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POWER STRUGGLE BETWEEN THE DEVELOPER AND BODY CORPORATE

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Report: Transformation of the legal profession

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Section 33(1) of the Constitution guarantees every citizen the right to a lawful, reasonable and procedurally fair administrative action. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) became the Act envisaged in the Constitution. Bayethe Maswazi discusses the most pertinent weakness of PAJA and asks if PAJA will survive and whether it will continue to impact our administrative review jurisprudence – as much as it has done – in light of the rapid emergence of legality.

29 Deducting amounts from salaries and failing to pay – Employers brought to book by the law

There are employers in South Africa who deduct retirement fund contributions from their employees’ salaries but fail to pay them over to the relevant retirement funds as mandated by s 13A and reg 33 of the Pension Fund Act 24 of 1956. Clement Marumoagae discusses the problem of non-payment by employers of contributions that are deducted from their employees’ salaries, to the relevant retirement funds and how the law currently seeks to remedy this problem.

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Transformation in our lifetime

What is this beast called transformation? The word transformation, since the advent of democracy, has been used as a catch phrase to define a societal change needed in South Africa. As inequality was the status quo during apartheid, every sphere of the country from business to government needed to transform so that it was generally representative of the demographics of the country. The Oxford Dictionary defines the word ‘transformation’ as: ‘A marked change in form, nature, or appearance.’ In relation to the law profession, what does the term actually mean? Does it only relate to the ‘appearance’ of the profession? In my view, the term has a much deeper meaning than just the colour of the profession.

As you should be aware, the Legal Practice Act 28 of 2014 (the Act) was promulgated on 22 September (see 43). Among other things, the objective of the Act is: ‘To provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic.’ The Act aims to address the ‘appearance’ of the profession to ensure that the demographics of the country are correctly reflected in the profession. Statistics of the profession show that its demographics do not reflect those of the country (see 2014 (Sept) DR 20).

The Legal Practice Council, envisaged in the Act, has a mammoth task of ensuring that the profession is indeed transformed by putting in place ‘measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic’. Economics are a major important component of transformation. The Act takes transformation a step further by mandating the council to ensure that there is ‘a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry.’ This will assist the poor to access justice and eradicate the perception that justice is only accessible to the rich.

On page 18 Nomfundo Manyathi-Jele writes an article on the report on the Transformation of the Legal Profession researched by the Centre for Applied Legal Studies (CALS) in partnership with the Foundation for Human Rights. Unfortunately, the findings of the report show that gender tends to be seen as less important than race in the process of transformation. The report also shows that due to racism, prejudice and pre-conceived notions of ability, or inability, many black legal practitioners believe that they have to ‘work twice as hard’ to only get ‘half as far’ as their white counterparts.

One of the participants of the research said that the notion of transformation is still not fully understood as she was told that she would receive more briefs as a black woman. The participant expressed discomfort at being guaranteed briefs by virtue of her race and gender, and wants her success to be based on her merit.

After 20 years of democracy, the profession has a long way to go till it addresses injustices of the past and eradicate prejudices and pre-conceived notions. For transformation to happen in our lifetime, it should be championed by all attorneys. All attorneys should be aware that the issue of transformation is not a human resource department problem and that the solution lies in all individual attorneys in how they conduct business and perceive others.
What Employment Equity Amendment Act means for employers and employees

The Employment Equity Amendment Act 47 of 2013 (EEAA) commenced on 1 August 2014.

The EEAA will be of paramount importance to employers.

The EEAA, among others, introduces a new provision that a difference in terms and conditions of employment between employees of the same employer, performing the same or substantially the same work or work of equal value that is directly or indirectly based on any of the grounds listed in subs 6(1) is unfair discrimination. The grounds contemplated in subs 6(1) includes, race, gender, sex, pregnancy, marital status, family responsibility, ethnic, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or any other arbitrary grounds.

What follows is that the employer should not design different terms and conditions of employment between employees performing the same or substantially the same work on the basis of the grounds enumerated above. This is good news for employees. Gone are the days where we would have huge disparities in terms of remunerations or some employees enjoying certain extra benefits than their colleagues on the same level of employment.

The EEAA further empowers the minister, in consultation with the commission, to prescribe the methodology for assessing work of equal value contemplated in the amendment. This will help realise the consequences intended by the legislature with this new provision.

The EEAA introduces a section conferring a right to a party to refer certain kinds of disputes to the Commission for Conciliation, Arbitration and Mediation for arbitration for certain kinds of disputes without resorting to the Labour Court. This will help reduce the burden of costs for the parties who would ordinarily have to approach the Labour Court for adjudication of their disputes. This process is often an expensive exercise.

Designated employers are charged with a heavy burden of having to prove that the alleged unfair discrimination – where alleged on grounds listed in subs 6(1) – did not take place over and above the requirement that such an unfair discrimination was rational and not unfair or justifiable. This must be another aspect of the amendment that employees can applaud the legislature for taking a heavy stance on employers who are perpetrating the conduct not countenanced by the EEAA, but wait, similarly the employers, can find solace in the fact that where the alleged unfair discrimination is alleged on arbitrary grounds, the burden shifts to the complainant to prove the reverse of the burden assumed by the employer.

A further burden is placed on an employer when assessment is made of compliance with the EEAA in terms of implementing employment equity. The employers will now be required to show reasonable steps taken to appoint and promote suitably qualified people from the designated groups, as well as reasonable steps taken to train suitably qualified people from the designated groups. This is yet another indication of the seriousness of the government in ensuring compliance with this piece of legislation.

Employers should be wary to note that the EEAA now introduces as a penalty, a fine for the designated employer having failed to prepare or implement an employment equity plan. The Director General may apply to the Labour Court for this exercise. This is an indictment on designated employers to take employment equity plans very seriously.

Employers should be weary to note that the EEAA now introduces as a penalty, a fine for the designated employer having failed to prepare or implement an employment equity plan. The Director General may apply to the Labour Court for this exercise. This is an indictment on designated employers to take employment equity plans very seriously.

It will be critical for employment equity committees to execute their statutory mandate diligently.

The EEAA appears to be a balanced piece of legislation and we can only hope
that it will address the lacunae presente-
d by the previous Act, but most impor-
tantly the employers will now feel the
urge to comply with the EEAA while the
employees will enjoy the benefits inher-
ent in the amendment.

Milford Chuene, non-practising
attorney, Gauteng

Has the profession lost focus?
Is it not a shame that the profession has
lost focus? It has to be urged to renew,
rejuvenate and promote ethics as in the
August editorial (2014 (Aug) DR 3).
We did not lose focus, we sold our soul
for 'a plate of soup' or, if you prefer, for
'thirty pieces of Silver'.
First (not necessarily in chronological
order), we meddled with our standards
of education and training, or as some
might prefer, we allowed such meddling
to happen. How?
We allowed legal education at universi-
ties to be broken up into modules. Then
we saw the LLB standard lowered to four
years without a fight. We followed suit by
breaking the practical legal training up
into modules as well. But the death knell
is the lowering of standards for access to
the practical legal training courses and
becoming a training institution for just
about everybody else but the profession.
Second, we bowed to the banks and
the estate agents to share fees with them
at the behest of our conveyancing mem-
ers, the most unethical component of
the profession.
Third, (the Road Accident Fund spe-
cialists might have to get the crown of
most unethical component) by allowing
the advent of contingency fees. There
were those of us who were dead against
this fee concept that was allowed to
smudge our law and our profession.
Now, allowing this evil practice has come
back to bite us, and bite us it did. Can an-
other think of a saga more tainting of our
profession and our ethics since 1909,
and yet again the decoy to lead the
eye away from the unethical abuses of
the major firms, that really matter.
It will be said that these views are cyni-
cal. That would just feed complacency
and be running away from the problem.
The practical innovations suggested in
the editorial will go some way, but not
nearly far enough.

What needs to be done is to follow the
cue of those academics who propose in-
fusing ethics all over, but then not only
in respect of academic education. It
should be infused all over in every fibre
of the fabric of our profession and perti-
nant to the above to at least -
• revisit the modular fragmentation of
academic training and then infuse ethics
into every fibre thereof;
• take up the University of the Witwa-
tersrand's lead in revisiting the LLB entry
requirement, structure and duration;
• revert to the original philosophy and
intent with the practical legal training
and infuse ethics in every fibre thereof;
• re-introduce fixed conveyancing fees
and steep sanctions in the event of shar-
ing thereof;

• move for the abolition of contingency
fee arrangements and legislation of any
kind allowing it;
• cancel the accord establishing the
25:25:50 structural components of the
societies and let us have free and fair
elections of our representatives in the
professional bodies so that we can oust
politics and racism from the equation;
and
• institutionalise voluntarily the sole
practitioners who are in any event the
protectors of the non-elitist and who are
the real attorneys.

Frans Geldenhuys, attorney,
Polokwane

Something to think about
When I was a schoolboy I distinctly re-
member that legal documents ended
with -
SIGNED THIS __________ day of
____________ 18______ at PIETERS-
BURG.
As a lawyer I now see endings like -
DATED THIS __________ day of
____________ 20______ at POLOKWANE.
Is this difference immaterial or is there
some reason that makes the one version
correct and the other not acceptable?
The language it seems, is correct for
both versions.

Harun Ebrahim, attorney,
Polokwane

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

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Cape Town attorney, Vasti Geldenhuys, has claimed the title of being the only woman from the African continent to have rowed across any ocean, a title she is very proud of.

Ms Geldenhuys, 36, and her longtime partner, Riaan Manser, 41, rowed from Morocco to New York. Ms Geldenhuys told De Rebus that the trip took almost six months. They left Morocco on 30 December 2013 and arrived in New York on 20 June. The pair rowed for almost 11 000 kilometers, doing 1.8 million oar strokes each. They arrived back in Johannesburg on 10 July.

Ms Geldenhuys was admitted as an attorney in 2005 and as a conveyancer in 2009. She started her own firm in Somerset West trading under her name in June 2013 where she specialised in civil and criminal litigation, especially evictions and drunk driving cases. She put the firm on hold during her travels and has not had a chance to re-open it as she has been giving inspirational speeches all over the world since her return.

Ms Geldenhuys said that while she was on the boat, she decided that she wanted to do her pupillage at the Cape Bar next year and she recently handed in her application.

Of the six months it took to get from Morocco to New York, four and a half were spent at sea in a 7 by 1.5 meter rowing boat. The pair rowed for eight to 12 hours a day and did not see any land or people for two and a half months. ‘We also only spoke to each other for two months after our satellite phone broke after we capsized approximately 2 000 km from the nearest land. I was capsized underneath the boat and Riaan got thrown out, luckily grabbing on to a rope to prevent him from being washed away into the deep blue,’ she said.

Ms Geldenhuys said that the scariest moment was when Mr Manser wanted to film their boat from the sea. ‘He took the camera and filmed a bit. He misjudged the speed the boat was being pushed by the wind and the swell and he could not swim back to the boat fast enough. I could not physically turn the boat around by myself. His swimming was hampered because he had the camera in his hand. After the third time grabbing and missing, he stopped swimming. He had swallowed so much water by that time that he had to stop or drown. When he stopped, in a matter of seconds the boat was 30 to 40 meters away from him. The terror I felt when he stopped swimming is difficult to describe. What saved him was the fishing line we were trawling behind the boat. He grabbed onto it and I reeled him back to the boat. Amazing,’ she reminisced, adding ‘the ocean is so vast, there is no way anybody would get to you in time if anything goes wrong. They will also never find you.’

Ms Geldenhuys said that when they got close to the Bahamas, the shark population increased considerably. She said that the waters up the east coast of the United States are riddled with sharks and that they could not keep the fishing line in the water anymore because they were constantly catching sharks.

The pair got food poisoning from eating a fish, they had caught, for the third day in a row. She explained that they did not have a fridge and the outside temperature was an average of 35°C. She does admit that they pushed it a bit by having some of the fish for a third day in a row.

When asked whether there was a time when they needed medical attention, Ms Geldenhuys said that she caught surfer’s eye, which is when a fatty deposit grows onto the white of your eye next to the pupil. She explains that it is caused by the
sun. ‘I was very worried. I did not know what it was and what to do about it so I taped up the one side of my sun glasses with duct tape to keep the sun out and rowed with one eye for more than half the trip,’ she said, adding that Riaan had a bad ear infection, he had to plug the ear and sit it out as they did not have any medication for that as well.

The couple ate freeze-dried food, which Ms Geldenhuys explains as the same food that astronauts eat when they go into space. ‘You just add hot water and let it stand for 10 minutes. Thereafter, you have roast lamb, Moroccan lamb, roast chicken, cottage pie, etc. It was so tasty. The last two hours of rowing in the day, Riaan and I spoke of the food we were going to eat that night,’ she said.

‘We also caught plenty of fish. After halfway the fish was plentiful. Dorado, Tuna, Bonita and Triggerfish. We sometimes caught fish we had no clue of what type it was, but we still cooked and ate it. Flying fish used to jump into our boat at night. At first we cooked them, but then realised we could use them as bait to catch bigger fish,’ she recalls.

Ms Geldenhuys said that Mr Manser lost about 12 kg and she lost about 7 kg on the trip.

Ms Geldenhuys said that they were not rowers before they left and that they only practised on their rowing machine at home, which was different compared to rowing on an ocean in a real rowing boat. She said that the first time they rowed any rowing boat was two days before they left.

‘I am glad to be back on terra firma. The journey was much tougher than I ever expected, but it was a once in a life time experience. When we were on that boat, I specifically remember saying that even if they gave me R 1 million, that I would never ever do it again. Apart from the physical agony you are in every day, the trip is mental torture. The scene is the same every day. It is very monotonous. You cannot judge your progress because there is no reference point. I do not think people can grasp how tough something like this can be. I definitely will not row to New York again, but maybe somewhere in the distant future, I will ask Riaan to take me somewhere else,’ she said.

When asked whether she had any regrets, Ms Geldenhuys said that the only regret she has is that they did not take more spices on the trip, adding that she now understands why spices were so popular in the 15th century.

She said that it is amazing how you miss everyday things one so easily takes for granted, and how small things that you never thought could, can bring you so much pleasure, such as a small packet of sugar.

• Images for the article were supplied by Ms Geldenhuys.

JAA holds 72nd AGM

The Johannesburg Attorneys Association held its 72nd annual general meeting (AGM) in Parktown on 10 September.

The guest speakers at the AGM were previous Democratic Alliance (DA) leader and South African Ambassador to Argentina, Uruguay and Paraguay, Tony Leon and DA parliamentary leader, Mmusi Maimane.

Mr Leon spoke on why the rule of law matters. He said that the rule of law and the obtaining of legal services is in essence a commodity that should be available to as many people as possible, at the most competitive pricing structure available.

Mr Leon said that the practice of law has changed unrecognisably from when he was practising, adding that the rule of law does not change.

Speaking on the role of and developments in parliament, Mr Maimane said that South Africa is a much better place than it was in 1994 and that citizens often forget the strides the country has taken.

Mr Maimane said that while the nation obsesses about the life of one leader, it ignores the greater challenges that South Africa faces. ‘We have to work harder 20 years later at protecting the institutions that protect our democracy, rather than simply living with the acceptance that they are there’, he said.

Mr Maimane said that when one speaks about the rule of law, one cannot separate it from the institutions that protect the execution of the law. He then explained why it was important to defend those institutions.
Public Protector, Thuli Madonsela, hosted her Swedish counterpart, Chief Parliamentary Ombudsman, Elisabet Fura, during a roundtable discussion on the role of the ombudsman on 7 October in Pretoria. The Dean of Law at the University of South Africa, Professor Rushiella Songca was also part of the discussion.

Ms Fura, whose country was the first in the world to establish the ombudsman more than 200 years ago, addressed the roundtable on the topic: ‘The Role of an Ombudsman in Ensuring Accountability in a Democracy – Lessons from Sweden.’

The aim of the discussion was to present an opportunity to deepen the understanding of the different roles that ombudsman institutions play in their countries based on those countries’ laws.

Ms Fura said that she is one of four ombudsmen in her country and that her office deals with at least 7,000 cases a year. Ms Fura explained that, like her South African counterpart, she –

• has a maladministration jurisdiction;
• reports on her office’s activities to parliament;
• publishes her investigation reports;
• uses moral persuasion or persuasive power to ensure compliance with decisions; and
• can refer her reports to parliament for implementation of decisions.

She also said that her office conducts visits to police stations, hospitals and prisons.

Ms Fura explained that her office also acts on complaints brought to them by the public. She added that it does not act on complaints filed anonymously, but that if an anonymous complaint has been filed, that has some weight, her office will take on the case and treat it as its own initiative.

Ms Fura said that the Swedish ombudsmen, although independent from parliament, cannot carry out investigations into politicians. This is in contrast with South Africa as Ms Madonsela does have such powers.

Ms Fura said: ‘When we look at complaints filed over government offices, we really try to tread carefully and not cross the line and be political’. Ms Madonsela said her office dealt with cases in a similar way, even when they involved politicians, her office ‘tried not to play politics,’ she said.

Ms Songca said that although there was clear legislation on the powers of the public protector, there were still issues with the public protector’s role.

Ms Fura said while there were other state agencies conducting oversight in areas that were within her jurisdiction, her office’s findings carried more weight and were considered ‘extraordinary’.

She said the decisions of her office were just recommendations and not legally binding, and that she counted on the persuasive power of her reports to get government and parliament to act on them.

Ms Fura said the Swedish government appreciated the work of her office and funded it appropriately when financial requests were made. In contrast, Ms Madonsela said the biggest challenge her office had experienced was access to funding.

To conclude the discussion, Ms Madonsela expressed gratitude to her counterpart and said that she was happy that her Swedish colleague, who is also a board member of the International Ombudsman Institute, had clarified that the powers of ombudsman institutions vary from one country to the next, depending on the law, cultural and historical context of each country.

‘This is why you cannot say to us “why do you not act like a normal ombudsman?”, as some have previously said to me,’ she said.

Ms Madonsela said one thing to take away from the discussion was the fact that there could never be a blanket approach to the concept of ombudsman-ship as each ombudsman exercised powers given to them by the constitutions or laws of their respective countries.

In South Africa, she said, the Constitution gives her the power to investigate alleged or suspected improper conduct, report on that conduct and take appropriate remedial action.

Ms Madonsela further said that the Public Protector Act 23 of 1994, which introduces the word ‘recommend’ for the first time, is worded in a manner that clearly shows that a ‘recommen-
How deferential to government are the courts?

The Democratic Governance and Rights Unit (DGRU) of the University of Cape Town held a discussion on two research reports in Cape Town on 2 October.

The research reports were titled ‘The Constitutional Court and the separation of powers’, prepared by DGRU researcher, Chris Oxtoby and ‘Aspects of South Africa’s Constitutional Court: The demographics of advocates appearing before the court and the court’s impact on socio-economic rights’, prepared by independent researcher, Michael O’Donovan.

According to DGRU, the issue of the separation of powers, and specifically how the doctrine has been applied by the courts, has been a hot topic in South Africa in recent years and has been raised regularly and assertively by certain members of the Judicial Service Commission in the interviews of prospective judges.

DGRU said that influential members of government have expressed criticisms of the courts for, it is claimed, exceeding their proper mandate and ‘intruding’ into the spheres of the legislature and the executive. ‘When government announced plans to commission a review of the jurisprudence of the Constitutional Court and Supreme Court of Appeal, many commentators expressed concerns that this was linked to a push-back against the power of the courts’ said the DGRU.

In this context, DGRU felt it was necessary to undertake a research project, examining the actual track record of the courts and how they have dealt with the issue of the separation of powers. DGRU then surveyed the decisions of the Constitutional Court between 2009 and 2013, with the aim of analysing the court’s recent track record in light of the criticisms of ‘overreach’ levelled against it.

DGRU also completed a race and gender analysis of all advocates who have appeared before the Constitutional Court since 1995, and sought to measure the extent to which the judgments have advanced socio-economic rights of citizens.

At the time of going to print, the reports were not yet available to the public but would be published on the DGRU website soon. The website address is www.dgru.uct.ac.za.

Electronic wills discussed at FISA conference

The Fiduciary Institute of Southern Africa (FISA) held its 4th Annual conference in Illovo, Johannesburg on 18 September.

The theme of this year’s conference was: ‘Are you fit for the challenges?’ Ten speakers gave speeches including University of the Free State’s private law lecturer, James Faber; fiduciary specialist, Ronel Williams; Professor of the Ethics Institute of South Africa, Leon van Vuuren; and Chief Master of the High Court, advocate Lester Basson.

Mr Faber spoke on the tension between the requirement that a will must be in writing and in hard copy on the one hand, and the technological advances in communication and document management on the other. His paper was titled: ‘Electronic wills and jurisdictional issues surrounding a “digital estate”’. Mr Faber looked at the legal position pertaining to electronic ‘wills’ and documents in the context of South African law and foreign jurisdictions.

Highlighting the challenges posed in the abovementioned regard, Mr Faber said that there was no statutory definition of what a will is, adding that provisions of the Wills Act 7 of 1953 include all the requirements necessary for a will to be valid or for a document to become a will.

Mr Faber said that in modern law there was a general trend to move away from succession being achieved through ‘will’ to ‘living wills’ in the context of ‘wills’ and “digital estate”.
from formalities. It has been said that there is still a need to retain a legal requirement for formalities when executing a will, he said.

Looking at South African legislation, Mr Faber said that the Electronic Communications and Transactions Act 25 of 2002 (ECT Act) excludes wills from the Act’s compass: Section 4(3) read with sched 1 and s 4(4) read with sched 2 conclude that a will cannot be executed electronically.

Mr Faber said that s 2(3) of the Wills Act 7 of 1953, which states that: ‘If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document intended to be his will or an amendment of his will, the court’, intended to be his will or an amendment of his will, the court has been accepted by the courts in Australia, New Zealand, the United States and Canada. He said that s 2(3) of the Wills Act 1965 (Act No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1). He said that the electronic document will be deemed as a will if the following three requirements are met:

- a document is presented to the court;
- this document was drafted or executed by the deceased; and
- the deceased intended the document to be a will.

Mr Faber referred to developments in countries such as Australia, New Zealand, the United States and Canada. He said that in Australia wills created on smartphones and of which only an electronic copy exists, have been accepted by the courts in some of the federal states. He also referred to the need to authorise someone to be able to access one’s electronic accounts, records, and social media profiles after death.

Mr Faber said that legislation has been enacted in Nevada in the United States to enable electronic wills.

Mr Faber said that some of the challenges posed by the electronic medium is that of security and access. He also said that electronic signatures can be removed.

In conclusion, Mr Faber said that we are living in a technological era and thus must start exploring the new possibilities that come part and parcel with it. He said that s 2(3) of the Wills Act provides a good platform to start exploring how to deal with technological changes and challenges. ‘With the importance of formalities in mind, the new challenge is to reformulate current formalities in the interest of finding a new regime that facilitates the fullest possible formal carrying out of the testator’s intention,’ he said.

Speaking on professional ethics in a high intensity environment, Professor van Vuuren quoted David Steward who said: ‘An ethical dilemma occurs when we face two choices, both of which lead to less than desirable consequences.’ He added that a conflict of interest can arise where professional duty and personal financial interests demand diverging actions.

Professor van Vuuren said that the law reflects the ethics of society but that the law did not equal ethics. He added that if something is legal, it being ethical was not guaranteed, adding that there was a time lag between ethics and the law.

Professor van Vuuren also said that a new rule could not be made for everything that can go wrong.

According to Professor van Vuuren, the purpose of professional ethics is to prevent the abuse of power and to promote the responsible use of power. He said that these two aspects would increase the public’s trust in the profession.

Professor van Vuuren said that some of the ways attorneys can make practical ethical decisions was by -

- talking about ethics;
- consulting colleagues; and
- exploring and discussing the profession’s grey areas.

He added that a way of recognising ethical issues was when attorneys heard phrases such as:

- We have to be careful here.
- Should we not get legal advice on this one?
- You can make this decision, but I do not want my name attached.
- Everyone else is doing it.
- We have always done it like this.

Professor van Vuuren suggested a quick ethics decision-making test consisting of five questions, namely:

- Is it legal/procedural?
- How will it look in a newspaper?
- Is it consistent with my professional values?
- Is it fair to all?
- If I do it, will I feel bad?

He said that if one is uncomfortable with the answer to any of these questions, it is a good indication that it is a slippery slope.

Other topics discussed were the huge compliance burden; ‘sham’ trusts; the challenges of dealing with lay persons as co-executors and co-trustees; modus, conditions in wills and trusts and the trends in the number of deceased estates reported and trusts registered per annum.

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People and practices
Compiled by Shireen Mahomed

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.

Molefe-Dlepu Inc in Johannesburg has appointed Stanley Isaka Boikanyo as a director. He specialises in insurance law and labour insolvency.

ENS has four new appointments.

ENS has four new appointments.
Steven Ndlovu has been appointed as an associate in the corporate commercial department in Durban.

Nashenta Vuddamalay has been appointed as an associate in the banking and finance department in Mauritius.

Cliffe Dekker Hofmeyr in Johannesburg has appointed Jacquie Cassette as a director to head the pro bono and human rights department.

Phatshoane Henney Attorneys in Bloemfontein has appointed six new associates.

Phatshoane Henney Attorneys in Bloemfontein has appointed six new associates.

Esmarie Prinsloo has been appointed in the commercial department.

Luhann Prinsloo has been appointed in the commercial department.

Jeannette Monahadi has been appointed in the labour department.

Rohini Pillay has been appointed in the commercial department.

Anne-Mieke Plekker has been appointed in the magistrates’ courts department.

Hermann Fourie has been appointed in the magistrates’ courts department.

Morris Fuller Walden Williams Inc has promotions and new appointments.

Morris Fuller Walden Williams Inc has promotions and new appointments.

Ayanda Myeni has been appointed as partner and director. She specialises in civil and commercial litigation and family law.

Sheralee Mullen has been appointed as a notary. She specialises in property law, incorporating sale agreements, property transfers, tax implications, notarial bonds and bond applications and cancellations.

Craig Laidlaw has been appointed as an associate. He specialises in conveyancing and litigation.

Andrew Leaker has been promoted to an associate. He specialises in civil litigation, commercial law, labour and employment law.

David Hall has been promoted to an associate. He specialises in civil litigation, family law, commercial and criminal law.

Lesley Hall has been promoted to an associate to head the Umhlanga office. She specialises in civil litigation, commercial law, alternative dispute resolutions, wills and estate planning.
The Consumer Protection Act: Direct Marketing

By Chantelle Gladwin and Adam Civin

Modern day advances in technology allow consumers to be contacted anytime day or night via e-mail, SMS and telephone calls. The Consumer Protection Act 68 of 2008 (CPA) seeks to regulate such communication by empowering the consumer to restrict unwanted direct marketing.

The right to restrict unwanted direct marketing

In terms of s 11 of the CPA every person shall have the right to refuse, terminate or pre-emptively block any communication that is primarily for the purposes of direct marketing.

Direct marketing is defined in the CPA as:

- "[a] means to approach a person, either in person or by mail or electronic communication, for the direct or indirect purpose of -
  - (a) promoting or offering to supply, in the ordinary course of business, any goods or services to the person; or
  - (b) requesting the person to make a donation of any kind for any reason,"

Once a consumer has been contacted for the purposes of direct marketing such a consumer may demand, during or within a reasonable time after the communication, that the person who initiated the communication, desist from any further communication.

In order to facilitate this right of the consumer any person authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of demands of consumers to desist from such communication.

Furthermore, once this demand has been received the communicator must not direct or permit any person associated with such communication activity to direct or deliver any communication for the purpose of direct marketing to a person who has either refused, pre-emptively blocked or opted out from receiving such communication.

It is important to note that the CPA provides that no person may charge a consumer a fee for making a demand to desist communication or registering a pre-emptive block. Potentially this means that the cost of sending an SMS to opt out of direct marketing communications, could be recovered from the person making those unsolicited communications.

Prohibited time for contacting consumers

The CPA further sets out specific times that consumers may not be contacted for the purposes of direct marketing. A marketer may not engage at all in any direct marketing directed to a consumer at home on Sundays or public holidays, Saturdays before 9 am and after 1 pm and all other days between the hours of 8 pm and 8 am the following day, except to the extent that the consumer has expressly or implicitly requested or agreed otherwise. Additionally direct marketing may not be timed to be delivered to the consumer during the prohibited times unless expressly, in writing, agreed to by the consumer.

A direct marketer is not in breach of the CPA if he or she has sent out the direct marketing within the period provided for, even if the consumer received the direct marketing outside of this. The onus to prove that the direct marketing was dispatched during the allowed period rests fully on the direct marketer and not the consumer.

Reporting breaches

If you are of the belief that a company has breached the provisions of the CPA, an anonymous complaint may be lodged with the National Consumer Commission for investigation.

How to exercise your rights pre-emptively

The CPA states that the Consumer Commission may establish or recognise as authoritative, a registry in which a person may register a pre-emptive block either generally or for specific purposes, against any communication that is primarily for the purpose of direct marketing. To date the commission has failed to set-up such registry. However, the Direct Marketing Association of South Africa (DMASA) has jumped at the opportunity to rise to the occasion.

The DMASA website (www.nationaloptout.co.za), hosts a national opt out register, whereby users can indicate their intention not to receive direct marketing messages. These details are then provided to paid up DMASA members on a monthly basis, who are (in theory) then prevented from contacting consumers who have indicated their reluctance to be contacted by direct marketers.

Consequences of failing to adhere to consumers wishes

The question that remains is - after you have taken the time to inform DMASA that you do not want to receive direct marketing messages from its members, and a member or a company, which is not a member of DMASA persists in its direct marketing contact with you - what recourse does one have?

Conclusion

The authors are of the view that, apart from the costly and time-consuming exercise of applying to court for an interdict preventing further communication with you, or alternatively pressing criminal charges for harassment and following up with the South African Police Services to ensure that the charges ‘stick’ (which is in itself a massively time consuming and frustrating exercise), only a direct challenge to the National Consumer Commission will result in an answer.

• How to opt out of direct marketing: The DMASA website is at the following link: www.nationaloptout.co.za

Chantelle Gladwin BA LLB (Rhodes) LLM (Unisa) (Notary) (Conveyancer) is an attorney and Adam Civin BA LLB (UP) is a candidate attorney at Schindlers Attorneys in Johannesburg.
As a professional indemnity insurer to the profession, the Attorneys Insurance Indemnity Fund is notified of many and varied instances of fraud perpetrated against attorneys by outsiders and employees alike.

Believe it or not, attorneys are as vulnerable as anyone else when it comes to falling for scams. Their trust and business accounts are fair game for unscrupulous people. The criminal mind is becoming increasingly fertile and the minute one scam receives publicity the scammers have yet another to replace it.

**Story 1 – the AFF scam**

The fraudster:
- deposits a stolen cheque into a practitioner’s business account;
- contacts the practitioner and purports to be an employee of the Attorneys Indemnity Fund (AFF) explaining that the deposit was made in error; and
- requests that the practitioner urgently refund the money by electronic transfer, into a bank account that is purportedly an AFF account (but in fact belongs to the fraudster who has opened it using a stolen identity document).

The amount credited to the practitioner’s business account (via a stolen cheque) is reversed by the bank once it becomes clear that the deposit is fraudulent.

The practitioner who paid out against this deposit has fallen victim to a scam.

Surprisingly, many practices have fallen for this scam.

**Story 2 – the first conveyancing scam**

A conveyancer is instructed to attend to the registration of transfer of a property. At the conveyancer’s offices, the seller signs transfer documents, including a document with banking details into which the proceeds must be paid.

Around the time of registration, a person pretending to be the seller telephones the conveyancing secretary, instructing her to deposit the proceeds into a bank other than the one already provided. This is followed by an e-mail providing the new banking details.

The proceeds are duly paid into the new bank account and withdrawn within a short period of time. The account was opened by someone on behalf of the fraudster.

By the time the real seller and conveyancer discover the problem, it is too late.

**Story 3 – the second conveyancing scam**

This scam is more sophisticated than the previous one.

In one such matter, a property sale had been cancelled and the conveyancer sent an e-mail to the purchaser’s Gmail address, advising her that the refund of the deposit would be paid into the FNB account from which the payment had been generated. He received an e-mail response – ostensibly from the purchaser – advising him that the FNB account had been discontinued and providing details of a Nedbank account into which he was instructed to pay the refund. He transferred the refund to the Nedbank account electronically, as instructed.

Meanwhile, the purchaser received e-mails (ostensibly from the conveyancer) apologising for the delay in the transfer of the funds into the FNB account.

By the time the conveyancer became aware that the Nedbank account did not belong to the purchaser, the money had been withdrawn.

A closer examination revealed that the e-mails sent to the conveyancer, in fact came from a Gmail address almost identical to the purchaser’s address. One letter had been swapped around – for example fraudster@gmail.com.

The conveyancer did not notice the slight discrepancy.

E-mails received by the real purchaser, ostensibly from the conveyancer, also came from an address almost identical to that of the conveyancer – for example h.sucker@scammedinc.co.za, became h.sucker@scammedinc.co.za.

The purchaser did not notice the slight discrepancy.

- The fraudster had somehow intercepted the e-mails sent to the purchaser’s genuine Gmail address.
- He then opened e-mail accounts with similar addresses to those of the conveyancer and purchaser.
- This enabled him to send messages to the conveyancer and the purchaser, which at first glance, came from their genuine e-mail addresses.
- Practitioners should be extremely vigilant when receiving any instructions via e-mail, particularly instructions to make payments.
- Carefully check e-mail addresses to ensure that they are identical to the ones on file.

**Story 4 – who is your client?**

A conveyancer was instructed to transfer a property from company O (represented by Mr P) to company C.

A company resolution authorising Mr P to act on company O’s behalf, specifically stated that Mr P’s authority was limited to signing the deed of transfer and that the execution of any other documents should receive prior approval from the company director.

After registration, the proceeds of the sale were paid into a bank account nominated by Mr P.

He was uncontactable thereafter.

**Scam fraudsters: Beware**

- Telephone the person who ostensibly sent the e-mail using a verifiable contact number. Never use a number provided in the e-mail concerned.
- Attorneys should not have potentially unreliable e-mail addresses like Gmail, Yahoo, Webmail, Ymail or Hotmail. If the client has such an address, then it might be a worthwhile precaution to follow up any important e-mail sent to that address with a short telephone call to ensure that (the correct) e-mail has been received by the correct recipient.

The success of these scams rely on the fact that the onus is on the depositor to ensure that the recipient account actually belongs to the payee. Generally, when an electronic transfer is made, the bank does not match the payee account number with an account name.

**Scam-proof your practice**

Be alert to the risks. Review your payment processes and procedures to minimise the risk that your practice falls victim to fraud. These should be included in your practice’s Minimum Operating Standards (MOS). Every member of staff must be made aware of the dangers of non-compliance.

Never –
- pay out on an e-mail or telephone instruction alone;
- pay out on amounts received into trust or business until you have properly confirmed with the bank that the payment has been verified; and
- make payment into an account without verifying the banking details. Insist on proof of bank details. Have a Financial Intelligence Centre Act 38 of 2001 (FICA) policy in place and insist that it be followed to the letter without exception.

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After registration, the proceeds of the sale were paid into a bank account nominated by Mr P.

He was uncontactable thereafter.
Always –
• know who your client really is;
• ensure that an agent/representative has the necessary authority;
• take careful note of any limitations on a representative’s authority;
• study and be aware of the contents of all relevant documents; and
• insist on proof of banking details.

Story 5 – trust me, I am your client
Scenario 1
The partners of a firm of attorneys (HF) were introduced to a very wealthy potential client, who lived in Greece and was interested in doing business in South Africa. He took their details, promising to give them work shortly.

Within a few weeks, a fax arrived from HF’s new client, confirming that he had deposited R 3 million into their trust account and gave specific instructions for disbursing the money. HF dutifully followed the client’s instructions.

Scenario 2
An acquaintance gave attorney B the opportunity to become involved in an unbelievably lucrative gold bullion deal, subject to three conditions –
• he had to raise a ‘goodwill deposit’ of R 3 million to prove that he was not a man of straw;
• he had to deposit the R 3 million into the dealer’s attorneys’ trust account, to be held in trust pending the transaction; and
• he was not to make any contact whatsoever with the dealer’s attorneys, to avoid the risk of the middle man being cut out of the deal.

You connect the dots.
(See Hirschowitz Flionis v Bartlett and Another 2006 (3) SA 575 (SCA)).

Story 6
Ms X, the purchaser of a commercial property, advised the transferring attorney, law firm A, that her accountant was introduced to a very wealthy potential home. They signed all the transfer documents at the conveyancer’s offices.

How did this happen?
Ms X, who had previously worked as a secretary at law firm A, posed as an attorney from law firm B. She met with Mr Y on a Saturday morning, to sign the documents (purportedly relating to the sale and transfer of a domestic property). They met at the offices of law firm A, for which Ms X had apparently kept a set of keys.

Ms X sent Mr Y a letter (on law firm B’s manipulated letterhead) providing law firm B’s banking details for payment of the purchase price.

Subsequently, Mr Y claimed that law firm B had negligently paid the R 500 000 to the seller of the commercial property, on behalf of Ms X.

(See the Hirschowitz case, Van Hulsteins Attorneys v Government of the Republic of South Africa and Another 2002 (2) SA 295 (SCA) and also Du Preez and Others v Zwiegers 2008 (4) SA 627 (SCA)).

Always –
• know your client (FICA);
• find out who deposited trust money; and
• obtain the depositor’s written instructions before paying out trust money.

Story 7 – let’s keep it in the family
Mr X instructed conveyancers to attend to the transfer of his father’s property to the purchaser, Y. He asked the conveyancing secretary to allow his bedridden, elderly father (who was moving into a frail care facility) to sign the documents at home.

It transpired after transfer, that the father was hale and hearty and had had no intention of selling his home.

Story 8
Mr and Mrs Smith, seemingly a very loving couple married in community of property, were selling their matrimonial home. They signed all the transfer documents at the conveyancer’s offices. When asked for her identity document, Mrs Smith discovered that she had forgotten hers.

‘I changed handbags this morning’ she explained.

‘Never mind’ said the kind, understanding secretary, ‘you can send us a copy by fax’ – which she subsequently did.

Aside from the fact that the conveyancer should have had sight of Mrs Smith’s original identity document before commissioning it, this was a fairly standard transaction ... or was it?

The real story:
Subsequently, the real Mrs Smith received a bit of a shock when she discovered that she no longer had a home and that her philandering husband had spent all the proceeds of the sale on his mistress.

Always –
follow your FICA processes, without exception. Original documents must be checked and the copies commissioned in the attorney’s offices, except in exceptional circumstances, where a notary or conveyancer in another jurisdiction may be required to do so. All documents must be signed at an attorney’s offices and witnessed contemporaneously (and not after the fact, as so often happens).

Story 9 – let’s keep it in the office
Theft and fraud by staff members
A conveyancing secretary applied for bridging finance on several transactions where neither party had requested it. She forged the parties’ signatures on the applications and the conveyancer’s signature on the undertaking.

She instructed the bridging finance company to deposit the loan into her creditors’ accounts.

Several conveyancing secretaries have misappropriated money held in trust pending the registration of properties, continuing to borrow from ‘Peter to pay Paul’ until the problem is discovered – usually when they are on leave or have left the practice.

These problems arise because many practices do not have MOS, which include checks and balances to minimise the risk of fraud/dishonesty or they fail to enforce the provisions of the MOS by not properly supervising staff.

Some essentials for your MOS are –
• segregation of duties;
• proper documents and records;
• independent checks;
• reconciliations;
• proper authorisations; and
• access controls.

In many ways, information technology and electronic banking have made it easier to run a practice efficiently, but they bring with them the attendant heightened level of vigilance and awareness. It is essential to ensure that there are effective risk management policies and controls in place, to address and mitigate these risks. Any breaches of policy by staff should be dealt with immediately and appropriately.

Ann Bertelsmann BA (FA) HED (Unisa) LLB (Wits) is the legal risk manager for the Attorneys Insurance Indemnity Fund in Johannesburg.
Who is in charge?

Power struggle between the developer and body corporate

Legal representatives acting on behalf of developers in opening sectional title registers display a fair amount of dexterity when faced with what could be thought of as boundless discretion when drafting the rules of the scheme. Indeed it has become commonplace to peruse rules that display blatant, and almost disingenuous bias towards the developer, and patent prejudice to the body corporate.

It is necessary to drill down relatively deep into the legislation in order to determine which rules the developer may amend, and which he or she may not even attempt to disassemble.

In terms of s 55(o) of the Sectional Titles Act 95 of 1986 (the Act):

‘The Minister may, after consultation with the sectional titles regulations board, make regulations in regard to –

(o) generally, any matter which he considers necessary or expedient to prescribe in order that the purposes of the Act may be achieved.’

In addition to the Act and the regulations, the management rules (Annexure 8) and conduct rules (Annexure 9) complete the quartet.

By Marina Constas
The liability of owners to make contributions, and the proportions in which the owners shall make contributions for the purposes of section 37(1) of the Act, or may in terms of section 47 of the Act be held liable for the payment of a judgment debt of the body corporate, shall with effect from the date upon which the body corporate comes into being, be borne by the sections.

At every annual general meeting the body corporate shall approve, with or without amendment, the estimate of income and expenditure referred to in rule 36, and shall determine the amount estimated to be required to be levied upon the owners during the ensuing financial year.

Within fourteen days after each annual general meeting the trustees shall advise each owner in writing of the amount payable by him or her in respect of the estimate referred to in subrule (2), whereupon such amount shall become payable in instalments, as determined by the trustees.

The giving of notice for trustees' meetings, as well as the rather well-known provision, giving an owner the right to speak at any trustees' meetings.

The signing of instruments or documents.

Currently the management rule reads as follows:

'27. No document signed on behalf of the body corporate shall be valid and binding unless it is signed by a trustee and the managing agent referred to in rule 46 or by two trustees or, in the case of a certificate issued in terms of section 15B(3)(b)(aa) of the Act, by two trustees or the managing agent.'

Another rule that can, and is often amended by developers, is r 31(1) – (6). For ease of reference, the rule is quoted verbatim:

'31. Contributions and liability in terms of sections 37(1) and 47 of the Act of the business sections are availed of the opportunity to hold increased voting rights, not only due to the participation quote, but due to the amendment of the management rule. Another rule to note, which may be amended, is one that relates to the termination of the contract between a managing agent and the body corporate. The rule deals with the breach of a master/servant relationship, and how a contract can be terminated. My experience is that the developer would rarely amend this clause unless he or she foresees holding a vested interest in the scheme in future. Quorums that reflect in r 57(2) may be amended by the developer, and the rule that speaks to postponing the meeting for a week, at the same time and place when no quorum is present, is also capable of amendment. Finally, the very last management rule, that may be amended, substituted, added or withdrawn is r 71 (1) – (8). This is notable in that developers have the real power to change the course of how arbitrations work today, ensuring that a better process is followed.

Having set out the developers' limitations, it is legitimate at this point to question the veracity of many body corporates claims that developers have amended, and added to far more rules than are allowed by reg 30. There is a seemingly innocuous portion of reg 30, namely, 30(2), which states in effect that a developer may substitute any Management Rule contained in Annexure 8. The only prerequisite is that the schedule referred to in s 11(3)(b) of the Act must contain a proviso restricting transfer of a unit without the consent of an association where all members of the body corporate of the development scheme shall be members of that association and the functions and powers of the body corporate shall be assigned to that association. This would, in all likelihood, be the case where a body corporate is situated within a homeowners' association. This is where, I believe, confusion has arisen. In a situation where a developer has added a management rule in a standard sectional title building, which says that the developer reserves the right to advertise on the roof, without compensation to the body corporate, which is contrary to reg 30. The rationale behind the regulation is to curtail the possible prejudice suffered by all the owners, excluding the developer, should the developer include rules that are biased in his favour.

Marina Constanda BA LLB (FA Arb) is a Fellow of the Association of Arbitrators and Director at BBM Law Inc Attorneys in Johannesburg.
The Centre for Applied Legal Studies (CALS) in partnership with the Foundation for Human Rights has released its final research report on the Transformation of the Legal Profession project. The research was conducted from 15 February to 31 August.

The research indicates that across the profession in Gauteng, lawyers are experiencing a range of hostility and exclusionary conduct based particularly on race and gender. CALS believes that this hostility is causing the stultification of excellence and the effective repression of talent in the profession. De Rebus news editor, Nomfundo Manyathi-Jele, analysed the findings and compiled this article.
The report states that the objective of the research was to engage directly with members of the profession, at various stages of their career, in order to:
- identify some of the impediments to the advancement in the profession; and
- identify potential interventions that could mitigate these specific barriers.

The research looked at the experiences of legal academics, practising as well as non-practising attorneys and advocates and was conducted in Gauteng.

The report states that the research was not designed to be conclusive evidence regarding transformation in the legal profession but rather, to test the accuracy of the assumptions identified. Three methodologies were used in the research, namely structured discussion groups involving 26 participants, semi-structured individual interviews involving 15 interviewees and electronic surveys with a sample size of 62 respondents.

According to CALS, all three methodologies used yielded consistent evidence that affirms that sexual harassment and the intersection between gender and race discrimination are factors that impede advancement in the legal profession.

Some of the findings of the report included:

The data indicates that while black women experience the same types of gender discrimination as their white female colleagues, they also experienced a different and additional form of discrimination because of their race. Similarly, the experience of racial discrimination is similar to that experienced by their black male colleagues but there too, there is a different and additional form of discrimination based on their gender. Participants noted that the experience of discrimination based on race is different from that based on gender. Where one is part of the racial and gender minority, a most particular type of discrimination is experienced.

According to CALS, the research data shows that gender tends to be seen as less important in the process of transformation than race. The prejudice against a person based on both gender and race, was not addressed by the project of racial transformation. Black women can face both discrimination and prejudice because of their race and their gender. As a participant noted, it seems that while white women suffer from sexual harassment throughout their careers, black women suffer from both sexual harassment and gender discrimination. As a result of this intersection of discrimination, there are fewer successful black women than white women, and this appears mostly manifest on the Bench. A participant noted that it is particularly distressing that the Constitutional Court, which is the guardian of our Constitution, does not appear to be transformed for black women, and that this does not bode well for black women.

Certain participants at the Bar observed that the experience of being at the Bar is significantly different for black and women advocates because they feel like a cultural minority. They said that people talk in a particular way and socialise in a particular way, and work flows as a result of socialising.

According to the report, due to racism, prejudice and pre-conceived notions of ability, or inability, many black legal practitioners believe that they have to 'work twice as hard' to disprove these negative assumptions but, even in doing so, they only get 'half as far' as their white counterparts due to racism, prejudice and pre-conceived notions of their capabilities.

The participants from the Bar noted that the Johannesburg Bar Council has not adopted either a maternity leave or a sexual harassment policy, but has recommended instead that such policies be adopted by individual groups. They noted with concern that this lack of leadership from the Bar Council is indicative of the established hierarchy of the Bar, and the cemented traditions where women’s views and positions are not taken as seriously as those of men.

Participants made nuanced references to respect. A number of female participants observed that they feel that although they are taken seriously within the workplace, they are not taken as seriously as their male colleagues. One participant remarked that she had felt that she was taken seriously throughout her upbringing, until she began working in a law firm. She noted that this is endemic to the legal profession, and not specific to any one firm.

For example, senior members of the profession will assume that, as the only woman in the room, the female staff member will make the coffee. The same participant noted that 90% of the time, she is the only woman in the room. Her supervising partner ensures that either he or the most junior person in the room makes coffee. However, other partners tend automatically to assume that, as the only female present, she will make the coffee.

**Findings**

**Gender discrimination and reproductive rights**

According to CALS, gender discrimination on the whole seems to be accepted in the legal profession, particularly when it comes to pregnancy. One participant spoke of the tension between her desire to try to become a director or partner in her firm and her desire to start a family. She does not know if these two goals are compatible. Another participant described one incident where a woman had disclosed her pregnancy to an employer and had been asked what she was ‘going to do about it.’ The strong implication was that she needed to terminate her pregnancy, or lose her job.

According to the electronic survey, no respondents had requested unpaid maternity or paternity leave but this may be because none of the respondents had been expecting a baby.

The report states that prejudice and exclusion may not always be deliberate or conscious. Male and female junior as-

'It seems that while white women suffer from sexual harassment throughout their careers, black women suffer from both sexual harassment and gender discrimination.'
sociates in law firms noted vastly different experiences, as did white and black attorneys. Some participants observed that, within the law firm context, seniors tend to be dismissive of juniors as a whole but still treat white males better than their black or female colleagues. Instances of preferring white junior counsel over black junior counsel continue to occur. Both clients and the senior counsel will more readily listen to the white junior than to a black female junior.

There was also recognition that prejudices are often unconscious or unintentional. Some female participants noted that prejudice is not always apparently negative, for example, male senior partners may be ‘protective’ of their female juniors, treating them more like a daughter than a professional colleague. This facially-neutral practice becomes negative, however, by undermining the female junior and categorising her as a child in a parent-child relationship. This practice, and its unintended paternalistic side-effect, was acknowledged by male participants.

Some participants from the Bar observed that a good relationship with an attorney, which is encouraged by social interaction, leads to more work. But, there are limited opportunities to socialise across race, which restricts briefing patterns and some participants noted that attorneys tend to brief counsel that look like they do.

According to the report, a black female candidate attorney reported being told that she would ‘never be like’ her white male counterpart and while he is taken to meetings, she is sent to make deliveries and photocopies. She observed that her colleague attended the same school as their supervisor, and believes that there was a pre-existing relationship between them, which influences their interaction within the professional sphere. CALS noted that as participants related their experiences, it became apparent that sexual harassment is a problem across the profession with insufficient structures in place to address it; insufficient understanding of the range of behaviours that constitute sexual harassment; and a lack of understanding of the manner in which it impedes advancement.

According to CALS, the participants from the Bar acknowledged that theirs is a particularly tough environment, it is a fight to enter the domain; a fight to remain in it and it is a significant fight to succeed in it. Some participants noted that entering the Bar and succeeding as an advocate can be difficult for anyone because of the series of challenges entering the Bar poses. For example, the financial strain of pupillage followed by the 97-day invoicing period places a burden on all members of the Bar.

According to the report, a number of black participants spoke of being used in expedient and opportunistic ways by their firms: They described being invited to participate in meetings in which their respective firm was soliciting or ‘pitching’ work from potential clients. Participants spoke of being actively recruited to participate in these sessions. Then, the next time they would hear about that client and work would be weeks or months later, in the corridors. They would learn that the firm had been retained and was engaged in the work, but that they, the black attorney used to attract the client, would not have been included in the work.

One participant spoke of the “dishonesty” of using black identities to solicit business from government entities but then not being included in the work once the firm was appointed, the report stated. According to the report, many of the participants believe that those in senior positions (be it within law firms, at the Bar or in the judiciary) doubt and question the intelligence, talent or prior experience of black and female practitioners. In their opinions, black professionals are generally viewed as less than equal or worthy until they prove themselves differently. In contrast, they felt that their white colleagues were always presumed to be competent and capable until or unless they prove otherwise. Black and female and, in particular, black female professionals, need to overcome preconceived ideas and assumptions related to their race, gender, language and accent.

Participants almost always agreed that the legal profession is far from transformed. They noted that it is largely white and male physically, and that this is reflected in the profession’s ideology and prejudices. Many participants spoke about facing preconceived notions and attitudes that assumed black people were incompetent, lazy or token appointees without substantive knowledge and skills.

CALS states that on more than one occasion and in more than one setting, the research team heard some participants talk about the requirement for them, as black professionals and/or as women, to ‘prove themselves’ or to ‘show that [they] could do the work’ or to ‘have to work harder and longer’ than their white male counterparts to be recognised and respected by their supervisors. In other words, the presumption of intelligence was against them. One participant reported that a senior white male lamented that there were ‘no competent [black people].’ Another participant noted that, in many instances, clients ‘do not trust’ black attorneys or women attorneys.

One mid-level professional stated that black candidates attorneys need to ‘work extra hard’ and understand that the playing field is not level. These young professionals should not be ‘naive’ about the reality of who stays and who departs at the end of the articles period. According to this source, as a general rule, the
majority of white candidate attorneys obtain offers and stay while the majority of black candidate attorneys depart because they are not invited to continue with the large firms once they have completed their articles. This, in the opinion of this participant, is the reality that black entrants into the profession must face.

‘A participant reported an incident where a black female lawyer had sent an e-mail containing spelling errors to a client. The client replied to the entire team, complaining that this was why he opposed working with black women and insisting that she be removed from the matter. The firm took her off the matter. After this incident, the attorney in question left the firm. The critique of the firm’s response was not because spelling is not an important component of professional lawyering; rather, the response linked the error to the race and gender of the attorney – and all like her. The participant noted that it is highly unlikely that the client would have requested the removal of the attorney, and that the firm would have agreed to his removal, had he been a white man,’ the report states.

A black senior counsel noted that, when briefed on a construction matter, he will automatically think ‘black counsel do not understand construction law, so I had better find a white junior’, despite the fact that there are black junior counsel who are indeed experienced in construction law. He feels that he has been conditioned to underestimate black juniors because his white counterparts underestimate black juniors, and because he, himself, was underestimated as a junior. He noted that, even though he himself is black and aware of the imperatives of transformation, these assumptions are very difficult to unlearn and will take time.

The report states that some participants from the Bar noted that there are black attorneys who feel that they cannot brief black advocates. They fear that if such black counsel fails to perform to a certain standard, this will serve as confirmation that all black professionals cannot succeed. They noted that some black attorneys would rather brief white counsel than risk confirming their white colleagues’ prejudices about black professionals.

‘One participant observed that, as a black lawyer, his seniors assume that he cannot do the work that he is given, or to effect meaningful transformation, and the ways in which the legal profession is conservative and traditional. ‘One participant observed that she did not believe that she will see “real” transformation in her lifetime. In her opinion, “not enough is being done,” there has not been adequate skills-transfer and training has been insufficient. “Transformation is very far off.” Some participants observed that as long as the upper echelons of the profession remain occupied by white men who do not recognise the problem, it will be very difficult for transformation to be taken seriously and to advance,’ CALS states.

The report states that comments made included: ‘We still have a long way to go; ‘we need to move away from lip service transformation.’ My firm is ‘great at giving audience’ to transformation issues and discussions ‘but it does not always get it right.’ Echoing the sentiments of others, a participant noted that at the junior level within the profession, diversity can be seen but at the higher ranks, it drops off.

Participants also observed that institutions may spend a great deal of money on surveys and assessments but some participants question the willingness of these entities to take matters beyond the information-gathering stage.

Money spent on these types of effort ‘does not translate into practice. This is the problem.’

It was also noted that interventions in support of transformation ‘will not come from the law firms’. There is ‘no commitment’, there are ‘no penalties’, ‘no negative press’, and ‘no accountability’.

One participant noted that, although some black advocates (for example) want to see change, they want just enough change so that they can obtain what white men have, but not so much that the status and power that they seek is perceived to be somehow diluted or diminished by transformation.

‘Another participant spoke of the “dishonesty” of “using black identities” to solicit business from government entities but then not being included in the work once the firm was appointed.’

‘As long as the upper echelons of the profession remain occupied by white men who do not recognise the problem, it will be very difficult for transformation to be taken seriously and to advance.’
A participant noted that ‘there has been transformation at the Bar over the last [ten or so] years. There are more women and [black people] at the Bar. The work distribution is better but it is still inequitable. White men are more likely to be successful at the Bar. [People of colour] fall through the cracks. [We must recognise that] the Bar is intrinsically conservative and traditional. Bar leaders find change threatening, even some [black people in leadership positions].’

Another participant noted the ‘dramatic changes in the last 13 years [at the Bar]. We must recognise this,’ however, this participant went on to note that “progress has not been that good. The numbers speak for themselves.’

A number of participants in the study spoke of the importance of receiving –

• proper, appropriate and timely legal training; and

• exposure to both substantive areas of law and to clients during the early stages of one’s legal career.

Those fortunate enough to receive this type of training and exposure spoke highly and enthusiastically of these experiences. Those who did not benefit from these types of interventions recognised the adverse impact that this absence had on their professional development and expressed disappointment, if not anger, about the lack thereof. Often, participants (in both the individual and group interviews) stated that white male juniors were more likely to garner these types of experiences than black females, black males and white women.

According to the report many participants referred to law firms’ laudable value statements and policies in support of transformation, diversity and equal opportunity. They say that the words are there, the policies are in place, but these statements do not translate into practices and actions in the work environment. Against this background, a number of participants talked about the need for legal workplaces to be monitored and assessed in the context of their transformation policies and held accountable when they fail to meet or uphold these assertions and policies.

An important observation was that unless clients demand transformation or the failure to effect transformation negatively impacts profit, there is little, if any, incentive to implement the change articulated in the firm’s vision statements. Black female respondents to the electronic survey disproportionately expressed scepticism about the leadership’s commitment to actualising transformation. One of the key areas of dissatisfaction cited in the electronic survey was individuals’ concern with the leadership and direction of the organisation. 38.4% of black female respondents were either ‘very dissatisfied’ or ‘dissatisfied with the leadership and direction of their organisation.

According to CALS, most of the participants stressed the crucial role of mentorship and sponsorship in the context of legal practice (as an attorney and as an advocate). Juniors and mid-level professionals do best when they have the guidance and assistance of legal practitioners who are senior to them. Beyond training (which is also critical), these types of relationships help newcomers to the profession develop their professional reputations and build confidence, networks and client-bases. Those participants who have or had mentors and sponsors noted the positive effect of these relationships on their careers. And again, both those who benefited and those who did not benefit from these types of professional relationships spoke of the tendency for mentorships and sponsorships to be disbursed, so to speak, along racial lines.

‘A number of participants expressed concern at the absence of black female role models in the top echelons of law firms. One black female participant observed that the absence of women in senior positions, on whom she can model her career, means that she does not feel that the senior position is an option for her. As a result, she frequently finds herself questioning her choice of career. Female participants within a law firm noted that they feel that they are expected to lose their femininity and individuality, and channel their energies into being trailblazers who demonstrate none of the characteristics of the stereotypes associated with women,’ the report stated.

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The importance of a clear understanding of transformation

A number of participants expressed concern at the use of the word ‘transformation’ without a clear understanding of its meaning.

One participant said that she is frequently told that, should she go to the Bar, she will have no problems getting briefs because she is a black woman. She expressed discomfort at being guaran-

teed briefs by virtue of her race and gender, and wants her success to be based on her merit. This leads her to question what transformation is, and what drives debates on transformation.

The same participant said that she is concerned when questions of transformation look only at race and gender, and suggested that the debate should also take economic circumstances into account. She provided the example of a white female colleague with whom she served her articles. Her colleague started her articles and had a number of loans that she had had to take out in order to pay for her studies, whereas she, as a middle class black female, had had her studies paid for by her parents.

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Economic disadvantage

According to the report, participants recognise the growing black middle class entering into the legal profession. However, issues of economic status and class continue to impede development and growth in the profession.

Several participants spoke of issues involving candidate attorneys and young black professionals who did not have driver’s licenses or did not have cars and how this adversely affected these attorneys during their article periods.

A participant told of a black female candidate attorney in a large firm who did not have a car and used public transport to travel to work, which hindered
Recommendations

The project mapped four stages of the legal profession and made recommendations for each stage.

CALS advised those working on transformation of the judiciary to identify the link between the transformation of the judiciary and the transformation of the profession as a whole. It recommended that it should acknowledge and identify that the lack of transformation in the judiciary is linked to a lack of transformation in the legal profession.

‘Addressing the representation of the judiciary demands an analysis of the lifespan of the entire legal profession to determine why black women in particular are exiting the profession, resulting in a smaller pool of black female candidates for the judiciary than their white male colleagues,’ it said.

Another recommendation was for law firms and members of the Bar to take it from the top.

‘Transformation requires a champion. The champion must be someone with power in the organisation and who is both respected and a high fee-earner. Change occurs if behaviour by those with power is adjusted. Somebody in a position of power in a firm needs to take on the role of championing transformation and addressing the impediments identified within that firm. This should not be left to human resources,’ it said.

It also recommended that the profession should acknowledge and respond to the patterns of discrimination that cause black women to leave the profession.

The report stated that there has to be fair and representative mechanisms that hold perpetrators to account and protect victims of discrimination and harassment and recommended that the Law Society of South Africa and the General Council of the Bar, at a minimum, should have policies around harassment and sexual discrimination for the parts of the profession they represent.

A recommendation was also made that senior lawyers should be clear about their own responses to black and white juniors. ‘They should always draw a distinction between criticism of an individual’s work and criticism of an individual and the group to which they belong. The former is acceptable and promoted excellence. The latter is a form of racial and gender discrimination, both of which are prohibited and which impede transformation of the profession as a whole,’ the report stated.

The final recommendation was for the Department of Justice and Correctional Services to undertake a research project to monitor the career paths of black female law graduates and determine how and if they progress in the legal profession over a ten year period.

It also encouraged the Judicial Service Commission to take responsibility for the patterns of discrimination that may or may not be emerging in the profession and, as a result, in their decision-making.

Conclusion

In conclusion, CALS said that the findings of the report needed to be explored further and addressed because failure to do so would result in the debate about transformation of the judiciary being a constant and unchanging phenomenon well into South Africa’s future. ‘In the same way as centuries of gender- and race-based discrimination has led to the loss of scientists, mathematicians and artists because the identity and race of a person mattered more than their skill, so too we risk the loss of excellence in the legal profession today,’ CALS stated.
Does PAJA still form part of the legislative puzzle?

By Bayethe Maswazi
Section 33(1) of the Constitution guarantees every citizen the right to a lawful, reasonable and procedurally fair administrative action.

Section 33(3) further enjoins the legislature to enact legislation to give effect to the right referred to in s 33(1). The Promotion of Administrative Justice Act 3 of 2000 (PAJA) became the Act envisaged in s 33 of the Constitution.

In fulfilling what it is required to do by the Constitution, namely, to give effect to the right contained in s 33(1), PAJA defined what administrative action is, and is thus liable to be reviewed when it violates its provision, and also what it is not and is thus not liable to be reviewed either in terms of the provision of PAJA or at all when it happens to transgress any of the rights in the Constitution.

PAJA left untouched a vast area inhabited by a number of acts, which were regarded as administrative actions prior to its enactment by its provisions, such as actions by public sector employers when they dismiss their employees and which hitherto have always been recognised as being liable to review on the basis of procedural fairness, or actions of voluntary associations when they discipline their members. This became an area too large for it not to be reviewed, or only to be reviewed at common law. The most pertinent weakness of PAJA is that it is likely to result in its receding influence as the central thrust of the cause of action for review of administrative action and consequently, that of the constitution of which it is a progeny. Will PAJA survive? In this article I discuss PAJA and whether it will continue to impact in our administrative review jurisprudence as much as it has done – in light of the rapid emergence of legality as yet another ground for review of administrative actions, outside the provisions of s 33(1) of the Constitution and PAJA itself.

PAJA or rule of law?
The provisions of PAJA insofar as they relate to the review of administrative action are onerous. Too often it happens that a litigant approaches a court for review without pertinently invoking any of the provisions of PAJA.

Subsequently it turns out that such a litigant has not complied with one or other of the provisions of PAJA and has not laid down a sufficient basis for condonation for such non-compliance resulting in the court from granting the review sought in terms of PAJA. Such a litigant is often, of late, rescued from such a situation by resorting to legality as his ground for review. It has also happened that certain actions of state functionaries are singled out in PAJA as non-reviewable. Examples here would be the decision of the National Director of Public Prosecution to, or not to prosecute, the actions of the Judicial Services Commission in recommending or not recommending an aspirant judge for appointment by the President of the Republic. Of late courts have found reason to ignore the provisions of PAJA and review such decisions on the basis of illegality, and not PAJA. (See in this regard, Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others 2012 (3) SA 486 (SCA) and also Democratic Alliance v President of the Republic of South Africa and Others 2013 (1) SA 248 (CC). In other words actions that are immunised by PAJA against judicial review do become reviewable under the doctrine of legality, thus creating a systems of administrative review outside PAJA and therefore outside the provisions of s 33(1) of the Constitution.

It is impossible to define the actions tabulated above as administrative action since they are explicitly excluded from the definition of an administrative action contained in PAJA. Something very interesting is that the very genesis of the cause of action based on review intrinsically necessitates that the decision sought to be reviewed must constitute administrative action, otherwise it is not reviewable. Where then does legality get its own definition of administrative action if not from PAJA and therefore s 33(1) of the Constitution? This is a question that our courts have not answered as yet and judging from their recent decisions, are not prepared to answer. The above does illustrate that even a review based on legality inadvertently reverts to PAJA for it does not have its own definition of administrative action other than the one which derives from PAJA and the Constitution. Therefore, there is a natural interlink between PAJA and legality for two reasons. Firstly, what is always sought to be reviewed can only be an administrative action referred to in s 33(1) of the Constitution and given meaning by PAJA. Secondly, s 33(1) of the Constitution requires that an administrative action must first be lawful. This is nothing short of the expression of the doctrine of legality that is built into s 33(1) of the Constitution. To emphasise, s 33(1) of the Constitution requires that an administrative action must, as a precursor to its procedural fairness, be lawful. This in my view is nothing short of the practical expression of the doctrine of legality that is alluded to in s 1 of the Constitution.

Two systems of administrative review?
In Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC), the Constitutional Court had occasion to consider the relationship between common law grounds of review and those based on the Constitution. From this judgment, two things become clear, one is that all grounds of administrative review are accumulated on the Constitution and therefore PAJA, the other is that any ground of administrative review based on common law must be developed on a case by case basis. The Pharmaceutical Manufacturers case clearly did not bargain on the law developing in the direction of giving birth to a ground of administrative review, which while based on the Constitution is nonetheless, not based on PAJA and its source namely s 33(1) of Constitution.

I therefore submit that the emergence of legality as the ground for administrative review is a new jurisprudence, which breaks rank with the principle enunciated in the Pharmaceutical Manufacturers case since it creates an offshoot system of administrative review based on the Constitution but outside s 33(1) of the very same Constitution and PAJA. Courts have not really clarified whether the doctrine of legality as a ground for judicial review should be resorted to only where PAJA is not available as a ground of review for whatever reason, thus leaving litigants at large to choose the doctrine of legality as a basis on which to stand in impugning one or other of the actions of state functionaries. In N Gagayi v Ingquza Hill Local Municipality and Two Others (unreported case no 1251/12, 22-6-2012) (Mbenenge AJ) the Eastern Cape Division – Mthatha per Mbenenge AJ (as he then was), opined that a person who approaches a court for review invariably has two choices, namely, those being to approach the court on the basis of PAJA; or based on legality. He did not, however, dwell at length on the distinguishing requisites of a review based on legality as opposed to one based on PAJA. This occurred in a case where the applicant had not exhausted internal remedies in terms of PAJA, and were, as it is of late becoming frequent, rescued by resort to legality as their ground of review and as opposed to PAJA and thus the court saw its way clear in granting them the review they sought. Had they come to court on the basis of PAJA, at the very least the court would have required them to exhaust internal remedies, and decline the relief sought, at least not until internal remedies have been exhausted. In the Gagayi case, the provisions of s 1(6) were pertinently implicated.

It is thus fair to surmise from the recent cases that a litigant has the right to appeal to the court on the basis of PAJA. This is irrespective of the sorts of grounds and remedies that a court may or may not grant.
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the two bases for judicial review are seen as two different lanes of the same street going the same direction but clearly separated from each other. Whether the two lanes can be straddled is not as yet clear. The recent decision of Murphy J in Freedom Under Law v National Director of Public Prosecutions and Others 2014 (1) SA 254 (GNP), there it was held at para 221, that it is unnecessary to characterise an impugned decision as an administrative action in order to render it reviewable on the basis of legality. What this means is that we are beginning to see signs of the growth of jurisprudence that seeks to draw a solid line between a review based on legality and the one based on PAJA. Perhaps in future we are going to see courts taking this trend further and actually setting out the requisite distinguishing factors for the two grounds of review. Such a trend, were it to emerge might save PAJA from its receding influence in administrative review jurisprudence, and the obscurity to which it seems to be destined.

Where is legality coming from?

While legality has always been accepted as one of the common law grounds for review, courts have located it within the Constitution. They have not applied it as part of their duty encapsulated in s 39(2) and (3) of the Constitution. Again it is not clear why courts have opted for the option they have, thus leaving us with two distinct causes of action emanating from the same set of facts.

One of the foundational values of our constitutional democracy is the rule of law, a principle encapsulated in s 1(c) of the Constitution. Courts have not held that s 33 (1) of the Constitution is the affirmation of the rule of law at least to the extent that it requires that an administrative action must be lawful. Why this is not so is not yet clear? While rule of law reviews have always been a feature of our jurisprudence, their popularity has grown over the years and have tended to eclipse PAJA as a ground for review. The Constitutional Court in Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (Nicro) and Others 2004 (5) BCLR 445 (CC), seems to suggest that no cause of action can arise from the provisions of s 1 of the Constitution. If the cause of action based on legality is based on s 1(c) of the Constitution, surely the Nicro case jurisprudence along with the Pharmaceutical Manufactures case have now clearly been contradicted to a point where they can no longer be said to be law. This has happened as the result of the emergence of legality as a cause of action for administrative review based on the Constitution, in particular s 1 of the Constitution but outside PAJA, which is born by s 33 of the Constitution.

Conclusion

As long as the courts have not fully tabulated the principle distinguishing factors between the grounds of review based on PAJA and those based on rule of law, PAJA’s passage towards obscurity is guaranteed, a sad eventuality. The legislature can, however, solve this jurisprudential anomaly by amending PAJA and removing from it the immunity given to certain decisions of public functionaries by rewording the definition of administrative action contained therein.
Deducting amounts from salaries and failing to pay –

Employers brought to book by the law

By Clement Marumoagae

There are employers in South Africa who deduct retirement fund contributions from their employees’ salaries but fail to pay them over to the relevant retirement funds as mandated by s 13A and reg 33 of the Pension Fund Act 24 of 1956 (the Act). Some employers also fail to register their employees with relevant retirement funds despite being participating employers to such funds (Moloantoa v The Private Security Sector Provident Fund and Others (PFA) (unreported case no PFA/00001982/2013/TKM)). Some employers fail to register themselves with funds operating within their respective industries, which they are compelled by law to register, unless they are lawfully exempted from registering with such funds (Mthimkhulu MB v NCB Holdings and Another (PFA) (unreported case no PFA/GA/8180/2006/SM)). Government, the Financial Services Board (FSB) and the office of the Pension Funds Adjudicator (adjudicator) have run out of patience with employers who make deductions but fail to pay the money to the intended funds (M Moonsamy ‘Section 13A of the Pension Funds Act: Payment of Contributions and Certain Benefits to Pension Funds’ (2010) www.dentasa.org.za/Sectio%2013a%20Pension%20Fund%20Act.pdf, accessed 6-10-2014). Such impatience is well illustrated by the 2013 amendments to the Act through the Financial Services Laws General Amendment Act 45 of 2013 (FSGAA). This article discusses the problem of non-payment by employers of contributions that are deducted from their employees’ salaries, to the relevant retirement funds and how the law currently seeks to remedy this problem.

Section 13A of the Act

Section 13A (1) of the Act mandates employers to pay money deducted in terms of the rules of the fund from the employee’s remuneration over to the retirement fund. In terms of s 13A (3) of the Act, any contribution to a retirement fund in terms of its rules shall be transmitted directly into the retirement fund’s account with a bank registered as such under the Banks Act 94 of 1990, not later than seven days after the end of the month for which such a contribution is payable (FSB Circular PF 108 (www.fsb.co.za/Departments/retirementFund/Circulars/PF%20Circular%20108.pdf, accessed 6-10-2014). Employers should make all the required contributions payment timeously. Section 13A (7) of the Act provides that interest shall be payable on the amount of any contribution not transmitted or received by the fund or insurer as prescribed in s 13A (3) of the Act. The employer will therefore be required to pay interest on any non-payments, late payments or short payments. The rate of interest is prescribed from time to time by regulation. The method of the calculation of the late payment interest is set out in FSB Circular PF 110 (www.fsb.co.za/Departments/retirementFund/Circulars/PF%20Circular%20110.pdf, accessed 6-10-2014). Section 13A (6) of the Act places the duty of compliance and monitoring of payment of contributions on the principal officer.
or an authorised person by the board of trustees.

The person responsible for checking receipt of electronic transfers into the fund’s account or responsible for receiving contributions must report to the principal officer of the retirement fund or authorised person when the employer fails to pay contributions as required by the rules of the fund (reg 33 (2)). This will enable the principal officer or an authorised person to report the failure in writing to comply to the board of trustees within seven days of receiving such report (reg 33 (3)). In terms of reg 33 (5), if the employer fails to transmit contributions to the fund within 90 days, the monitoring person should inform the Registrar of Pension Funds. The Registrar may inform the Commissioner for South African Revenue Service of such non-compliance and the Commissioner shall take whatever action he or she deems necessary against the participating entity/ies or the board of the fund (reg 33 (6)).

It is concerning that even with the above discussed statutory safeguards certain employers, more particularly within the private security industry, still neglect to pay contributions to the funds to which they are mandated to. This is despite the fact that all the employers within the private security sector are obliged to participate in the Private Security Sector Provident Fund, unless an employer is exempted from the fund in terms of the rules of that fund (see r 3.1 – 3.3 of the Private Security Sector Provident Fund Rules). It has been reported in the media that the Private Security Sector Provident Fund is in shambles and it needs to recover millions from employers who allegedly pocketed provident funds after deducting them from employees’ salaries (Thuli Zungu ‘Security guards robbed of millions in pensions’ Sowetan 15-4-2013 (www.sowetanlive.co.za/helpline/2013/04/15/security-guards-robbed-of-millions-in-pensions, accessed 6-10-2014)). The effect of non-access to pension funds is that employers who are mandated to comply with the regulations of which the contribution is payable; name and address of the employer; and employee’s full names, identity (ID) number and date of membership.

The FSGAA

The purpose of the FSGAA is, among others, to amend and update the Act in order to ensure a sound and well regulated financial services industry. This amendment makes the employer’s failure to pay contributions to a retirement fund a criminal offence. Section 17 of the FSGAA amended s 13A of the Act by introducing three subsections thereto, namely, subs 8, 9 and 10 respectively. Section 13A (8) of the Act now provides for personal liability for every director who is regularly involved with the financial affairs of a company, every member who regularly controls or involved with the financial management of a close corporation and persons entrusted with managing the overall financial affairs of the employer. Section 13A (9)(a) of the Act obliges retirement funds to request participating employers to notify the fund in writing of the identity of the person who will be personally liable when contributions are not made by the employer to the fund. Should the employer fail to provide the fund with the name of such person, all the directors of a company, members of a close corporation or persons comprising the management body of the employer shall be held personally liable (new s 13A (9)(b) of the Act). The board of trustees is also mandated to report any non-compliance by the employers to the Register of Pension Funds (new s 13A (10) of the Act).

The Registrar of Pension Funds is empowered to refer non-compliance with s 13A to the Enforcement Committee of the FSB. The Enforcement Committee was introduced to enable the FSB to act against individuals and entities that contravene the laws that the FSB regulates, including the Act. The Enforcement Committee is an administrative body established to adjudicate on all alleged contraventions of legislation, regulations, and codes of conduct administered by the FSB, and it has the power to impose unlimited penalties, compensation orders and cost orders that are enforceable as if they were judgments of the High Court of South Africa (www.fsb.co.za/enforcementCommittee/Pages/aboutFSGAA.aspx, accessed 6-10-2014). However, it has been argued that ‘although that committee was empowered to impose civil penalties on those who violated provisions of various financial services laws, for unknown reasons the registrar has not referred non-payment cases to the enforcement committee’ (Bowman Gilfillan, Access Group ‘Employer’s failure to pay pension fund contributions to become a criminal offence’ FANEWS 15-1-2013 (www.fanews.co.za/article/legal-affairs/10/general/1120/ employer-s-failure-to-pay-pension-fund-contributions-to-become-a-criminal-offence/13019, accessed 6-10-2014)). However, it has been reported that the FSB has not yet had a watertight case of a defaulting employer, which could be taken to its Enforcement Committee, but nonetheless it does not want to use the Enforcement Committee as a collecting agent when retirement funds should be using other ways to collect the contributions due to them (Lara du Preez ‘Employers reneging on pension payments’ IOL 17-3-2013 (www.iol.co.za/business/personal-finance/retirement/employers-reneging-on-pension-payments-1.1487422#.VDKK_vmSx7g, accessed 6-10-2014)).

Section 49 of the FSGAA further amended s 37 of the Act by providing that a person who contravenes or fails to comply with, among others, s 13A of the Act is guilty of the criminal offence of not paying pension contributions on conviction of a fine not exceeding R 10 million or to imprisonment for a period not exceeding ten years, or both such a fine and such imprisonment. It remains to be seen whether this legislative initiative will induce employers, more particularly within the private security sector to start being compliant with s 13A of the Act. I am of the view that if the boards of trustees begin assessing their records adequately in order to identify employers who are failing to act in accordance with the law and start utilising both the civil route provided by the Enforcement Committee, as well as the criminal route provided for by these amendments, employers will have no option but to comply. I also welcome the initiative for personal liability, and believe that this initiative will most definitely ensure that employers start making contributions to retirement funds, which they are supposed to contribute to.

The Pension Funds Adjudicator

The adjudicator has also assisted employees in cases where the fund refused to pay their withdrawal benefits. More particularly when employers failed to register such employees with the relevant pension fund but deducted contribution amounts from their salaries. The adjudicator has ordered the fund to compute the value of the withdrawal benefit that the employee member would have been entitled to had he been a member of the fund and had the employer timely made the pension contributions due in terms of the rules of the fund, and directed the employer to pay the employee the amount computed by the fund (the Methimkulu case). The adjudicator has also ordered some employers to register themselves and their employees with the
funds, which they are mandated to register with (Selebogo v The Private Security Sector Provident Fund (PFA) (unreported case no PFA/NW/000005120/2013/PGM).

Conclusion
It is unjustifiable that there are employers who continue to deduct amounts from the salaries of their employees but deliberately fail to pay such amounts to the relevant retirement funds. Most employees, more particularly those who are earning less such than those working within the security sector, more particularly the private security sector are the most vulnerable to such practices. The legislature has provided the much-needed intervention as discussed in this article. Thus the boards of trustees need to ensure non-compliant employers are effectively brought to book. The trustees need to comply with s 7C of the Act, which requires them to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times. It is pleasing that the Office of the Pension Funds Adjudicator has been instrumental in trying to force employers who took contributions from their employees and failed to contribute to the relevant fund to pay such money with interest to either the employees or the retirement funds.

It is important that practitioners who are approached by clients, who experience difficulties with their withdrawal benefits pay-out or pay-out of pension benefits as dependants of members of retirement funds, should first attempt to liaise with the fund directly through letters and possibly by telephone before approaching the adjudicator. Section 30A of the Act provides that a complainant may lodge a complaint with the fund for consideration by the board of trustees, which should be considered and replied to in writing within 30 days of receipt thereof. Further that if the complainant is not satisfied with the reply or there was no reply at all, then a complaint may be lodged with the office of the Pension Funds Adjudicator.

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The salient facts concerned the fate of a flock of sheep. In terms of the will of one EWD Keevy, a usufruct was granted to his wife in respect of, inter alia, a flock of sheep. After she had taken possession of the sheep following the death of her husband, she entered into an agreement with NW Keevy in terms of which the sheep were leased to him. The agreement provided for the lease to terminate on her death and imposed an obligation on him to 're-deliver to the Administrators in Estate Late EWD Keevy livestock of equal number and value as received at the commencement of [the lease]'.

The present application concerned a number of issues, only one of which will be discussed here, namely, whether the cession on which Keyter sues is valid and enforceable.

Plasket J held that there is authority for the proposition that an executor of a deceased estate may cede rights vested in the estate. In Elizabeth Nursing Home (Pty) Ltd v Cohen and Another 1966 (4) SA 506 (D) the court held that an executor has a great deal of freedom as to the mechanics of how he or she liquidates and distributes an estate. An executor is first required to reduce assets, including rights of action, into his or her possession. Having acquired possession of an asset, it is for the executor to decide whether to call for payment if it is a debt, or to realise it, or to distribute it among the beneficiaries.

The decision in the Elizabeth Nursing Home case is authority that an executor may cede a right that is vested in an estate. It is clear that an executor of a deceased estate may cede a right to an heir. If he or she can do that, there is no reason in principle why he or she cannot cede a right to a third party, as happened in the present case.

Keyter was accordingly entitled to the flock of sheep ceded to him by the executor.

**Attorneys**

**Striking from roll:** In Hepple and Others v Law Society of the Northern Provinces [2014] 3 All SA 408 (SCA) the respondent, the Law Society of the Northern Provinces (the law society), had brought an application for the removal of the first two appellants, Hepple and Earle, from the roll of attorneys. Section 22(1)(d) of the Attorneys Act 53 of 1979 (the Act) provides that an attorney may, on the application by the relevant law society, 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.
The proceedings in applications to strike the name of attorneys from the roll are not ordinary civil proceedings. They are proceedings of a disciplinary nature and are sui generis. Therefore, if allegations are made by the law society and underlying documents are provided that form the basis of the allegations, they cannot simply be denied and brushed aside by the attorney under investigation. The latter must respond meaningfully to them and furnish a proper explanation of the financial discrepancies as the failure to do so may count against him or her.

An examination of the evidence convinced the court that the irregularities in the trust accounts were not merely the result of accounting errors, but were the result of deliberate dishonesty. The offending conduct was found to have been established on a balance of probabilities.

On the second leg of the inquiry, the court could not find that Hepple and Earle were not fit to practise as attorneys at all.

In deciding the third question, regarding the sanction, the court held that before imposing the sanction of striking from the roll, a court should be satisfied that the lesser stricture of suspension from practice will not achieve the court’s supervisory powers over the conduct of attorneys. Where there is dishonesty, exceptional circumstances should exist before the court will order a suspension instead of a removal from the roll.

There were no exceptional circumstances in the present case and the appeal was accordingly dismissed with costs.

Cession

**Effect of litis contestatio**

The facts in *Antonie v Noble Land (Pty) Ltd* 2014 (5) SA 307 (GJ) were as follows. In an earlier application, the main application, the trustee of an insolvent estate launched an application against the respondent, Noble, for payment of an amount plus interests and costs allegedly owing to the insolvent estate in terms of a settlement agreement between the insolvent estate, Noble, the insolvent and two other parties. Noble was then granted an order for the provision of security for costs by the trustee. The effect was to stay the proceedings until the order was complied with. The main application is still pending.

The current application for substitution was launched on 19 April 2012. In terms of the present applicant, Antonie, for an order that she be substituted as the applicant in the proceedings instituted by the trustee on the ground that she and the trustee had concluded a written agreement under which the trustee ceded to Antonie all entitlement to the main claim against Noble. This agreement had been concluded after *litis contes­tatio* in the main application. Noble opposed the substitution because of the potential prejudice it might suffer if the substitution were granted without an additional costs order, particularly in regard to the costs already incurred in the various legal proceedings instituted prior to the present application.

In dealing with the present application, Claassen J pointed out that the substitution of a party to litigation by an applicant, had to be regarded as the substitution of the cessionary as the new plaintiff or defendant in the main application. In its capacity as the new plaintiff or applicant, had to be regarded as the institution of new proceedings. In the present case this would result in a bad debtor in respect of costs (the insolvent estate) being substituted by a potentially more creditworthy debtor (Antonie, assuming she was not insolvent). The substitution would benefit the liquidator of the insolvent estate having regard to any future costs order granted in its favour. This benefit did not, however, apply to the pre-substitution costs incurred by Noble. Whichever way the matter was looked at, the hands of the court were tied while the security for costs order was in force: The court could not issue an order that was irrec­ oncilable with the order of se­ curity for costs. There would be no further adjudication of the application while the security for costs order was still valid and enforceable.

Antonie’s application was thus dismissed with costs.

**Company law**

**Business rescue:** In *Van Zyl v Engelbrecht NO* 2014 (5) SA 312 (FB) the liquidator of a company, Engelbrecht, sued a director, Van Zyl, for the company’s debts. The director raised a special plea of prescription and applied for separation of the trial issues and payment of associated costs. A few days later an application to place the company under business rescue was made by an affected third party. The court ultimately settled the separation application, which was thus dismissed with costs.

The parties are, effectively, at variance on whether or not the action between them is a step in the liquidation proceedings so as to bring it within the parameters of the provisions of s 131(6) of the Companies Act 71 of 2008 Act (the Act). The applicant contends that the respondent is liable for the costs of the application for separation of issues, which latter, on his part, maintains that he cannot be saddled with such costs because his position as a liquidator was suspended when the business rescue application was launched.

Since liquidation proceedings are in terms of s 131(6) of the Act – suspended by an application for business rescue, the question was wheth­ er the liquidator’s action against the director qualified as a step in the liquidation proceedings. The liquidator argued that he could not under s 131(6) be held liable for costs incurred after the business rescue application. The director argued that s 136(1) did not suspend proceedings, such as the liquidator’s action against him, that were for the benefit of the company.

Lekale J held that the liqu­
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dator’s action was a claim for the recovery of a debt due to the company and therefore qualified as a step in the liquidation process that was hit by s 131(6). Suspension of the liquidation proceedings entailed the suspension of the office of the liquidator. The director’s contention, that claims for the company were exempt from s 131(6) because they stood to benefit the company and, as such, served to resuscitate it, was without merit because the legislature would have said as much. Therefore, steps taken by the liquidator after a business rescue application are futile and of no legal consequence. But the court held that such steps may nevertheless be ratified by the liquidator himself at the end of the suspension period as contemplated by s 131(6)(a) and (b) of the Act, or possibly by the appointed business rescue practitioner where liquidation proceedings were converted into business rescue proceedings.

In the light of the above the costs in the separation application had to stand over for determination at a later stage pending finalisation of the business rescue application.

Oppressive conduct: In Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others 2014 (5) SA 179 (WCC) the court was asked to consider what constitutes oppressive conduct by directors of a company.

The crisp facts were that the applicant, Visser Sitrus, sought to transfer its shares in Goede Hoop Sitrus (Pty) Ltd (Goede Hoop) to Mouton Sitrus. However Goede Hoop’s board refused to approve the transfer. Visser Sitrus applied to the High Court for an order amending Goede Hoop’s Memorandum of Incorporation (MOI) insofar as it dealt with transfers of shares. The clauses in question provided that a shareholder required the approval of the board in order to transfer shares and that the board could decline to register a transfer without giving any reasons. Visser Sitrus further sought changes obliging the board to give reasons for its decisions.

In dealing with Visser Sitrus’ application, Rogers J held that a MOI could quite validly permit a board to not give reasons for refusing to transfer shares.

Visser Sitrus also sought an order compelling Goede Hoop to register the transfer of shares in terms of s 163 of the Companies Act 71 of 2008 (the Act). Section 163 allows a shareholder to apply to a court for relief if an act of the company has had a result that is unfairly prejudicial to it. It allows the court, in determining the application, to make any order it considers fit. Section 76 provides, inter alia, that a director must act in good faith and for a proper purpose and in the best interests of the company. Visser Sitrus based its s 163 claim on the alleged breach by Goede Hoop’s directors of their fiduciary duties in terms of s 76 of the Act.

Next, the court addressed the following questions. First, if directors exercise a power given to them by the company constitution, and meet the standard of conduct in s 76, can a shareholder prejudiced by the decision complain that it unfairly prejudices him? The court held that the circumstances would have to be exceptional for a decision taken in accordance with s 76 to cause unfair prejudice in terms of s 163.

Secondly, the court considered the question whether Goede Hoop’s directors complied with their fiduciary duties in terms of s 76? The court held that the question regarding the duty to act in the best interests of the company is not a strict objective test. What was required was that the directors had to take reasonably diligent steps to become informed about the matter; that they subjectively believe their decision to be in the best interests of the company; and that their belief should have a rational basis as required in terms on s 76(4) of the Act.

The court held that the directors had indeed acted in the best interests of the company by refusing to register the transfer of shares they –

• had been sufficiently informed;
• had subjectively believed the decision was in the best interests of the company; and
• had acted rationally.

They had also acted for a proper purpose. The actual purpose of refusing transfer had been to prevent Mouton Sitrus increasing its shareholding, where this was believed to be against the best interests of the company. This actual purpose echoed the intended purpose of the provision.

Accordingly, so the court reasoned the standards set in s 76 had been met and the refusal to approve the transfer was lawful.

The court thus held that the refusal was not unfairly prejudicial to Visser Sitrus and the application was refused with costs.

• See 40.

Contract law

Interference with contractual relationship: The facts in Minister of Safety and Security (now Minister of Police) v Scott and Another [2014] 3 All SA 306 (SCA) were as follows.

In 2005, the first respondent, Scott and the second respondent, Scottco, sued the appellant, the Minister, for damages arising from the alleged unlawful arrest and detention of Scott. Suffice it to mention here that Scott was arrested by the police after he and his friends assaulted someone outside a pub. Scott was a professional hunter and a registered undertaker of big game hunting enterprises in South Africa. His arrest meant that Scott was unable to take an American group for a planned hunting trip at his ranch. The failure of the hunting trip further led to the American magazine that carried advertisements for Scott’s business advising him
that it was terminating its agreement with him. In terms thereof, the magazine would no longer run his advertise-
ments, and would also no longer bring its own clients to his ranch as planned.

The High Court awarded Scott R 75 000 for general damages in respect of the unlawful arrest and detention and R 577 610 being wasted advertisement costs. The Minister appealed against the award of loss of contractual income and profits awarded to the second respondent and the amount of R 75 000 awarded to Scott.

Although the Scott case concerned a number of is-

sues, the present discussion will be restricted to the pos-

sible interference with Scott’s contractual relationship with the magazine.

On appeal, Theron JA noted that the court a quo had not considered whether a claim for pure economic loss could be sustained in the circum-
stances of the Scott case. The present court held it was common cause that the claim for loss of income and profits was a claim for pure econom-
ic loss. Accepting that such a claim could only be brought by way of an Aquilian action, the respondents were con-
strained to concede that in that respect the particulars of claim were technically lack-
ing. No exception having been filed, the appropriate inquiry was whether, despite the de-
ciency in the pleadings, and having regard to the evidence, the Minister should be held li-
able for the loss suffered by the second respondent.

The court first dealt with the legal position in respect of claims based on an inter-
ference with a contractual re-
lationship. The general rule in our law is that only the inten-
tional interference with the contractual relationship of another constitutes an inde-
pendent delictual cause of ac-
tion. In the present case, the police had no knowledge of the contract between the sec-
ond respondent and the visit-
ing American hunting group. There could therefore not be any intentional interference in the contractual relationship. On that basis alone, the second respondent’s claim had to fail. Even if that was not true, then the second re-

spondent was found not to be able to establish the delictual requirements of wrongful-

ness and causation. The court con-

cluded that the damages claimed by the second re-
spondent were too remote to be recoverable.

The appropriateness of the damages awarded to Scott was the next issue considered on appeal. The assessment of general damages is a matter within the discretion of the trial court and depends on the unique circumstances of each particular case. An appeal court is generally reluctant to interfere with the award of the trial court but will do so where there has been an irreg-
ularity or misdirection. Where the appeal court is of the opinion that no sound basis exists for the award made by the trial court or where there is a striking disparity between the award made by the trial court and the award, which the appeal court considers ought to have been made. A comparative study with other cases revealed that the award made by the High Court was grossly excessive.

The court held that an award of R 30 000 for general damages was more appropri-
ate, and upheld the appeal.

Delict

Misrepresentation: The dispute in Sanlam Capital Mar-
kets (Pty) Ltd v Mettle Manco (Pty) Ltd and Others (2014) 3 All SA 454 (GJ) turned on a circuitous transaction con-

cerning the buying and sell-
ing of financial instruments based on debts. The plaintiff, Sanlam, engaged in the trans-
actions by virtue of certain representations made to it by the defendants. It began with the first respondent, Mettle, calling on the plaintiff with a proposal, which invited San-
lam and one other institution to participate in a debt securi-
ratisation scheme as the sen-
tor founders of such a scheme. In presenting the proposal, Mettle made certain represen-
tations (the representations), the crux of which was that all the defendants had been involved with and intimately knowledgeable of the busi-

ness, history, management, personnel, financial position, accounts and structuring of another commercial entity, MIP Logistics.

Sanlam claimed that the defendants owed it a duty of care not to make the re-
presentations to it unless the representations were correct in all material respects. The crux of Sanlam’s case was that the defendants breached such duty by not ensuring that the representations were at all material times correct. The consequence of the de-
fendants’ breach, so Sanlam alleged, was that significant losses were incurred by the various associated companies of MIP Logistcs.

Alternatively, Sanlam claim-
ed that the second, third and fourth defendants contra-

vened s 76(3) of the Compa-
nies Act 71 of 2008 (the 2008 Companies Act) by acting recklessly, alternatively neg-
ligently, in their capacities as directors of MIP Finance.

The defendants raised a number of exceptions against the particulars of claim, only two of which will be dis-
cussed here: First, the issue of unlauffulness, and secondly, the issue of the liability of the defendants on the basis of their alleged contravention of various sections of the 2008 Companies Act.

Vally J pointed out that the defendants excepted to the particulars on the basis that even though the negligent misstatements imputed to them were the cause of the plaintiff concluding a con-
tact to its detriment, the rep-

resentations were not wrong-
ful. The court confirmed that the particulars in a delictual claim must contain an allega-
tion of wrongfulness as well as the facts relied on to sup-
port such allegation. As San-
lam relied on case authority that was confirmed by the present court as good in law, the exceptions in this regard were dismissed.

The remaining exception was directed at Sanlam’s al-
ternative argument based on the 2008 Companies Act as referred to above. The court found that Sanlam was en-
titled to find its alternative action on the provisions of s 218(2) read in conjunction with s 76 and the various other sections of the 2008 Companies Act identified in the particulars. The remaining exception was thus also dismissed.

Estoppel

Plea of res judicata: In Prin-
slo NO and Others v Goldex 15 (Pty) Ltd and Another 2014 (5) SA 297 (SCA) a trust sold a farm to Goldex. Goldex later purported to cancel the sale on the basis of an alleged fraudulent misrepresentation prior to the sale by the trust’s representative, one Prinsloo. The trust then applied to a court to compel Goldex to perform. Goldex in its an-
swering affidavit set out the details of the misrepresenta-
tion. The court’s finding was that Prinsloo had made the fraudulent misrepresentation and it dismissed the trust’s application. The trust’s ap-
plication for leave to appeal was dismissed by the court of first instance, and subse-
quently also by the SCA.

Sometime later Goldex and one Scheepers brought an action against the trust and Prinsloo in his personal capacity. It was for delictual damages suffered as a result of Prinsloo’s fraudulent mis-
representation while repre-
senting the trust. Goldex and Scheepers alleged that Prin-
sloo had made the fraudulent misrepresentation. The trust and Prinsloo denied this allega-

tion. Goldex and Scheepers replicated that, given the mo-
tion court’s finding of fraudu-

tent misrepresentation, the excep-
tio rei judicata estopped the trust and Prinsloo from denying the allegation. The court upheld Goldex and Scheepers’ contention.

On appeal to the SCA Brand JA held that the requirements of res judicata were that the cause of action, relief and
parties be the same in the earlier and later proceedings. However, the requirements of same cause and same relief could be dispensed with where the same issue had been finally decided in the previous proceeding — the form of res judicata known as issue estoppel. A plea of issue estoppel could only be permitted though if it would not cause unfairness in the later proceeding.

In the present case the relief claimed differed in the application and the action. However, the issue decided in the application — whether Prinsloo had made a fraudulent misrepresentation — was the same as in the action, as were the parties (at least insofar as the trust was concerned). However, the court held that even though the requirements of issue estoppel were present, it would be unfair to uphold the plea and to bind the trust to the motion court’s finding. This was because the motion court had failed to properly investigate the allegation of fraud before coming to the conclusion of its existence, and because the trust had had no opportunity to challenge the finding in an appeal.

The appeal was accordingly upheld and the plea of res judicata dismissed.

Pension Funds

Interpretation of Rules: In LA Health Medical Scheme v Horn and Others [2014] 3 All SA 421 (SCA) the appellant, LA Health, operated a medical aid scheme for local authorities in the Western Cape. The respondents, the members, were former employees who, by virtue of their employment with LA Health, were members of the Cape Joint Retirement Fund (the fund). In 2005, in terms of the provisions of s 197(2)(a) of the Labour Relations Act 66 of 1995, the members were automatically transferred to another company, Discovery. They contended that they thereby became entitled to redundancy or retrenchment benefits under the rules of the fund. The present appeal arose from the upholding of the members’ claim by the High Court, and on appeal also by the Full Court.

At stake was the question whether, on being transferred to the employ of Discovery, the members were entitled to the benefits provided for in the fund’s rules. In terms of the rule in question, if the members’ claims were valid, LA Health would be obliged to pay those claims. LA Health contended that the benefit was only available to employees who could show that their contracts of employment provided for that benefit and the members’ contracts of employment did not do so.

On appeal Wallis JA identified the crux of the present matter as the proper interpretation of the fund’s rules. Such interpretation involved a consideration of the language of the rule in question, read in the light of its context, apparent purpose and the factual background against which it came into existence.

LA Health relied on the introductory words of the rule, which read, ‘The members’ conditions of service provide for an additional redundancy/retenchment benefit to be paid by the local authority’ (the court’s emphasis).

LA Health contended that the effect of those words was to refer to the conditions of employment of the claimants in accordance with the definition of ‘service’ in the rules and, as the conditions of service of the members did not make provision for the payment of the redundancy benefits, a necessary pre-condition to their entitlement to the benefits was absent. The members submitted that the reference in the introductory words to an additional benefit referred to a redundancy or retrenchment benefit payable by the local authority in terms of an obligation falling outside the ambit of the rules of the fund and not to any part of the benefit embodied in the rule itself.

To resolve the opposing contentions of the parties, the court examined the genesis of the rule. It established that the benefits in question were ones that local authority employers agreed to provide to their employees. That led to the question of whether the fund rule in question applied to employers, such as LA Health. The court questioned whether the context of the rule required the application of the extended meaning of ‘local authority’ to include LA Health as a local authority bound by the obligations under the rule. It answered that question in the negative.

When the rule was viewed in context, the references to the ‘local authority’ could only be construed as references to local authorities properly so called and not to other employer members of the fund falling within the extended definition of that term. That being so the rule did not apply to LA Health and its employees and the members were not entitled when transferred to Discovery to claim a redundancy or retrenchment benefit under the rule.

The appeal was, accordingly, upheld with costs.

Spoliation

Mandament van spolie: In Ngakukumba v Minister of Safety and Security and Others 2014 (5) SA 112 (CC); Ngakukumba v Minister of Safety and Security and Others 2014 (7) BCLR 788 (CC) the court was asked to interpret and apply s 68(6)(b) of the National Road Traffic Act 93 of 1996 (the Act). Section 68(6)(b) of the Act prohibits possession ‘without lawful cause’ of a motor vehicle of which the engine or chassis number has been falsified or mutilated. Further, s 89(1) of the Act provides that it is an offence to contravene or not to comply with any ‘direction, condition, demand, determination, requirement, term or request’ under the Act. The SCA had held that these provisions of the Act precluded an order in spoliation proceedings for the restoration of possession of such motor vehicle when, as in the present case, it was unlawfully seized by the police.

On appeal to the CC per Madlanga J held that the SCA’s finding that possession of a tampered vehicle would always be unlawful was wrong. That is an erroneous premise because possession of a tampered vehicle will be unlawful only if it is ‘without lawful cause’.

The court held that it was possible to have a ‘legal cause’ for the possession of a tampered-with vehicle. Sections 68(6)(b) and 89(1) of the Traffic Act must as far as possible be read in a manner that is harmonious with the mandament van spolie. This is in accordance with the principle that, to the extent possible, statutes must be read in conformity with the common law.

In the present case N’s possession of the vehicle pursuant to its return in terms of a court order would be unlawful only if it were established that he did not have lawful cause to possess it. However, an inquiry into the facts surrounding N’s possession could not be held in spoliation proceedings because that would be inquiring into the merits of the lawfulness of N’s possession. Those merits are irrelevant in proceedings for a spoliation order: The despoiler must restore possession before all else.

The court ordered the police to restore possession. The appeal was accordingly upheld 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, appeals, civil procedure, contract law, criminal law, criminal procedure, elections, gambling, housing, immigration, jurisdiction, labour law, land, local authorities, motor-vehicle accidents, prescription, revenue, spoliation and winding-up of companies.
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It is our privilege

A Company and Others v Commissioner, South African Revenue Service 2014 (4) SA 549 (WCC)

By Kaelin Govinden

Legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given. The requirements to claim legal advice privilege are as follows –

• the legal adviser must have been acting in a professional capacity at the time;
• the adviser must have been consulted in confidence;
• the communication must have been made for the purpose of obtaining legal advice;
• the advice must not facilitate the commission of a crime or fraud; and
• the privilege must be claimed (see Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions 2009 (1) SA 141 (CC)).

The concept of what falls within the expression ‘legal advice’ for the purposes of legal advice privilege goes not only to advice on the law, but also advice as to what should prudently and sensibly be done in the relevant legal context, including advice as to how a client’s position or case should best be presented.

On 17 March 2014 the Western Cape High Court handed down judgment in the matter of A Company and Others v Commissioner, South African Revenue Service 2014 (4) SA 549 (WCC) and in the process re-examined the ambit of legal advice privilege. The applicants, three companies in a group of companies, had applied for a declaratory order that certain content of two fee notes (invoices) rendered by their attorneys to the first applicant was subject to legal professional privilege extended to the blacked out parts of an otherwise unprivileged document that had been disclosed; since disclosure of part of a privileged document may constitute an implied or imputed waiver of the whole, whether a lawyers’ fee note qualified by its nature and as a general rule as a privileged document; and what was the appropriate manner of asserting the claimed privilege.

Applying the reasoning of a line of English case law in the local context, the High Court came to the conclusion that the applications from their attorneys and/or the advice given by those attorneys.

The High Court, per Binns-Ward J, had to consider the following issues:

• whether the ambit of the legal professional privilege extended to the blacked out parts of an otherwise unprivileged document that had been disclosed;
• since disclosure of part of a privileged document may constitute an implied or imputed waiver of the whole, whether a lawyers’ fee note qualified by its nature and as a general rule as a privileged document; and
• what was the appropriate manner of asserting the claimed privilege.

Applying the reasoning of a line of English case law in the local context, the High Court came to the conclusion that attorney’s fee notes were not amenable to any blanket rule that would characterise them as privileged communications per se. The court held as follows at para 30 – 31:

‘Fee notes are not created for the purpose of the giving of advice and are not ordinarily of a character that would justify it being said of them that they were directly related to the performance of the attorney’s professional duties as legal adviser to the client. They are rather communications by a lawyer to his or her client for the purpose of obtaining payment for professional services rendered; they relate to recoupment for the performance of professional mandates already completed, rather than to the execution of the mandates themselves. It is, however, readily conceivable that attorneys’ fee notes might contain references to legal advice sought and given in the course of a narration of the services in respect of which the fees had been raised.’

The matter in respect of which legal advice privilege may be claimed was ‘the actual communications between the client and the lawyer involved in the seeking and giving of the advice ... or references in other documents that would disclose their content or from which their content might be inferred.’

The court held at 550 C – D: ‘Thus, where a fee note set out the substance of the privileged communications in respect of the seeking or giving of legal advice, or contained sufficient particularity of their substance to constitute secondary evidence thereof, those parts, but not the document as a whole, would be amenable to the privilege. The test was whether, upon an objective assessment, the references disclose the content, and not just the existence, of the privileged material.’

In respect of the appropriate manner of asserting the claimed privilege, Binns-Ward J concluded by explaining that the privilege should be asserted by blacking out the information, so as to disclose those parts of the document that were not subject to the privilege and covering up those that were, and that the party asserting the legal professional privilege should generally be able to provide a rational justification for such claim without needing to disclose the content or substance of the matter in respect of which the privilege is claimed.

Cliffe Dekker Hofmeyr acted on behalf of the applicant in this case.

Kaelin Govinden LLM (UKZN) (Howard College) is a candidate attorney at Cliffe Dekker Hofmeyr in Cape Town.

DE REBUS - NOVEMBER 2014 - 39 -
T he case of Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others 2014 (5) SA 179 (WCC) involved an application concerning the refusal by the board of the first respondent (GHS) to approve a transfer by the applicant (VC) to the second respondent (MC) of the shares held by VC in GHS. As such, VC sought to compel GHS to register the transfer by claiming relief in terms of s 163 of the Companies Act 71 of 2008 (the Act).

The case is of great relevance in the company law landscape in South Africa as Rogers J provides guidance to lawyers in considering three important issues. Firstly, the judgment confirms the legal validity of a clause in a private company’s Memorandum of Incorporation (MOI) entitling a company’s board to refuse a transfer of shares without giving reasons. Secondly, it considers the scope of the new s 163 of the Act, which replaced s 252 of the Companies Act 61 of 1973 (the 1973 Act). Thirdly, it provides a thorough and well-considered evaluation of the inter-relationship between s 76 and s 163 of the Act.

The legal validity of such a clause

Counsel for the applicant argued that in the modern era it is objectionable for a company’s board to be entitled to refuse a transfer without giving reasons. This view reflects a sense of surprise, which is generally held by the public when they hear of the existence of such seemingly draconian powers.

Rogers J considered South African and foreign legal authorities in concluding that this type of clause is a common inclusion in the MOIs of private companies. It is normally inserted in a MOI to ensure that the company complies with s 82(2)(b)(ii) of the Act. The judgment also confirms that ‘there is no general duty on a person holding a fiduciary position to give reasons for his actions to those to whom his duties are owed’. Further to this point, a strong argument is put forward as to why the ‘administration of corporations would become unwieldy if directors were bound on request to provide reasons for their decisions’ in the context of share transfers. There may be sound business reasons not to provide reasons as disclosure may jeopardise the company’s business relations with third parties, that may result in the disclose of matters of strategy or force the company to publicly state reservations, which it has concerning a proposed transferee.

As a result of these considerations, the judge rejected the contention that such a clause in a private company’s MOI is bad in principle in our law. This finding should lay to rest concerns that some directors and lawyers may have had in respect of the enforceability of and reliance on such clauses. A board may, however, discover that it will have to disclose its reasons in order to successfully defend their decision in court proceedings - as was the case in this matter.

The scope of the new s 163(1)(a) of the Act

Section 163(1)(a) entitles a shareholder or a director of a company to apply for relief under the section if ‘any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant’ (our emphasis).

The predecessor of s 163 was s 252 of the 1973 Act. It is doubted by Rogers J as to whether the new wording materially alters the character of the conduct that was held to fall within the scope of s 252 of the 1973 Act as ‘the test focuses on the effect of the conduct complained of’. Section 252 had dealt with conduct that was ‘unfairly prejudicial, unjust or inequitable’. Rogers J answers the question of scope of the new s 163(1)(a) in expressing respectful disagreement with the observation of Moshidi J in Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others 2013 (2) SA 331 (GSJ) to the effect that the inclusion of the phrase ‘unfairly disregards the interests of’ the applicant indicates ‘a far wider basis on which relief may be sought’. It is confirmed by Rogers J that the old s 252 had also covered ‘interests’ and not only the enforcement of ‘rights’, therefore establishing that the scope of the new provision has not been greatly widened.

It is not, however, enough for an applicant to show that the conduct complained of is ‘prejudicial’ to his rights or ‘disregards’ his interests, but he must show that the prejudice or disregard has occurred ‘unfairly’.

Inter-relationship between s 76 and s 163 of the Act

The judge considered the evolution of the statutory and judicial position in England and acknowledged that the unfair-prejudice remedy could extend beyond unlawful conduct. This, however, could leave a board in a quandary. Such a board will be damned if they comply with s 76 by acting in the interests of the company (and run the risk of being attacked in terms of s 163) and damned if they do not act in the interests of the company in an effort to prevent an attack on their decision in terms of s 163 (and in so doing fall foul of s 76).

It is trite in law that if the board exercises a power, conferred on them by the company’s MOI and in so doing also meets the standard imposed by s 76 then they act lawfully. The question then is whether a shareholder who is prejudiced by the decision can in those circumstances complain that the exercise of powers is ‘unfairly’ prejudicial to him? This is problematic because such a case may bring the invocation of the unfair-prejudice remedy into conflict with other principles of company law, namely, that of majority rule and the binding nature of the company’s constitutional documents.

In our view, and to avoid a conflict between these two provisions, it seems that s 163 should be interpreted in such a manner that excludes the element of ‘unfairness’ in all cases where a board has acted lawfully. A shareholder can expect no more of its board than that it acts lawfully. Such a conclusion was lacking.

By Pierre le Roux and Jarryd Mardon
in the judgment, and if it had been made by Rogers J, would in our opinion have provided the most suitable legal equilibrium on this issue. The door, therefore, remains open for the argument that despite complying with s 76 a decision of the board may still be subject to attack under s 163. What must a board do to protect itself in those circumstances – contravene s 76 to save itself from attack under s 163?

Rogers J held that the circumstances of a case would have to be ‘exceptional’ before one could find that a board decision, taken in accordance with the standard established by s 76, had caused a shareholder prejudice, which can properly be described as ‘unfair’ within the meaning of s 163. The judge listed some circumstances that could possibly qualify as such, which included informal arrangements and legitimate expectations amongst shareholders in small companies. As stated above, in our view it is difficult to envisage a circumstance where a legally unenforceable expectation could outweigh the interests of the company. Further, where such an expectation does exist, the board will nonetheless be compelled to act in the best interests of the company as required by s 76. In such a case, the decision should not, in our view, be treated as unfairly prejudicial as the binding provisions of the MOI and s 76 should invariably have preceded any expectation of a shareholder.

**Compliance with s 76**

The duties of directors in exercising their powers have been codified by s 76. The power must be exercised in:

- good faith for a proper purpose;
- in the best interests of the company; and
- with the degree of care, skill and diligence required as described in s 76(3).

Section 76(4)(a) sets out the circumstances in which the obligations imposed by s 76(3) will be satisfied by a director. Rogers J’s judgment focuses on the notion that the duty to act in the best interests of the company is not an objective one. In other words, what is required is that the directors, having taken reasonably diligent steps to become informed, should subjectively have believed that their decision was in the best interests of the company and that this belief must have had ‘a rational basis’.

The rationality criterion as laid down in s 76 is an objective one and takes the form of a threshold requirement. Rogers J held that the principles in case authorities on the exercise of public power are similarly applicable to the ‘rationality’ requirement for the proper exercise of powers by directors. Such authorities have held that the requirement of rationality concerns the relationship between the decision and the purpose for which the power was given.

As regards the requirement of exercising the power for a ‘proper purpose’, in terms of s 76(3)(a), the test is objective in that once one has ascertained the ‘actual’ purpose for which the power was exercised by the board, then it must be determined whether the ‘actual’ purpose falls within the purpose for which the power was conferred, where the latter amounts to an issue of interpretation of the empowering provision. In this regard, it was suggested that the ‘overarching purpose for which directors must exercise their powers is the purpose of promoting the best interests of the company’.

**Did GHS comply with its fiduciary duties under s 76?**

Rogers J concluded, in considering the facts and circumstances placed before him, that GHS’ directors were *bona fide* of the opinion that the best interests of the company would be served by not allowing MC to increase its shareholding, because MC had a vision and ambitions that were adverse to GHS’ interests and its strategy for long-term contracts with producers.

The ‘actual’ purpose for which GHS’ board exercised the power to refuse the proposed transfer fell within the intended purpose of the empowering provision that was to enable the board to prevent a person from acquiring an increased shareholding where this was considered to be contrary to the best interests of the company.

Lastly, it was held that the directors’ genuine belief had a rational basis in uncontested facts, as prescribed by s 76(4)(a)(iii).

It was, therefore, concluded that the board, in refusing to approve the transfer, had met the standards set by s 76 of the Act and on this basis, the refusal was lawful. The judge still had to consider whether despite the fact that the board acted lawfully the refusal was nevertheless “unfairly prejudicial” to the applicant, but held that the case did not fall within any of the exceptional circumstances mentioned above to qualify as such.

**Conclusion**

Directors can, with confidence, apply the provisions of a MOI that allows them to refuse to provide reasons for their decisions, while complying with their fiduciary duties. The rules formulated in this judgment should be of great assistance to boards of directors when confronted with decisions that will result in prejudice for some of their shareholders and when they wish to determine whether or not their decisions comply with s 76. A resolution of a board adopted lawfully in compliance with s 76 should in most, if not all cases, be safe from attack in terms of s 76 and s 163.

- Werksmans, Cape Town, acted on behalf of the first respondent’s in this case.

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**Pierre le Roux**

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Setting precedents, not following them
NEW LEGISLATION

Legislation published from 29 August – 26 September 2014

* Items marked with an asterisk are discussed later in the column.

BILLS INTRODUCED

Medical Innovation Bill (Private Member Bill) B100M of 2014.

COMMENCEMENT OF ACTS


PROMULGATION OF ACTS


*Legal Practice Act 28 of 2014. Commencement: Chapter 10 comes into operation on a date to be proclaimed. GN R710 GG37986/9-9-2014.

Amendment to the scope of profession of dental technicians and dental technologists. GN R711 GG37987/9-9-2014.


Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 Amendment to regulations relating to health messages on container labels of alcohol beverages. GN R697 GG37975/4-9-2014.


Health Profession Act 56 of 1974 Health Professions Council of South Africa: Amendment of rules relating to the registration by dental therapists and oral hygienists of additional qualifications. BN107 GG37941/29-8-2014.

Regulations relating to names that may not be used in relation to the profession of emergency care. GN R734 GG38009/16-9-2014.

Regulations relating to the qualifications for the registration of emergency care assistants, student emergency care technicians or student emergency care practitioners. GN R741 GG38016/23-9-2014.

Regulations relating to motor vehicles of category N1 and M1. GN687 and GN688 GG37980/12-9-2014.


National Health Act 61 of 2003 Regulations relating to research with human participants. GN R719 GG38000/19-9-2014.


National Regulator for Compulsory Specifications Act 5 of 2008 Amendment to the compulsory specification for motor vehicles of category N1 and M1. GN687 and GN688 GG37958/5-9-2014.

Delegated Legislation


Criminal Procedure Act 51 of 1977 Declaration of peace officers in terms of ss 334, GN R691 and GN R692 GG37968/2-9-2014.

Dental Technicians Act 19 of 1979 Regulations relating to the supervision of registered dental laboratories. GN R710 GG37986/9-9-2014.

Regulations relating to the scope of profession of dental technicians and dental technologists. GN R711 GG37987/9-9-2014.

Regulations relating to the qualification for registration of emergency care assistants, GN R733 GG38008/16-9-2014.

Regulations relating to the qualification for registration of emergency care technician. GN R732 GG38007/16-9-2014.

Regulations relating to the qualifications for the registration of emergency care practitioners. GN R731 GG38006/16-9-2014.
Natural Scientific Professions Act 27 of 2003
South African Council for Natural Scientific Professions: Recommended consultation fees. BN110 GG37979/12-4-2014.

Plant Breeders’ Rights Act 13 of 1976
Amendment of regulations relating to plant breeders’ rights. GN R645 GG37942/29-8-2014.

Petroleum Pipelines Levies Act 28 of 2004
Levy and interest payable on petroleum pipelines industry. GenN782 GG37979/12-9-2014.

Precious Metals Act 37 of 2005
Amendment of Regulations. GN R737 GG38014/22-9-2014.

Public Finance Management Act 1 of 1999
Rate of interest on government loans. GenN805 GG37999/19-9-2014.

Small Claims Courts Act 61 of 1984
Establishment of a small claims court for the area of Senekal. GN705 GG37979/12-9-2014.

Trade Administration Act 71 of 2002

DRAFT LEGISLATION
Draft Rules on the transfer or disposal of social housing stock funded with public funds in terms of the Social Housing Act 16 of 2008. BN106 GG37941/29-8-2014.


Draft Regulations in terms of s 4(c)(2)(a) and (b) of the Independent Communications Authority of South Africa Act 13 of 2000. GenN827 GG38023/25-9-2014.


SELECTION ASPECTS OF THE LEGAL PRACTICE ACT 28 OF 2014

Commencement date
The Legal Practice Act 28 of 2014 was published in GN R740 GG38022/22-9-2014. The Act will commence on the following dates:
- Chapter 10 comes into operation on a date to be proclaimed.
- Chapter 2 comes into operation three years after the date of commencement of Chapter 10 or on any earlier date fixed by the president.
- And the remaining provisions of the Act come into operation on a date, after the commencement of Chapter 2, to be proclaimed.

What are the purposes of the Act (s 3)?
The purposes of the Act are to –
• provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;
• broaden access to justice by putting in place –
  - a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry;
  - measures to provide for the rendering of community service by and practising legal practitioners; and
  - measures that provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of South Africa;
• create a single statutory body to regulate the affairs of all legal and candidate legal practitioners;
• provide for the establishment of an Office of Legal Services Ombud;
• provide a fair, effective, efficient and transparent procedure for the resolution of complaints against legal and candidate legal practitioners; and
• create a framework for the development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services, for the regulation of the admission and enrolment of legal practitioners; and for the development of adequate training programmes for legal and candidate legal practitioners.

To whom does the Act apply (s 2)?
The Act applies to all legal practitioners and all candidate legal practitioners. A ‘candidate legal practitioner’ is defined as a person undergoing practical vocational training as a candidate attorney or as a pupil.

Overview of the Act
The Act is divided into ten chapters. The contents of every chapter are summarised in the table on the next page.
<table>
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<th>CHAPTER</th>
<th>REGULATED ASPECTS</th>
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<td>Chapter 1</td>
<td>Definitions, application of the Act and purpose of the Act</td>
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| Chapter 2 - South African Legal Practice Council | • The South African Legal Practice Council will be established in terms of s 4.  
• Sections 4 – 14 regulate the powers and functions of the Council.  
• Sections 15 – 23 regulate the operation of the Council. |
| Chapter 3 - Regulation of legal practitioners and candidate legal practitioners | Sections 24 – 35 regulate legal practitioners and candidate legal practitioners. Aspects such as admission, enrolment, right of appearance, minimum qualifications and vocational training, community service, forms of legal practice and fees in respects of legal services are regulated. |
| Chapter 4 - Professional conduct and establishment of disciplinary bodies | Sections 36 – 44 regulate professional conduct and the establishment of disciplinary bodies. Specific aspects such as the code of conduct, procedure for dealing with complaints of misconduct, disciplinary hearings, procedures and sanctions, monitoring by the Legal Service Ombud and the powers of the High Court are regulated. |
| Chapter 5 - Legal Services Ombud | Section 45 – 52 regulate the Legal Services Ombud. A Legal Service Ombud will be established in terms of s 45. The powers and the administrative duties of the Legal Services Ombud are set out in this chapter. |
| Chapter 6 - Legal Practitioners' Fidelity Fund | • Sections 53 – 60 contain the founding provisions relating to the Legal Practitioners' Fidelity Fund. The continued existence of the Legal Practitioners' Fidelity Fund, its revenue and liability are provided for in these sections.  
• Sections 61 – 77 regulate the operation of the fund.  
• Sections 78 – 83 regulate claims against the fund. |
| Chapter 7 - Handling of trust monies | Sections 84 – 91 regulate the handling of trust monies. It specifically sets out the obligations of a legal practitioner relating to the handling of trust monies and it regulates trust accounts, accounting and rights of banks in respect of trust accounts. |
| Chapter 8 - General provisions | Sections 92 – 93 regulate recovery of costs by attorneys rendering free services and it also sets out offences and penalties in terms of the Act. |
| Chapter 9 - Regulations and rules | Sections 94 – 95 contain provisions relating to regulations and rules. |
| Chapter 10 – National Forum and transitional provisions | • Sections 96 – 120 contain provisions related to the National Forum on the Legal Profession and transitional provisions.  
• A National Forum on the Legal Profession will be established in terms of s 96. Sections 96 – 108 set out the powers, functions and duties of the National Forum.  
• Sections 110 – 118 contain transitional provisions. |
Employment law update

Polygraph tests

In DHL Supply Chain (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Others [2014] 9 BLLR 860 (LAC), the Labour Appeal Court (LAC) (per Sutherland AJA, Ndlouv JA and Molemela AJA) held that the mere fact that an employee fails a polygraph test is not in itself sufficient to find an employee guilty of dishonesty. Also, that the employer is required to lead expert evidence to prove cogency and reliability of polygraph tests should the employer wish to rely on the results of a polygraph test.

In this case, the employer had experienced stock losses in its cigarette dispatching warehouse and required the eight employees who had been working in the warehouse at the time of the stock losses to undergo polygraph tests. Two of the employees failed the polygraph tests and were charged with theft in an internal inquiry. The employer alleged that during the inquiry the employees were not credible and were consequently dismissed. The two employees referred an unfair dismissal dispute to the bargaining council, the outcome of which was that their dismissal was found to be substantively unfair and they were reinstated. The employer instituted review proceedings in the Labour Court but the review application was dismissed. The employer then appealed to the LAC alleging that the evidence demonstrated that the employees were guilty of theft and alternatively, that even if their dismissals had been unfair, reinstatement was not an appropriate remedy and compensation should have been ordered instead.

In this case, the commissioner had disregarded the evidence of the polygraph tests and found that the mere fact that the employees had been on duty when the theft occurred, had access to the stock and the stock losses ceased after their dismissal was not sufficient to find them guilty of theft. The LAC considered case law in which it was held that polygraph evidence can be sufficient to discharge the onus in labour disputes if it is not in isolation, but there is also other circumstantial evidence to support the finding that the employees are lying. In light of this, the LAC found that the commissioner had not acted unreasonably in failing to take into account the results of the polygraph tests as in light of the other circumstances surrounding this matter there was not enough evidence to infer guilt from the results of the polygraph tests. The circumstantial evidence that the employer raised was the fact that the stock losses had stopped. However, this was not sufficient as there were other possible factors to account for this such as tightened security or the fact that the real thieves may have decided to lie low.

It was found that the results of polygraph tests are not in themselves sufficient to establish guilt. The LAC noted further that the weight to be given to polygraph tests remains an open question but in the event that a party wishes to rely on them it would need to produce expert evidence on the accuracy of the polygraph test and why an inference should be drawn from it. The LAC found that no expert evidence had been given in this case on the concept of polygraph testing or on the technical integrity of the process. It was found that submissions by the operator of the polygraph machine did not amount to expert evidence because the operator lacked independence and sufficient credentials.

As regards the order of reinstatement, the employer argued that there had been a breakdown in the trust relationship and that even if the employees were not found guilty of theft the taint of suspicion was enough to undermine the employment relationship. Sutherland AJA considered the discretion that arbitrators are afforded by the Labour Relations Act 66 of 1995 in granting reinstatement or compensation and found that the default remedy is reinstatement where the dismissal is substantively unfair. It was found that where there is not sufficient evidence to prove that an employee is guilty of dishonesty then that employee should not be deprived of employment unless continued employment is intolerable or impracticable. The LAC also considered the element of consistency and the fact that previous employees had failed a polygraph test but had not faced dismissal as there had been no other evidence to support a dismissal. Reinstatement was accordingly found to be the appropriate sanction and the appeal was dismissed.

See 2013 (May) DR 52.

Lapsed warnings in disciplinary proceedings

In the case of National Union of Mine-workers obo Selemela v Northam Platinum Ltd [2014] 9 BLLR 870 (LAC) an employee was dismissed for failure to obey an instruction, leaving the workplace without permission and threatening to kill a colleague. The employee was reinstated after the Commission for Conciliation, Mediation and Arbitration found that the dismissal had been unfair. The arbitration award was then set aside by the Labour Court on review. The matter was then taken in appeal to the Labour Appeal Court (LAC).

The commissioner had found that the employee was guilty of insubordination but that this was not serious enough to warrant dismissal especially in light of the fact that the employee’s previous final written warning for insubordination had lapsed. The LAC (per Waglay J, Ndlouv JA and Musi AJA) found that the final written warning had in fact not lapsed and even if it had lapsed, it should still have been taken into account in considering the fairness of the dismissal. It was held that employees who repeatedly commit misconduct are acting in contravention of their obligations in terms of their employment contract and thus an employer is entitled to take into account all previous transgressions when considering whether or not to dismiss an employee for an offence. It was found that

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the fact that the warning had allegedly lapsed did not relieve the commissioner from taking this into account, particularly where the misconduct for which the employee received the final written warning was of such a similar nature and occurred approximately five months before. It was held by the LAC that the commissioner had reached a decision that no reasonable decision maker could have made. Thus, the appeal was dismissed and the order of the Labour Court was upheld to the extent that it found that the dismissal was substantively unfair. It was, however, found that the dismissal was not procedurally unfair.

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The Constitutional Court affirms its views


On two separate occasions Barnard, a white female, applied for a promotion within the ranks of the South African Police Service (SAPS). On both occasions she obtained the highest score from the respective interviewing panels and was recommended for the posts applied for.

On the first post Barnard applied for, the Divisional Commissioner did not support her recommendation for reasons relating to equity but on the second occasion the Divisional Commissioner wrote to the National Commissioner supporting Barnard’s recommendation.

In a written response the National Commissioner declined the recommendations on the basis that Barnard’s appointment would not enhance representativeness and that service delivery would not be affected should the post not be filled. The National Commissioner directed that the post be re-advertised during the following promotion phase.

Litigation history

Barnard referred an unfair discrimination dispute to the Labour Court alleging she had not been promoted because she was white and that such discrimination was not justified in terms of any lawful restitution measures. In its defence the SAPS relied on the following four grounds; firstly, the National Commissioner acted within the framework of the SAPS equity plan together with the relevant national instructions and as such, his decision was on valid ground. Secondly, Barnard’s claim was misplaced on the basis that the post had been withdrawn and thus no one had been treated differently as compared to another. Thirdly, the decision to appoint a person rests with the National Commissioner who was not bound by any recommendations and lastly, Barnard did not seek to review the National Commissioner’s decision.

The Labour Court in Solidarity obo Barnard v SAPS [2010] 3 BLLR 561 (LC) per Pretorius AJ upheld Barnard’s claim with costs. The court held that the SAPS had failed to discharge its statutory onus of establishing the discrimination was fair. In this regard the court held that the reasons provided by the National Commissioner were ‘scant’ and ‘insufficient’.

This decision was overturned by the Labour Appeal Court (LAC) in South African Police Service v Solidarity obo Barnard [2013] 1 BLLR 1 (LAC). In his judgment Mlambo JA (Davis JA and Sandi AJA concurring) held that no discrimination had occurred as no appointment had been made. In addition and on the assumption Barnard had been discriminated against, the LAC found that such discrimination was fair. The court held that to subject the implementation of affirmative action measures to the individual’s right to equity would stifle the purpose of such measures and perpetuate inequality in the workplace.

In a unanimous judgment delivered by the Supreme Court of Appeal (SCA) in Solidarity obo Barnard v South African Police Service 2014 (2) SA 1 (SCA), the SCA upheld Barnard’s appeal and in effect reinstated the Labour Court’s ruling. (See 2014 (March) DR 48.)

The SCA found that Barnard had not been appointed to the post because she was white and this then triggered a shift in onus to the SAPS to justify its decision as one which is fair and lawful. On an account of the National Commissioner’s reasoning for not promoting Barnard, which the court held to be ‘scant’ and ‘contrived’, the SCA found the SAPS had failed to discharge its onus and as a result thereof, ruled that Barnard was subjected to unfair discrimination.

The SAPS turned to the Constitutional Court.

The Constitutional Court acknowledged that restitution measures must be legitimate measures that advance those who have suffered past discrimination without unduly invading the human dignity of those who are affected by such measures. A restitution measure is deemed unfair until the authority implementing it proves that it is fair. In deciding whether the measure is fair the courts have the power to interrogate whether it serves a legitimate purpose that seeks to achieve the constitutional objective. Once a court is satisfied that the measure in question is for legitimate reasons then the measure is deemed fair.

Furthermore, once a court determines the restitution measure is fair, it can further pronounce on whether the measure was fairly applied or implemented. Put differently there is nothing in law that would prevent a court from determining whether a valid restitution measure was implemented fairly without an ulterior or impermissible purpose. In making this determination a court would apply the doctrine of legality, to ensure the measure was rationally and fairly applied.

Having made this point the majority of the Constitutional Court found that the SCA had misconceived the legal issue before it as well as the ‘controlling laws’.

The SCA applied a test that sought to determine whether the restitution measures (in casu the SAPS equity plan and relevant national instructions), were fair or not under circumstances were Barnard had never alleged or challenged such measures as being unfair.

On this point the court held: ‘The respondent readily accepted this position in this Court. She never pressed upon us to endorse the reasoning of the Supreme Court of Appeal. Ms Barnard accepted that the Employment Equity Plan in question was a valid affirmative action measure. Equally, she did not impugn the validity of the Instruction. She never contended that either of the two were suspect and should have attracted a presumption of unfairness. None of the parties contended otherwise nor can I find a valid reason to hold that the Employment Equity Plan and the accompanying Instruction are not affirmative action measures authorised by section 6(2) of the Act.

Accordingly, there was no warrant for the Supreme Court of Appeal to burden the applicant Police Service with an onus to dispel a presumptively unfair discrimination claim and find that it had not discharged it. The appeal in that Court was therefore decided on the wrong principle.’

However, this did not dispose of the matter. In submissions before the court Barnard argued that the National Commissioner’s decision was both unreasonable and unlawful, which stood to be set aside. In support of this Barnard argued that the National Commissioner attached undue weight to demographic equity at the expense of her competency and merit, furthermore his reasons for
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not appointing her were inadequate as the National Commissioner failed to make mention of which factors, as listed in the national instruction, he took into account when making his decision.

In response the court held that this was a new cause of action that had not been initially pleaded. The court reiterated that in proceedings before the Labour Court the SAPS, as part of its defence, specifically stated that Barnard had not sought to review the National Commissioner’s decision; this remained unchallenged and was only brought up at the final stage of the appeal. Accordingly the court held that it could not entertain such a claim.

Having made this point, the court nevertheless held that it would have dismissed Barnard’s argument had she made out this case in her statement of claim. In applying the doctrine of legality to the discretion afforded to the National Commissioner as contained in the national instructions, there was nothing to conclude that in exercising his discretion not to appoint Barnard and to withdraw the post, the National Commissioner did so unlawfully.

The court upheld the appeal and confirmed the order of the LAC. On the issue of costs the court held that parties were liable for their own costs at the lower courts as well as costs incurred at the Constitutional Court.

In a separate judgment penned by Cameron J, Froneman J and Majiedt AJ, the court reached the same conclusion but for different reasons.

Unlike in the main judgment the minority judgment held that the court was competent to hear Barnard’s argument raised before it – Barnard’s claim was for unfair discrimination and it would be impossible to evaluate such a claim without interrogating the reasons for the National Commissioner not appointing her.

Before doing so the judges warned that when applying a restitution measure too rigidly, the outcome or result could be inconsistent with the very purpose of the Employment Equity Act 55 of 1998 (EEA); for example a measure that seeks to redress racial inequality, when applied rigidly, could unduly aggravate gender inequality and in so doing, be inconsistent with the overall purpose of the EEA.

In agreeing with the main judgment, the minority held that a court was competent to adjudge the implementation of restitution measures. However, the minority differed in terms of which standard to use when doing so. The main judgment held that the appropriate standard is that of rationality and lawfulness. The minority held that in addition to this, the appropriate statutory standard was that of fairness.

In applying this standard one must consider all factors, including the reasons provided by the National Commissioner for not appointing Barnard. Despite finding that such reasons are inadequate, the minority nevertheless held that there were external factors that rendered the National Commissioner's decision fair. This included the fact that there was an overrepresentation of white females at the post Barnard applied for, which meant that the National Commissioner could place more weight on racial targets as opposed to any other considerations he was bound to consider when making his decision.

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- PER: Potchefstroom Electronic Law Journal (University of the North West)
- PLD: Property Law Digest (LexisNexis)
- SACJ: South African Journal of Criminal Justice (Juta)
- SJ: Speculum Juris (University of Fort Hare)

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By Darcy du Toit & Marleen Potgieter
Cape Town: Juta (2014) 1st edition
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193 pages (soft cover)

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The readability in terms of sequence and flow of the book, the consistency of the language and the use of key terms makes it easy to assist readers.

This book should be on the shelves of all persons that appear in the Commission for Conciliation, Mediation and Arbitration and any other employment forums.

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Public interest versus the interest of justice

By Mahlodi Sam Muofhe

Judge Thokozile Masipa has pronounced her sentencing in a trial that has gripped the country since the events which took place on Valentine's Day in 2013, at the home of Olympic runner Oscar Pistorius. The shooting, which claimed the life of law graduate Reeva Steenkamp, has been a talking point among South Africans in general. There has been arguments by both the state and the defence. Oscar Pistorius’ fate lies entirely in the hands of Judge Masipa. There is no tempering or interfering – one way or the other – with the court processes, which can in any way prejudice the outcome of the case or lay the basis for those who may want to argue that Oscar received an unfair trial because, among other things, broadcasting the case live and the general public’s views and comments on the case could be advanced as one of those contributing factors.

The transformative impact of our Constitution with its entrenched Bill of Rights is felt and possibly enjoyed by all of us today without exception. Through our Constitution and in the public interest, the court was persuaded by the media by way of an application, the basis of which was that it was in the public interest to broadcast the case live. The court obviously weighed the submission made by the media and justly ordered that it was indeed in the public interest to broadcast the case.

One could argue that there have been some positives in the live broadcast. For example, the public probably now broadly comprehends the workings of the construction of our criminal justice system. Through this public trial, the public had its right of access to information upheld by the state. Students of criminal law, criminal procedure and the law of evidence, to a limited but perhaps confusing extent, also got to understand these complex modules. Students of law are probably battling to fathom how under cross-examination by the state prosecutor, Gerrie Nel, Pistorius said that his defence team prepared his bail application affidavit themselves and then brought it to him at the police station he was held in, just for him to append his signature on an affidavit which, in terms of the law, ought to have been deposed to by Pistorius himself. Pistorius’ version of how his affidavit was done was never clarified by his defence team during his re-examination, which means in reality that his version is correct and if it is, issues of professional legal ethics were violated by Pistorius’ legal team. Unless there is a general understanding that Pistorius was less than frank in his testimony, in which case then, he cannot be deemed to be a reliable witness as he was by his own admission ‘fighting for his life’.

However, now that the crux of the trial is – in reality – behind us, can we as South Africans honestly still hold a view that criminal cases should, in the public interest, be broadcast live? Have we fully considered what other interests may be compromised if the public’s interest gains momentum in our criminal justice system? I am of the view that should we go on the public interest trajectory, the interest of justice is likely to be severely compromised, with the likely consequences of getting many criminal cases declared to have been run unfairly, to the detriment of the accused persons.

In this particular case, for example, the defence’s legal team hinted that some of the potential defence witnesses flatly refused to co-operate with them because they did not want their faces beamed on television, nor their voices broadcasted on radio. Though this reason seems weak in that those witnesses could have testified in camera, a common phenomenon in our criminal justice system, this is an important factor. It demonstrates that live broadcasting of criminal cases, as much as it may be in the public interest and the interest of justice, may be seriously prejudiced. Witnesses from both sides of the divide, namely, the state’s witnesses and the defence’s witnesses alike, should not be privy to what other witnesses who would have already testified before the court would have said in their testimonies before they themselves testify. We would be less than sincere as a society if we are to believe that the witnesses in the Pistorius case never watched the broadcast of the case before testifying, as some of them seemed to suggest. In fact, Tom Wolmarans, a defence expert witness conceded under cross-examination that he took Roger Dixon out for dinner when Dixon, another defence expert witness, was still under oath or if he had finished testifying, Wolmarans himself at that time of their dinner had not yet testified. Their interaction was clearly in conflict with the law.

Before being witnesses, they are members of the public who could not be barred by anyone from watching the re-broadcast of the trial in the evenings in the comfort of their homes. Enforcing this ban on witnesses watching the trial was in any event simply not going to be possible. In some instances, some of the witnesses, under cross-examination by the state, conceded that they were only approached to testify for the defence after Pistorius’ evidence-in-chief, cross-examination and re-examination. These witnesses were, like the rest of us, glued to their television sets following the trial with interest before being called up to testify. Given that they were the defence’s witnesses, there was no way in which they could have known upfront that they would at some point be called to testify.

Given the argument outlined above, can we then honestly argue that public interest trumps the interest of justice? Courts should in future aim to balance the objectives of the two, so that the ordinary South African, and indeed the accused, can be sure that justice has indeed been served.

- Oscar Pistorius was sentenced to five years in prison for culpable homicide at the time De Rebus went to print.

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