees advising them that they have no legal standing to request tenants to paint their security gates. Subsequently, another letter was sent conveniently stating that all owners were required to paint their security gates. Section 44(1) of the Sectional Titles Act 95 of 1986 states quite clearly that an owner is responsible to repair and maintain his or her portion of the property. This practitioner needs to be convinced that the Legal Practice Act 28 of 1986[1] is for the better. It is going to be far worse than we had. The Act as it stands, strikes no fair balance between the executive and the judiciary as counterweight for it and the debate.

In appropriate instances the body corporate or trustees should place pressure on the owner at all times by enforcing the duties and ‘reformation n., radical change for the better esp. in political, religious or social affairs ...’ (my italics). Perhaps this contribution could reform a few mindsets somewhere and get us talking, understanding first what the content of transformation should be and then what for the better is, that we want for the functioning of legal professions in the country.

This practitioner needs to be convinced that the Legal Practice Act 28 of 2014 (the Act) is for the better. It is going to be far worse than we had. The Act as it stands, strikes no fair balance between the res publica, the executive and the judiciary as counterweight for it and the debate.

So let us talk about reforming rather than transforming or why transforming rather than reforming. Then at least we will get less hidden and more truth into the debate.

Frans Geldenhuyse, attorney, Polokwane

How the RAF settles claims

Dr Eugene Watson, the Chief Executive Officer of the Road Accident Fund (the Fund), in his latest report bemoans the fact that the only source of funds available to meet the obligations of the Fund is the receipt of money allocated to it from the fuel levy and regretfully with the high accident rate on our roads, which seems to be ever increasing, the amount it has to pay out to road accident victims exceeds the amount it receives from the fuel levy. In addition the Fund has been besieged by numerous frauds committed against it by some of its own employees, and unprofessional and unscrupulous doctors and lawyers.

What Dr Watson has failed to outline is how much money the Fund becomes obligated to pay out in respect of wasted legal costs as a result of the failure by the Fund’s claims handlers to settle claims at the earliest opportunity, which also brings hardship to bear on road accident victims. I illustrate this point by citing as an example of incontrovertible facts in one particular matter with which I am dealing.

The mother of a two and a half year old minor child who was seriously injured in a pedestrian motor accident lodged a claim against the Fund for damages arising out of the injuries sustained by the minor child. The Fund did not react within the statutory 120 day window period afforded to it in terms of the provisions of the Road Accident Fund Act 56 of 1996 and action was instituted against the Fund in the High Court Pretoria. The Fund defended the action and filed a plea denying liability. A pretrial conference was held at which it was agreed that both liability and quantum remained in dispute and there was to be a separation of issues with the issue of liability to be determined first.

The trial for the determination of the issue of liability was set down for hear-
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Road Accident Fund – cash constraints official position

The Road Accident Fund (the Fund) has in recent months been inundated by inquiries from the general public, claimants and stakeholders about delays in claims payments.

For many years the RAF performed below expectations. In 2012, the Board, with the support of the Minister of Transport, called on management to implement a dramatic performance transformation to ensure that services are rendered efficiently to victims of road crashes. The team executed an effective strategy and in two years the ‘backlog’ of claims reduced, claims payments reached record highs almost twice what they were two years prior, costs reduced, a performance management system was rolled out and two successive ‘clean’ audits were recorded. To a large degree, the improved claim payments were funded over and above the monthly RAF Fuel Levy by a surplus of cash, which had accumulated in less productive years.

Claims processing increased by 47% to R 22,2 billion in the last financial year, while the Fund’s footprint continues to expand with the opening of five customer service centres to augment its 86 hospital service centres. Improved access, business processes and performance drove the visible improvement in the fulfilment of the Fund’s statutory mandate.

Since June 2014, the Fund is only able to pay claims from the monthly RAF Fuel Levy income of R 1,9 billion, but, as a direct result of improved productivity and greater numbers of court orders on litigated cases, over R 2,5 billion worth of claims are prepared and finalised for payment.

While the organisation faces this significant financial challenge as a result of improved productivity, the Fund remains dedicated to honouring its commitments to claimants and their legal representatives. All available cash is being put to efficient use, while continued payments to claimants is dependent on the availability of the funding received in the form of the Fuel Levy. Liquidity is managed on a day-to-day basis and daily claims payments are being made from available cash. In addition, the Fund constantly focuses on cost-reduction measures to improve efficiencies and to avail more cash for the payment of compensation. Claimants and attorneys are advised of payment queues and when payments may be expected. Though it will take longer than what has become practice in the past two years, payments will be made. In some instances, legal representatives of claimants seek immediate payment through the issuing of writs of execution, but as is often seen this merely disrupts the cash management processes and further delays the claims queued for payment.

In the meantime, the Fund continues engaging with National Treasury and the Department of Transport on short- and medium-term financial support. I would therefore like to assure all concerned that the Fund is committed to being of service to you and ask that you please bear with the Fund during this period. The Fund will be providing transparent updates from time to time to ensure that everyone is kept abreast of the status quo in this regard.

On many levels we need to appreciate the fact that the current accident compensation scheme has not been a solvent arrangement for over 30 years and changes proposed under the Road Accident Benefit Scheme (RABS) are now more important than ever if we are to ensure a sustainable support mechanism provided by government. While road users contribute to funding the benefits provided by the RAF through the Fuel Levy, it is clear that the benefits provided and the Fuel Levy are not aligned to each other. Further Fuel Levy contributions by claimants are required to provide the cover and compensation demanded. More importantly, all the claims we speak of emanate from the reality of road accidents which are so prevalent in everyday society. Safer road use will see reduced claims and reduced cost implications. Let us all commit to making road safety a national priority.

I must at this point thank and encourage the team of dedicated Fund officials who continue to work, to perform and to attend to awaiting payments under these difficult circumstances.

The Fund is indeed on the right track and will continue making a difference in the lives of many who need its support. Even now, over 14 000 claims are paid monthly and the Fund continues to improve access, the prevalence of direct claiming and delivery of much needed services to victims of car crashes who desperately need support.

The Fund’s efforts to continue servicing claimants, particularly through its flagship outreach campaign ‘RAF on the Road’, were recently recognised when it received the Department of Public Service and Administration’s Batho Pele Service Excellence Award in the Best Implemented Programme category, and the Minister’s Special Award at the Inaugural Transport Awards Ceremony. Meanwhile, it was also first runner-up at the Centre for Public Service Innovation Awards in the category of Innovative Service Delivery Institutions, and the Avusa Media Recruitment Award for Best Internal Recruitment Team in the Public Sector.

Dr Eugene Watson, Road Accident Fund Chief Executive Officer

Do you have something that you would like to share with the readers of De Rebus?

Then write to us.

De Rebus welcomes letters of 500 words or less.

Letters that are considered by the Editorial Committee deal with topical and relevant issues that have a direct impact on the profession and on the public.

Send your letter to: derebus@derebus.org.za
SCA President calls for increased *pro bono* in civil matters and the infusion of constitutional values into daily practice

Supreme Court of Appeal President, Justice Lex Mpati, chose to focus closely on two aspects of the Constitution that impact on the daily work of attorneys in his address to Cape practitioners at the annual general meeting (AGM) of the Cape Law Society in Port Elizabeth in November last year these were:

- A professional disposition that takes into account the Constitution on the one hand.
- The need for practitioners to provide *pro bono* assistance in civil matters on the other.

As regards *pro bono*, Justice Mpati called on older, more experienced and retired attorneys to make their services available *pro bono* for civil matters. He stated: ‘I am due to retire in mid-2016. I have indicated to the public interest institution to which I was attached before my appointment to the Bench, that I will assist in their work after my retirement. Maybe retired attorneys could consider giving up a few hours of their time to assist with *pro bono* work.’

He also noted that, in his view, there was no rational reason for the exemption from *pro bono* work of attorneys with 40 or more years of experience or over 60 years of age. ‘These attorneys, who are still sufficiently proficient to work for commercial firms, are an available resource of experience.’

Acknowledging the *pro bono* work done by practitioners, Justice Mpati commended the Cape Law Society for instituting mandatory *pro bono* for attorneys. ‘It gives practical effect to the constitutional right to access to courts and the concomitant right to have civil disputes resolved fairly as envisaged in s 34, particular for the indigent and vulnerable groups of society,’ he noted. He commended many of the large and medium-sized law firms that have departments or practice areas solely dedicated to *pro bono* work and the large number of attorneys – even sole practitioners – who undertake *pro bono* work.

However, Justice Mpati noted that 24 hours of *pro bono* work a year is relatively modest, and that although he is aware that attorneys are expected to conduct their businesses profitably and professionally, there may be deserving cases that should not be turned away because the client is short of funds.

He pointed out that initiatives that provide largely for ‘indirect *pro bono*’ – which includes supervisory services at university clinics, community advice offices and NGOs – although it should not be undervalued, it does not necessarily contribute to a direct increase in direct legal services, legal representation and litigation for the indigent. ‘An increase in such services could be achieved by requiring attorneys to take unpaid matters on referral from Legal Aid, South Africa’s Justice Centres and the courts. This will require additional administrative machinery and planning,’ he said.

‘*Pro bono* assistance in civil matters offers attorneys an opportunity to defend the constitutionally entrenched rights of the indigent and vulnerable groups of our society. Unlike the right to state-funded legal aid in criminal matters protected under s 35 of the Constitution to which practical effect is given by Legal Aid South Africa, the constitutional right to access courts and the concomitant right to have civil disputes resolved fairly under s 34 are not protected sufficiently. *Pro bono* presents attorneys with the opportunity to meet the immense need for free civil services, thereby discharging part of their duty to protect the Constitution,’ said Justice Mpati.

A professional disposition that takes into account the Constitution requires all lawyers proactively to infuse into their professional conduct, their sense of duty and in their general outlook the spirit and purport of the Constitution, said Justice Mpati. He explained that this starts with the oath of office taken by a practitioner on admission: ‘At admission the applicant swears, affirms or declares that he or she will truly and honestly undertake to be faithful to the Republic of South Africa.’

Quoting Mthiyane AJA in the case of *Prince v President of the Law Society of the Cape of Good Hope and Others 2000* (7) BCLR 823 (SCA), Justice Mpati said that Acting Justice Mthiyane had pointed out that a candidate attorney at admission is required to take ‘a solemn oath of allegiance’. He explained that this meant that those who wished to be admitted into the honourable profession undertake to be faithful to the Republic founded on the values enshrined in the Constitution and the rule of law. ‘What this means is that when members of the legal profession discharge their duties in the ordinary course of executing their clients’ mandates, they must do so with due deference to the Constitution and its foundational values of human dignity, the achievement of equality and the advancement of human rights and freedoms, among others. This means that the professional ethical standard must be measured against the values of the
Justice Mpati said that in preparing his address for the AGM, he considered aspects of the Constitution which had been under threat or the subject of some discussion. He referred to the Chapter 9 institutions and singled out the Office of the Public Protector, which in terms of s 182(1)(a) of the Constitution has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice. ‘That office has been under tremendous strain and pressure,’ he noted.

Justice Mpati mentioned the courts, in which is vested the judicial authority of the Republic in terms of s 165(1) of the Constitution. He said: ‘In the exercise of that authority courts, in certain cases, may have tramped on the toes of other branches of government; which raises the question of the separation of powers. Recently judges of the highest court were labelled as counter-revolutionaries.’ Referring to the call for an investigation of the impact of the judgments of the Constitutional Court and the Supreme Court of Appeal (SCA) on the transformation of society, he pointed out: ‘Whatever the initial idea may have been, it seems to me that an assessment of the impact of the decisions of those two courts on the transformation of society may be a good thing, provided there is good intent in the whole exercise.’

The third aspect he highlighted was s 174(2) of the Constitution, which deals with the appointment of judicial officers and which he noted had been the subject of major disagreement within the Judicial Service Commission (JSC). He explained that some JSC members believe that numbers should be taken into consideration, and because indigenous Africans form the majority of the country that is what the judiciary must reflect. Other members hold the view that the provision rather requires the judiciary to reflect the diversity in our society.

In his written report he noted: ‘When I was first elected to the Council [of the Cape Law Society] I was impressed by the cooperation of the constituents. Regrettably, since then there has been a dramatic erosion of the cooperation, based primarily on the polarisation between the three constituents [Black lawyers Association, National Association of Democratic Lawyers and the so-called ‘statutory’ component]; the differences among constituents flowed over into council meetings and, equally regretfully, time that should have been spent on dealing with these affairs of the Society was spent scrapping about political issues. I need to make it clear that I am not pointing fingers at any particular constituent, as the oversight of the Cape Law Society is in the hands of the entire Council. It is, however, a matter of deep concern that after twenty years of democracy, we are not putting the interest of the profession above political considerations.’

As regards legal practice, Mr Alberts stressed the challenges of changes in information technology (IT) in the profession. He noted that the old model of delivering legal services was at the end of its life cycle. ‘The question is where to now? The Law Society of South Africa is already looking at these issues. We are concerned with the question of survival,’ he said.

Sessions for members at the AGM focused on some of these changes and challenges with social media specialist attorney Emma Sadleir outlining the social media landscape and platforms, as well as focussing on some of the risks of the Libel Practitioners’ Association, National Association of Democratic Lawyers and the so-called ‘statutory’ component; the differences among constituents flowed over into council meetings and, equally regretfully, time that should have been spent on dealing with these affairs of the Society was spent scrapping about political issues. I need to make it clear that I am not pointing fingers at any particular constituent, as the oversight of the Cape Law Society is in the hands of the entire Council. It is, however, a matter of deep concern that after twenty years of democracy, we are not putting the interest of the profession above political considerations.’

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Outgoing CLS President highlights challenges

In his address to members, outgoing CLS President, Koos Alberts, raised a number of issues of concern for the profession.

He urged all practitioners to familiarise themselves with the Legal Practice Act 28 of 2014. ‘I have a suspicion that it will have a more dramatic effect on the way we practise than we think,’ he said.

He pointed out that there appears to be a rift between the larger firms and the law societies. He suggested the large firms to make their practitioners available to serve on the committees of the profession and to provide assistance to the members representing the attorneys’ profession on the National Forum on the Legal Profession [the transitional body that will be the first body to come into effect in terms of chap 10 of the Legal Practice Act].

Mr Alberts highlighted the poor public image of the profession. Pointing out that not all criticism is necessarily justified, he added that notice should, however, be taken of the negative publicity around the contingency fees issue in the jurisdiction of the Law Society of the Northern Provinces, the short-lived but public ‘dysfunctional’ state of the KwaZulu-Natal Law Society due to some councillors walking out of the council; and he added ‘The Cape Law Society raised the ire of Eastern Cape and Western Cape judges where we may not have handled matters as professionally as we should have.’
The ADF holds its first annual AGM

The Attorneys Development Fund (ADF) held its first annual general meeting at OR Tambo International airport in late 2014. In his chairperson’s report, the acting chairperson, David Bekker gave a brief history of the ADF. He said that the ADF was incorporated on 21 September 2010. The first chairperson, Thoba Poyo-Dlwati served as chairperson until her appointment to the Bench in July 2014.

The ADF seeks to assist South African attorneys by offering them assistance towards starting, expanding or sustaining their law firms. ADF manager, Mackenzie Mukansi, highlighted the fact that one does not have to be starting up their law firm for assistance. He said that the ADF has assisted attorneys wanting to buy into an already established firm.

According to the chairperson’s report, the ADF has an operational model in which loan applications are received, processed and, after the lapse of a 12-month repayment holiday, the funds are to be repaid over the agreed period of time by the beneficiaries of the fund.

Applications for funding are received on an ongoing basis, throughout the year. The manager receives the applications, reviews them for compliance with the guidelines and assess the business plans for the technical application to the desired business of the applicant. On completion of the process, a recommendation is sent to the board for final review and approval.

As at 27 November 2014, a total of 34 beneficiaries had received assistance from the ADF. Of these, ten are female.

Mr Bekker concluded his report by showing concern and disappointment at the low number of applications for funding.

Comments from the floor included delegates asking whether the ADF is known to attorneys and whether enough was being done to make attorneys aware of it.

A New board of Directors was constituted with representatives from the constituents.

The new board is as follows:

- Ms Michelle Beatson remains as Director – Law Society of the Northern Provinces;
- Mr Luvuyo Godla remains as Director – Black Lawyers Association;
- Ms Nomahlubi Khwinana remains as Director – National Association of Democratic Lawyers;
- Mr Roland Meyer remains as Director – Cape Law Society;
- Ms Miemie Memka appointed as Director – Law Society of South Africa;
- Mr Etienne Horn remains as Director – Attorneys Fidelity Fund;
- Mr Gavin McLachlan appointed as Director – KwaZulu-Natal Law Society; and
- Mr Tšiu Vincent Matsepe appointed as Director – Free State Law Society.

Mr Etienne Horn was elected as Chairperson of the Board at the ADF’s Board meeting that was held after the AGM was adjourned and Ms Nomahlubi Khwinana was elected as the vice Chairperson of the board.

Judge of the Labour Court and former co-chairperson of the Law Society of South Africa (LSSA), David Gush was invited and honoured at the ADF AGM held at OR Tambo Airport in November 2014. He is one of the founders of the ADF. Around 2007/8 Judge Gush and the current Co-chairperson of the LSSA, Max Boqwana, had a discussion about the need for a fund that would ensure and cater for the development of young professionals entering the law profession. The fund would assist young professionals with setting up credible firms by providing them with infrastructure and other essential equipment needed to start a law firm. Around May 2008, Judge Gush and Mr Boqwana, made a presentation to the council of the LSSA with a view to seeking funding mechanisms that would ensure that this initiative is made a possibility and that it succeeds. The events that followed led to the setting up and registration of the Attorneys Development Fund.
Minister assures professional independence

Mr Mukansi, the first speaker on the podium, began his address by saying that the theme of his speech was to review the progress the ADF has made since 2013. Following on what he reported on in 2013 he said that he made a plea to all in the organised law profession to ensure that the ADF stayed relevant and the KZNLS headed the call. 'Through your development managers we were able to get people that were worthy of assistance. We are very grateful for that. I would also like to impress that we are steadily growing, [but] not as much as we would have liked to, in the number of applications that we get countrywide. The trend has changed, we no longer have only single practitioners approaching us for funding, we now have two practitioner firms and sometimes more that approach us in an interest of clubbing together for them to be better organised to serve the public,' he said.

Speaking about the funds of the ADF, Mr Mukansi said: 'In 2014, after having looked at the number of applications and applicants that we have assisted in 2013, 2012 going backward, we have noted that our fund reserves – if we were to conservatively assume that 750 applications would come through and we approve them at a capped amount of R 40 000 that would amount to wiping out our reserves as it stands at around R 32 million. This made us think that we should rather do various projects and engage with corporates and commercial banks, who in each of their organisations have corporate social responsibility funds, present the ADF as a project to them and tap into those funds. This will enable the ADF to not deplete its limited resources. We have had several promising engagements.’

Mr Mukansi said that the ADF has also come up with a customer relations management (CRM) tool, which is a practice management tool that allows applicants to be able to do their work electronically by capturing their files. He added that the ADF has noticed that a lot of firms fail not because of incapacity but because of the inability to bill for work done. ‘The CRM tool will be able to draw reports, those reports will be analysed by subject matter experts. ... In an agreement between the LSSA, the ADF and a group of charted accountants, in a bid to bring accounting and reporting to the profession, we have identified experts who will analyse the data from each and every firm in its uniqueness and be able to give them feedback and give them direction on what they need to do in order for them to be able to stay afloat. The modeling of the CRM is one of the projects that will need a lot of capital injection and the capital injection will not come from our reserves but will be funded by one commercial bank,’ he said.

Mr Mukansi noted that there are attorneys that have been in practice for a number of years and would like to upgrade their computers; he added that the doors of the ADF are open to them and that the organisation has assisted a number of these firms. ‘We are also in discussion with the likes of Xerox to come up with a package deal that will be able to assist firms to be able to do their work efficiently and in a cost effective manner. We will be announcing these in our monthly reports.’

In conclusion, Mr Mukansi said that 2014 highlights will be comprehensively presented in the ADF’s annual report.

ADIF on claims

Mr Harban began his presentation by giving a brief background on the AIIF. ‘The AIIF is an insurance vehicle that was created by the AFF to provide a level of professional indemnity insurance to attorneys, it also provides bonds of security at no cost to attorneys. As it has been noted in the last two years there has been an increase in claims. If we were to stop operating today we would need over R 200 million to run off the current claims and it would take us 16-and-a-half years to do that. The problem areas in terms of claims still remain conveyancing, prescribed MVA [motor vehicle accident] settlements as well as prescription in general. The reason for conveyancing claims relates to inadequate or lack of supervision of the staff in firms and the hangover from the property boom,’ he said.

Mr Harban added that: ‘Another reason for the increase in claims is that the public has become more aware of their rights and people are questioning attorneys. So far as court bonds are concerned, these are the bonds issued to executors; our exposure still sits at R 9 billion with bonds still open from the year 2000. We still have a problem with practitioners not notifying us when estates have been finalised the result is that we sit with that exposure on our books … So far as the way forward for the AIIF, currently the AIIF is funded by a single premium from the AFF, that premium is used to pay claims and pay for operations. The current model in reality is unsustainable and we are working on relooking at the funding and the underwriting of the AIIF, there will be engagement with the profession in this
that as of 31 August 2014 there were 956 claims on record with a combined value of over R 432 million. ‘The bulk of the claims, that is, 53% is in respect of conveyancing related matters, followed by estates at 14%, commercial at 12% and Road Accident Fund at 10%,’ she said.

**Co-chairpersons Mid-term Report**

Highlighting aspects of the Co-chairpersons Mid-term Report that was circulated at the AGM, Mr Barnard said that it was a privilege to serve the profession during the time of the enactment Legal Practice Act 28 of 2014. He added that the LSSA has embraced the Legal Practice Act and held a strategic planning session to understand what its full role in the Act will be. ‘We want to ensure that the transition into the new structure will take place smoothly,’ he said.

**Minister’s thoughts on the Legal Practice Act**

Delivering his keynote address, Mr Masutha said that the legal profession has always been a tightly regulated profession because it operates in a much regulated space. Different role players including government will have a right to say how people who conduct business in our courts and who conduct their profession in a public space such as yourselves, in the pursuit of access to justice, operate,’ he said.

Speaking on the Legal Practice Act, Mr Masutha said: ‘As you are aware the Legal Practice Act was signed by the President. The constructive deliberation by the organsed profession that led to the Act is mostly appreciated. It is also heartwarming that the Law Society of South Africa released a press release when the Act was promulgated in September ... it reiterated its intention to actively cooperate in the implementation thereof. The first phase of the implementation will be putting into operation chapter 10 to establish the National Forum on the Legal Profession. It is important that the National Forum commences its activities as soon as possible, its functions will lay the foundation for the broader transformation of the profession contemplated in the Act. One of the first steps would be the designation of persons for purposes of constituting the National Forum.’

Mr Masutha added that while the legal profession is given the opportunity to transform and rationalise itself, during deliberations of the National Forum, government has a legitimate interest in overseeing that the profession is transformed in line with constitutional imperatives. However, he assured delegates at the AGM that government has no desire to take over or control the legal profession.

Mr Masutha said that there has been criticism on the issue of the ministerial designates to the National Forum and ultimately s 14 of the Legal Practice Act dealing with the dissolution of the Council. He said that others are of the view that the power of the minister to dissolve the Council impacts negatively on the independence of the Legal Practice Council. ‘It is also argued that the legislator must have in place a mechanism that can cater for a situation where the Council becomes dysfunctional, an unlikely scenario of course but that should be catered for in any event in the public interest and the interest of the administration of justice,’ he noted.

Mr Masutha said: ‘While the minister does have the power to dissolve the Council if it does become dysfunctional in terms of section 14, he or she at the end of the day can only do so after the Legal Services Ombuds, who is a retired judge, has investigated the matter and has made recommendations to this effect, and then only after the High Court grants an order for the dissolution of the Council. In other words the Minister’s tasks in this regard are circumscribed and can only be exercised, at the end of the day, on the authority of the High Court.’

In conclusion Mr Masutha said that fears were also expressed that the new provisions in s 35 that provides for cost agreements between lawyers and clients will create an administrative burden on to practitioners. ‘The practical implication of this provision was widely exaggerated in the press and by persons who did not read the contents of the Legal Practice Act. It is trusted that attorneys will embrace the advantages to client and practitioner alike ... and find a way to implement this initiative,’ he noted.
Significant reforms in pursuit of the ideal justice system

The Law Society of the Northern Provinces (LSNP) held its annual general meeting (AGM) late last year. Speakers included Judge President of the Gauteng Division of the High Court, Judge Dunstan Mlambo; Minister of Justice and Correctional Services, Michael Masutha and Political and Policy Analyst, Theo Venter.

In pursuit of the ideal justice system, are we on track?

Speaking at the AGM, Justice Mlambo said that a few years ago, former President Thabo Mbeki labelled South Africa a country of two opposites; one for the rich and the other for the poor. ‘I listen to a number of talk show programmes where members of the public call into the talk shows and air their views, my sense is that the overwhelming majority of the public hold the firm view that the law treats the rich and able with kid gloves, bending over backwards to fast-track their cases and that this category of persons is treated leniently compared to the harsh treatment of those who are poor. The accession is also made very forcefully that cases involving the poor sector of society do not enjoy the same prioritisation,’ he said.

Justice Mlambo illustrated the public opinion of the justice system with an example of the murders of Taegrin Morris and Senzo Meyiwa. He said that in the young Taegrin Morris case, a suspect was only arrested months after the murder, while in contrast, in the case of the country’s soccer captain, Senzo Meyiwa, a suspect was arrested within two weeks of the murder. He added: ‘What is our take as the judiciary and the profession to the accession that we treat people according to their social standing? I can take a guess that instinctively the reaction from judges is that there is no merit to this accession; I agree that there is no merit to that accession. However much we deny the allegations of discriminating persons according to their social standing, if we are not honest about cer-
tain practices that lead to this result we are in danger of losing credibility and the confidence that we require in our justice system.’

Justice Mlambo spoke on another perception by the public that is not true, which is that Legal Aid lawyers are not as capable and committed as lawyers in private practice. He said that the signing into law by President Zuma of the Legal Practice Bill was a momentous occasion for the justice sector and the legal profession in particular. He added: ‘This was not a coincidence that the Legal Practice Act 28 of 2014 followed after the enactment of two other important Acts, the Constitution Seventeenth Amendment Act, 2012 and the Superior Courts Act 10 of 2013.

Speaking on the legislature that reforms the legal profession, Minister Masutha said that the LSNP AGM took place during a time of significant reforms to the judicial and legal land scape. He said that the Act creates a unified court structure with a single judicial governance framework under the leadership of the Chief Justice. Similarly, the Legal Practice Act provides for a legislative framework for the rationalisation of our Superior Courts to be in line with the Constitution. The rationalisation mandated by the Act ensures that old features of the judicial system which are still tied to the defunct Homeland, self-governing and RSA-territory give way to a democratic, inclusive and integrated value system founded on equality and human dignity. Furthermore, the Act creates a unified court structure with a single judicial governance framework under the leadership of the Chief Justice. Similarly, the Legal Practice Act provides for a legislative framework for the transformation and restructuring of the legal profession into a profession, which is broadly representative of South Africa’s demographics under a single regulatory body. It seeks to free the profession from the bondage of the Homeland and self-governing states and democratise the governance structures of the profession. The Act strengthens the independence of the legal profession and ensures the accountability of the legal profession to the public.’

The next phase of the Legal Practice Act, Mr Masutha said, is for the nominated members of the National Forum to gear themselves for the last round of negotiations that will shape the future legal practice ‘freed from the bondage of our ugly past’. He anticipates that the National Forum will commence its work early at the beginning of 2015. He added: ‘Hard work lies ahead of the National Forum which is the reform of the article ship and pupilage to address current barriers to the profession. When I perused the recent statistics relating to the membership of the four law societies, the LSNP boast the largest constituency, which is about 12 000 of the 22 500 practitioners. It therefore has the overwhelming majority with a potential to influence the discourse on critical issues that affect the broad constituency. I trust that you will use the advantage to the benefit of the profession and the country at large.’

Speaking on government’s briefing patterns, Minister Masutha said that it is often said that the state is the biggest consumer of legal services in South Africa as its litigation account runs into billions of rands annually. ‘Under normal circumstances the cake should be enough for everyone. However, what is evident is that the cake is not shared equitably among the diverse constituencies of practitioners, with Black and female practitioners being the worst affected,’ he said.

Minister Masutha said that the State Attorney Amendment Act 13 of 2014 seeks to redress the anomaly that exists with state briefing patterns and requires his department to develop policy that will regulate allocation of legal briefs to practitioners. The policy will also include measures that will ensure effective monitoring of the implementation of policy. Often government comes with progressive policies that suit every element of the National Development Plan but the devil lies in its implementation. It is for that reason that we will strengthen the monitoring and evaluation systems to generate accurate and reliable data to measure the impact of the policy. I will engage with the profession once we have produced a draft that allows us to commence with consultations,’ he said.

Reflecting on the Legal Aid South Africa Bill B8 of 2014 Minister Masutha said: ‘This Bill was approved by the National Assembly on 30 October 2014 and now is being considered by the National Council of Provinces. The provision of legal aid is currently regulated by the Legal Aid Act, 1969 (Act 22 of 1969). The Act is outdated and not in line with current realities and requires a revision in its entirety in order to replace it with a new one. The main purpose of the Bill is therefore to establish a statutory entity called Legal Aid South Africa, which is governed by a Board of Directors and define its objects, powers, functions, duties and composition. It is a measure about governance more than anything else. What I would like to address is a concern that was raised during the passage of the Bill in the National Assembly. I am led to believe that the attorneys’ profession, questioned the change from the existing provisions in the 1969 Act relating to the composition of the Legal Aid Board. Section 4 of the Act currently requires one practicing advocate and four practicing attorneys nominated by the General Council of the Bar of South Africa and the Law Society of South Africa, respectively, to be members of the Board. The Bill, on the other hand, reduces the size of the Board of Legal Aid South Africa and requires members who have the skills referred to in clause 7 of the Bill. This change was motivated on the grounds that a body of this nature should be composed of experts rather than stakeholders, which is in line with best practice and the King III report which has a bearing on good governance. Nonetheless, clause 7, which sets out the qualifications for membership of the Board, does require experience in and knowledge of the provision of legal services, “including experience as a practicing attorney or advocate”. I cannot imagine the new Board being constituted without a practicing attorney or advocate. I also wish to express my gratitude for the role played by members of the legal profession in the deliberations of the Legal Aid Board to date. Their positive contributions are noted with appreciation.’

Minister Masutha, in conclusion, thanked all legal practitioners, in particular attorneys for the generosity and in the spirit of ploughing back to the community, for their contribution through various community service initiatives. ‘The services you provide as presiding officers in the Small Claims Court and other fora within the justice sector where you provide pro bono services lie at the heart of access to justice. We will always be indebted to you,’ he said.

Work in progress

Mr Venter shared his insights of where South Africa is as a country. He said that there was no handbook written about the political situation or political development as South Africa is a work in progress. ‘This is what makes it so difficult, we are developing a democracy, we are developing a constitutional state, and we are developing a number of things on the go.’
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Towards the end of 2014 the Western Cape branch of the National Association of Democratic Lawyers (NADEL), in partnership with Foundation for Human Rights, held a seminar at the Cape Law Society offices. The theme of the seminar was ‘Gender Transformation within the Legal Profession’.

The seminar aimed to facilitate discussion relating to the current status of racial and gender disparities in the legal profession as well as to stimulate debate that could help identify key issues and challenges currently being faced by individuals in the legal profession.

According to a report compiled on the seminar, the event also looked at the nature of efforts required to promote the integration of women in the legal profession and the creation of an enabling environment for women to pursue a career in law.

Topics discussed included –
- access to justice and the legal profession for women;
- the impact of briefing patterns on black female advocates; and
- whether the profession can attain substantive equality and transformation through legislation and policy alone.

Speakers included the Deputy Minister of Justice, John Jeffery; advocate Rose-line Nyman; the current Acting Director of the Legal Resources Centre, Charlene May; Acting Chief Litigation Officer in the Office of the State Attorney, Mohube Phahlane; and the President of the South African Women Lawyers, Nosolo Mabulu.

The seminar was attended by, among others, High Court judges, magistrates and advocates.

Deputy Minister Jeffery began his speech by asking attendees who the first female lawyer was. He made reference to Arabella Mansfield who was admitted to the Bar in Iowa in the USA in 1869, who some believe to officially hold this title. Others, according to Mr Jeffery, believe the title should go to Italian advocate, Arabella Mansfield who was admitted to the Bar in Iowa in the USA in 1869 who some believe to officially hold this title.

The Appellate Division refused her application to be admitted as an attorney, holding that a woman was not a person as required by the legislation. In Incor-porated Law Society v Wooky 1912 AD 623, a full bench of the then Appellate Division relied on Roman Dutch law and its exclusion from legal practice of persons who could be termed ‘unfit and improper’ including, the deaf, the blind, pagans, Jews, persons who denounced the Christian Trinity, and women.

Quoting Judge Pius Langa, he explained how even when women were finally allowed in the legal field, their involvement never really extended beyond its periphery. ‘Langa writes that it was in 1967, 44 years after the admission of the first white female attorney that Desiree, who came from Umtata, was admitted as the first black female attorney in the country. Appearing before a magistrate in Vereeniging, [Ms] Finca struggled to be heard as the magistrate claimed he had never heard of a black female attorney. It was only after he confirmed her status with another attorney that the magistrate apologised and continued with the proceedings.’

Mr Jeffery noted the changes that have occurred within the legal profession since 1994, but questioned whether real transformation had occurred and whether the legal profession has since transformed. According to the report, Mr Jeffery examined certain statistics relating to the status quo of the legal profession in South Africa. He said: ‘The latest figures show that of our country’s 2,571 advocates at the Bar are female. Of these, only 4.5% (116) are African females. Of the silks, or senior counsel, only 27 are female, of which only four are African. That is less than 1% of our country’s 451 senior counsel. Mr Jeffery said that this was a concern, particularly since many judges come from the ranks of the advocate’s profession.’

According to NADEL, Mr Jeffery believes, however, that the picture is not overwhelmingly bleak, as it must be acknowledged that much progress has been made, particularly in the magistracy and also in respect of briefing patterns. The number of female magistrates has increased significantly from a total of 284 in 1998 to 667 currently. ‘This translates to an increase of 134%. There were only 62 African female magistrates in 1998, today there are 285. This translates to an increase of 359%. Of these, 252 are Regional Court Presidents and nearly 50 are Regional Magistrates. For the first time in the history of the mag-
istracy we now have more women than men at the level of Chief Magistrate, of the 18 Chief Magistrates, ten are female,' the report said.

Mr Jeffery concluded by urging lawyers to have the courage to continuously recommit themselves to the Constitutional imperative of transformation, in the legal profession and society at large as ‘there is still much to be done.’

The seminar report states that speaking on the topic ‘remaining ignored and unseen – the impact of briefing patterns on black female advocates’, advocate Nyman spoke about her own experiences as a member of the Cape Bar which, in her view, could be generalised to many other black female advocates.

She highlighted that in her practice, she receives the majority of her briefs from the Office of the State Attorney and the rest from black firms and non-governmental organisations adding that she had not received many briefs from white firms.

Ms Nyman explained how today black women slip through the cracks in terms of affirmative action. She said that black men are selected to fulfil the requirement of ‘black people’ and ‘white’ women are selected to fulfil the requirement of ‘females’. She added that this means that black women are once again at the bottom of the ladder. She made reference to two black advocates who were senior to her and who, in her opinion, were very competent female advocates who left the Cape Bar last year as they did not get enough briefs to sustain their practices.

Ms Nyman said that, as an acting judge for two years, she hardly saw black female advocates in motion court, in trials or in opposed or urgent applications. She said that they usually appeared before her occasionally when they represented the state, or in criminal trials as prosecutors.

Ms Nyman stated that the Legal Practice Act 28 of 2014 has a few provisions relating to the empowerment of black women in the legal profession and that she welcomed the Act. She said that the role of the State Attorney’s Office and government departments in briefing black female advocates is also welcomed. She ended off by expressing her gratitude to these organs of state for their current briefing patterns and the attempts they make to empower black women in the legal profession.

According to the report, Ms May said that internationally, South Africa has become known for its relatively good performance when measuring gender equality. She then highlighted contradicting realities in the country today.

She said: ‘One in ten girls will miss four days of school on average per month because of her period; female employees tend to earn only 77% of what their male counterparts earn, women’s unpaid work is not calculated and has no economic value – women spend more than twice as many minutes on unpaid care work than men; young girls in rural

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areas are still being abducted, raped and then forced into marriage; in rural parts of KwaZulu-Natal women still take their cases to traditional courts where they will not be heard unless they are represented by men; and gender reassignment surgery through a public hospital in this country currently has a 26 year waiting list.’

Ms May questioned why the dialogue on gender equality and transformation is still relegated to special occasions and commemorative dates such as during August and 16 Days of Activism.

Speaking on overcoming challenges faced by women in the legal profession, Ms Mabuda said that while the progress is noted, there is still more to be done to ensure gender transformation of the judiciary. According to the report, she stated that while there has been a legislative review, processes undertaken over the years to address the legacy of discrimination against women, there have been challenges experienced in the implementation of those legislations.

Ms Mabuda said that the report by the Centre for Applied Legal Studies and the Foundation for Human Rights on the transformation of the legal profession exposed that a number of black female lawyers are being used for ‘window dressing’ to lure clients and to act as tea ladies in meetings.’

Ms Mabuda, however, believes that if one only focuses on the challenges and does not look into finding ways of addressing them, the profession will remain male dominated. She believes that in addressing the challenges faced by women in the legal profession, black women needed to find ways into and to stay in the legal profession. According to the report, Ms Mabuda said that the high percentage of female candidate attorneys entering the profession is a beacon of hope for the change of the patriarchy of the profession. She added that female lawyers should give support to each other and not exert their energy into negatively competing against each other.

Ms Mabuda challenged all female lawyers to not allow the profession to change them but that they should rather change the profession. She said that women in the field need to create a level of flexibility and support that allows them to balance the demands of their day-to-day lives with the demands of the legal profession. The lifestyles should embrace their cultural, social and economic demands while still acknowledging the nature of the profession.

Ms Mabuda said that in order to propel women, to enter into, and stay in the legal profession, they need to be performance driven, adding that they can acquire this expertise through taking on challenging cases.

Learning from her past experiences in the profession, Ms Mabuda found that women lawyers need to have good mentors and more experienced ones should offer mentoring services through programmes. ’Choosing a mentor should, however, not always be gender based as women do have their converted male counterparts that are willing to be part of the mentoring equation,’ she said.

Speaking on the Legal Practice Act, which was assented on the 20 September 2014, Ms Mabuda said that female lawyers, through their organisations and stakeholders, that form part of the council, should ensure that there is a 50/50 gender representation on the National Council.

Ms Phahlane spoke on the allocation of briefs and how the profession can support the transformation agenda of the Justice Department in promoting gender inclusivity and transformation within the legal profession.

She said that for the period under review, her office issued 4 115 briefs to counsel as opposed to 3 206 in the 2012/13 financial year. The number of briefs increased by 909 from the previous financial year figures. Ms Phahlane added that out of the 4 115 briefs issued to counsel in the 2013/14 period, 3 641 (68,48%) was allocated to previously disadvantaged individuals. A total of 1 378 of the total briefs issued in 2013/14, which translates to 33,48% was allocated to female counsel.

Ms Phahlane added: ‘The money paid to counsel in the 2013/14 financial year amounts to R 641 874 613. The payment made in 2013/14 decreased by R 140 from R 684 591 753 in the 2012/13 financial year. The target for 2013/14 was to pay a minimum of 75% of the total payments to previously disadvantaged counsel. An amount of R 482 386 444 was paid to previously disadvantaged individuals, which translates to 75,15%. The target was exceeded by 0,15%.

According to the report, in the 2013/14 financial year an amount of R 113 974 012 was paid to female counsel, which is 17,0% of the total payments. The total number of enrolled and finalised cases for the 2013/14 financial year was 1 236. Of this number, 794 cases were won and 442 lost. The target set for 2013/14 was 50% and 61% was achieved.

The Director of the Foundation for Human Rights in South Africa, Yasmin Sooka discussed the findings and recommendations of the research report on transformation in the legal profession by the Centre for Applied Legal Studies and the Foundation for Human Rights. (See 2014 (Nov DR 18)). She encouraged participants to read the report and added that the findings revealed that women still face exactly the same issues more than 20 years later, adding that although women have taken up different positions, the face of gender discrimination has not changed.

According to the seminar report, a panel discussion chaired by NADEL Western Cape secretary, Seeham Samaai took place after the speeches. The audience was able to pose questions for comment by the panel. The following challenges were raised:

• The huge number of female LLB students graduating from university, which does not reflect in the profession.
• Treatment of black women lawyers (and males) within private practice.
• The introduction rule of the Bar prohibits the young advocates to meet with the State Attorney Office, government structures etcetera. How the Justice Department can play a much more proactive role via the State Attorney Office to ensure that black advocates and especially black female advocates are instructed by the State Attorney Office not only to improve the stats but also to ensure a qualitative impact and outcome on the recipient of the brief.
• FHR to extend its research to all legal professionals within the state and private practice.
• Women networking opportunities and the role of the Justice Department in playing an active role in the promotion of gender equality in the legal profession.
• Promotion of internships at institutions such as the Bar, law societies, the South African Women Lawyers, which are similar to the Justice Department Law Clinic candidate attorneys programme.
T his year high school learners from all over South Africa participated in the 4th Annual National Schools Moot Court Competition (NSMCC). This is a non-profit initiative supported by the University of Pretoria, Centre for Human Rights at the Faculty of Law. Other key stakeholders include the Department of Justice and Correctional Services, the Department of Basic Education, the Foundation for Human Rights, the Constitutional Literacy and Service Initiative, the Constitution Hill Education Project and the South African Human Rights Commission. The competition is open to grade 10 and 11 learners from high schools throughout South Africa. The learners are given a factual problem in which different constitutional rights are at play, which involve issues faced by young people in South Africa. This year’s problem was based on the limits to the right to freedom of expression within a school context. Learners were required to write essays and come up with arguments for both sides of the hypothetical situation. The top nine schools from each province advanced to the provincial rounds of the competition, where they argued against other schools in their province. The top four teams from the provincial oral rounds advanced to the national rounds of the competition.

The competition aims to create awareness among young people about their constitutional rights and how it affects their lived realities. It gives the learners an opportunity to engage in constructive dialogue about the Constitution in context and find creative ways to resolve some of the pressing issues affecting young people today. The competition also affords the learners an opportunity to develop critical research, written and oral skills during this process. They are also given the opportunity to interact with other learners from across the country, with whom they can learn from and share experiences.

The national rounds were held over the long weekend of 9 - 12 October 2014. The semi-finals took place at the University of Pretoria on 11 October 2014. Attorneys, advocates, legal academics and senior law students made up the body of judges at the semi-final rounds. Each team argued twice, once for the applicant and once for the respondent, against teams from around the country. The day was long, but the learners came away enriched by the experience of acting as counsel with robes before some of the nation’s top legal minds.

The final rounds took place at the Constitutional Court on 12 October 2014, where the finalists presented arguments before Justices Sisi Khampepe and Mbuyiseli Madlanga of the Constitutional Court, Judge Jody Kollapen of the North Gauteng High Court, Professor Ann Skelton of the Centre for Child Law at the University of Pretoria, and advocate McCaps Motimele of the General Council of the Bar. Deputy Minister of Basic Education, Enver Surty delivered the keynote address and handed out awards to finalists and certificates to all participants.

The winners of this year’s competition were Kim Lentswe and Gomotsegang Montsho from Grenville High School in the North West Province. The runners up were Justin Kuni and Anele Nyaka from...
Court-annexed mediation rolled out

Court-annexed mediation was rolled out on 1 December 2014 at certain magisterial districts in Gauteng and the North West.

Implementation commenced in 11 courts and will gradually be rolled-out to other courts country-wide. According to the Justice Department, mediation serves as an alternative dispute resolution mechanism. It is a process through which a mediator assists parties to reach a negotiated settlement and therefore avoid huge litigation costs, which saves litigants on both time and cost.

In a press release the Justice Department stated that parties involved in the mediation process do not have to be represented by a lawyer. However, a party may choose to be represented and pay the required legal fees. The responsibility of the mediator remains that of ensuring a fair and structured process with a level playing field, irrespective of whether parties are represented by lawyers or not.

The mediator is entitled to charge a fixed tariff in terms of the mediation rules. The cost is much lower than that of court litigation. The tariffs are fixed by the Justice Minister and are published in the Gazette from time to time. ‘This is to make sure that mediators do not overcharge for their services. In the normal court process, litigants carry costs overcharge for their services. In the normal court process, litigants carry costs.

According to the Justice Department, another significant benefit of mediation is that it is less adversarial and promotes restorative justice in that the dispute is resolved amicably to the satisfaction of both parties.

So far, the Justice Department has trained over 30 mediation clerks who have been appointed at the selected sites to assist litigants with steps they must take to initiate mediation. They are also tasked with informing them of the payable tariffs for mediation. The clerks will also assist the public in choosing mediators of their choice from a panel of mediators who have been accredited by the Justice Minister.

At the moment, the magistrates’ courts which provide mediation are:

In Gauteng: Johannesburg, Kagiso, Krugersdorp, Palmridge, Pretoria North, Sebokeng, Soshanguve and Soweto.

And in the North West: Mmabatho, Temba and Pofexfroom.

Supreme Court of Appeal practice directions

The President of the Supreme Court of Appeal issued the following Practice directions in respect of the Supreme Court of Appeal and replaces all previous practice directions.

- Because of problems experienced in obtaining orders from registrars in High Courts, the Registrar will for the time being accept applications for leave to appeal or notices of appeal without the certified copy of the order as required by r 6(2)(c) or 7(3)(c). Instead, a letter from the Registrar of the Court certifying the date of the order will be sufficient.
- If any party to a pending appeal is of the view that it warrants preferential enrollment whether by reason of urgency or other good cause, such view must be conveyed immediately by letter to the Registrar for the attention of the President.
- Documents longer than ten pages lodged with the Registrar, including records of appeal, applications and heads of argument, must, in spite of the wording of the court rules, ordinarily be printed on both sides of the page.
- Where a party uses single-sided printing, it must by letter to the Registrar indicate the reason for this.
- Records containing double-sided printing must be bound in a way that permits both sides of each page to be fully legible.
- The record must be divided into separate conveniently-sized volumes of approximately 200 pages each.
- The mode of address to the Bench in proceedings before this Court will no longer, in English, employ the expressions ‘My Lord’, ‘My Lady’, ‘Your Lordship(s)’ or ‘Your Ladyship(s)’. Instead, the Bench will be addressed through the presiding Judge and be referred to as the ‘Court’. Where an individual member of the Bench is referred to this should be by using the Judge’s surname preceded by the word ‘Justice’. The current mode of address used in Afrikaans will continue to apply.

2015 examination dates

Admission examination
The admission examination dates for 2015 are:
- 10 February
- 11 February
- 18 August
- 19 August

Conveyancing examination
While the conveyancing examination dates are:
- 13 May
- 9 September

Notarial examination
And the notarial examination dates are:
- 10 June
- 21 October.
Chapter 10 of the Legal Practice Act 28 of 2014 (LPA) makes provision for the National Forum on the Legal Profession (NF) – the transitional body that will deal with the nuts and bolts to flesh out the framework for the regulation of legal practitioners in terms of the LPA.

It is expected that the implementation date for this chapter will be announced early in 2015 by the President. The existing law society structures are expected to continue to exist for three years from the implementation date of chap 10 of the LPA. One of the tasks of the NF will be to negotiate for the transfer of these structures to the Legal Practice Council (LPC).

At the end of last year, the Law Society of South Africa (LSSA) communicated the details of the eight attorneys who will represent the attorneys’ profession on the NF to the Minister of Justice and Correctional Services, Michael Masutha, in anticipation of the implementation date for chap 10 of the LPA being announced early this year and the first meeting of the NF being called by the Justice Department.

Section 96(1)(a)(i) of the LPA stipulates that the LSSA must designate eight attorneys, two of whom represent the Black Lawyers Association (BLA), two from the National Association of Democratic Lawyers (NADEL), and one from each of the four statutory provincial law societies.

The LSSA’s designated representatives on the NF are –

- Max Boqwana (NADEL);
- Krish Govender (NADEL);
- Jan Maree (Law Society of the Free State);
- Martha Mbhele (Black Lawyers Association);
- Janine Myburgh (Cape Law Society);
- Praveen Sham (KwaZulu-Natal Law Society);
- Lutendo Sigogo (Black Lawyers Association); and
- Jan Stemmett (Law Society of the Northern Provinces).

The LSSA’s NF delegates met early in December last year to lay the groundwork for work to be done this year. Max Boqwana was nominated as chairperson of the LSSA delegation and Jan Stemmett as deputy chairperson.

The LSSA NF delegates acknowledged that the attorneys’ profession must take a united leadership role in the NF discussions with well-informed positions based on sound research and international best practice.

The LSSA NF delegates highlighted the following during their first discussion:

- The need to meet with other stakeholders on the NF (advocates, Legal Aid South Africa and the Attorneys Fidelity Fund) to discuss common positions.
- The need to provide guidance to the NF on rules and regulations, using the recently adopted uniform rules of attorneys’ profession as a basis, and taking into account the rules of the Bar.
- The need to research international codes of conduct and aspects relating to fees.
- The need to consider regulatory and non-regulatory functions currently being performed by the provincial law societies and the LSSA with a view to identifying which will be dealt with by the National Legal Practice Council in terms of the LPA, and then to consider what should be done to preserve the non-regulatory activities of the attorneys profession such as legal education and development.
- The need to identify anomalies in the LPA that may be unworkable or impractical and to collate these for possible submission as amendments to the LPA.

Keep informed on the LPA and engage with the LSSA

A separate section dealing with the LPA and the NF has been set up on the LSSA website and will be updated with the latest information and developments (www.LSSA.org.za).

The LSSA plans to arrange roadshows at the most appropriate time in 2015 to reach practitioners across the country and engage with them on the LPA, particularly on aspects that will have a direct impact on practitioners and their practices.

Practitioners are encouraged to contact the LSSA if they have identified aspects of the LPA that require amendment or to raise questions and issues related to the LPA.

- E-mail: LSSA@LSSA.org.za
- Fax: (012) 362 0969
- Tel: (012) 366 8800

Compiled by Barbara Whittle, communication manager, Law Society of South Africa, barbara@lssa.org.za
LSSA suggests changes to refugee regulation form to protect applicants

The Immigration and Refugee Law Committee of the Law Society of South Africa (LSSA) submitted comments to the Department of Home Affairs (DHA) in November 2014 on the First Draft Amendment of the Refugees Regulations (Forms and Procedure) issued in terms of the Refugees Act 130 of 1998 (the Act). The purpose of the DHA 1590 Form is to form the basis of a refugee status determination and protection evaluation in order to determine whether someone qualifies to be recognised as a refugee.

The LSSA pointed out that the draft form does not provide the kind of advisory that is both logical and part of international best practice as well as being consistent with the ethos of our constitutional dispensation. The LSSA submitted that, providing such an advisory may contribute to ‘arrested or detained’. The LSSA raised concern about the lawfulness of the questions relating to whether a person applied for asylum in a third country; and if not, why not. The LSSA pointed out that s 2 of the Act clearly provides that, if a person seeks status and can set out a prima facie case for persecution, our country cannot return him or her to that condition – even if via a third country - and that person’s application must be assessed here.

“Posing such a question in the form, without explaining why it is asked, may ‘invite’ the refugee to invent reasons which may impact negatively on his or her credibility. We have to guard strictly against the false comfort of “armchair logic”; we need to understand the situations that many people have in fact fled from,” said the LSSA.

As regards the question as to whether the applicant had notified ‘the refugee commissioner’, the LSSA submitted that very few people in South Africa would be able to indicate who the ‘refugee commissioner’ in South Africa is, much less how and where he or she may be found. The LSSA pointed out that, if the question were revised to refer to the ‘refugee authorities’ in the third country, the question would possibly elicit the information it actually seeks to secure.

The full submissions by the LSSA can be accessed on the LSSA website www.LSSA.org.za under ‘Legal practitioners’ then ‘LSSA comments on legislation’.

Law association chief executives meet in Cape Town

The International Institute of Law Association Chief Executive’s (IILACE) held its annual conference in Cape Town, bringing chief executives from some 30 European, American, Canadian, Australian, Asian and SADC law societies and Bar associations together in South Africa for the first time. The successful conference was arranged with the assistance of the Law Society of South Africa (LSSA). LSSA Co-Chairperson Ettienne Barnard and Cape Law Society Vice President Ashraf Mahomed welcomed delegates to the conference and to Cape Town.
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Sheriff’s search via sms

Simply sms the area you are looking for to 42269 and you will receive a reply sms with the Sheriffs contact details for that area.

* Note that if the name of the area is two words please type it as one word eg. “Somerset West” type as “Somersetwest” and you will receive the name and contact numbers for the requested area via return sms.

If you have any queries, complaints or compliments please contact us.

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www.sheriffs.org.za
LSSA comments on RAF Amendment Bill; raises questions on consultation regarding acceptable tariff for private sector health care

The reason for the need for the Road Accident Fund Amendment Bill, 2014 is, *inter alia*, to address the issue of a medical tariff in response to the judgment of the Constitutional Court on 25 November 2010 in the case of *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (2) BCLR 150 (CC), which struck down the public healthcare tariff then prescribed as the limit of the liability of the RAF to compensate a claimant for 'non-emergency' medical and hospital costs in the Road Accident Fund Amendment Act 19 of 2005. The memorandum to the Bill also notes that the administration of a two-tariff system adds 'administrative complexity is unavoidable'. In terms of the Constitutional Court ruling, currently all medical and hospital treatment which cannot be classified as 'emergency' is compensated as if the claim came into existence prior to the commencement of the 2005 Amendment Act on 1 August 2008.

In commenting on the Bill, the Law Society of South Africa (LSSA) stressed that it is in agreement that administering a two-tariff system of compensation is unnecessarily complicated and costly and the move back to a single method of calculating the compensation payable for all medical, hospital and related expenses arising from a motor vehicle injury is welcomed.

The LSSA was asked by the SCCL to spell out the directors’ duties as to the circular to shareholders seeking approval. The LSSA suggests the following new ss (1)(b):

'Approved in writing by all shareholders entitled to exercise voting rights in relation to that transaction, which approval is given after receipt by all such shareholders of a written notice prepared by the directors of the company: (i) giving details of the transaction sufficient to enable each such shareholder to make a considered decision whether to give the approval sought or not; (ii) to which a copy of the provisions of Sections 112 and 115 is attached.'

As regards amendments to Memorandum of Incorporation (MOI), the LSSA pointed out that the date on which amendments to an MOI come into effect is unclear under the Act. The LSSA understands that the Companies and Intellectual Property Commission (CIPC) is of the view that, CIPC is more than an office of record of MOI's, but also has a checking function by virtue of ss 14(1), 13(3) and 13(4) and that, until such time as it has approved amendments to an MOI, such amendments cannot take effect.

The LSSA submitted that if CIPC should have a checking function, it must be a very limited one. The LSSA suggested that there should be a closed list of items which CIPC must check in respect of MOI's. In the view of the LSSA this should only comprise the following:

- The name and registration number are correct.
- Whether the company has provided for share capital in its MOI and that there is no patent error in the provision, that is whether the company purported to create par value shares and that the arithmetic is correct.
- In the case of an RF company that the appropriate notice recording in which clauses the restrictive conditions are contained has been filed.
- That the filing notice was signed by the company secretary, a director or someone who files a document authorising him or her to file the amendment.
- If an MOI otherwise contravenes the Act, it is the directors of the company that must be held responsible. According to the LSSA, it is not, nor should it be, the duty of CIPC to scrutinise the entire MOI in case some conflict with the Act is contained in the MOI. If needs be, CIPC may send out compliance notices.

Furthermore, the LSSA noted that the Act should provide that if the amendment is not rejected by CIPC within 14 days from time of lodgement, it will be deemed to be accepted. Provision should also be made that should the company consider the amendments to be urgent, detailed reasons for urgency should be provided, which if accepted by CIPC as being genuine grounds for urgency, will result in CIPC considering the amendment within one business day.

- The full submissions by the LSSA can be accessed on the LSSA website www. LSSA.org.za under 'Legal practitioners' then 'LSSA comments on legislation'.

LSSA engages with Specialist Committee on Company Law to improve Companies Act

The Law Society of South Africa (LSSA) furnished written submissions on amendments to sections in the Companies Act 71 of 2008 and made proposals to the Specialist Committee on Company Law (SCCL) in August 2014. The LSSA also addressed the SCCL on 4 September 2014. The SCCL then requested further supporting information in relation to the LSSA’s submissions and the LSSA’s Company Law Committee provided extensive responses in November last year.

The SCCL asked the LSSA to elaborate on its original view that ‘many of the sections in the Act are not workable for companies which have only a few shareholders. We recommend an amendment to Section 6(3)(b) by inserting a subsection (iii) that in the case of a private company with a public interest score of 100 or less or a wholly owned subsidiary, it should not be necessary to comply with unnecessary requirements, including, without limitation, administrative requirements.’

The LSSA has suggested that wholly owned subsidiaries should be exempted from a number of provisions including, but not limited to, those in ss 6(9), 40(1), 44, 45, 48(8)(b), 57(2) 66(4)(b) and 68.

Also in s 57(3) in respect of a wholly owned subsidiary, which has the same directors as the holding company (identical boards) it should not be necessary to have separate meetings and the companies should be entitled to combine the meetings. A sub-section 3(bis) should be added to provide for this.

As regards s 66(2)(b), the LSSA considered that the number of directors should not be prescribed since no company should be obliged to have at least three directors. The LSSA said this proviso should be deleted *in toto*. However, should the SCCL not be in favour of its removal, the following should be added at the end of the sub-section: ‘or one director if it is a wholly owned subsidiary’.

The LSSA noted that, for purposes of chap 5, a wholly owned subsidiary should not constitute a regulated company.

The LSSA was asked by the SCCL to address the issue of a medical tariff then prescribed as the healthcare tariff. The LSSA stressed that it is in agreement that administering a two-tariff system of compensation is unnecessarily complicated and costly and the move back to a single method of calculating the compensation payable for all medical, hospital and related expenses arising from a motor vehicle injury is welcomed.

The LSSA further noted that the LSSA has suggested that wholly owned subsidiaries should be exempted from a number of provisions including, but not limited to, those in ss 6(9), 40(1), 44, 45, 48(8)(b), 57(2) 66(4)(b) and 68.

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In commenting on the Bill, the Law Society of South Africa (LSSA) stressed that it is in agreement that administering a two-tariff system of compensation is unnecessarily complicated and costly and the move back to a single method of calculating the compensation payable for all medical, hospital and related expenses arising from a motor vehicle injury is welcomed.
It added: ‘Of course, if the tariff eventually prescribed is such, so as to exclude access to private health care, it will meet with the very same challenges as were raised by the LSSA in its successful application to strike down the previous tariff, particularly as the common law right to recover the balance of costs not covered by the Act remains abolished.’

In this regard the LSSA noted that the Bill proposed that the costs of the first 30 days of treatment be paid on a no-fault basis. The LSSA noted: ‘It is in those 30 days that the vast majority of high cost expenditure is incurred, both in relation to hospitalisation and medical treatment. The object of the Bill is stated to be to create a scheme that facilitates responsible financial management and that enables the efficient and cost effective delivery of compensation. Without knowing what tariff is proposed, it is obviously not possible to estimate the costs that might be incurred as a result of this proposal. Common sense dictates that, if those costs are to be met on a no-fault basis, the exposure of the Fund for past medical and hospital costs will increase materially.’

The Bill also proposes no-fault liability for funeral claims, but caps liability at R 10 000 per claim. ‘Hopefully the medical tariff will not also be aimed at containing those costs also at a significantly lower level than the actual costs reasonably incurred by a claimant,’ stated the LSSA.

The LSSA welcomed the major amendment that proposes the removal of the two-year prescriptive period for hit and run claims and the Bill proposes a unitary prescription period for all claims.

The LSSA provided a detailed commentary to the various proposals in the Bill. The full submissions can be accessed on the LSSA website www.LSSA.org.za under ‘Legal practitioners’ then ‘LSSA comments on legislation’.

The Law Society of South Africa (LSSA) hosted a delegation of Egyptian lawyers, electoral officials and civil society representatives who were visiting South Africa in December 2014 on a study trip to investigate gender mainstreaming in electoral administration. The group was meeting with various South African institutions, including the Electoral Commission and gender organisations.

However, the LSSA pointed out that any tariff that may now be prescribed by the Minister of Transport in order to meet the criteria laid down in the Constitutional Court judgment four years ago still needed to be published for comment. ‘No doubt, the objective of the introduction of a “tariff” is still to limit the exposure of the RAF with regard to expenses incurred, which are covered by that tariff. The Act requires that any such tariff be prescribed after consultation with the Minister of Health. It is not known whether those consultations have taken place and whether there has been any engagement with the private health care sector and/or medical aids on what would be an acceptable tariff for the private sector to be able to continue to provide much needed treatment and health care to road accident victims to supplement the often inadequate, overstretched, poorly administered and, in some cases, unavailable, services at public hospitals,’ said the LSSA.
People and practices
Compiled by Shireen Mahomed

<table>
<thead>
<tr>
<th>Smit Sewgoolam Inc in Johannesburg has eight new appointments.</th>
<th>Phatshoane Henney Attorneys in Bloemfontein has two new appointments.</th>
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<tbody>
<tr>
<td>Tiaan Jonker has been appointed as chairman.</td>
<td>Natalie Steenkamp has been appointed as an associate in the conveyancing department.</td>
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<tr>
<td>Rachelle Freed has been appointed as a director.</td>
<td>Nongcali Zibi has been appointed as an associate in the commercial department.</td>
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<tr>
<td>Francisca Pretorius has been appointed as a senior associate.</td>
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<tr>
<td>Charl Cilliers has been appointed as a senior associate.</td>
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<td>Smit Sewgoolam Inc in Johannesburg has eight new appointments.</td>
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<tr>
<td>Ravika Sukdeo has been appointed as a senior associate.</td>
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<tr>
<td>Corne Du Plessis has been appointed as an associate.</td>
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<tr>
<td>Schalk Pienaar has been appointed as an associate.</td>
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<tr>
<td>Jurgens Bekker Attorneys has two new appointments.</td>
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<tr>
<td>Sheralyn Pieterse has been appointed as a senior associate. She specialises in family law and general litigation.</td>
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<tr>
<td>Megan van der Merwe has been appointed as an associate. She specialises in mining law and general litigation.</td>
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<tr>
<th>Hogan Lovells in Johannesburg has appointed Natalie Napier as a partner in the tax department.</th>
<th>WerthSchröder Attorneys in Johannesburg has appointed Thys Jacobs as a consultant. He specialises in personal injury and medical malpractice.</th>
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<th>People &amp; Practices</th>
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<td>Please note: Preference will be given to group photographs where there are a number of featured people from one firm in order to try and accommodate everyone.</td>
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</table>

Gildenhuys Malatji in Pretoria has two new appointments and one promotion.

- Keabetswe Seate has been appointed as an associate in the corporate and commercial law department.
- Boiketlo Mphahlele has been appointed as an associate in the insurance law and general litigation department.
- Johan Smalberger has been promoted to a senior associate in the commercial litigation and public law department.
The principle of subrogation is well established in South African law and allows an insurance company to litigate under the name of the insured for the recovery of damages incurred. Any judgment obtained for, or against, the insured is thereafter settled by the insurance company, subject to the terms and conditions of the agreement of insurance entered into between the parties.

Should an insurance company fail to uphold their contractual duties to the insured, the insured holds the applicable contractual remedies to enforce such a claim against the insurance company, however, the insured party shall remain liable to the third party.

As a general principle in South African law, a party instituting a claim for delictual damages must proceed against the person who has caused the harm, subject to specific circumstances where this principle has been altered through the enactment of legislation, for example the application of the Road Accident Fund Act 56 of 1996, as amended by Act 19 of 2005, among others.

Therefore, as a point of departure a third party will hold no such direct right of recourse against the insurance company and should execution against an insured commence and insufficient capital be raised. The third party holds little to no options in respect to obtaining their damages, save for the remedy contained in terms of s 156 of the Insolvency Act 24 of 1936.

Section 156 has a novel application in that it provides a remedy, on the insolvent of the insured, for a third party to ‘pierce the veil’ of the principle of subrogation and hold an insurance company directly liable for the damages incurred by the insolvent insured.

Where legislation has been effected to provide for the liability of a party not directly causing the harm it ordinarily provides for the substitution of that party for the wrongdoer and not for the joint and several liability of that party, as is the case in s 156, which provides as follows:

‘Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.’

The effect of s 156 was illustrated by the court in Coetze v Attorneys’ Insurance Indemnity Fund 2003 (1) SA 1 (SCA) at para 19 – 20 where the court provided as follows:

‘In the absence of [the] section the insured's creditor, upon the former's sequestration, would have to prove a claim in his insolvent estate and be content with whatever dividend is paid to the concurrent creditors; whilst the insured's rights under the policy would vest in his trustee, who would claim from the insurer for the benefit of the general body of creditors. The effect of the section, therefore, is that the creditor is granted the considerable advantage that he does not have to share the proceeds of the policy with other creditors. To that end he is given a direct right of action against the insurer. However ... the section was not designed to confer any additional favour upon that creditor. He would have to prove not only his claim against the insured, but also that the insured would have succeeded against the insurer in his claim for an indemnity.’ (See also Unitrans Freight (Pty) Ltd v Santam Ltd 2004 (6) SA 21 (SCA) at para 7 and 8; Le Roux v Standard General Verzekeringmaatskappy Bpk 2000 (4) SA 1035 (SCA) at 1046J – 1047G; Canadian Superior Oil Ltd v Concord Insurance Co Ltd (formerly INA Insurance Co Ltd) 1992 (4) SA 263 (W) at 273H – 274B; and Woodley v Guardian Assurance Co of SA Ltd 1976 (1) SA 785 (W) at 795E – H.)

While the effect of the section is clear the precise nature of the liability imposed by this section bears further discussion and was established by the court in the Unitrans case at para 7 where the court found the following:

‘The section does not add to the contractual liability of an insurer. It merely allows a person, who is not a party to the policy of insurance, to recover directly from the insurer in particular circumstances. It entitles a person who has a claim against someone who is indemnified against such liability by an insurer to pursue the claim directly against the insurer if the estate of the indemnified person is sequestrated.’

In the case of Van Reenen v Santam Ltd 2013 (3) SA 395 (SCA) at para 17 the Supreme Court of Appeal provided further clarity on the application of the section as follows:

‘What may be gleaned from these authorities and indeed the clear wording of section 156, therefore, is that its provisions create a right which does not exist before insolvency. Whilst it allows the third party to exercise the insured's rights against the insurer, it nonetheless confers upon the third party no greater rights than those enjoyed by the insured.

And, importantly, the section does not transfer to, nor vest the existing rights of an insolvent in the third party (Gypsum Industries Ltd v Standard General Insurance Co Ltd 1991 (1) SA 718 (W) at 722D). ... The section rather creates a new and distinct cause of action for the third party, on the sequestration of the insured, as a means to recover from the insurer precisely what the latter owes the insured under the insurance contract.’

Prior to the third party therefore being in a position to utilise the remedy provided for in s 156 certain requirements need to be met, which are as follows –

• there must be an obligation to indemnify the insured for the specific liability incurred to the third party; and

• the insured's estate must be sequestrated or under sequestration.

In assessing whether the remedy provided to protect third parties is sufficient, one must first focus on the nature of the claim, the ordinary course of litigation and the extent to which the operation of the law would provide for further enhancement of the litigation.

It is important to note that this remedy is exceptional and a departure from the ordinary and general principles of both
South African insurance and delictual principles. The importation of liability on the insurance company directly further departs from ordinary contractual principles, for example the principle of privity of contract.

Arguably the extent to which the third party would have to go to prove their claim would result in excessive legal costs often outweighing any advantage that they may obtain. These legal costs may furthermore not be covered by the already provided for would give rise to additional and unfair liability on the insurance company. I submit that a fair balance has been obtained by the legislature in enacting this legislation.

Nicole Bell BA (Law) LLB (SU) is an attorney at Goldberg & de Villiers Inc in Port Elizabeth.

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(placements in London, Paris and Dubai)

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The ILFA Flagship Programme facilitates interchange opportunities for African lawyers to take part in a three-month secondment programme in law offices of international law firms and corporations based in London, Paris and Dubai. Additionally, the programme provides an academic enrichment series that incorporates training modules on various topics relevant to the African legal sector. Finally, the ILFA lawyers undergo intense seminars at the prestigious Oxford and Cambridge Universities.

Applications are to be submitted online through the website www.ilfa.org.uk

Online application opens on Monday, 2 February 2015.

Deadline for applications: Thursday, 2 April 2015.

More about ILFA:
ILFA’s mission is to build legal excellence in Africa by providing access to advanced legal training, networking opportunities and education for African lawyers and senior professionals engaged in the negotiation of complex transactions in Africa.

ILFA furthers its mission through its Flagship Programme; which has been described as “simple yet impactful”.

Placements offer an annual curriculum of the most relevant parts of the participating law firms’ existing training programmes. These include the following practice areas: complex services, litigation, intellectual property, project finance, and sovereign debt. A wide variety of industries are covered from mining to construction, banking to oil and gas.
Interest earned on trust current banking accounts: To be paid over monthly

By Andrew Stansfield and Robert Burawundi

This article is intended to be a comprehensive reference document. Please provide a copy of this article to the staff in your accounts/bookkeeping department.

Practitioners are advised to review their banking arrangements well in advance of the 1 March 2016 deadline and to take the necessary action to educate bookkeeping staff accordingly.

In planning for the introduction of a monthly process the AFF worked with the banking industry to harness banking systems and technology to best effect. The four largest banks in South Africa offer products for attorneys that automate the monthly collection process in seamless fashion, with little or no practitioner involvement, and recoverable bank charges are automatically set off against the interest earned before payment of the remaining interest is made to the relevant collection authority. All transactions are transparent and reflect in bank statements provided to practitioners. The detailed process is explained below.

Regional law societies are designated as collecting agents for the AFF. Transfers of interest from a bank to a collecting law society are accompanied by electronic reporting that enable the societies to upload information into their membership management systems.

The automated monthly process explained

• All transaction fees and credit interest accumulate during the course of a month in the trust current banking account. Often such information will reflect in a memorandum column on the bank statement and on a certain day (usually the last day of the month) the items are posted to the account.
• On the day that accrued fees and interest are posted to the account, the VAT-exclusive portion of fees is compared against the credit interest paid during the month.
• If the credit interest exceeds the VAT-exclusive value of fees, the bank pays the excess to the account of the law society nominated by the practitioner.
• If the VAT-exclusive fees exceed the credit interest, the bank will debit the business account of the practitioner with the excess value of fees.
• In all cases, the value of VAT raised during the month will be charged separately to the client’s business account. Such VAT should be claimed as a VAT input credit when the practitioner submits the regular VAT return to the South African Revenue Service. Practitioners who are not VAT-registered may recover such VAT from the AFF by completing annual claim form.
• The bank will generate a monthly report to the collecting law society in respect of each practitioner firm, indicating the credit interest, bank fees and the net amount paid over.

Many practitioner firms prefer to split their s 78(1) trust balances across a number of banks for business reasons. This practice is especially popular in conveyancing. The AFF has no objection to such an approach being taken, despite the fact that interest paid by the banks on smaller account balances is paid at a lower interest rate. A larger account balance will always yield a better return to the AFF. The flip side to this coin from a practitioner point of view is that firms who prefer to split their trust account balances must accept a minor inconvenience, explained in the next paragraph.

In order for an automated monthly process to operate, a matching business banking account must be located at the same bank as the trust banking account. It follows that if a firm has four s 78(1) trust accounts, such firm must operate four matching business bank accounts if it wishes to utilise the automated monthly process. The alternative is to pay over manually, which is administratively burdensome for obvious reasons.

Action required by practitioners – a summary

• Ensure that a matching business bank account exists for each and every s 78(1) trust account.
• Ensure that each s 78(1) trust current account is operated within the correct bank product reference code (see below). Bankers should be requested to confirm to practitioners that the accounts are configured correctly.
• Ensure that authorisation documents required by the banks are completed and submitted.
• Thereafter ensure that the automated process is operating correctly, with reference to movements of interest and bank charges reflected in the trust account bank statements.

Staff employed in the trust accounting departments at each collecting law society will be pleased to assist with queries. The AFF Trust Interest Co-ordinator, Mr
Andrew Stansfield BCompt (Hons) (Unisa) PG Dip Tax (UCT) is the Finance Executive and Robert Burawundi BCom (Hons) Financial Analysis and Portfolio Management (UCT) BCom Economics (UCT) is the Investment Manager at the Attorneys Fidelity Fund in Cape Town. Mandlenkosi Mbatha, will assist on issues not specific to a particular law society. Mr Mbatha can be contacted via email at mandlenkosi@fidfund.co.za.

Bank product reference codes for automated monthly transfers

To achieve a seamless transition, practitioners must ensure that their bankers operate s 78(1) trust accounts using the reference codes provided on the AFF website, www.fidfund.co.za. From the homepage select ‘banking options’ where the information relating to ABSA, FNB, Nedbank and Standard Bank is available.

As indicated earlier, practitioners who operate trust current accounts at a bank that does not offer an automated option will be required to pay over the interest manually each month.

Impact of the Legal Practice Act

The new Legal Practice Act 28 of 2014 will in due course replace the Attorneys Act. The new Act empowers the AFF to make arrangements with the banking industry with respect to trust account banking, and also makes it clear that practitioners must adhere to such arrangements.

Andrew Stansfield BCompt (Hons) (Unisa) PG Dip Tax (UCT) is the Finance Executive and Robert Burawundi BCom (Hons) Financial Analysis and Portfolio Management (UCT) BCom Economics (UCT) is the Investment Manager at the Attorneys Fidelity Fund in Cape Town.

While the cat is away…

By Ann Bertelsmann

businessdictionary.com succinctly defines it as ‘monitoring and regulating of processes, or delegated activities, responsibilities, or tasks’ (www.businessdictionary.com/definition/supervising.html#ixzz3IeymmzJU, accessed 28-11-2014).

In this article, I limit the discussion to professional supervision, covering interaction with colleagues and clients and the manner in which clients’ work is done. I do not discuss supervision covering contractual and human resources issues, such as time-keeping and sick leave.

In my view, effective supervision is not -
• micro-managing staff;
• disempowering staff; or
• checking everything oneself.

It should rather -
• be based on a well-considered, well-coordinated supervision plan and policies;
• be seen as a business process rather than a threat or criticism;
• provide broad guidelines;
• provide appropriate training;
• provide regular reviews;
• provide constructive feedback;
• empower and motivate;
• provide effective delegation;
• be flexible and vary depending on level of experience of the supervisee and the complexity of the work being done;
• include peer reviews;
• be delegated where possible;
• be built on a foundation of the softer skills like supportiveness, inspiration, respect, openness, two-way communication and leading by example;
• be reinforced by the judicious use of rewards (carrots) and some sanctions (sticks) where appropriate.

Why supervision?

In my experience at the Attorneys Insurance Indemnity Fund (AIIF), most professional indemnity claims are primarily the result of the absence of effective supervision.

Supervision should be regarded as a tool to improve profitability and efficiency, rather than a nuisance that takes away valuable fee-earning time.
Who should be supervised?

All principals (partners or directors) professional and administrative staff, consultants and agents should be supervised to some degree. It goes without saying that different degrees and styles of supervision are required. (The nature and frequency of supervision will naturally depend on the level of experience of the person being supervised and the complexity of the work being supervised.)

Remember that principals are jointly and severally liable for the actions of their co-principals. Many claims arise out of lack of mutual supervision among co-principals.

So what is it that should be supervised?

All aspects of the running of a practice need to be supervised, but some important areas are:

- ethics and compliance with professional standards and the firm's ethos;
- technical skills;
- client service and communication;
- productivity;
- billing;
- fee recovery;
- staff development; and
- risk management interventions like the use of engagement letters, use of diary systems and file management.

Policies and procedures relating to these topics should be covered in the firm's Minimum Operating Standards (MOS) document. (Ideally, the MOS should also contain a well-considered, well-coordinated supervision plan and policy.)

How do I supervise effectively?

Firstly, micromanagement is unproductive. It means that sen-
Monitoring of file inactivity for a significant period. This could mean that the file is overlooked or there are problems with the conduct of the matter.

Files on which work is still being done, but there is no billing, or where clients have not paid the bill. These could be warning signs.

Obtaining client feedback. Put in place formal complaints-handling processes.

Use of checklists for different areas of work.

Performance management procedures.

Training (for supervisees and supervisors).

Encouraging those being supervised to ask for help.

Delegation

In running a successful practice and carrying out a client’s mandate, it is usually essential to delegate responsibility to others, for fulfillment of parts or the whole of the mandate. Delegation will not remove a practitioner’s responsibility to clients. The buck still stops with you. Wherever there is delegation, it is essential that controls are put in place to ensure quality service to clients. Delegates must be supervised effectively.

Delegation of some supervisory functions is also possible and desirable.

By all means delegate, but ensure that the nature of the task is matched to the qualifications and experience of the delegate. The supervision style adopted will also depend on these factors.

‘Delegation can be an important part of providing effective supervision when supervising the work of a more inexperienced person. Successful delegation involves –

- checking that the individual has the capacity to take on the work;
- briefing well by providing sufficient information to enable them to do the task effectively;
- explaining the background to the work and that individual’s part in it;
- being clear on the results you are expecting and the deadlines;
- giving sufficient authority and resources to get the work done;
- encouraging the individual to exercise initiative and ask questions; [and]

It is also well worth reading the excellent guide on the topic of supervision, produced by the Queensland Law Society (www.qls.com.au/files/a8a0b3c6-eebf-45d0-91b4-a08500e39983/Effective_Supervision_in_Legal_Practice.pdf, accessed 28-11-2014).

Lack of supervision is the common thread that runs through all three below scenarios.

Scenario 1: The secretary

Susan, a conveyancing secretary, had to amend certain transfer documents, where the property description had been incorrectly reflected. The client had already signed the incorrect documents. Believing that she was assisting the client by
saving him the inconvenience of coming into the office to re-sign the documents, she simply forged the client’s signature to the amendments. The amended property description became the centre of a dispute.

This led to a claim against the practice.

Scenario 2: The candidate attorney

Steve was a candidate attorney with six months’ experience. His principal Andrew, a commercial lawyer, asked him to attend to a claim against the Road Accident Fund (RAF), on behalf of his domestic worker, whose son had been injured when an unidentified vehicle collided with him. Because Steve knew that prescription did not run against minors, he calculated the prescription date by reference to the date of majority – being unaware that the two-year prescription period for lodgment of ‘hit and run’ matters also applied to minors.

Another candidate attorney subsequently took over the matter and noted the prescription date Steve had written on the file. The error was only discovered when the RAF rejected the claim that she had lodged after the two-year period had elapsed.

A claim was made against the practice.

Scenario 3: The qualified attorney/partner

In a small two-partner practice, Jan attended to commercial matters and Piet ran the litigation. For a while the practice ran smoothly, but Piet who was going through a messy divorce, became progressively impossible to work with.

Soon after the partnership broke up, Jan started getting inquiries from Piet’s clients. It emerged that Piet had not been attending to his clients’ matters for some time and had lied to them about progress – even producing faked documents to buy time.

Piet subsequently absconded. Jan was left to deal with the inevitable professional indemnity claims that followed.

Conclusion

Looking at the three scenarios sketched above (based on actual claims) it appears that the practices concerned did not have any systems in place for effective delegation and supervision.

Consider what systems, checks and balances the firms could have had in place to mitigate the risk of staff (including management) creating these claims-prone situations.

Now consider again whether or not you agree with the views of insured attorney X.

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By Adam Civin and Ramon Pereira

Recent research by Global Research company, Euromonitor, estimates that over nine million dogs are kept as pets in South Africa. Dogs are kept for many reasons, including companionship, exercise and protection. (Roberto A. Ferdman and Christopher Ingraham “South Africa is a dog country” 29-8-2014 IOL Online www.iol.co.za/lifestyle/family/friends/south-africa-is-dog-country-1.1727561#.Vlk2XDGUEso, accessed 10-1-2015.)

This article seeks to explain how South African courts have interpreted applications by owners to keep a pet within a sectional title scheme.

How the courts have addressed this issue

In the case of Body Corporate of the Laguna Ridge Scheme No 152/1987 v Dorse 1999 (2) SA 512 (D), the respondent was the owner of a section within a sectional title scheme. Within her section she kept a Yorkshire Terrier dog. The respondent had not sought permission from the trustees of the applicant to keep the dog on the premises and had subsequently been requested to house the dog elsewhere.

The Prescribed Conduct Rules (annexure 9) as contained in the Sectional Titles Act 95 of 1986 (the Act) regulated such permission and provided that no animals, except birds in cages, could be kept in the section, or the common property, unless expressly permitted by the trustees.

The owner’s request to keep her dog in her section had been considered by the trustees and was subsequently refused, resulting in her being told to find alternative accommodation for the dog. The owner failed to do same, resulting in the trustees bringing an application for an order that the owner remove the dog from her section. The owner opposed the application and brought a counter application to review the decision of the trustees to refuse her permission to keep the dog, and for an order that she be allowed to keep the dog on condition of specific circumstances.

Can the trustee’s decision be reviewed?

When considering the question of whether the decision of the trustees was open to review, the court had to bear in mind whether the trustees had genuinely applied their minds to the owner’s application for consent or had refused it purely as a hard and fast rule to refuse all such applications so not as to create a precedent of allowing residents to house dogs. When considering the trustees’ reasons for the refusal of the owner’s application the court found that the decisive factors in refusing same were namely –

- the general policy; and
- the issue of precedent.

With regard to the general policy the court held that by simply applying a general policy the trustees had not truly applied their minds to the owner’s application and had not genuinely considered departing from the general rule.

Furthermore, the court found that the question of precedent was not a relevant consideration and ought not to have influenced the trustees’ decision. If each decision by the trustees to grant or refuse such permissions was to be considered on its own merits that decision would not constitute a precedent because it would be a decision based on the facts and circumstances relevant to the particular case under consideration. A refusal to grant permission in a particular case simply because it would create a precedent would be tantamount to a failure to consider and decide the
application on its own merits and would result in a refusal to depart from the general policy of not granting permission. As such the court held the decision of a trustee is reviewable under the common law.

Decision by the court

The decision of the trustees to refuse the owner’s application to keep her dog in her unit was set aside.

The owner was given leave to keep her dog in her unit on the following conditions –

• the dog must be confined to the unit and at no time may be allowed to walk on the common property;
• when the dog leaves the unit it must be carried;
• the dog shall not be allowed to constitute a nuisance to other residents; and
• the owner shall not replace the dog with another pet when it dies, save with prior written consent by the trustees.

What if the body corporate register their own rules prescribing instances where pets can be allowed?

It is important to note that the above refers to the factual scenario where the Prescribed Conduct Rules are applicable. Interestingly, our law considers these rules to be contractual in nature and you agree to same when an owner purchases a property within a sectional title scheme. In terms of the Act a body corporate may elect to amend, remove or add to these rules as they see fit. In order to do so a special resolution must be passed and in essence indicates that the majority of owners wish to have certain rules binding them as a body corporate namely, a further consensus between the owners is required.

This raises the question that where a body corporate has registered its own conduct rules, in terms of s 35 of the Act, replacing the prescribed conduct rules contained in the Act which, for example, states that no applications to have pets at the section will be considered if the pet exceeds the height restriction of 70cm. In this instance it is clear that the body corporate intended to limit the considerations trustees must take cognisance of when applying their minds to the application to have a pet in their section but if the trustees apply the rule as a ‘hard and fast’ rule then they could potentially be in violation of the above case.

In our opinion, when an owner purchases a unit within the complex the purchaser is then contractually bound by the registered conduct rules of that sectional title scheme and thus the purchaser agreed that if the minimum requirements for an application to keep a dog were not met then her application should fail. Importantly, the height restriction is a prescribed consideration that the trustees must take cognisance of and does not prevent the trustees from taking a number of other considerations in mind as well. When the purchaser bought into the sectional title scheme they agreed that this should be a prescribed consideration and that if they fall foul thereof they will not be able to have the pet they desire at the premises.

Conclusion

When purchasing a property in a sectional title scheme you are choosing to live in a high-density living environment. Concomitantly, you are agreeing to curtail certain of your rights in order to ensure harmonious living with others in the high density environment. Furthermore, you are agreeing to allow, in certain instances, the majority in that environment to limit certain of your choices you otherwise would have had if you had purchased a freehold property.

Importantly, our law does not recognise an unfettered approach to all rights and, in fact, recognises certain instances where it must be limited. One of those instances will be where you have exercised free will and elected to be placed in that position on your own volition, such as purchasing a property in a sectional title scheme, which limits the type of pets you may have at that premises.

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In the United States (US), ‘stand your ground law’ removes a duty to retreat from the elements of self-defence. It exists in American statutory law and sometimes through common law precedents.

‘Stand your ground’ laws effectively extend the ‘castle doctrine’ to any place someone has a right to be. The castle doctrine is a legal doctrine that designates a person’s abode as a place in which that person has certain protections and immunities, ‘for a man’s house is his castle!’ Sir Edward Coke – 17th century jurist (The First Part of the Institutes of the Laws of England, or, A commentary of Littleton (London 1628)). Forty six US states have adopted the castle doctrine, stating that a person has no duty to retreat when their home is attacked. Twenty two states go a step further by removing the duty of retreat from other locations. Under such laws there is no duty to retreat from anywhere the defender may legally be.

For instance Michigan’s stand your ground law, MCL 780.972, (Self-Defence Act 309 of 2006) provides that:

-An individual who has not or is not engaged in the commission of a crime at the time he or she uses deadly force may use deadly force against another individual anywhere he or she has the legal right to be with no duty to retreat if … the following applies:

(a) The individual honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or to another individual.’

The state of Louisiana’s revised criminal law statute (RS 14:20) title 14, s 20 entitled: Justifiable homicide states a homicide is justifiable under certain circumstances provided that ‘no finder of fact shall be permitted to consider the possibility of retreat as a factor in determining whether or not the person who uses deadly force had a reasonable belief that deadly force was reasonable and apparently necessary to prevent a violent or forcible felony involving life or great bodily harm or to prevent unlawful entry.

The recent case of State of Florida v George Zimmerman (case no 2012 CF 1083 AXX, 18th Judicial Circuit), Seminole County, Florida sparked worldwide controversy and race riots. George Zimmerman was charged with the second degree murder of Trayvon Martin, a 17-year-old black teenager after he was shot and killed in a gated estate. The jury rendered a verdict of not guilty. The defence team had initially alerted the media that they would present their case to the judge at an immunity hearing before going to trial and request that the case be dismissed under the protection from prosecution provided for by the states stand your ground law. However at the trial of the matter the defence proceeded on the defence of self-defence.

Criticism

The stand your ground law now lets people use deadly force as a first resort just about anywhere if they feel threatened. This seems to be the consensus of the American public.

In South Carolina, the stand your ground laws broadened the traditional self-defence claim by adding that a person did not have to retreat and could use...
deadly force outside his home if he had a 'reasonable fear of imminent peril'.

An article published in the Huffington Post on 30 August 2014 entitled 'UN condemns U.S Police Brutality, Calls for stand your ground review' (www.huffingtonpost.com/2014/08/30/un-police-brutality-stand-your-ground_n_5740734.html, accessed 27-11-2014) stated that a United Nations panel said that 'Stand Your Ground Laws, a controversial self-defence statute ... should be reviewed to “remove far-reaching immunity and ensure strict adherence to principles of necessity and proportionality when deadly force is used for self-defence”'.

The South African approach

In South Africa our law does not recognise the stand your ground law but rather the traditional defence of private defence (commonly referred to as self-defence).

In S v Steyn 2010 (1) SACR 411 (SCA), Leach AJA held that factors relevant to whether an accused acted in private defence are as follows at para 19 –

- ‘the relationship between the parties
- their respective ages, genders and physical strengths
- the location of the incident
- the nature, severity and persistence of the attack
- the nature of any weapon used in the attack
- the nature and severity of any injury or harm likely to be sustained in the attack
- the means available to avert the attack
- the nature of the means used to offer defence
- the nature and extent of the harm likely to be caused by the defence’.

In the aforementioned case the appellant shot and killed her former husband when he threatened her with a knife. The appellant was convicted of culpable homicide. On appeal to the Supreme Court the state argued that the appellant should have fled and thus avoided being assaulted without the necessity of shooting at the deceased. The judge remarked as follows ‘[w]hether a person is obliged to flee from an unlawful attack rather than entitled to offer forceful resistance, is a somewhat vexed question. But in the light of the facts in this case, it is unnecessary to consider the issue in any detail’.

In Grigor v S (SCA) (unreported case no 607/11, 1-6-2012), Tshiqi JA held as follows '[t]he facts of this matter, even on the appellants version, show that he had several other harmless means he could have adopted to avoid a physical confrontation. He could have driven off and ignored the complainant'. In this case the defence raised by the appellant was that he stabbed the complainant several times in an apparent road rage incident resulting in a confrontation between himself and the complainant. From this finding one can gauge that the judge determined that the appellant did not have to confront the appellant in the circumstances but simply retreat.

It would appear that our courts have not definitively decided whether a person has a duty to flee an attack or whether the individual can stand his or her ground and take steps to ward off an impending attack.

Conclusion

It is apparent that there are marked dissimilarities in the legal approach to the traditional defence of self-defence and the stand your ground laws. The stand your ground laws also offer Americans a wider ambit in terms of legal defences in justifying an otherwise unlawful act that is not available to South Africans as a valid legal defence.
A trade mark is a mark, word, name, sign, symbol, device or any combination thereof by means of which manufacturers may distinguish their products from the products of others. The law protects trade marks by allowing them to be registered and exclusively used by the trade mark holder. Traditionally marks are classified in order of descending strength, as arbitrary or fanciful, suggestive, descriptive or generic. Terms that are deemed generic are not entitled to trade mark protection because such words are in the public domain. A generic term identifies 'a type of product', not the source of the product, and is not entitled to legal protection. A generic term therefore serves to name the goods themselves, rather than the producer of the product.

Genericide refers to the death of a trade mark. Who are you? Where do you come from? Protectable mark answers the questions 'Who are you?' and 'What are you?'. In determining whether a mark is generic, Thomas McCarthy's seminal treatise on trade mark law refers to the 'who are you, what are you test'. A protectable mark answers the questions 'Who are you? Where do you come from? Who vouches for you?' If a mark answers the question 'What are you?' then it has lost its source identifying properties, and is generic. (ED Jay 'Genericness surveys in Trademark disputes: Evolution of species' (2009) The Trademark Reporter 1119.)

Linoleum is generally considered to be the first trade mark to become a generic term. Frederick Walton coined the name for floor covering in 1864. It was so widely used that the name was ruled generic in 1878 following a lawsuit (Linoleum Manufacturing Co v Nairn LR 7 ChD 834 (1878) (Linoleum) in J Powell and L Svendensen Linoleum (2003)). Trade mark holders who have patented products often encourage the public to use their marks as generic words. When consumers eventually use these terms to identify the product rather than its source, the trade mark is in jeopardy of genericide. The manufacturers of Aspirin and Shredded Wheat both had patents on their products. Each product was marketed solely under one mark without competition on their products. Each product was marketed solely under one mark without offering the public an alternative term with which to refer to the product. In the case of Aspirin, the term had been used generically by the producer and the public for more than a decade. The name was eventually found to be generic because it had become the only name by which the public knew their favourite headache remedy. The only alternative description was acetyl salicylic acid which was not recognised by the public. (Bayer Co v United Drug Co 272 F 505 (SDNY 1921).) Kellogg Co v National Biscuit Co 305 US 111 (1939) in DR Desai and SL Rierson 'Confronting the Genericism Conundrum' (2007) Cardozo Law Review 1789 involved the use of the name 'Shredded Wheat' with regard to biscuits in pillow shaped form. The court held that 'Shredded Wheat' was a generic term for the product since it described it fairly accurately, and was the term by which the product was generally known by the public.

There are many other examples of words once registered as trade marks that were found to be generic such as the words cellophane, brassiere, trampoline, zipper, lanolin and thermos. However, proactive steps to prevent genericide may not always be successful. In King-Seeley Thermos Co v Aladdin Industries Inc 321 F 2d 577, 579 (2d Cir 1963) (http://openjurist.org/321/f2d/577, accessed 4-12-2014) the plaintiff sued to prevent Aladdin from using the word 'thermos' to describe its vacuum bottle containers. The court found that despite the plaintiff's substantial efforts to preserve the trade mark significance of the vacuum flask 'thermos' there was little they could do to prevent the public from using "thermos" in a generic rather than a trade mark sense'. The court noted at 581 that: "The genericide doctrine is a harsh [doctrine] for it places a penalty on the manufacturer who has made skilful use of advertising and has popularised his product".

Genericide gives power to the public to appropriate a word as its own, despite resistance by the trade mark owner. The brand name becomes so popular, spreads through the English language and enters the trade mark graveyard. A consequence of genericide is that the public domain benefits by the addition of a new word in the English dictionary. In Mattel Inc v MCA Records Inc 296 F 3d 894 at 900 (9th Cir 2002) (www.leagle.com/decision/20021 190296F3d894_11090.xml/MATTEL%20 INC.%20v.%20MCA%20RECORDS,%20INC, accessed 4-12-2014) the genericide process is explained as follows: '[T]rademarks [may] transcend their identifying purpose. Some trade marks enter our public discourse and become an integral part of our vocabulary ... Trademark often fill in gaps in our vocabulary and add a contemporary flavor to our expressions. Once imbued with such expressive value, the trade mark becomes a word in our language and assumes a role outside the bounds of trade mark law.'

An indication that a term has become generic is when the term is defined in the dictionaries without reference to the term's identity as a trade mark. However, the mere presence of a term in a dictionary does not establish that the mark has become generic, especially when the definition includes reference to the trade mark.
Google faces the generic dilemma since the terms ‘google’, ‘googling’ and ‘googled’ are commonly used by the public of conducting internet search using the Google search engine. Ironically the first reference to google as a verb was in an e-mail dated 8 July 1998 from Google co-founder Larry google as a verb was in an e-mail dated as it was at the height of its success. Similarly, the mark ‘Rollerblade’ was at risk of genericization due to the public’s reference to in-line skates as ‘rollerblades’ and in-line skating as ‘rollerblading’. The mark has been saved after the owner insisted that the product be referred to as Rollerblade in-line skates.

Many trade marks were destroyed by what is sometimes referred to as ‘death by verbing’, that is, they came to be used as the generic word for the type of object. Google and Xerox are fighting to preserve their names from what is also referred to as ‘death by verbing’ because people are ‘googling’ and ‘xeroxing’ their products.

The trade mark should stand out from surrounding texts such as in product labelling, failing to police trade mark infringement and improper use, neglecting to provide a simple generic name for the product, and failing to educate the public concerning the product’s name or generic name. (RH Folsom and Harry L. Teply ‘Trade marked Generic Words’ (1980) 89 Yale L.J 1323 at 1327 in VB Pierce ‘If it walks like a duck and quacks like a duck, shouldn’t it be a duck?’: How a “functional” approach ameliorates the discontinuity between the “primary significance” tests for genericness and secondary meaning” (2007) 37 New Mexico Law Review 147). Trade mark holders should diligently police their marks to maintain the source identifying qualities of the mark and be vigilant to prevent generic use of their marks by competitors. There are various precautions to prevent a brand name from becoming generic:

• Select a distinctive, non-generic name for your product or service.
• Always use the product’s generic name with the trade mark (eg, Apple computers; Google search engine). If a new product is introduced for which a generic name does not exist, two names should be coined; the trade mark and the generic descriptor of the product or service.
• Do not use the mark in any way that suggests a common, descriptive or generic name.
• Do not use the trade mark as a verb or noun. Trade marks should preferably be used as an adjective, alongside the generic name.
• Never use the mark in a plural or possessive form (eg, kids play with Lego bricks, not Legos).
• Do capitalise the first letter of the mark, or put the whole trade mark in capital letters (Kodak; Xerox; HP).
• The trade mark should stand out from surrounding texts such as in product labels or advertising.
• Monitor your own use of the mark and aggressively police and enforce the trade mark rights.

Once a trade mark starts to be used as a noun or a verb there is a real risk that its distinctiveness will be diluted, eroded or even lost. Ironically, the most popular marks face the greatest risk of public genericize, because this process often occurs when one specific product has dominance over the entire market. If a mark is not sufficiently protected, the success of the mark may lead to the destruction of the mark. A trade mark owner may contribute to the genericize of a trade mark by misusing it in advertising and labelling, failing to police trade mark infringement and improper use, neglecting to provide a simple generic name for the product, and failing to educate the public concerning the product’s name or generic name. (RH Folsom and Harry L. Teply ‘Trade marked Generic Words’ (1980) 89 Yale L.J 1323 at 1327 in VB Pierce ‘If it walks like a duck and quacks like a duck, shouldn’t it be a duck?’: How a “functional” approach ameliorates the discontinuity between the “primary significance” tests for genericness and secondary meaning” (2007) 37 New Mexico Law Review 147). Trade mark holders should diligently police their marks to maintain the source identifying qualities of the mark and be vigilant to prevent generic use of their marks by competitors. There are various precautions to prevent a brand name from becoming generic:

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• Monitor your own use of the mark and aggressively police and enforce the trade mark rights.

The Coca Cola Company is known to be aggressively defending its trade mark by actively educating restaurants that Coke means Coca Cola and not Pepsi or some other brand. Any establishment not complying will be requested to stop the deceptive practice, failing which a suit for trade mark infringement will follow. (Coca Cola vs Overland Inc 692 F 2d 1250, 1252 (9th Cir 1982) (http://openjurist.org/692/f2d/1250, accessed 4-12-2014).

Johnson and Johnson follow its trade mark with the word ‘brand’ in Band-Aid brand adhesive bandage. Fully aware of the dangers of genericize they changed the name ‘Band-Aid’ to ‘Lego blocks’ or ‘Lego toys’. Lego also informed a Lego Fan site in a cease and desist letter that:

‘our trade marks must never be used descriptively or generically (ie, Legos), but must always be used as an adjective followed by a descriptive noun (eg, LEGO * toys) and must never be combined with other words (with or without a hyphen) to form a new word’. (DR Desai and SL Rissner op cit at 1840).

Kleenex is a trade mark often considered to be borderline generic. Kleenex took steps to revive its exclusivity by adding the descriptor ‘tissues’ or ‘brand tissue’ to their name. The purpose is to educate consumers that their product is the ‘Kleenex brand’ of tissues, tissues being the generic term.

Blackberry was once at great risk of genericize. People often said that they would check their ‘Blackberry’s’ which translated into the generic name for any wireless e-mail terminal. However, competition from other device manufacturers saved the Blackberry brand, and the perception of the Blackberry is no longer as it was at the height of its success. Similarly, the mark ‘Rollerblade’ was at risk of genericize due to the public’s reference to in-line skates as ‘rollerblades’ and in-line skating as ‘rollerblading’. The mark has been saved after the owner insisted that the product be referred to as Rollerblade in-line skates.

Many trade marks were destroyed by what is sometimes referred to as ‘death by verbing’ because people are ‘googling’ and ‘xeroxing’ their products. Vacuum cleaner manufacturer Hoover has lost their ‘verbing’ battle in the United Kingdom because people ‘hoover their carpets’. However, Hoover remains protected in United States. Interestingly, certain megabrands do not easily lend themselves to verb- ing. The Coca Cola Company is known to aggressively defend its trade mark by actively educating restaurants that Coke means Coca Cola and not Pepsi or some other brand. Any establishment not complying will be referred to as ‘Death by Verbing’ because people are ‘googling’ and ‘xeroxing’ their products. Vacuum cleaner manufacturer Hoover has lost their ‘verbing’ battle in the United Kingdom because people ‘hoover their carpets’. However, Hoover remains protected in United States. Interestingly, certain megabrands do not easily lend themselves to verb- ing. The Coca Cola Company is known to aggressively defend its trade mark by actively educating restaurants that Coke means Coca Cola and not Pepsi or some other brand. Any establishment not complying will be referred to as ‘Death by Verbing’ because people are ‘googling’ and ‘xeroxing’ their products. Vacuum cleaner manufacturer Hoover has lost their ‘verbing’ battle in the United Kingdom because people ‘hoover their carpets’. However, Hoover remains protected in United States. Interestingly, certain megabrands do not easily lend themselves to verb- ing.

“Belper Knolle” was a cheese from Belper, England. The trade mark was not genericize by the use of Belper Knolle to denote any cheese. In 1980 the court refused to register the mark “Belper Knolle” as a trade mark, finding that Belper Knolle had become a generic name for ‘cheese’.

The courts will consider various factors to determine whether a trade marked term is generic such as generic use by the owner, media usage of the term, proof of uncontested widespread use of the trade mark by competitors, dictionary definitions of the term and evidence of consumer use indicating that the public believes the term to be generic.

Many protected trade marks are in danger of genericize such as Ping pong (tennis); Frisbee (flying disc); Astroturf (artificial grass); Polaroid (instant photographs); Post it (self-adhesive note paper); Jacuzzi (whirlpool bath), Laundromat (self-service laundry) and Vaseline (petroleum jelly).
CHANGING THE LANDSCAPE OF PROPERTY AND CONSTRUCTION LAW

Our innovative team deserve their recognition as African Legal Awards 2014 Property and Construction Team of the Year.
This is one of the thorny issues between the owners of farms and occupiers of farms in South Africa. On the one hand, land owners feel that as owners of land they have a right to enjoy undisturbed use and ownership of their land. On the other hand, occupiers feel that as occupiers of land they have a right of security of tenure including the right to bury their deceased family members on land where they reside.

Both the land owners and occupiers are protected by s 25 of the Constitution. As a result of s 25(9) of the Constitution, an Extension of Security of Tenure Act 62 of 1997 (ESTA), was promulgated in order to specify and regulate the rights and duties of occupiers and land owners.

In order for an ‘occupier’ to enjoy protection under s 6(2)(dA) of ESTA, he or she must establish on the balance of probabilities that –

- he or she is an ‘occupier’ on the farm where he or she intends burying the deceased on;
- the deceased was a member of his or her family;
- the burial sought would be in accordance with his or her religious and/or cultural beliefs;
- the deceased was residing on land, which the occupier resided at the time of death of the deceased; and
- an established practice on land exists to bury deceased family members.

It is clear that in terms of s 6(2)(dA) of ESTA, the burial of the deceased on land must be done according to an occupier’s religion or culture. For example the direction that the deceased’s body must face on burial, the depth and size of the grave in the ground, the nature of the ceremony that accompanies the burial, and so on, must be in accordance with an occupier’s religious or cultural beliefs.

It is very important to note that the landowner (or person in charge of the land) may not restrict the nature of the burial including the ceremony to be something less than or different from what the religion and cultural demands. However, the qualification of the burial with regard to religion and culture offer protection to both land owner and occupier. The land owner is protected in the sense that an occupier has to practice his or her culture and religion in a reasonable manner.

Without having expressly decided the point, this interpretation is certainly in accordance with the interpretation adopted by the full Bench in Nhlabathi and Others v Fick [2003] 2 All SA 323 (LCC) para 36.

As explained above, one of the requirements that an occupier who intends burying the deceased on land must satisfy is that ‘an established practice in respect of the land exists’.

This requirement, however, is that the
practice must exist for 'people living on the land'. There is nothing in the wording of the definition to suggest that it must be peculiar to the particular family in question and or family of the deceased. This is supported by the Supreme Court of Appeal (SCA) in the case of 

Dlamini And Another v Joosten And Others 2006 (3) SA 342 (SCA). In para 19 the SCA stated that: 'In so deciding, the court a quo erroneously interpreted s 6(2)(dA) to require the established practice to relate to a particular family, whereas the section clearly links the “established practice” to “people residing on the land”. It is not confined to particular families. The respondents were therefore correct in conceding that the court a quo’s interpretation of the section is wrong.'

But it must be taken into account that most people, including some of the presiding officers such as magistrates and judges, are of the opinion that an ‘established practice’ must be in respect of an occupier’s family who intends burying on land. This cannot be the intention of the legislature and is therefore wrong. Balancing the rights of the land owner and the rights of an occupier who intends burying the deceased on land is very important. Most of the land owners in denying occupiers rights to bury their deceased family members on land often say the water on the land would be contaminated or the value of their land would diminish should an occupier be permitted to bury his or her deceased family member on land. But this argument has no value due to the fact that, where there is an established practice on land, people have already buried their deceased family members on land and the water had already been contaminated. Furthermore the grave is permanent in nature. This is supported by the Dlamini case where the Supreme Court of Appeal has decided that an established practice cannot be withdrawn unilaterally.

There is also a special category of occupiers who enjoy special protection in terms of ESTA. In terms of s 6(5) of ESTA, an occupier who has been on the land for ten years or more and has reached the age of 60 years or was employed by the landowner or person in charge of the farm, but was unable to work due to ill health is entitled to be buried on land where he or she was residing at the time of his or her death.

- See also 2014 (Aug) DR 22.
Exemption from unalterable provisions an underutilised procedure

By Paul Truter and Amy Jones

In principle, every company is required to comply with all of the unalterable provisions of the Companies Act 71 of 2008 (the Act), except to the extent that its Memorandum of Incorporation (MOI) imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than otherwise would apply to the company in terms of an unalterable provision in terms of s 15(2)(a)(iii) of the Act. An ‘unalterable provision’ is defined in s 1 as a provision of the Act that does not ‘expressly contemplate that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company’s Memorandum of Incorporation or rules.

However, this principle is not absolute. It is limited by an exemption procedure set out in s 6(2) of the Act, which has received little attention to date. In terms of s 6(2), a person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company’s MOI or rules from any prohibition or requirement established by or in terms of an unalterable provision of the Act, other than a provision that falls within the jurisdiction of the panel (which is primarily concerned with affected transactions and offers and has jurisdiction over the matters referred to in section 201 of the Act).

Therefore, s 6(2) of the Act affords the Companies Tribunal extensive powers to make an administrative order for exemption from any prohibition or requirement established by or in terms of an unalterable provision of the Act. These powers may, in terms of s 6(3), be exercised if the Companies Tribunal is satisfied that –

‘(a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and

(b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including –

(i) the purpose and policy served by the relevant prohibition or requirement; and

(ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement.’

The use of the word ‘and’ between the requirements set out in s 6(3) indicates that both requirements must be met for an administrative order to be granted.

In the case of La Lucia Sands Share Block Limited v Flexi Holiday Club and Ten Others (CT) (unreported case no
The Companies Tribunal handed down the first decision on s 6(2) of the Act. The decision sheds light on how the Companies Tribunal is likely to approach applications for exemption in terms of this provision.

In the La Lucia Sands case the applicant was a public and share block company in terms of the Act and Share Blocks Control Act 59 of 1980, respectively. In terms of s 51 of the Act and reg 32 of the Companies Regulations, the applicant was required to establish and maintain a register of its issued securities in the prescribed form and standard. Despite the advent of the Act and the regulations thereto, the applicant had failed to do so.

The applicant sought an exemption from the unalterable provisions of ss 50 (Securities register and numbering) and 51 (Registration and transfer of certificated securities) and reg 32 (Company securities registers) of the Act coupled with an order that the applicant’s register as it stood constituted sufficient compliance with these provisions.

In its decision, the Companies Tribunal pointed out that an exemption in terms of s 6(2) of the Act ‘is not a general exemption from statutory provisions, but an exemption of “an agreement, transaction, arrangement, resolution or provision of a company’s Memorandum” from a prohibition or requirement imposed by an unalterable provision of the Act. Therefore, what in fact had to be exempted was a resolution of the shareholders of the applicant, and not the unalterable provisions themselves. In terms of a resolution of the shareholders of the applicant passed on 27 June 2006 the directors of the applicant were ‘instructed to maintain the privacy of all shareholders’ of the applicant, ‘... and not to release any information other than their names to any party whatsoever, and in the event that any information has to be given out, that the directors first obtain in writing, and be satisfied with the purposes for which information is required and the identity, background and intentions of the persons seeking such information.’ The applicant’s reason for applying for the exemption was that it wished to prevent or stop abuse by the respondents. The alleged abuse was primarily the first and tenth respondents’ attempts to take over the applicant through hostile means.

The Companies Tribunal found that insofar as the 2006 resolution empowered the applicant or its directors to thwart any takeover attempts by the respondents it did not serve a reasonable purpose in terms of s 6(3)(a) of the Act. The Companies Tribunal noted that takeovers have always been a part of the statutory landscape of South Africa, and that to the extent that the manner in which a prospective takeover is conducted does not comply with the law, the affected parties will be entitled to approach the courts for relief. In any event, the 2006 resolution was directed towards the release of information by the directors of the applicant and not the maintenance of a statutory register or information.

On the basis that it accepted that the two legs of the inquiry in s 6(3) are conjunctive, the Companies Tribunal also found that it would not be reasonable and justifiable to grant the exemption in terms of s 6(3)(b) of the Act. The Companies Tribunal did not fully articulate its reasons for this finding save to state that it did ‘not consider it reasonable and justifiable to grant the exemption, especially when considering the purposes of the CA 2008 as reflected in section 7, which include the need to encourage transparency and high standards of corporate governance.’ Given that both legs of the inquiry in s 6(3) must be met for an application for exemption to be granted, it is submitted that it was not necessary for the Companies Tribunal in the La Lucia Sands case to proceed to the second leg of the inquiry. However, s 7 provides useful guidance as to when it will be reasonable and justifiable to grant an exemption as it sets out the purposes of the Act as follows:

- (a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;
- (b) promote the development of the South African economy by -
  - (i) encouraging entrepreneurship and enterprise efficiency;
  - (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
  - (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
- (c) promote innovation and investment in the South African markets;
- (d) retain the concept of the company as a means of achieving economic and social benefits;
- (e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a global partner within the global economy;
- (f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
- (g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
- (h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;
- (i) balance the rights and obligations of shareholders and directors within companies;
- (j) encourage the efficient and responsible management of companies;
- (k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and
- (l) provide a predictable and efficient environment for the efficient regulation of companies.

There are various practical examples in which s 6(2) may be underutilised and its application might serve to mitigate the effect of a prohibition or requirement established by an unalterable provision in the Act. The Companies Tribunal stated that the application in question could have been made for an exemption against an uncontrolled dis-
closure of the register contemplated in terms of s 26(2) of the Act on the basis that the members wished to maintain some measure of control on the release of information.

• In terms of sched 2 to the Act, every member of a close corporation which has been converted into a company in terms of the Act is entitled to become a shareholder of the company resulting from that conversion. This provision entails the issue of shares to those former members. Section 40(1)(a) of the Act requires that the board of a company may issue authorised shares only for adequate consideration to the company as determined by the board. It might not be reasonable to require former members of a close corporation that has converted to a company to pay adequate consideration for their shares in the converted company.

In order to go about filing an application for exemption, it is necessary to have regard to the Practice Guidelines (setting out procedures reflecting what constitutes best practice) of the Companies Tribunal of the Republic of South Africa. The guidelines require the following documents to be included in the application:

• A form CTR 142. This form includes a concise statement setting out the circumstances and the particulars of the request.

• A sworn statement or affidavit setting out the facts on which the application for exemption is based.

• Certified copies of the agreement, transaction, arrangement or resolution.

• A copy of the Memorandum of Incorporation of a company or the company’s rules as filed with the Commission.

• Proof of authority where the deponent is acting on behalf of a juristic person or corporate body.

The application may be filed with the Registrar of the Companies Tribunal by hand, registered mail or by fax or e-mail. If transmitted by fax or e-mail, the application must include a cover page or cover message, respectively, on which the name, address and telephone number of the sender, either the name of the person to whom it is addressed, and the name of that person’s attorney, if applicable; or, the name or description of the class of intended recipients, are reflected. An application delivered by fax must also include the transmission date, the total number of pages and the name and contact details of the sender (see www.companiestribunal.org.za in this regard).

Pending the grant of an application for exemption by the Companies Tribunal, it is uncertain what the status of an agreement, transaction, arrangement, resolution or provision of a company’s MOI or rules that is in conflict with the Act will be. Commentators submit that the provision in conflict with an unalterable requirement or prohibition in the Act will be void given that the exemption cannot operate retrospectively (PA Delport Henochsberg on the Companies Act 71 of 2008 vol 1 1ed (Durban: LexisNexis 2011) at 50).

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FEATURE

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THE LAW REPORTS

November 2014 (6) South African Law Reports (pp 1 – 312); [2014] 4 All South African Law Reports October no 1 (pp 1 – 146); and no 2 (pp 147 – 278); and [2013] 3 All South African Law Reports no 2 (pp 135)

This column discusses judgments as and when they are published in the South African Law Reports, the All South African Law Reports and the South African Criminal Law Reports. Readers should note that some reported judgments may have been overruled or overturned on appeal or have an appeal pending against them: Readers should not rely on a judgment discussed here without checking on that possibility – Editor.

Abbreviations:
ECP: Eastern Cape Local Division, Port Elizabeth
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
LP: Limpopo Division, Polokwane
SCA: Supreme Court of Appeal

Class action

Requirement of a ‘triable issue’: In Pretorius and Another v Transnet Second Defined Benefit Fund and Others 2014 (6) SA 77 (GP) the applicant, Pretorius, sought leave to institute a class action pursuant to the provisions of s 38(c) of the Constitution.

Pretorius was a representative of the members of the Transnet Second Defined Benefit Fund and the Transport Pension Fund (the funds). Pretorius sought in the proposed class action to compel the fourth respondent, Transnet, and the fifth and sixth respondents, the state, to pay a 'legacy debt' of R80 billion dating from the establishment of Transnet, to the funds in accordance with their obligations. Pretorius contended that these amounts were assets of the funds, the object of which was to provide benefits to pensioners, special pensioners and beneficiaries and the failure to redeem the debt had materially and adversely affected their rights and those of the members of the class.

The issue for determination was whether, on the evidence of facts and/or legal submissions set out in Pretorius’s founding papers and the draft particulars of claim, Pretorius has made out a case for the certification of a class action against any one or more of the respondents, including the question whether it was in the interest of justice to certify such a class action.

The court held that a class action is available where a constitutional or non-constitutional right is involved. Section 38(c) of the Constitution provides that ‘anyone … has the right to approach a … court … [including someone] (c) anyone acting as a member of or in the interest of a group or class of persons’. The court held that s 38(c) of the Constitution must be interpreted generously and expansively. In Children’s Resource Centre Trust and Others v Pioneer Food (Pty) Ltd 2013 (2) SA 213 (SCA) the court held further that a court faced with the application for certification of a class action must satisfy itself of a number of factors, including the existence of a class that is identifiable by objective criteria; and a cause of action ‘raising a triable issue’. With regard to the requirement of a triable issue the court held that the applicant must show a cause of action with a basis in law and proof before the court. The claim must be legally tenable and evidence of a prima facie case needs to be submitted.

The court held that the situation in the present case was pattern-made for class proceedings. The class which Pretorius represents is drawn from the poorest within our society (that is, elderly pensioners) who are in need of statutory social assistance. As individuals they are unable to finance a legal action. What they have in common is that they are victims of alleged official excess and bureaucratic misdirection and administration.

With regard to the requirement of a ‘triable issue’ the funds argued that Pretorius had failed to establish any cause of action and that the court should find that there existed no triable issue between Pretorius and the funds. The funds’ main defence was that the concept of ‘rea-
Electricity Law in South Africa
A Klees

Electricity Law in South Africa comprehensively analyses the existing legal and regulatory framework for the country’s electricity supply industry. It also contributes to the discussion on electricity sector reform in South Africa.

A Practitioner’s Guide to the Mental Health Care Act
A Landman, W Landman

A Practitioner’s Guide to the Mental Health Care Act provides access to the law on mental health care in the context of the Constitution, case law and international law. The book outlines and explains how the Mental Health Care Act and its regulations are applied to or administered by those who implement the Act, those who administer it and those affected by it.

Labour Litigation and Dispute Resolution (2nd edition)
J Grogan

Labour Litigation and Dispute Resolution is a comprehensive exposition of practice and procedure in the various forums charged with the responsibility of resolving employment and labour disputes in South Africa. The rules of the several forums are discussed, and there are useful tips for all role players in labour litigation, arbitration, and other forms of dispute resolution. Separate chapters on private arbitration and alternative dispute resolution are also included.

Perspectives on the Law of Partnership in South Africa
J J Henning

Perspectives on the Law of Partnership in South Africa offers the subject specialist a detailed consideration of complex areas in the law of partnership. Topics range from the history and development of partnership law to Leonine partnership, the triple contract and universal partnership proper. Aspects of the law in general are also comprehensively explored.

Social Media and Employment Law
M Potgieter

This book thoroughly analyses the intersection between social media and workplace law, providing real-life examples, useful templates and guidelines. A wealth of case law, discussed simply and clearly, will help to guide readers through this new territory.

Labour Relations Act 66 of 1995 & CCMA Related Material (Juta’s Pocket Statutes) (23rd edition)
Juta’s Statutes Editors

This new edition has been updated to incorporate the Labour Relations Amendment Act 6 of 2014.
reasonable pension benefit expectation’ only applied to procedural requirements for fair administrative action and did not create substantive rights.

The court held that South African case law does not prohibit an extension of the doctrine of ‘substantive reasonable pension benefit expectation’ to also cover the substantive protection of a legitimate expectation. The defence raised by the funds regarding the concept of ‘reasonable pension benefit expectation’ would be better argued or deliberated on more fully at the trial of the action contemplated by Pretorius.

The court accordingly held that there was indeed a ‘triable issue’ between Pretorius and the funds, and Pretorius was granted leave to institute a class action against the funds and Transnet.

It needs to be emphasised that the court merely ruled that Pretorius has provided prima facie proof of a ‘triable issue’ and that later appears that the proposed class action does not disclose a cause of action, the funds and Transnet are at liberty to file an exception at the appropriate time.

Company law

Business rescue: In Copper Sunset Trading 220 (Pty) Ltd v Spar Group Ltd and Another 2014 (6) SA 214 (LJ) the business rescue practitioner of the applicant company had launched a s 153(1)(a)(ii) application pursuant to the first respondent (Spar), a secured creditor, and the second respondent (NF, a concurrent creditor), voting against the adoption of the applicant’s revised business rescue plan.

In issue was whether the applicant had made out a proper case that their votes were inappropriate within the meaning of s 153(1)(a)(ii) read with s 153(7) of the Companies Act 71 of 2008.

Section 153(1)(a)(ii) provides that if at a meeting to consider a business rescue plan, the holders of voting interests or shareholders votes to reject it, the appointed business rescue practitioner may ‘advise the meeting that the company will apply to a court to sit aside the result of the vote … on the grounds that it was inappropriate’.

Section 153(7) provides that in the case of a s 153(1)(a)(ii) application the court may order that the vote on a business rescue plan be set aside if it is satisfied that it is reasonable and just to do so, having regard to the following three aspects. First, the interests represented by the person or persons who voted against the proposed business rescue plan. Secondly, the provision, if any, made in the proposed business rescue plan with respect to the interests of that person or those persons. Thirdly, a fair and reasonable estimate of the return to that person, or those persons, of the value of the company if it were to be liquidated.

Makgoba J held that as a secured creditor Spar would probably be the only creditor standing to gain from a liquidation, and this rendered its opposition to business rescue unreasoned and unreasonable. Spar would in any event gain at the most a R 0,45 dividend. NF’s opposition to the business rescue in turn, was held to be irrational since absent such a plan it would receive nothing. Accordingly they risked in rejecting the applicant’s revised business rescue plan was inappropriate.

The court ordered the proposed rescue plan to be properly adopted. The costs of the present application were reserved.

Constitutional law

Constitutional damages: In Minister of Police v Mbweni and Another 2014 (6) SA 256 (SCA); Minister of Police v Mbweni and Another [2014] 4 All SA 452 (SCA) one Mbweni (the deceased) was detained by the police and locked up in a police cell with other detainees. The deceased was assaulted by the other detainees and as a result he died. The respondents, the plaintiffs, were mothers who each had a daughter with the deceased. The plaintiffs sued the appellant, the Minister, and claimed damages on behalf of their daughters for infringement of their right to parental care in s 28(1)(b) of the Constitution. The High Court found the Minister liable to pay damages for loss of support and referred the quantum of damages to trial. It also found, on a stated case, that a child whose parent had died because of unlawful conduct of a third party, could claim constitutional damages for infringement of the right to parental care. It found the Minister liable for such damages.

In an appeal to the SCA Wallis AJ overruled the High Court’s decision. In doing so the SCA held that the High Court had made a number of crucial errors in allowing the claim. First, it failed to properly analyse the constitutional right to parental care. In this regard it held that the fact that s 28(1)(b) expressed the right it embodies in three alternatives, demanded that in the first instance there be a proper analysis of the different elements of the right and, in particular, the relationship between the right to family care and the right to parental care. The word ‘parent’ may encompass a biological, adoptive or foster parent or a parent who has become such by virtue of a surrogacy agreement. The High Court’s conclusion that parental care necessarily means care by a custodial parent is unduly restrictive.

Secondly, the SCA pointed out that facts proving loss of parental care were not placed before the High Court. This was owing to a misapplicaton of r 33. Faced with a special case inadequately stating the facts, the judge ought to have refused to hear it. None of the facts the High Court identified as important to the determination of whether there had been a loss of parental care had been alleged or admitted. As a result, so the SCA reasoned, the High Court was not in a position to assess whether there had in fact been any loss of parental care.

Thirdly, it failed to consider s 8(2) of the Constitution in deciding whether the right at stake applied to the policemen. It also failed to consider whether they owed a legal duty to his children to prevent an infringement of the right.

Fourthly, it did not consider whether damages for loss of support was, on its own, an adequate remedy.

Finally, the parties with an interest in the decision, especially those organs of state that discharge their responsibilities from public funds, were not given an opportunity to intervene and make submissions that would have enabled the High Court to arrive at a just conclusion.

The SCA accordingly upheld the appeal and referred the matter to the High Court for trial.

Contract law

Termination by reasonable notice: In Plaaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd [2014] 4 All SA 12 (SCA) the facts were as follows. In February 2005, the parties entered into a written agreement involving the local distribution authority, in respect of imported agricultural chemicals. The appellant (the defendant in the High Court, Plaaskem) argued that the contract contained a tacit term to the effect that it was terminable by either party on reasonable notice.

The High Court found that the contract did not have a tacit or implied term that the agreement was terminable on a reasonable notice. The purported notice of cancellation of the agreement by Plaaskem with effect from 30 June 2010, was thus held to have been invalid and of no effect. Plaaskem was held to be obliged to render a statement and debitment of account to the respondent (the plaintiff in the High Court case) in respect of all sales it made in keeping with the agreement, for a stipulated period.

Hancke AJA pointed out that it has been stated by the courts that the law regarding a contract of unspecified duration is a matter of construction of the agreement according to the ordinary principles of construction. In this regard the court referred with approval to the earlier decision in Trident Sales (Pty) Ltd v AH
That term was that the contract could be terminated by either party by giving reasonable written notice to the other party.

The appeal was, accordingly, upheld with costs.

**Education**

**Standards:** In *Dean of the Law Faculty, University of the North West and Others v Masisi* 2014 (6) SA 61 (SCA) the respondent (Masisi) was registered for a LLB degree at the appellant university (UNW). Masisi wanted full credit for the courses and modules he had completed at the University of the North. However, the NWU refused to give him more than 50% credit, arguing that it was constrained to do so by its own rules and those of the Joint Statute of South African Universities, a document approved by the Minister of Education under the Universities Act 61 of 1955. Masisi approached the Equality Court with a complaint of unfair discrimination. The Equality Court struck down the relevant provisions of the university’s rules and of the Joint Statute.

In an appeal to the SCA, the court, in a joint judgment, held that the issue of giving credit by one university to modules passed at another university, was of vital importance to tertiary education in South Africa. It further held that the Equality Court should have given the Minister of Education, other universities and their collective voice, Higher Education South Africa (which appeared as amicus curiae in the present appeal), the opportunity to deal with the issues raised by Masisi’s complaint, including the question of the Equality Court’s competence to make an order setting aside legislation.

The SCA accordingly ordered that the matter be remitted to the Equality Court with the instruction that all interested parties be informed of the relief being sought against them. The costs of the proceedings in the Equality Court and in the SCA court shall be costs in the cause.

**Insolvency law**

**Effect on property of solvent spouse:** In *Motala and Another NNO v Moller and Others* 2014 (6) SA 223 (GJ) the court was asked to pronounce on the legal effect of the sequestration of one spouse’s estate, on the estate of the solvent spouse.

The crisp facts were as follows. Ms Stein was the owner of an immovable property. She was married to one Mr Segal. After a time Segal was sequestrated and thereafter Stein sold and transferred her property to Moller. Moller was unaware that Segal had been sequestrated and acted in good faith, paying the fair market price. Segal’s trustees then applied for an order declaring the transfer void. The trustees based their application on s 21(1) of the Insolvency Act 24 of 1936 (the Act).

Section 21 of the Act provides that the alienation of property by a solvent spouse whose spouse’s estate has been sequestrated, remains effective and valid unless and until it is assailed and set aside by the trustee of the insolvent spouse’s estate.

Section 25 of the Act provides that if an insolvent person lawfully disposes of immovable property or a right to immovable property, which forms part of his insolvent estate, the trustee may recover the value of the property or right so disposed of from the insolvent; or from any person who, knowing such property or right to be part of the insolvent estate, acquired such property or right from the insolvent without giving sufficient value in return.

Three issues were at stake. First, the effect of s 21(1) of the Act on a solvent spouse’s transfer of her property to a third party. Secondly, the nature of a vesting of a solvent spouse’s property in a trustee, which is effected by s 21(1) as well as its consequences. Thirdly, the relation between s 21(1) and s 25(4) of the Act, and more specifically whether a trustee may choose which of these two subsections he will proceed under.

Myburgh AJ held as to the first issue, that s 21(1) rendered such a transfer voidable at the instance of the trustee. That is, the transfer was valid until set aside by the trustee.

Regarding the second issue, the court held that s 21(1) vests the insolvent spouse’s property in the trustee ‘as if it were property of the sequestrated estate’. It followed that the trustee had the same powers in respect of the solvent spouse’s property as he had in regard to the insolvent’s property.

In respect of the third issue, the court confirmed that a trustee’s remedies regarding disposal of immovable property by an insolvent or his spouse, are confined to those in s 25(4). In such a case a trustee cannot elect to proceed by way of a general provision such as s 21(1).

Because none of s 25(4)’s requirements for relief were met, the court dismissed the application with costs.

**Marriage**

**Property rights:** The applica-
to the counterclaim disputing

the husband’s estate in terms of s 3(1) of the Matrimonial

Property Act 88 of 1984 (the Act). It was or-
dered that a determination of the parties’ respective estates be made by a referee. The referee’s report, in turn, would result in payment to one or other spouse of any sum due in terms of s 3(2) of the Act.

The parties were at loggerheads about the question whether the contents and values of the estates of spouses married under the accrual system were to be determined on the date that the divorce was granted or when the pleadings in the divorce proceedings closed.

Sutherland J held that the date of dissolution of the marriage was the only relevant date on which to determine the content and to calculate the value of the respective estates.

The court rejected the argument that a distinction exists between procedure and substance that can change the moment for ‘assessment’ of the estates from the date of dissolution to the date of litis contestatio and that any transaction after this moment is to be left out of account. In this regard it remarked that litis contestatio is an archaic label for a banal event: The moment when no more pleadings may be filed. A trial or an argument is then possible.

Property rights: The decision in DP v DP and Others 2014 (6) SA 243 (ECP) concerned the question whether a court may take the value of the assets in a trust into account in determining the accrual of one of the spouses’ property where the trust was allegedly a sham.

In a counterclaim in a divorce action, the wife claimed half the net accrual of the husband’s estate in terms of s 3(1) of the Matrimonial Property Act 88 of 1984 (the Act). The husband filed a plea to the counterclaim disputing that his estate had shown a greater accrual. She then launched the present application seeking to amend her counterclaim, inter alia, to the effect that the value of the assets of a trust established during their marriage, should be taken into account in determining his accrual. She contended that he had been in de facto control of its assets since its inception and that the trust was a sham and that he had abused the trust form to acquire personal wealth and failed to keep the trust assets separate from his personal estate.

The husband, in turn, argued that the court was not permitted to exercise discretion to include the trust assets in the accrual as this offended against the wording of ss 3 and 4 of the Act, which excluded trust assets in the calculation of accrual, and would therefore render the counterclaim explicable.

Alkema J held that if the evidence showed that the trust in question was effectively the alter ego of one of the parties, certain or all of the trust assets ought to be included in the estate for determination of the accrual. In piercing the trust veil the court was not exercising discretion under the Act, but a power under the common law. The amendment requested by the wife was accordingly granted.

The court referred with approval to earlier case law (BC v CC and Others 2012 (5) SA 562 (ECP) in which it was held that in cases dealing with the lifting of the trust veil it is unnecessary for a plaintiff to expressly claim or seek an order or a declarator that the trust be set aside; or that all or some of the property owned by the trustees of the trust is facto owned by one or more of the trustees in their personal capacity; or that trust assets be transferred to the personal estate of a trustee; or be deemed to be property in the personal estate of a trustee. If it is proved that a transaction is simulated and shown in the financial records as a trust asset whereas in truth and in fact it is an asset in the personal estate of the trustee, then the court is entitled to treat such asset as an asset in the personal estate of the trustee for purposes of considering accrual.

Because those assets never became trust assets and remained assets in the personal estate of the trustee by virtue of the simulation, it will be wrong in law and in fact to claim the transfer of ‘or to deem’ such assets as assets in the personal estate of the trustee. All that is required is to make an order as claimed by the wife, namely that the value of those assets be taken into account when determining accrual because in law and in fact they are, and always have been, assets in the personal estate of the trustee.

Each case is only concerned with the facts of the transaction under attack in that case. The court is not required to necessarily set aside the entire trust as a simulated deed. It is only required to set aside those transactions which are proven to be simulated. Therefore, the order which a plaintiff (here: the wife) seeks, namely that some or all of the assets in a particular trust be taken into account in determining the claim for accrual, will only apply to assets proven to be the subject of simulated transactions.

Money
Nature of banknotes: The crisp facts which served after Malan JA in Master Currency (Pty) Ltd v Commissioner for the South African Revenue Service 2014 (6) SA 66 (SCA); Master Currency (Pty) Ltd v Commissioner for the South African Revenue Services [2013] 3 All SA 135 (SCA) were as follows. The appellant (the taxpayer) was a bureau de change operator in the duty-free area of what is now known as the Oliver Tambo International Airport. The taxpayer charged no value-added tax (VAT) on the fees and commissions it earned from currency-exchange transactions it concluded with departing non-residents.

The Johannesburg Tax Court upheld the commissioner’s ruling that the taxpayer’s assumption that no VAT was chargeable in duty-free areas was incorrect, and held that VAT at the standard rate applied.

The taxpayer appealed to the Supreme Court of Appeal. Two issues fell to be decided. The first issue concerned the proper construction of the provisions zero-rating services to non-residents in s 11(2)(b) of the Value-Added Tax Act 89 of 1991 (the Act). The taxpayer contended that the services concerned qualified for a zero rating under s 11(2)(ii)(aa) as ‘movable property ... exported to [non-residents]’. The Commission- er, in turn, argued that it was excluded from a zero rating by s 11(2)(iii)(i), having been rendered to a person who was ‘in the Republic at the time the services [were] rendered’.

The second issue concerned the contention (raised by the taxpayer in reply) that because currency was banknotes and therefore movable property, and because the incorporeal rights that attached to the banknotes were situated where it was issued, its services were supplied directly in respect of ... movable property situated in any export country at the time the services [were] rendered’, and were therefore zero-rated in terms of s 11(2)(k).

With regard to the first issue the court held that the word ‘or’ where it appeared after subpara (ii) in s 11(2)(l) could not be read disjunctively. The fact that a service may fall under subpara (ii) (aa) did not mean that it was not covered by subpara (iii). Subparagraphs (i) – (iii) were exceptions to the zero-rated services, in effect services that were standard-rated. No status was conferred on the services referred to in subpara (aa) or (bb); these helped to define the services referred to in the main body of (iii). The taxpayer was not entitled to a zero rating by virtue of s 11(2)(iii)(aa) of the Act.

With regard to the second issue the court held that banknotes used to contain a promise whereby the issuing bank undertook to pay the face value of the note to the bearer. However, these promises to pay to bearer that were contained in some banknotes
could no longer be regarded as promissory notes embodying incorporeal rights against the issuing bank. Banknotes, with or without a promise to pay its face value on demand, could not be regarded as documents that embodied incorporeal rights that were situated, in the case of foreign notes, elsewhere. In any event, modern banknotes no longer contain such a promise. They nevertheless embody personal rights, which are situated in the country where they are issued, that is, the place where the issuing bank resides. The banknotes exchanged by the taxpayer are therefore 'moveable property' situated in 'export countries' at the time the services (that is, the exchange of currencies) are rendered. The taxpayer's services rendered in the duty-free area were subject to VAT at the standard rate and were correctly assessed as being so by the commissioner.

The taxpayer's appeal was dismissed with costs.

OTHER CASES

Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with administrative law, business rescue, champerty, civil procedure, competition law, constitutional law (housing; local government), criminal procedure, damages, injury, labour law, land, legal representation, maintenance, motor-vehicle accidents, revenue, sectional titles and servitudes.

THE LAW REPORTS

December 2014 (6) South African Law Reports (pp 315 – 625); [2014] 4 All South Africa Law Reports November no 1 (pp 279 – 410); and no 2 (pp 411 – 537); 2014 (10) Butterworths Constitutional Law Reports – October (pp 1137 – 1264) and (11) November (pp 1265 – 1395)

This column discusses judgments as and when they are published in the South African Law Reports, the All South African Law Reports and the South African Criminal Law Reports. Readers should note that some reported judgments may have been overruled or overturned on appeal or have an appeal pending against them: Readers should not rely on a judgment discussed here without checking on that possibility – Editor.

Abbreviations:

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
GP: Gauteng Division, Pretoria
KZD: KwaZulu-Natal Local Division, Durban
LCC: Land Claims Court
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Attorneys

Refund of unlawfully charged and retained contingency fee: In Bitter NOobo De Pontes v Ronald Bobroff & Partners Inc 2014 (6) SA 384 (GJ) the first respondent, Ronald Bobroff and Partners Inc (RBP), was a law firm that acted for one Anthony De Pontes (Anthony) in a motor vehicle accident claim against the second respondent, the Road Accident Fund (RAF). The claim was settled in a capital amount of some R 6 million. Thereafter RBP made certain payments to Anthony but retained an amount of R 2,1 million, which was 30% of the capital amount paid by the RAF. The amount was retained as security for RBP's attorney and own client costs as per a common-law contingency fee agreement concluded between the parties. It was retained notwithstanding the fact that RBP had in the meantime received from the RAF a further payment of some R 260 000 for costs and disbursements that included some R 83 000 for taxed party and party fees, about R 8 000 for correspondent attorney's fees and a further R 169 000 for disbursements relating to expert reports and counsel's fees. The applicant Bitter, who was Anthony's curator ad litem, instituted proceedings for payment of the R 2,1 million to Anthony's new attorneys, there to be held in trust until RBP's fully itemised attorney and client bill of costs, reflecting reasonable attorney and client fees and disbursements, was settled by agreement or taxed by the taxing master. The order was granted with costs on attorney and client scale as a mark of disapproval of the conduct of the first respondent.

Mayat J held that in the absence of a lawful agreement relating to contingency fees within the parameters of the Contingency Fees Act 66 of 1997 (the Act), and the alleged common-law contingency fee agreement between the parties not falling within the parameters of the Act, the first respondent was only lawfully entitled to fair and reasonable costs for work actually done. Furthermore, in the absence of a lawful agreement, the first respondent's entitlement to a fair and reasonable fee for services actually rendered could only be determined on the basis of an attorney and client bill of costs taxed by the taxing master. Accordingly, there was no legal basis for the first respondent to retain the sum of R 2,1 million as it did, particularly since the attorney and own client costs in the instant case would in all likelihood constitute a small fraction of that amount. More importantly, there was no prejudice to the first respondent if such money was paid to the trust account of the applicant's attorneys pending agreement or taxation of the bill of costs, which was to be submitted.

Companies

Effect of restoration of registration on prospecting or mining rights that lapsed on deregistration of a company:
Section 56(c) of the Mineral and Petroleum Resources Development Act 28 of 2003 (the MPRDA) provides among others that '[a]ny right, permit, permission or licence granted or issued in terms of this Act shall lapse, whenever and for whatever reason a company or close corporation is deregistered in terms of the relevant Acts and no application has been made or was made to the minister for the consent in terms of section 11 or such permission has been refused; ...'. Section 11 deals, among others, with cession, letting, subletting, disposal, assignment and alienation of a prospecting or mining right, which can be done only with the consent of the Minister. In *Palala Resources (Pty) Ltd v Minister of Mineral Resources and Energy and Others* 2014 (6) SA 403 (GP) the applicant company, Palala Resources, was deregistered in July 2010, at which stage the prospecting right that it held over a farm in Malamulele area in Limpopo Province, lapsed. Two months later, in September 2010, registration of the company was restored and as a result it contended that the prospecting right that it held before deregistration, had been revived. As a back-up position, the company also applied for renewal of the prospecting right. The Acting Director-General of the Department of Mineral Resources and Energy accepted the application for renewal of the prospecting right, which decision was overturned by the first respondent, the Minister. The applicant applied for review and setting aside of the Minister’s decision, which application was dismissed with costs.

Keightley AJ held that generally the legal personality of a company that was lost by its deregistration was revived retrospectively. That meant that, in general terms, as regards its rights and obligations, the company would on restoration reassume them as if they had not been lost in the first place. However, the intended meaning and effect of s 56(c) of the MPRDA was different in that mining and prospecting rights held by companies which were deregistered lapsed, meaning that they became void or legally invalid, unless, prior to the deregistration, the company applied for the Minister’s written consent to cede or otherwise dispose of the right. However, before the minister expressly provided for a s 11 application to act as an exception to a right lapsing on deregistration, coupled with the fact that restoration of registration was not identified as an exception, it was a strong indication that the legislature intended that only in the case of a s 11 application, and no other, would a mining or prospecting right be protected from becoming void on deregistration. It was important to appreciate that what the deeming provision in s 73(6A) of the applicable Commonwealth Act of 1973 did was to revive legal personality of the company. The deeming provision of the section did not revive rights that had lost their legal validity and had become void. Thus, while the effect of the provision was to reinvest in the company the rights and assets it previously held, that only applied insofar as those rights and assets which still existed. The deeming provision could not have the effect of giving life to rights that, because they had lapsed, were legally dead. For that reason the applicant’s contention that the effect of the deeming provision in s 73(6A) was retrospectively to revive a prospecting right that had lapsed by operation of s 56(c) was misdirected and could not be upheld.

**Delict**

**Abolition of action for adultery:** In *RH v DE* 2014 (6) SA 436 (SCA) the respondent husband, DE, and Ms E were married to each other. A few years down the line a breakdown of the marriage took place and as a result Ms E left the matrimonial home never to return. In the event the respondent, citing breakdown of the marriage, sued for divorce, which was granted. However, before the marriage was dissolved Ms E had an adulterous affair with the appellant RH. For that reason the respondent sued the appellant for damages due to the commission of adultery, claiming compensation under headings *contumelia* (insult or injury to self-esteem) and loss of consortium (loss of comfort and company of spouse). In the GP, Vorster AJ awarded the respondent damages in a composite amount of R 75 000 covering both headings. An appeal against that judgment was upheld with costs.

Brand JA (Cachalia, Tshiqi, Majiedt and Mbha JJA concurring) held that a history of the delictual action for adultery revealed its archaic origin. On the one hand it stemmed from the concept peculiar to old English law in terms of which the husband had some proprietary interest in the person and ‘services’ of his wife. According to some earlier judgments, on the other hand, the action was influenced by the biblical notion received from canon law that both husband and wife in a marriage were entitled to the sole use of each other’s body. When those archaic notions were exposed by the changing norms of society, the law started looking for a new *raison d’être*. However, the time had come for South African law to recognise, in harmony with most other legal systems, that in the light of changing mores, those reasons advanced for the continued existence of the action had now also lost their persuasive force. What was more, even if the action still performed some legitimate function, that notional advantage would be outweighed by the hurt and damage that the action too often brought about. Accordingly, in the light of changing mores of the society the delictual action of the innocent spouse based on adultery had become outdated and could no longer be sustained. Consequently, the time for its abolition had come, this meaning that the action derived from the *actio injuriarum* and based on adultery, which afforded the innocent spouse a claim for both *contumelia* and loss of consortium was no longer wrongful in the sense that it attracted liability and was...
Fundamental rights

Right to dignity, privacy, freedom and security of person:

In an earlier case of the City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another 2012 (2) SA 104 (CC), the CC ordered the city of Johannesburg (the City) to provide temporary accommodation to persons who had been evicted from private property. That process, which was supposed to last six months and could be extended to 12 months, took too long as some three years down the line the City was still working on a temporary accommodation policy. That led to the present case of Dladla and Others v City of Johannesburg and Another 2014 (6) SA 516 (GP); Dladla and Others v City of Johannesburg Metropolitan Municipality and Another 2014 (4) All SA 51 (GP) where, because of the delay in finalising temporary accommodation policy, the City accommodated the evicted persons in a totally different accommodation arrangement, namely, an overnight accommodation facility run by the second respondent, Metropolitan Evangelical Services, a not for profit organisation. The rules and policy of the second respondent, which the first respondent City approved of, provided that residents of the overnight accommodation facility shelter would vacate during the day, during which time the gate would be locked, and come back in the evening. Moreover, when there spouses or permanent life partners were not allowed to live together. The applicants, Dladla and Others, approached the High Court for an order declaring that the shelter rules and policy violated their fundamental rights to dignity, freedom, privacy and security of person and that the respondent should be interdicted and restrained from implementing them. The order sought was granted with costs.

Wepener J held that the rules and limited gender separation policy of the respondents had humiliating consequences. They compromised and disrupted the family as a unit and created emotional distance in a relationship. The inability of spouses and partners to live as a family represented a loss to them of one another and created an additional financial burden on the couple’s limited financial resources. The most basic associational privileges connected to a marriage or permanent relationship were denied to the couples. The splitting-up of families at the overnight accommodation shelter cut to the very heart of the right to dignity and family life. As a result the applicants were entitled to a declaration that the splitting-up of families by gender at the shelter was in violation of s 10 (human dignity), s 12 (freedom and security of persons) and s 14 (privacy) of the Constitution.

In the absence of any legislative provision there could be no justified limitation of the right of spouses, and life partners, to cohabite. Any infringement of that right was an infringement of the right to dignity and was therefore unconstitutional. The daily lockout rule also violated the residents’ right to privacy and dignity and resulted in residents being exposed to dangers inherent in street life while it also inhibited their freedom in material respects. That infringed residents’ right to freedom, security and dignity.

Lease

Cancellation of lease: In Malan v City of Cape Town 2014 (6) SA 315 (CC); Malan v City of Cape Town 2014 (11) BCLR 1265 (CC) the appellant, Malan, was a 74-year-old widow who received social grant and lived in public rental housing in respect of which she paid nominal rental. The owner of the property, the City of Cape Town, cancelled the lease after allegations of breach thereof and thereafter obtained a High Court order evicting her from the premises. It was alleged that she fell in arrear with payment of rent and that illegal activity, in the form of drug trafficking and possession of illegal ammunition, took place on the premises. Such activities were allegedly carried out by the applicant’s son and daughter as well as third parties. The WCC held per Dolamo J that the respondent was justified in seeking the applicant’s eviction. The CC granted the applicant leave to appeal but dismissed the appeal with no costs as the case raised no costs as the case raised.

The majority judgment was read by Majiedt AJ while Madlanga JJ concurring and Zondo J delivered separate dissenting judgments. The court held that the respondent had lawfully and validly cancelled the lease agreement on the ground of illegal activities that took place on the property. The applicant was well aware of illegal activity that was taking place there and at no stage did she ever that she could not control the prohibited conduct. The letter delivered to her giving notice of cancellation of the lease enabled her, if she was so minded, to protest the allegation that illegal activities were taking place on the property and, if such were admitted, to take steps to bring such activities to an end. She did neither. In the face of bare, unsubstantiated denial and continuation of illegal activities beyond the date of notice of cancellation, the unavoidable conclusion was that the applicant had failed to remedy breach of the lease agreement.

Medical negligence

Negligence: In Sibisi NO v Maitin 2014 (6) SA 533 (SCA) the appellant, Mrs Sibisi, sued the respondent, Dr Maitin, for injury suffered by her baby, Y, during birth. As a result of the injury the baby became permanently paralysed in the shoulder and arm. This was due to the size of the baby at birth, it being 4,68 kg. It was alleged that the respondent had acted negligently by not establishing the weight of the baby with the result that it got stuck in the pelvis area during birth at which stage it suffered permanent shoulder paralysis and also because of the forceful manoeuvre (McRoberts manoeuvre) used to extract it. The appellant argued that in the circumstances of the case a Caesarean section should have been resorted to instead of natural birth. At the trial the parties agreed on a separation of merits from the quantum with the result that the action proceeded on merits only, the issue of quantum being postponed. The KZD (per Penzhorn AJ) dismissed the claim for lack of negligence on the part of the respondent. An appeal to the SCA was dismissed with costs.

Lewis JA (Ponnan, Pillay JJA, Dambuza and Mathopo JJA concurring) held that foetal size was not a good predictor of shoulder dystocia (difficult childbirth). Therefore, there was no reason why the respondent would have foreseen that the baby would present with shoulder dystocia. Medical literature on the subject was clear that unless the mother was diabetic or had history of problems with shoulder dystocia a Caesarean section was not advisable. Due to risks inherent in the Caesarean section, including causing septicaemia (infection) and possible death of the mother, which was very real, the suggestion that in all cases of shoulder dystocia a Caesarean section should be performed could...
not be accepted. Therefore, there was no mismanagement on the part of the respondent of the appellant's labour and certainly no negligence. A reasonable obstetrician in the respondent's position would not have foreseen the possibility of shoulder dystocia and would have proceeded on the same basis as the respondent did. The appellant bore the onus of showing that an obstetrician with reasonable skill and diligence possessed by that branch of the profession would have foreseen the possibility of shoulder dystocia and taken steps to mitigate the risk. The appellant did not discharge that onus.

Nuisance

Liability for loss of livestock caused by spread of disease: In Oosthuizen v Van Heerden t/a Bush Africa Safaris 2014 (6) SA 423 (GP) the appellant, Oosthuizen, and the respondent, Van Heerden, were carrying on farming activities on neighbouring farms in Ellisras (now Lephalale) in Limpopo Province. The appellant kept cattle while the respondent kept blue wildebeest (wild animals). After the appellant lost six head of cattle due to 'snotsiekte' (bovine malignant catarrhal fever) it was common cause that the source was the wildebeest. The problem was that another farmer on a neighbouring farm, Van Vuuren, also kept blue wildebeest. It was, therefore, not known which wildebeest caused the spread of the disease. As Van Vuuren's farm was a little further away the appellant chose to leave him alone. The magistrate dismissed the appellant's claim against the respondent for failure to prove the cause of the disease and the quantum of damages. An appeal to the Gauteng Division, Pretoria was dismissed with costs.

Keightley AJ (Louw J concurring) held that the magistrate was correct on the causation finding. The court did not have to decide on the quantum issue as the appeal failed on two other grounds, namely negligence and wrongfulness. It was held that while it could not be gainsaid and it was common cause that blue wildebeest carried 'snotsiekte' virus, that in itself was insufficient to establish negligence on the part of the respondent. The risk of the cattle contracting 'snotsiekte' from the respondent’s blue wildebeest was very low. It could not per se be negligent for game farmers to keep blue wildebeest. Given the low risk of infection and the high cost of erecting a game fence, it was hardly credible to suggest that the respondent was negligent in failing to erect such fence. Whether a particular defendant or respondent acted wrongfully or negligently in keeping blue wildebeest in proximity to cattle-farming activities depended very much on the particular facts to hand. The mere fact that wildebeest were known to be carriers of the 'snotsiekte' virus did not mean that the appellant's right to reasonable use of his farm trumped the concomitant right of the respondent. Reasonable use of property between neighbours with competing interests necessarily involved a 'give-and-take' on both sides. In the instant case parties could have discussed measures to accommodate both of their farming requirements but that was not done. The assumption of the appellant that if his cattle contracted the disease the law would hold the respondent liable for loss was misplaced.

Restitution of land rights

Determination of equitable compensation: In the case of Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC); Florence v Government of the Republic of South Africa 2014 (10) BCLR 1137 (CC) in 1957 the Florence brothers bought property in Rondebosch, Cape Town on which they had lived for some years. Payment was in instalments all of which were duly paid. However, the buyers could not take transfer of the property because of the Group Areas Act 77 of 1957, which classified the area as 'white group area' and accordingly disqualified them from becoming owners. As a result in 1970 the parties agreed to cancel the contract

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and an amount of R 1 350 was returned to the buyers. In 1995 a land restitution claim was instituted against the property. As subsequent development had taken place the claimant, a member of the Florence family who also claimed on behalf of the other brothers, did not seek restitution of the property. Instead, equitable redress in the form of financial compensation was sought together with erection of a memorial plaque. The claimant and owner of the property agreed that a memorial plaque would be erected on the property. Thereafter the Florence family approached the Land Claims Court (LCC) for determination of their claim, just and equitable compensation and costs of erecting the memorial plaque.

The LCC held that the market value of the property at the time of its loss in 1970 was R 31 778 plus the agreed removal cost of R 85 from which had to be deducted the refunded R 1 350 which the Florence family received at the time. Therefore the difference was R 30 513 which the family did not receive. Using the consumer price index (CPI) the R 30 513, loss suffered in 1970 was converted into the present value of R 1 498 890 which was awarded as equitable redress. The court rejected the claim that equitable redress had to be achieved using a 32-day-deposit rate-investment yield or capital-gain metric. Doing so, it was held, would result in overcompensation and thus not be equitable. The court also rejected the claim for the costs of erecting a memorial plaque, holding that the Restitution of Land Rights Act 22 of 1995 (the Restitution Act) did not give it the power to do so. On appeal to the SCA the CPI conversion rate of the LCC was confirmed. However, the appeal succeeded on the costs of erecting memorial plaque which the respondent, the government, was ordered to pay.

On further appeal to the CC the CPI conversion rate of the claim was confirmed. The cross-appeal against the costs of erecting the memorial plaque order of the SCA was upheld. No order was made as to costs. The majority judgment was read by Moseneke ACJ while Van der Westhuizen J and Zondo J read separate dissenting judgments. Khampepe J concurred in the judgment of Moseneke ACJ in the main appeal (CIP conversion rate) and that of Van der Westhuizen J in the cross-appeal (costs of memorial plaque).

Moseneke ACJ held that Parliament had adopted a conversion mechanism that was meant to ensure that compensation sounding in money should reflect changes in the value of past monetary loss. The claim against the state for equitable redress was not a civil debt. Neither was it punitive nor retributive. It was not to be likened to a delictual claim aimed at awarding damages that were capable of precise computation of loss on a 'but-for' basis. It was a constitutional scheme paid out of public funds in order to find equitable redress to a tragic past. Therefore, the LCC was correct in calculating the financial loss at the time of the dispossession and for the purpose of placing the Florence family in the same position they would have been immediately after the dispossession. The Restitution Act did not warrant an approach that fixed compensation, as if the loss never occurred. Nor did it warrant awarding a full replacement value of the property. Just and equitable financial compensation did not aim to restore claimants in current monetary terms to the position they would have been in had they not been dispossessed but rather the financial loss they incurred at the time of dispossession.

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OTHER CASES

Apart from the cases and material dealt with or referred to above, the material under review also contained cases dealing with access to information, application for leave to appeal not suspending operation of business rescue order, appointment of judges, approval of building plans, business rescue, claim for constitutional damages, Constitutional Court decision binding on SCA even if wrong, consumer credit agreements, deduction of foster child grant from loss of support claim, detention of illegal immigrants, disciplinary action against soldiers, distribution of free residue in insolvent estate, discovery and inspection of documents, duty of court to investigate matters of concern in proceedings, duty to keep information secret, examination of persons in insolvency inquiry, infringement of patent, irregular finding of fraud against attorney, removal of outdoor advertising signs, special votes cast in by-elections, threshold requirements for winding-up of company and unconstitutionality of detention of mentally impaired accused for indefinite period.
n Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another (SCA) (unreported case no 725/13, 21-11-2014) (Cachalia JA) the Supreme Court of Appeal (SCA) ruled that a contract between two Durban businesses was lawfully cancelled through e-mails they sent each other. The judgment has set a precedent in the validity of the cancellation of a written agreement via e-mail.

Background

The appellant, Spring Forest Trading 599 CC (Spring Forest) and respondent, Wilberry (Pty) Ltd (Wilberry) entered into several agreements in which Spring Forest leased ‘mobile dispensing units’ (MDU’s) from Wilberry which Spring Forest required for use in its mobile car wash business. The agreement contained a non-variation clause providing that no variation or consensual cancellation would be effective unless reduced to writing and signed by both parties.

However, Spring Forest was unable to meet its rental obligations in terms of the agreement and, following negotiations, verbally agreed to cancel the agreements. The terms of the cancellation, namely the payment of the arrear rental owed by Spring Forest and the return of the machinery to Wilberry, were recorded in e-mails between Nigel Keirby-Smith, Gregory Hamilton and Walter Burger, the representatives of Wilberry and Spring Forest with the names of the parties appearing at the foot of their e-mails.

The appeal concerned a series of e-mails purporting to consensually cancel written agreements between the parties. The agreements required any ‘consensual cancellation’ to be in writing and signed by them. The Electronic Communications and Transactions Act 25 of 2002 (the Act) gives legal recognition to transactions concluded electronically by e-mail. The dispute between the parties required the Supreme Court of Appeal (SCA) to consider whether their exchange of e-mails met the writing and signature requirements of the Act thereby constituting a consensual cancellation.

Mr Hamilton sent an e-mail to Mr Keirby-Smith at 11:44 am confirming the proposals. It read:

‘Hi Nigel,

Thanks for meeting with Walter and I today, I would like to clarify the options that you mentioned to us today.

1/ Pay a cash amount of R1 600 000.00 for the balance of 2 years.
2/ Cancel agreement and walk away.
3/ Carry on operating but we would end up in court.
4/ Pay R1 000.00 per month for 5 years with 15% escalation.

Please confirm the above then we will advise tomorrow.

Kind Regards

Greg.’

At 11:56 am, Mr Hamilton sent a further e-mail to Mr Keirby-Smith:

‘Hi Nigel,

[Further to my previous mail, to clarify point 2. Please confirm that should we elect this option to walk away, there will be no further claim or legal action from either side.

Kind Regards

Greg.’

At 12:18 pm, Mr Keirby-Smith replied:

‘Hi Greg,

That is correct subject to my last reply, Nigel.’

The ‘last reply’ referred to in the e-mail was sent from Mr Keirby-Smith’s address at 12:05 pm and it read:

‘All arrear rental due at the date of handover will be due.

Henry Wilkinson
Chief Executive Officer.’

At 4:02 pm, Mr Hamilton sent the final e-mail which read:

‘Dear Henry and Nigel,

[As per our discussion this morning and follow up emails, we thank you for the 4 options offered to us. We confirm that we accept your second offer where by we will return all equipment leased to us and that there shall be no further legal recourse from either party. We would like all equipment picked up on or before 28 February 2013 so that we do not incur further lease costs for the following month.

Kind Regards

Greg.]’

Spring Forest, paid the arrear rentals. However, it continued operating its car washing business at the locations covered by the rental agreements. It says it was entitled to do this as both the master and rental agreements between it and the respondent had been cancelled. Spring Forest then entered into an agreement with another entity to conduct the same business. In response, Wilberry applied for an interdict preventing Spring Forest from conducting its business. The respondent denied that the agreements were validly cancelled. It therefore sought and was granted interdictory relief to protect its proprietary rights in its MDU’s pending the institution of an action for breach of the agreements. The High Court found that the e-mail communication did not evince an intention to cancel the agreements, but merely recorded the inconclusive negotiations between the parties. And, that in any event, the parties had not specified that their agreements could be cancelled by the exchange of e-mails.

It thus held that the Act did not apply to the e-mails and that the appellant’s purported cancellation of the agreements was in conflict with the terms of their written agreements, and therefore invalid. The interdict was granted by the Durban High Court. Spring Forest thereafter lodged an appeal to the SCA.

The respondent disputed the appellant’s argument. It contended that the e-mail exchange was merely a negotiation between the parties regarding the appellant’s breaches and did not amount to a consensual cancellation of the agreements, a contention that the High Court upheld. At best for the appellant, says the respondent, the e-mails refer only to the rental agreements, not the master agreement. However, if they do evince a cancellation of both the master and the rental agreements, the e-mails did not comply with s 13(1) of the Act. This is because the section requires an ‘advanced electronic signature’ to be used on an e-mail when a signature is required by law – as specified by the non-variation clause in this case – and no such signature appears on the e-mails. In addition, the respondent argued that s 13(3) relied on by the appellant to bring the e-mails within the ambit of the Act does not apply because: ‘First, it contends that the e-mails do not and cannot constitute a separate electronic transaction because they pertain to the oral negotiations about the written agreements. Secondly, even if they do constitute a separate electronic transaction, the parties did not require an electronic signature as envisaged in the section; and finally, there was no reliable method used whereby the parties were identified and indicated their approval of the information communicated in the emails.’

On appeal, the SCA stated that it was not in dispute that the e-mails between the parties fulfilled the requirement that the cancellation of the agreements must be ‘in writing’. This was because,
in terms of s 12(a) of the Act, a legal requirement for an agreement to be in writing is satisfied if it is in the form of data messages and that it was common ground that the e-mails between the parties was governed by the Act.

The SCA held that the real issue in this case was whether the names of the parties at the foot of their respective e-mails constituted signatures as contemplated by ss 13(1) and (3) of the Act. Section 13 reads as follows:

'(1) Where the signature of a person is required by law and such law does not specify the type of signature, that requirement is met only if an advanced electronic signature is used.

(2) ...

(3) Where an electronic signature is required by the parties to an electronic transaction and the parties have not agreed on the type of electronic signature to be used, that requirement is met in relation to a data message if –

(a) a method is used to identify the person and to indicate the person’s approval of the information communicated; and

(b) having regard to all the relevant circumstances at the time the method was used, the method was as reliable as was appropriate for the purposes for which the information was communicated.'

The court held that s 13(1) did not apply in the circumstances of this case, and on the face of it, s 13(3) did.

The SCA pointed out that s 13 of the Act makes a distinction between a situation where the law requires a signature and where the parties between themselves agree on the added formality of a signature. Where a signature is required by law and the law does not specify the type of signature to be used, s 13(1) says that this requirement is met only if an ‘advanced electronic signature’ is used. Where, however, the parties to an electronic transaction require this but they have not specified the type of electronic signature to be used, the requirement is met if a method is used to identify the person and to indicate the person’s approval of the information communicated (s 13(3)(a)); and having regard to the circumstances when the method was used, it was appropriately reliable for the purpose for which the information was communicated (s 13(3)(b)). Section 13(1) of the Act requires an ‘advanced electronic signature’ whereas in the latter instance only an ‘electronic signature’ is required.

The SCA rejected Wilberry’s contention that in this case an ‘advanced electronic signature’ was required as the requirement was agreed between the parties and it could not be argued that the parties were involved in a business where an ‘advanced electronic signature’ was necessary.

The SCA analysed s 13(3) of the Act. Justice Cachalia said: ‘The respondent submits that the phrase: “Where the signature of a person is required by law” (emphasis added) in s 13(1) it should be interpreted not only to include formalities required by statute but must also incorporate instances where parties to an agreement impose their own formalities on a contract, as in this case. And, so the contention goes, because the parties required their signatures for the contracts to be cancelled the requirement could only be satisfied by the use of an advanced electronic signature as contemplated in s 13(1), which did not occur in this case.’

Conclusion

The court held that the approach of the courts to signatures in general has been pragmatic and not overly formalistic. It said that the courts look to whether the method of the signature used fulfils the function of a signature – to authenticate the identity of the signatory rather than insist on the form of the signature used.

The judgment cited a case where the courts have accepted any mark made by a person attesting to a document. ‘In the days before electronic communication, the courts were willing to accept any mark made by a person for the purpose of attesting a document, or identifying it as his act, to be a valid signature. They went even further and accepted a mark made by a magistrate for a witness, whose participation went only as far as symbolically touching the magistrate’s pen’ (para 25).

In the Act, an electronic signature is defined as ‘data attached to, incorporated in, or logically associated with other data and which is intended by the user to serve as a signature’. The court held that the typed written names of the parties at the foot of the e-mails were intended to identify the parties, constituted data that was logically associated with the data in the body of the e-mails and therefore constituted an electronic signature. The SCA found that ‘there is no dispute regarding the reliability of the e-mails, the accuracy of the information communicated or the identities of the persons who appended their names to the e-mails. On the contrary, as I have found earlier, the e-mails clearly and unambiguously evinced an intention by the parties to cancel their agreements. It ill-behoves the respondent, which responded to clear questions by e-mail itself, to now rely on the non-variation clauses to escape the consequences of its commitments made at the meeting on 25 February 2013 which were later confirmed by e-mail.’ Accordingly, the SCA found that the cancellation of the agreements was valid and the appeal of Spring Forest was upheld.

Shortly after this judgment was handed down, social media was abuzz with users questioning whether a court would show the same comfort to an agreement cancelled on social media such as via a Tweet or a Facebook status update.

Nomfundo Manyathi-Jele is the news editor at De Rebus.
NEW LEGISLATION

Legislation published from 31 October – 19 December 2014

BILLS INTRODUCED

Children’s Amendment Draft Bill PMB3 of 2014.
Banks Amendment Bill B17 of 2014.
Criminal Procedure Amendment Act 65 of 2014.
Maintenance Amendment Bill B16 of 2014.
Auditing Profession Amendment Bill B15 of 2014.

PROMULGATION OF ACTS

Defence Act 42 of 2002.

NEW LEGISLATION


Agricultural Product Standards Act 119 of 1990
Regulations relating to the grading, packing and marking of rice intended for sale in the Republic of South Africa. GN R864 GG38159/7-11-2014.
Regulations relating to the control of export of grains. GN R1026 GG38320/19-12-2014.
Service fee in respect of abattoirs that participate in the classification and marking of meat. GenN1112 GG38290/12-12-2014.
Regulations regarding control of the export of feed products. GN R1030 GG38320/19-12-2014.
Regulations regarding control of the export of fresh vegetables. GN R1031 GG38320/19-12-2014.
Amendment of standards and requirements regarding control of the export of lesser known types of maize. GenN1149 GG38319/19-12-2014.

Allied Health Professions Act 63 of 1982
Rules: Use of professional titles. BN130 GG38128/31-10-2014.

Animal Diseases Act 35 of 1984
Amendment of the Animal Diseases Regulations. GN R865 GG38159/7-11-2014.

Auditing Profession Act 26 of 2005
Adoption of international quality control, auditing, review, other assurance and related services pronouncements. BN143 GG38263/5-12-2014.

Basic Conditions of Employment Act 75 of 1997
Amendment of Sectoral Determination 7: Domestic Worker Sector, South Africa.

BILLS INTRODUCED

Children’s Amendment Draft Bill PMB3 of 2014.
Banks Amendment Bill B17 of 2014.
Criminal Procedure Amendment Act 65 of 2014.
Maintenance Amendment Bill B16 of 2014.
Auditing Profession Amendment Bill B15 of 2014.

PROMULGATION OF ACTS

Rental Housing Amendment Act 35 of 2014. Commencement: To be proclaimed. GN876 GG38184/5-11-2014.
Legal Aid South Africa Act 39 of 2013. Commencement: To be proclaimed. GN1013 GG38315/9-12-2014.

COMMENCEMENT OF ACTS


SELECTED LIST OF DELEGATED LEGISLATION

Administration of Estates Act 66 of 1965

Agricultural Product Standards Act 119 of 1990
Regulations relating to the grading, packing and marking of rice intended for sale in the Republic of South Africa. GN R864 GG38159/7-11-2014.
Regulations relating to the control of export of grains. GN R1026 GG38320/19-12-2014.
Service fee in respect of abattoirs that participate in the classification and marking of meat. GenN1112 GG38290/12-12-2014.
Regulations regarding control of the export of feed products. GN R1030 GG38320/19-12-2014.
Regulations regarding control of the export of fresh vegetables. GN R1031 GG38320/19-12-2014.
Amendment of standards and requirements regarding control of the export of lesser known types of maize. GenN1149 GG38319/19-12-2014.

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Adoption of international quality control, auditing, review, other assurance and related services pronouncements. BN143 GG38263/5-12-2014.

Basic Conditions of Employment Act 75 of 1997
Amendment of Sectoral Determination 7: Domestic Worker Sector, South Africa.

Philip Stoop BCom LLM (UP) LLD (Unisa) is an associate professor in the department of mercantile law at Unisa.
Amendment of Regulations: Defining scope of profession of environmental health officers. GN R986 GG38289/3-12-2014.

Income Tax Act 58 of 1962

Intestate Succession Act 81 of 1987
Fixing of amount for purposes of s 1(1)(c)(i). GN R921 GG38238/24-11-2014

Labour Relations Act 66 of 1995
(i). GN R921

Local limits (borders) of certain districts. GG

Mine Health and Safety Act 17 of 2002
General Regulations relating to the Mental Health Care Act. GN R874 GG38182/6-11-2014.

National Health and Safety Act 29 of 1996
Regulations relating to rescue, first aid, emergency preparedness and response. GN R906 GG38218/21-11-2014.

National Council of Societies for the Prevention of Cruelty to Animals
Amendment of Rules. BN140 GG38232/28-11-2014.

National Environmental Management Act 107 of 1998
Regulations relating to the procedure to be followed when oral requests are made in terms of s 30A, GN108 GG38253/26-11-2014.

National Appeal Regulations. GN R993 GG38303/8-12-2014.

National Exemptions Regulations. GN R994 GG38303/8-12-2014.

National Forests Act 84 of 1998

National Regulator for Compulsory Specifications Act 5 of 2008

Amendment to the Compulsory Specification for Electrical and Electronic Apparatus (VC 8055). GN835 GG38138/31-10-2014.


National Road Traffic Act 93 of 1996
Amendment of the National Road Traffic Regulations. GN R846 GG38142/31-10-2014.

Plant Breeders’ Rights Act 15 of 1976
Amendment of regulations relating to plant breeders’ rights. GN R1027 GG38320/19-12-2014.

Project and Construction Management Professions Act 48 of 2000
Annual fees. BN148 GG38295/4-12-2014 and BN155 GG38333/12-12-2014.

Registration policy and procedures. BN149 GG38295/3-12-2014.

Promotion of National Unity and Reconciliation Act 34 of 1995
Regulations relating to assistance to victims in respect of Higher Education and Training. GN R852 GG38157/3-11-2014.

Refugees Act 130 of 1998
First Amendment of the Refugees Regulations (forms and procedures). GN R877 GG38186/7-11-2014.

Road Accident Fund Act 56 of 1996
Adjustment of statutory limit in respect of claims for loss of income and loss of support. BN133 GG38128/31-10-2014.

Rules for transfer or disposal of social housing stock funded with public funds. GenN106 GG38283/3-12-2014.

Social Service Professions Act 110 of 1978
Rules relating to acts or omissions which constitute unprofessional or improper conduct of child and youth care workers and rules relating to conduct of child and youth care workers in practising at professional and auxiliary levels. GN833 GG38128/31-10-2014.


South African Schools Act 84 of 1996
Determination of minimum outcomes and standards and a national process and procedures for the assessment of learner achievement as stipulated in the policy document, National Policy pertaining to the programme and promotion requirements of the National Curriculum Statement Grades R–12. GN915 GG38226/19-11-2014.

Draft legislation
Proposed amendment of alternative dispute resolution regulations in terms of the Electronic Communications and
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Employment law update

Reinstatement in Constructive Dismissal Cases

In Western Cape Education Department v General Public Service Sectoral Bargaining Council and Others (2014) 10 BCLR 987 (LAC) the respondent employee, Mr Gordon, suffered from prolonged ill health after he suffered a heart attack. He accordingly applied for ill health retirement and temporary incapacity leave. His application form was handed to his senior manager, Mr Elliott, who undertook to attend to the application personally and to ensure that the form was signed by two witnesses. A few months later, Mr Gordon was informed by the employer, the department, that his application had not been processed as there had been a technical error in that it was not signed by two witnesses. He was informed by the department that he was required to report for duty, failing which he would be dismissed for abscondment. He was further informed by the department that his absence over the past two years would be regarded as unpaid leave and that in order for the department to recover the amount that had already been paid to him in respect of his salary during his period of absence, an amount of R 753 352,02, monthly instalments of R 12 000 each would be deducted from his salary. This was a deduction of roughly 80% of Mr Gordon’s monthly salary.

Mr Gordon then lodged a grievance and on receiving no response to the grievance, he resigned. A meeting was then convened between Mr Gordon and the department during which he was given the option to proceed with the resignation or to retract it and continue with his application for ill health retirement. He was also informed that the head of the department would be approached about the decision to regard his absence as leave without pay and the resultant deductions. Being under the impression that his grievance and concerns would be seriously considered by the head of department, Mr Gordon retracted his resignation. However, at the end of that month a further R 12 000 was deducted from his salary and he still heard nothing about the outcome of his grievance. Another grievance meeting was convened and when nothing further happened for another month, he resigned and referred a constructive dismissal dispute to the bargaining council.

The bargaining council found that the dismissal was unfair and ordered reinstatement. On review, the Labour Court per Steenkamp J, held that while it was unusual for an employee to seek reinstatement in a constructive dismissal claim, reinstatement was nevertheless an appropriate remedy in these circumstances.

The matter was then taken on appeal to the Labour Appeal Court (the LAC). The LAC found that these deductions were significant and were sufficient to render Mr Gordon’s employment intolerable, especially in light of the department’s apathy in resolving his issues. This was further compounded by the fact that the department had been careless in ensuring that Mr Gordon’s application be processed. Had Mr Elliott procured the signature of two witnesses as he undertook to do, the application would have been processed and Mr Gordon would not have found himself in a situation where he had to repay the amounts that had been paid to him over a period of two years. Thus, the LAC held that Mr Gordon had discharged the onus of proving that his employment was rendered intolerable. As regards Mr Gordon’s contention that he was constructively dismissed, the LAC (per Molemela AJA, Davis JA and Sutherland AJA) found that in determining whether or not an employer made continued employment intolerable, the employer’s conduct has to be considered as a whole.

Furthermore, the requirement is not that the employee must have no other choice but to resign but only that the employer made continued employment intolerable. In this case, the senior managers in the department had frustrated Mr Gordon’s application process for ill health retirement and had had no regard for the fact that he had been suffering from anxiety and post-traumatic stress disorder. The department had also reached a decision to treat his period of absence as unpaid and had insisted on making unreasonable deductions from his salary. In terms of s 38 of the Public Service Act 103 of 1994 an employer is permitted to recover amounts from employees where there has been an over-payment but these deductions must be reasonable. The LAC concluded that a deduction of 80% of an employee’s salary was not reasonable. Furthermore, the department did not seriously consider Mr Gordon’s grievance and had continued to make deductions from his salary despite his request that a moratorium be placed on the deductions pending the outcome of his temporary incapacity application. The LAC found that these deductions were significant and were sufficient to render Mr Gordon’s employment intolerable, especially in light of the department’s apathy in resolving his issues. This was further compounded by the fact that the department had been careless in ensuring that Mr Gordon’s application be processed. Had Mr Elliott procured the signature of two witnesses as he undertook to do, the application would have been processed and Mr Gordon would not have found himself in a situation where he had to repay the amounts that had been paid to him over a period of two years. Thus, the LAC held that Mr Gordon had discharged the onus of proving that his employment was rendered intolerable.

The LAC considered the fact that Mr Gordon was seeking reinstatement but found that this did not defeat his claim.
that he had been constructively dismissed. This was because he was seeking reinstatement more than two years after the termination of his employment and work environments change. Thus, the fact that Mr Gordon sought reinstatement did not mean that the circumstances had not been intolerable at the time that he resigned. In this regard, Mr Gordon argued that the work environment would be different if he were to be reinstated as he would not be subject to deductions or if he was required to repay the amount, the deductions would be reasonable. He also had reason to believe that the matter would be handled better as the department had implemented better procedures. Furthermore, Mr Gordon had recovered psychologically since his constructive dismissal.

would rather discuss what could happen when an employer becomes alive to the fact that an employee has been dishonest when applying for a position he or she is employed for. I feel it necessary to stress that I am not insinuating that you were dishonest in any manner, or that your dismissal was substantively fair in light of the factual dispute you raised, but the facts you have presented (and in the absence of anything to the contrary), invites us to have a discussion on what is commonly referred to as curriculum vitae (CV) fraud.

In general CV fraud is when a prospective employee is dishonest having regard to a material requirement of the position they are applying for, so as to secure or increase their chances of being offered such position. Our courts have taken a tough stance against employees guilty of such an offence.

The LAC held that while it is unusual for the job. ... The provisions of the employment contract not only reinforced the fact that the applicant had to be in possession of a valid driver's licence, but required this driver's licence as an integral part of the job specification to enable the incumbent to perform the functions allied to the post. The fact that the third respondent performed well at the interview and thus secured the post is irrelevant. It is also of no consequence as to how the discovery was made about her not having a driver's licence.‘ In Hoch v Mustek Electronics (Pty) Ltd (2000) 21 ILJ 365 (LC) the employer discovered the employee had misrepresented her qualifications when she had been hired, seven years prior. Despite the fact that the qualification under review was not related to the duties the employee was hired for, the employer dismissed the employee for dishonesty.

In upholding the dismissal the Labour Court per Basson J held: ‘...even though the applicant was an employee of seven years’ standing and was honest and trustworthy in her work and even though the applicant’s qualifications were irrelevant to her position as debtors’ clerk at the time of her dismissal, the respondent was, in my view, justified to consider her dishonesty as serious enough to have irreparable damaged the unique trust relationship enjoyed by her. It is for the employer to set standards of conduct for its employees. As long as these standards are reasonable the court will not interfere (see the requirements of item 7 of schedule 8 to the Act).’ Labour law practitioners should be aware of the distinction between an act of dishonesty and the failure by any prospective employee to disclose information they were not specially required to disclose.

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**Question:**

My employer was aware of my criminal record for many years but did nothing and let me continue to work as a law enforcement officer. My criminal record became a problem when I was successfully appointed into a senior position and I was subsequently dismissed. After a three year battle I was forced to accept an agreement at bargaining council, as the commissioner said prior to arbitration hearing that reinstatement would not be an option because of my criminal record. We eventually reached an agreement whereby the employer would give me five months’ salary and amend my employee record from dismissal to resignation.

**Answer:**

The fact that you reached a settlement agreement puts an end to your dispute, unless you want to review the settlement agreement. A party can review a settlement agreement because of such a reason. Our courts have taken a tough stance against employees guilty of such an offence.

The LAC rejected the employee's version that she was not dishonest and had mistakenly not inserting ‘learners licence’ in her CV. With regard to the seriousness of the misconduct Waglay DPJ (as he then was) held:

'Furthermore the misconduct was indeed serious. This is evident from the consequence that followed the supply of the false information. It led to the third respondent being shortlisted and being appointed at the expense of other properly qualified applicants. The unchallenged evidence of the appellant was that had it known that the third respondent only had a learner’s licence, she would not have been shortlisted and therefore she would not have been considered for the job. ...

The LAC held that while it is unusual to grant reinstatement in constructive dismissal cases, the courts are not precluded from doing so where the circumstances that gave rise to the constructive dismissal have changed. It was found that in this case there had been a change in circumstances and thus reinstatement was appropriate. The appeal was accordingly dismissed.'
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cant’s dismissal was not within her exclusive knowledge, even though it may have been a material issue. It may not have been within the knowledge of the members of the interview panel, but it can hardly be said they were not in a position to ascertain the circumstances in which the applicant’s previous employment with Eskom ended either by simply asking the applicant, or by consulting Eskom’s own records. Moreover, in its dealings with the applicant, Eskom gave no indication that it expected more information than it specifically requested. When the commissioner found that the applicant had a duty to disclose her previous dismissal to Eskom, he did not give consideration to the proper legal principles applicable to determining when such an obligation arises in contract. As a result, he gave no consideration to the principle that there is no general duty on a contracting party to tell the other all she knows about anything that may be material, nor to the fact that the applicant’s dismissal was not a matter within her exclusive knowledge in this case.’

This was confirmed by the LAC who dismissed Eskom’s appeal in Eskom Holdings Ltd v Fipaza and Others (2013) 34 ILJ 549 (LAC).

Do you have a labour law-related question that you would like answered? Send your question to derebus@derebus.org.za.

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Abbreviations:
EL: Employment Law (LexisNexis)
SA Merc LJ: South African Mercantile Law Journal (Juta)
JJS: Journal for Juridical Science (University of the Free State)

Company law


Competition law

Credit law
Otto, JM, van Heerden, CM and Barnard, J ‘Redress in terms of the National Credit Act and the Consumer Protection Act for defective goods sold and financed in terms of an installment agreement’ (2014) 26.2 SA Merc LJ 247.

Intellectual property law


Judiciary
Okaluba, C ‘Delay in delivering judgment or a case of “washing” judicial “dirty linen in public”? Reflections on Myaka v S’ (2013) 38.2 JJS 106.

Labour law
Germishuys, W and McGregor M ‘The legal obligation to provide for employee-related contingent liabilities when an enterprise is sold as a going concern’ (2014) 26.2 SA Merc LJ 436.


Legal profession


Procurement

Succession law

Lotter, M ‘Estate planning: The inclusion of the proceeds of a life policy when the accrual is calculated’ (2013) 38.2 JJS 38.

Tax law
Lotter, M ‘Estate planning: The inclusion of the proceeds of a life policy when the

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Please note that copies of the articles mentioned in this feature are not supplied by the author, but may be obtained from the publishers of the journals, or a law library.
In 1748 that Baron de Montesquieu published ‘De L’Esprit des Lois’ (the Spirit of the Laws) in which he proposed the doctrine of the tris politica or separation of powers between the executive, legislative and judicial branches of government. This work would have a profound influence on the constitutional development of countries such as the United States and South Africa post 1994.

Separation of powers is fast becoming the mantra of public officials or public institutions seeking to immunise their activities from oversight by the courts. In many cases reliance on the doctrine is misplaced and unless that reliance is ingenious there is a fundamental misunderstanding that prompts a discussion of the doctrine itself and of its application by the Constitutional Court (CC).

The separation of powers is intended to prevent the overconcentration of power in any one particular organ of state (GE Devenish A Commentary on the South African Constitution (Durban: LexisNexis 2005) at 11). As Montesquieu wrote: ‘When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty’ (quoted by S Ngcobo ‘South Africa’s Transformative Constitution: Towards an Appropriate Doctrine of Separation of Powers’ (2011) Stellenbosch Law Review 1 at 37). There is no universal model of separation of powers and there is no separation that is absolute (In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (10) BCLR 1253 (CC) at para 108). The CC has recognised that the doctrine is not fixed or rigid and is made subject to checks and balances of many kinds. Much of South Africa’s hybrid legal system is based on English law, which is in essence a parliamentary system where to an extent the executive and the legislature are amalgamated. Given the abuses of power that flowed from such a system in South Africa’s history, the idea of a separation of powers with checks and balances between branches of government was enthusiastically imported into our post-apartheid constitutional order.

Under the American constitutional system, there is a separation of personnel between the executive and legislative branches of state that is almost complete (Currie & J de Waal ‘The New Constitutional & Administrative Law’ vol 1 (Cape Town: Juta 2002) at 18). Congress holds legislative power, executive power vests in the President and the Supreme Court holds judicial power. No power may remove another from office and no member of the President’s cabinet may simultaneously be a member of Congress. This application of the doctrine is distinguishable from our own, for example, does not provide for such a strict separation of personnel. The doctrine is not expressly stated in the final text of the Constitution, despite appearing in the Interim Constitution. It arose in the Constitutional Principles, which governed the drafting of the final text (Glenister v President of the Republic of South Africa and Others 2009 (2) BCLR 136 (CC) para 29). In the South African model of the doctrine, functions are delineated and separated but not always performed by different persons (Devenish op cit at 11). Members of the executive may also be members of the legislature and judicial officers may, from time to time, carry out administrative tasks (South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) BCLR 77 (CC) at para 35). Whether or not there has been an infringement of the doctrine will depend on the circumstances of the case.

A brief overview of key decisions by the CC demonstrates the already recognised flexibility of the doctrine and gives substance to the indication by the CC, more than 15 years ago, that the South African courts would over time develop a ‘distinctively South African model of separation of powers’ (De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC) at para 60). In the Certification case, the CC had to determine whether the new text of the Constitution complied with all the Constitutional Principles. The court held the following:

The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: ‘The scheme is always one of partial separation.’ (The Certification case at para 109.)

In the Glenister case the CC had to decide whether, in view of the doctrine, courts could set aside a decision of the National Executive or interdict the respondents from pursuing the passage of certain bills through parliament. The court recognised that the power of the courts is not to amend legislation but to pronounce on whether or not legislation is consistent with the Constitution. The courts not only have the right but a duty to intervene and prevent violation of the Constitution. As the ‘ultimate guardians of the Constitution’, the courts have an ‘obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds’ (see the Glenister case at para 33). The court held that although, as a general principle, a court should not interfere in the legislative process, it accepted that there may be circumstances, although rare, in which a court could intervene in parliamentary proceedings. Demonstrating the judicial restraint that is required of a court under the separation of powers doctrine, the CC declined to intervene where the applicant had not established that its intervention was necessary in the circumstances (Glenister at para 41, 44, 57). The clear message from the judgment appears to be that if the courts’ intervention is necessary, the courts can and will intervene.

That the courts in general, and the CC in particular, are aware of the limits of their judicial review powers is also evidenced in a number of other notable judgments. After declining to order the state to provide expensive dialysis treatment to save a critically ill, unemployed patient in Soobramoney v Minister of Health, KwaZulu-Natal 1998 (12) BCLR 1696 (CC), the Constitutional Court was heavily criticised for its failure to hold the other branches of government sufficiently accountable for their inadequacies. Similarly, in Mazibuko and Others v City of Johannesburg 2010 (3) BCLR 239 (CC), socio economic scholars and other critics denounced what they deemed to be the CC’s callous attitude toward the poor when the court declined to prescribe to the City of Johannesburg the minimum quantity of free basic water it should provide to each person daily. Considering the immense public pressure placed on the CC in these cases, the court’s response hardly reflects an institution that wants to step into the shoes of the executive.
Although these decisions represent only a small portion of the jurisprudence that has developed around the separation of powers in South Africa, it is abundantly clear that there is no infringement of the doctrine where a court reviews and if necessary invalidates an act of the executive or parliament where that act contravenes the Constitution. It is equally clear that the courts are not trying to take over the role of the executive or the legislature.

It is also not controversial to accept that some aspects of decision making are more appropriately left to the non-judicial branches of government. The executive makes and executes policy but it is the courts that must then test policies and decisions for constitutional compliance. It is that obligation of the courts that the naysayers of judicial review ignore choosing instead to misapply the doctrine of separation of powers in an attempt to disempower our courts.

The point is that our courts have a constitutional mandate and it is baseless to argue as a principle that the court may not interrogate the constitutionality of decisions of the executive or of state institutions or officials.

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whose marital matters are regulated by some or other body of customary law and that there exists many different strands of customary law. Each community is governed by a set of customs and usages that change and develop all the time and the Constitution has been a major catalyst in this regard (see the Shilubane case at 54 – 55). These developments have not left the handing over of the bride - as a requirement of a customary marriage - untouched. It is also true that the adherence to this ritual has never been monolithic. As indicated above, the different communities practise it differently, and execute it differently (see the Mabuza case at 226, where the court condemned the non-performance of ukumekze (a siSwati version of handing over which also involves the bride appearing naked in front of the female elders of the groom's family), and also accepted that the bride had cohabited with the groom for about eight years, and had regarded herself as the groom's lawful wife; see also the Letsolo case at 1072 – 1074). In some of the communities, the handing over of the bride takes a physical form, manu in manum, on the day of the wedding (JC Bekker Seymour’s Customary Law in Southern Africa (Cape Town: Juta 1989) at 109 and 114). And, in others, the ritual is symbolic or uxorilocal in nature. The uxorilocal handing over may involve the slaughtering of a beast by the father or guardian of the bride, to signify the acceptance of the groom by the family; or as an indication that she is free to join him and his people, if she so wishes (ibid). This is very much in line with the view that, in customary law, 'scrupulous attention to the rule is seldom vital', particularly where a man is already married (another woman) or is a widower, or where there is (pre-marital) pregnancy and elopement involved, and the intending parties seek to expedite matters for themselves (see TW Bennett Customary Law in South Africa (Cape Town: Juta 2004) at 214 – 216).

Cohabitation is another factor that needs to be considered in these circumstances, particularly where the bride’s family never objected to it, or did not display any opprobrium by, for example, exacting a fine from the groom’s family. Bekker makes this point, concisely, when he says: 'Proof of cohabitation plus the receipt by the woman's guardian of a substantial number of cattle ... may raise presumption that a customary marriages exists' (Bekker op cit at 116).

And, if there is no cogent evidence in rebuttal of that presumption, the court will definitely conclude that a valid customary marriage exists between the parties (ibid). In KwaZulu-Natal, for instance, all that is required is a 'declaration' on the day of the wedding in the presence of an 'official witness' from the office of the local traditional leader (see s 38(1) of the Natal Code of Zulu Law 1987 (see Proc R151 of GG10966/9-10-1987 1967) and s 38(1) of the KwaZulu Act on the Natal Code of Zulu Law Act 16 of 1985). It is also important to note that lobolo itself is not even a legal requirement in that province (see s 38 of the Codes). That is why it is difficult to agree with this passage in Motsoasoa v Roro and Another [2011] 2 All SA 324 (GSJ) at para 19 – 20 (which is cited with approval by Matojane J): '[The handing over of the bride] is the most important and final step in the chain of events [that] happens in the presence of both the bride and groom’s families. One can even describe this as the official seal in the African context, of the customary marriage.

The handing over of the bride is what distinguishes mere cohabitation from (a customary) marriage ....

In terms of practised or living customary law the bride cannot find herself over to the groom’s family. She has to be accompanied by her relatives.'

While there are some salutary aspects in Matlapeng AJ’s judgment, including the fact that he did not completely close the door on the probative value of cohabitation in cases of this kind, and that each case would have to turn on its own facts, there are aspects of it that lie ill in one’s mouth.

First, the judge began by traducing the works of academics as unreliable in this regard, but ended up cherry-picking the selfsame works (and court decisions) to support his views. Second, it is not clear from the judgment what the customs and usages of the two family groups were, or to what extent they had evolved and developed with regard to the handing over of the bride. Nor were the elders of the community called in as experts to clarify the issue for the court. Third, while Matlapeng AJ acknowledged the fact that customary law differs from one community to another, and the need to, 'expedite matters for themselves (see Bennett op cit at 194). As the Constitutional Court put it in Alexkor Ltd and Another v The Richtersveld Community and Others 2004 (5) SA 460 (CC) at para 53: ‘Throughout its history [customary law] has evolved ... to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistent with the Constitution’ (see also in this regard, the Shilubana case at para 54-55; the Pilane case at para 35 and Letsolo case at 1075). In the last-mentioned case, the court held that because the mother of the bride was the head of her household, she had the right to negotiate for and receive the payment of lobolo from her daughter’s suitor (at 1075). The court also considered the fact that the power relations between men and women had changed: Women are now financially independent, and do, from time to time, pay back (from their own pockets or kraals) the lobolo to their erstwhile husbands and 'dissolve' their customary marriages, without any further involvement of the two families (see Letsolo case at 1074, and the authorities cited therein).

If South African women (or mothers) can now perform all the juristic acts mentioned above, then surely fathers can, as a corollary, accept their sons’ intending spouses into their homes, as their ‘daughters in law’ – as a species of the handing over? Moreover, there is nothing constitutionally reprehensible about this deviation, particularly where there was cohabitation between the bride and groom after the payment of lobolo – or a portion thereof. This would ensure that the dignity of the women involved in these seemingly inchoate marriages is protected; and that the children are not rendered extramarital. After all, there is no universal, rigid, catechismal formula that exists for all customary marriages, and the handing over of the bride is not the sine qua non that it is made out to be.
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