I HEARD IT THROUGH THE GRAPEVINE:
THE DIFFERENCE BETWEEN LEGAL PROFESSIONAL PRIVILEGE AND CONFIDENTIALITY

When is it appropriate for the sentencing court to interfere with parole?

Dying declaration – should the dead have a say in a matter?

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22 I heard it through the grapevine: The difference between legal professional privilege and confidentiality

In the context of legal professional ethics, the terms ‘confidentiality’ and ‘privilege’ are often used interchangeably. While these two terms may overlap in some respects, they remain two distinct concepts says Kristin Wagner and Claire Brett. The distinction between confidentiality and legal professional privilege is absolutely essential insofar as their differences ensure the proper functioning of the South African legal system, which is dependent on freedom of communication between legal practitioners and their clients.

26 When is it appropriate for the sentencing court to interfere with parole?

In practice there are judicial officers who impose a sentence that the accused will undergo a certain period of imprisonment and will not be eligible for parole. Nicholas Mgedeza and Dumisani Masuku discuss whether the magistrates’ courts are vested with the powers to impose a sentence where parole is denied?

28 Dying declaration – should the dead have a say in a matter?

The dying declaration is based on the Latin maxim ‘nemo moriturus praesumitur mentiri.’ Literally translated it means ‘a man will not meet his maker with a lie in his mouth’. This article written by Sherika Maharaj, discusses the history of the dying declaration and the legal principles practised in South Africa.

30 Evictions – a sad reality in South Africa

Madeleine Truter writes that South Africa’s history is one where the majority of people have been deprived of land, and have experienced a lack of access to housing and despite the progress made by the legislature and judiciary to ensure that no South African is left homeless, land evictions are still rampant, and officials on the ground are finding ways to circumvent the overarching test of ‘justice and equity’, introduced by the PIE Act.

32 On the relativity of property rights in the Constitution

The very first founding provision of the Constitution declares that the Republic is a state founded on values. Our social order is in the first place a value based society, and not rule based. This article, written by Johan van der Merwe, aims to consider briefly, and in very broad strokes, how the concept of property rights in a democratic constitution differs from the pre-constitutional dispensation, what the values are that underlie the rules of constitutional property rights, particularly vis-à-vis use rights, the impact on social and environmental justice, and how the Constitutional Court is giving effect to these changes.
Free and fair elections?

On the heels of the local government elections held on 3 August, the Law Society of South Africa (LSSA) issued a press release, which states that ‘the elections were on the whole free and fair’. The LSSA fielded a team of over 300 admitted attorney election observers during the local government elections.

The press release goes on further to state that there were some irregularities that were observed during the elections. The LSSA will investigate the irregularities further; all the details regarding these will be noted fully in the final report, which will be published during August.

It goes without saying that free and fair elections are part and parcel of any thriving democracy. Therefore any observed irregularities during elections would go against the very reason elections are held in a democratic society in the first place.

Meanwhile, media reports in the aftermath of the elections state that the African National Congress (ANC) is considering changing the Electoral Act, which it blames for benefiting opposition parties at its expense. The ANC were to discuss the electoral system and the calculation of allocated seats at its upcoming national executive committee meeting. The election results show that the ANC received the most votes across the country; amongst others, it had to seek coalitions in three important metros in Gauteng after losing Nelson Mandela Bay, in the Eastern Cape to the Democratic Alliance. The support of the ANC has fallen from 62% of the national vote in 2011 to 54% in the 2016 local government elections.

Whether there are legitimate grounds to change the Electoral Act, or whether this is just the case of the ruling party’s denial to its apparent lack of confidence by the public remains to be seen. Either way, these are both signs of a healthy democracy.
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rights, it will revive the HRRAP. We will open an office under a section 21 company in Johannesburg. The office will start operating in August and will be accessible to members of the public to deal with all matters that relate to the protection and realisation of human rights. This will ensure that we uphold the values of the Constitution. After 22 years of the advent of democracy, we cannot have a situation where there are still people who do not have proper housing, water or sanitation. This calls upon us as lawyers to do something. There is no need for grandstanding and sleeping outside, we do not need to sympathise with the plight of the indigent, we need to act. Sleeping outside does not resolve the issues,' Mr Notyesi added.

'Ve are now embarking on documenting the work of the organisation over the past 30 years. We will be holding an international event next year where our members will be called to be present. … Soon the public will see the likes of former Deputy Chief Justice Dikgang Moseneke playing an active role to lead the human rights movement,' Mr Notyesi said.

Mr Notyesi concluded by saying that NADEL will pronounce a candidate, which they will support for the Public Protector position, not to influence the appointment but to ensure that a strong candidate is appointed.

Black Lawyers Association strengthens relations with the National Bar Association

The National Bar Association (NBA) is the oldest and largest bar of African-American Attorneys, legal students and judges in the United States of America (US), with a membership of over 60 000. It was established in 1925 when some African-American lawyers were denied membership in the American Bar Association (ABA).

In the week of 16 to 22 July 2016, the NBA hosted its 91st Convention under the leadership of NBA President, Benjamin Lloyd Crump. Mr Crump was one of the delegates who attended the NBA international affiliates meeting in South Africa (SA) in May 2015. He was the then President-Elect, and this delegation was led by President Pamela Meanes, the 72nd NBA President.

The relationship between the BLA and NBA dates back to the Apartheid era. The NBA assisted in establishing the Black Lawyers Association – Legal Education Trust, which is commonly known as the Legal Education Centre (BLA-LEC), in the mid-1980s. The purpose of the BLA-LEC was to empower the SA black lawyers who did not get much assistance from the statutory law societies and Association of Law Societies. The BLA-LEC also established litigation centres throughout the country. These centres in conjunction with the BLA-LEC played a vital role in representing the interests of the disadvantaged people, mainly those who were arrested or harassed by the security agencies for their stance against the Apartheid regime. The first director of the BLA-LEC was the late Godfrey Pitje (see news ‘Founding President of the Black Lawyers Association honored’ 2015 (Nov) DR 6).

Over the years BLA delegations, led by BLA Presidents, attended the NBA Convention in the US. This year a delegation of ten BLA members, led by President of the BLA, Lutendo Sigogo, attended the NBA Convention, which was held at St Louis, Missouri. The high number of the delegation to the convention came as a result of the sterling work and call by the NBA life members and stalwarts, Leroy Wilson Jr, Herbert Moreira-Brown and Donald Watson who attended the BLA annual general meeting (AGM) in October 2015 (see AGM news ‘BLA AGM: Black lawyers can handle complex matters’ 2015 (Dec) DR 6). The three emphasised the need to revitalise the relationship between the two organisations and place it on the next level of mutual respect and benefit in terms of sharing of common experiences and points of divergence.

NBA members were thrilled by the size of the BLA delegation and undertook to attend the BLA AGM during October in Kimberley. BLA members were warmly welcomed at the convention and felt at home with the hospitable treatment afforded to them throughout the convenion. They constituted the majority of the affiliate members out of the US.

The business of the convention is regarded as a national affair. The official opening of the convention was preceded by ‘colours of change’ hosted by the St Louis Metropolitan Police Department and the singing of the National Anthem as well as ‘Lift Every Voice and Sing’. Members of the judiciary received a standing procession in their welcome. The convention showcased the professionalism in the legal profession.

The convention’s two main functions are to execute the business of the AGM. Where the Executive Committee accounts to the general membership of the activities, which they undertook and those which they plan to fulfil in the future. The review of the year that was by the president, as well as the election of the new leadership; and the presentation of various mandatory Continuing Legal Education (CLE) seminars. Members who attend the CLE seminars are credited points as a prerequisite of their continued registration as lawyers.

The manner in which the NBA CLE Committee arranges and presents seminars is something which should be looked at in SA. In the future all South African legal practitioners will, in terms of ss 5 and 6 of the Legal Practice Act 28 of 2014 (LPA), be required to attend compulsory Post-Qualification Professional Development (PPD) to earn points for them to continue to practice. In this regard, the BLA found the convention to be highly informative and showcased model organisations such as the BLA, through its Legal Education Centre, can remain relatable to the profession and empowering to its members and the profession at large. The BLA may apply to be accredited by the Legal Practice Council to provide PPD in terms of ss 6(5)(g) of the LPA to benefit its members and the profession in general. Accreditation of BLA will strengthen the relationship with the NBA even more, as both BLA and NBA members may get PPD or CPD points in attending each other’s CLE seminars during AGMs. As a result there will be more value for members of the two organisations in attending each other’s events and thereby bolster the relationship between the two.

The week long convention hosted a to-
tal of just over 60 seminars. These seminars were lined up in such a way that each and every attendee could attend a maximum of four seminars per day depending on the area of participant’s practice. The NBA has about 24 permanent and ad hoc divisions ranging from government lawyers, Judicial Council (taking into account that NBA membership also includes judges), law professors, in-house counsel, small firms/solo, female lawyers, young lawyers, law students and labour and employment law lawyers, to name a few. Almost all the fields of practice were covered in the seminars. For example, judges held their own seminars under topics such as -

- judging while black: An analytical, statistical and anecdotal examination of the black judicial experience; and
- crisis and attendance in the courts: What can judges do?

Topics of seminars are proposed by the CLE committee and at times are adopted through advice by members or by presenters.

Resolutions and motions are presented by the chairpersons of the resolutions and motions committees. There was a first reading of the resolutions and motions at the opening plenary session and the second reading at the closing session. After the second reading, the motions and resolutions were debated and adopted.

The highlight of the convention was the recollection and reflection of the ‘criminal case of the 20th century’, the OJ Simpson trial, 20 years after the trial. The session was moderated by Joey Jackson, the CNN legal analyst and criminal defence attorney. The presenter was attorney, Carl Douglas, Esq, member of the OJ Simpson legal ‘dream team’. Mr Douglas emphasised that the American Constitution was the winner in that case because the false evidence planted by the police was exposed and was not accepted by the court. Mr Douglas presented details and shared his insight to the strategies used by the ‘dream team’ during the trial.

The other highlight was the issue of police brutality and killings of black males. The convention condemned killings of police and by police. This subject reached climax on Wednesday when the President of the NBA hosted Mothers of the Movement symposium under the theme ‘Transforming tragedy into triumph in and out of the courtroom.’ The symposium was preceded by the emotive visit to the scene where Michael Brown was killed and his memorial site. The mothers of the police victims, Trayvon Martin, Jordan Davis, Michael Brown, Robbie Tolan and Clinton Allen, spoke of the pain they endured as a result of the killing of their sons and how they expect the public to support them. They emphasised that the deaths of their sons should never be in vain and that people should stand-up together and fight the continued injustice by voicing their concerns and also by taking positive actions. They said this can be done through registering to vote and to vote in all elections, from local to presidential. They spoke about the meaning of being a mother of a black son in America today. The moderators of this symposium were Ed Gordon, a journalist and television host and Mr Crump. Reverend Jesse Jackson was among the attendees, he led the convention in prayer and called for a stop in the violence and killing of black children.

The theme, which was a topical discussion for the BLA members, was ‘doing business in emerging markets’. The panellist for this seminar was Kendal Tyre, Esq and moderated by Vicky McPherson, Esq. Discussions in this seminar focused on Africa as an emerging market. Emphasis was placed on the gateways to the economic communities in their regions. During the discussion, BLA members emphasised that when US law firms do business with SA firms, in their due diligence, they must look out for possible fronting so that they may partner with firms, which empower black practitioners rather than those that use them for window dressing for the sake of compliance with the Broad-Based Black Economic Empowerment legislation. It was further emphasised that when instructing South African law firms, such firms must also be able to do work with small black law firms so that there may be skills transfer, empowerment and gaining of appropriate experience. The International Law Forum of the NBA welcomed developments in SA particularly in respect of prospects for their members to have opportunities to be admitted and enrolled as legal practitioners in SA in terms of s 24(3) of the LPA. The International Law Forum division undertook to develop rules of engagement in this matter. These rules will include, but not limited to, requesting big law firms to enter into joint ventures with small law firms and encourage coaching and mentorship with observable deliverable outcomes.

This convention also made us realise that black legal practitioners in America are facing, to some extent, similar challenges as those faced by black legal practitioners in SA, in terms of access to lucrative legal work. What, however, makes our situation more untenable is that black people in our country are in the majority whereas in the US they are the minority. However, the main and peculiar challenge facing the African-Americans is discrimination meted out to them in a form of police brutality wherein a number of them are being killed by police under questionable circumstances.

The other lesson that may be learnt from the NBA is how they conduct their elections. Nominated candidates are interviewed by the nominations committee to establish if they meet the minimum set requirements. Those who are found to be ineligible to be voted into the office are recommended to the convention during the opening plenary session. Thereafter, the floor is opened for nominations to take place and those nominated will once again be subjected to the scrutiny of the nominations committee. If successful, their names are included in the ballot paper. This is very relevant when taking into account the provisions of s 7(2)(e) of the LPA in that a committee like the nominations committee will then assess if the LPC contestants meet the requirements espoused in the section.

During the closing session and awards banquet ceremony, President-Elect, Kevin D Judd together with the new executive committee and board members, were confirmed and sworn in as the new President and leadership of the NBA for the 2016 – 2017 term of office, respectively. Juan R Thomas was elected as the new President-Elect for the same period.

It was in this session where BLA members were officially recognised and welcomed.

NBA stalwarts undertook to investigate the manner through which they can meaningfully assist in the development of the black legal practitioners in SA. This convention positively assisted in strengthening the relationship between BLA and NBA. We believe that this relationship will continue to grow.

The 2017 NBA Convention shall be held in Toronto, Canada.

The following BLA members attended the convention: Lutendo Sigogo; Mike Chauke; Penelope Magona; Mafori Edward Lesufi; Mashudu Netsitungulu; Zinle Ngodobo; Stanley Boikanyo; Melatong Ramushu; Vellie Tinto; and Siya Wotshela.
Newly appointed judges acknowledged

The KwaZulu-Natal Law Society (KZNLS) in liaison with the office of the Premier KwaZulu-Natal held a celebratory dinner to acknowledge the appointment of Justice Mjabuliseni Isaac Madondo as Deputy Judge President of the KwaZulu-Natal High Court and the appointment to the judiciary of Judge Pieter Bezuidenhout and Judge Thokozile Masipa. The dinner, held on 22 July, was well attended by representatives from the judiciary, KZNLS and the premier’s office.

The President of the KZNLS, Lunga Peter, welcomed delegates, while the Chairperson of the Attorneys Fidelity Fund, Nonduduzo Khanyile-Kheswa, was the programme director. Delivering his address, the Premier of KwaZulu-Natal, Willies Mchunu, said that his office saw it fit to congratulate Deputy Judge President Madondo on his appointment. Mr Mchunu added that the importance of the role of judges in the country was one that needed to be highlighted.

‘On behalf of government, to all the new justices that are now on the Bench, I say congratulations. We look forward to the interactions that will happen between the two arms of the state. Justice Madondo has come a long way before he was appointed as Deputy Judge President. Some of those who have undermined Justice Madondo are surely now seeing his worth. Democracy has an important role to play to ensure a balance between the past and the present. Justice Madondo will have all the support he needs to fulfil his role as Deputy Judge President,’ Mr Mchunu concluded.

Judge President of the KwaZulu-Natal Division, Achmat Jappie’s speech focused on giving advice to the appointed judges. Justice Jappie noted that the role of a judge is to do what others avoid doing, which is making decisions that are difficult at times. He added that recent developments of enabling the media to live record proceedings of court have put the decisions of judges on the spotlight.

‘Judges should not be surprised; people will run to the appeals court to appeal decisions. Whatever you do as a judge will make an immense impact on society. … As far as I am concerned there is no better job than being a judge,’ Justice Jappie noted.
Speaking on the importance of the relationship between the judiciary and the KZNLS, KZNLS council member Praveen Sham said that attorneys assist the judiciary at times by being acting judges to ensure a smooth running of the court systems. This is something that is essential for the public at large. The KwaZulu-Natal Law Society acknowledges what the judiciary has done, and continues to do for the public,' Mr Sham added.

Speaking on behalf of the newly appointed judges, Justice Madondo expressed his gratitude to have been seen to be fit to be appointed as the Deputy Judge President and that the KZNLS and government organised an event to acknowledge his appointment. Justice Madondo said that the job of a judge is to ensure justice is conveyed on the citizens, especially the vulnerable. ‘Justice needs to be seen as effective and efficient. Justice is the resolution of civil disputes and the prosecution, conviction and sentencing of those who have committed crimes,’ Justice Madondo added.

Justice Madondo noted that he has a vision of change for the division he will be presiding over and hopes that others, in the division, will be able to follow his vision.

### Pathway to progress:
**One small act can make an impact**

Children are the future of South Africa and bring joy and hope into the world. Some are born into loving and advantageous homes, whereas others are not. This fact alone however, should not shape the life of a young and aspiring child and spoil their hopes and dreams. It is with this in mind that the class from the School for Legal Practice in Bloemfontein (Bloemfontein School) decided to reach out and embark on a journey with a less fortunate group of young children. On 9 July, the Bloemfontein School made their mission to bring renewed aspirations to these children and give them a sense of belonging in society. The group travelled to Lebone House in Bloemfontein for a community engagement task. The orphanage was established in May 2000 by the AIDS Mission Outreach Trust and opened its doors as a day care facility for HIV/AIDS infected and affected children.

The Bloemfontein School made contact with a number of law firms, as well as other businesses in the Bloemfontein area and shared their ideas on how they can contribute to Lebone House and the children. Many firms shared the Bloemfontein School’s vision and made numerous donations.

With the help of these generous donations, the Bloemfontein School was able to purchase a large quantity of paint and together with their man-power, began to paint the school buildings. The idea behind the newly painted buildings, was not only to bring joy to the children, but also to bring a sense of pride. For the Bloemfontein School, it is important to strive for more than just justice in the legal world, but also to give back to a community that was in need of a helping hand and some kindness. To give back to the community brings with it a sense of fairness towards those who were dealt unfairly setbacks in life.

The painting of the school buildings was not the only task chosen. It was important for the Bloemfontein School to also do something more personal for the children. The Bloemfontein School further purchased blankets and winter jackets for the children, giving them warmth and something to call their own.

The Bloemfontein School was truly fortunate to have had the opportunity to have had the support and donations from -
- Symington & de Kok Attorneys;
- Phatshoane Henney Attorneys;
- Etienne van Zyl;
- Webbers Attorneys;
- Spangenberg Zietsman & Bloem Attorneys;
- Nick’s Electrical Northern Cape;
- Kloppers Interstate Bus Lines;
- BBS Developers; and
- the Free State Law Society.

Without these generous donations, the Bloemfontein School would not have been able to make their vision a reality.

### 2016 annual general meetings

The six constituent members of the Law Society of South Africa will have their annual general meetings on the following dates:

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<th>Province</th>
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<th>Venue</th>
<th>Contact person</th>
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<tr>
<td>KwaZulu-Natal Law Society</td>
<td>14 October</td>
<td>Durban – Coastlands Hotel, Umhlanga commencing at 2 pm. Time and venue may change.</td>
<td>Riona Gunpath (033) 345 1304.</td>
</tr>
<tr>
<td>Black Lawyers Association</td>
<td>21 – 22 October</td>
<td>Kimberley – Venue to be confirmed.</td>
<td>Lutendo Sigogo (015) 962 0712.</td>
</tr>
<tr>
<td>Cape Law Society</td>
<td>4 – 5 November</td>
<td>Cape Town – Century City Conference Centre commencing at 8.30 am.</td>
<td>Thergesari Roberts (021) 443 6700.</td>
</tr>
<tr>
<td>Law Society of the Northern Provinces</td>
<td>19 November</td>
<td>Sun City commencing at 9 am.</td>
<td>Hester Bezuidenhout (021) 338 5949.</td>
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The National Association of Democratic Lawyers has provisionally set its meeting for the end of February 2017.
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The Cape Town Candidate Attorneys’ Association (CTCAA) is a dynamic and diverse body of candidate attorneys (CAs) practising law in the greater Cape Town area. Forming part of this group of CAs, the CTCAA is served by a small committee of individuals who aim to provide the young professionals in the field with a platform for networking, as well as opportunities to be involved in community initiatives, both directly and indirectly. The CTCAA is fortunate in that it has strong affiliations with the Cape Law Society - as well as the Cape Bar – a dual function of our field on which it prides itself.

The CTCAA committee hosts a variety of events throughout the year, with all money raised being donated to deserving charities. In 2015, the CTCAA committee raised R 65 000, which was allocated towards social donations. Its events include:

- pub quiz nights;
- education days;
- a young professionals evening;
- a charity auction; and
- a closing function.

These events enable its sponsors to be part of its networking and social responsibility commitments, while providing them with an ideal platform to form long standing relations with young professionals within Cape Town.

Ultimately, the CTCAA committee aims to facilitate networking between CAs, prominent members of the legal fraternity and other young professionals in the greater Cape Town area, while remaining mindful and dedicated towards its social responsibilities with regard to those less fortunate. For this reason the CTCAA committee's activities in 2016 consist primarily of involving CAs in social events, social responsibility projects and fund raisers, with the aim of raising funds for its main charity, The Homestead Projects for Street Children (The Homestead).

The CTCAA pub quiz nights
The CTCAA committee has in the past supported a vibrant local partnership with a group that provides pub quiz services to various Cape Town based pubs. The CTCAA committee hosted two pub quizzes in 2016, the first of which was held in May and the second, in August.

The first event of the year took the form of a pub quiz held in Cape Town. The evening was well attended and guests were asked to answer questions on a varied selection of interesting topics. The winners walked away with complimentary prizes from the partnered brands and sponsors.

Take a child to work day
In May, as part of our Community Development Programme, the CTCAA introduced a programme called ‘Take a Child to a Law Firm Day.’ The CTCAA focused on working in conjunction with Maitland High School that has children from disadvantaged areas. Several Grade 9 learners were welcomed into the offices of various firms across Cape Town. The programme aimed to highlight the importance of knowing ones rights, as well as the inner workings of busy law practices. Learners were advised on the prerequisites of studying law and possibly other disciplines that might enhance their career in law.

Participating law firms showed their hospitality by treating the learners to lunch. The programme was not all fun and games, learners were tasked with conducting preliminary research on relevant matters such as evictions and consumer protection related issues. Through the media, many young people have a skewed perception of the legal profession; and the CTCAA provided clarity by ensuring that the learners were taken on tours of the various courts and judicial offices around the city.

The CTCAA is fortunate to be working in an ever changing profession, and it is through these initiatives that it is able to share the lessons it has learnt along the way. The CTCAA looks forward to hosting more learners in the future and hopes to encourage more firms to open their doors to eager high school learners.

The young professionals evening
The CTCAA, in partnership with the South African Institute for Chartered Accountants, as well as the Trainee Accountant Society, invites young professionals annually in various fields for a Young Professionals Evening.

The first Young Professionals Evening (YPE) was held on 15 June at the BMW
Auto Atlantic venue in Cape Town. The YPE is one of the CTCAA committee’s events, which are specifically aimed at providing young professionals with a pleasant and unique networking experience.

This year’s YPE centred on the theme of selflessness, with Paul Hooper of The Homestead speaking to attendees about their work in taking homeless children off the streets of Cape Town and socialising them back into schools.

The life of CAs can become isolated; hence the CTCAA committee continually strives to provide the body with social initiatives to counter this.

Education day
Due to the ever increasing unemployment levels among the youth within South Africa, the CTCAA tries to alleviate the burden put on high schools and learners in preparing learners for the workplace. During the CTCAA education days, hosted at Maitland High School, the CTCAA invited professionals from industries ranging from drama and film to medicine and construction and gave learners the opportunity to ask questions relating to their area of interest. Not only are learners given an introduction to various job opportunities, learners are also taken through a CV writing course to increase their chances of securing employment within their desired field of employment.

Mandela day
In line with the vision of Mandela day actions being focused on the realisation and restoration of dignity and empowerment through contributions in areas of civic need, the CTCAA supported by its main partners, BMW and PPS, arranged for a fun day out at The Homestead, the CTCAA’s charity for 2016.

The 2016 Candidate Attorney Moot Court Competition
The CTCAA committee will be launching the very first inter-firm Candidate Attorney Moot Competition in November. As new entrants to the legal profession, the CTCAA believes that every CA should be equipped with skills to confidently navigate their way around the district level motion and criminal courts. Taking place at the Wynberg Magistrate’s Court, participants will have a choice of competing in either a Criminal Court bail application or arguing an opposed prevention of illegal eviction (PIE) application. Matters will be presided over by magistrates and senior practitioners. Top litigators will be selected on a points based system.

The winning firm and their selected CAs will have their names engraved into the CTCAA trophy. This will be an annual event, which aims to foster the tradition of cooperative learning and camaraderie. Winning firms will be encouraged to defend their titles in subsequent years.

The CTCAA understand that many CAs are not afforded with the opportunity to gain experience within litigation. To aid participants in building their skills within this space, the CTCAA committee will be hosting two workshops, the first workshop will be led by one of the country’s top criminal defence attorneys and the second will be led by Senior Council behind landmark Constitutional Court judgments relating to housing and mass evictions.

Each firm, regardless of size will be allowed to enter two teams of two CAs, one per category (criminal and civil), entry will be R 500 per team. Expectedly, all proceeds raised will be going towards its partnered charity and upcoming social responsibility projects. The CTCAA looks forward to receiving entries and being the first group of candidate attorneys to participate in this initiative.

Candidate Attorneys and firms can e-mail Darren Hanekom at darren.hanekom@gmail.com to enter.

Charity auction
The work done by the CTCAA throughout the year is only made possible through the kind donations received from sponsors. The Charity Auction is the CTCAA’s biggest event and has in the past been very successful in raising funds and attracting attendees from various professional spheres. The CTCAA envisages an even more successful auction this year, which can only be achieved with the help from their invaluable sponsors. Guests are treated to three course meals and funds are raised through the auctioning of unique sponsored items such as F1 racing experiences and one of a kind collectables.

The charity auction will take place on 4 November 2016.

Conclusion
In conclusion, the CTCAA is conscious of the challenges which exist within the profession. Scarce CA placement opportunities create competitive law students, who in turn look to compete rather than cooperate with their peers. This culture of competitiveness only hinders opportunities to learn from each other and further exacerbates fragmentation and isolation within the profession. Rather than digging our heads in the sand, one should look to take small strides in creating an inclusive fraternity. Due to the dreary salaries offered to aspirant attorneys, the growing consensus among many CAs is that practice is not for everyone, and that the tenure of articles is just another way to make ourselves more marketable to the corporate world. The CTCAA believes that practice is indeed available for everyone, we did not study all these years to become yet another cog in the machine. The CTCAA challenges CAs to join it in their journey in growing, learning and sharing what it means to practice law in this country we call home.

• Find the CTCAA Facebook at www.facebook.com/capetowncaa/ or e-mail: thectcaa@gmail.com
Compiled by Barbara Whittle, communication manager, Law Society of South Africa, barbara@lssa.org.za

Briefing Pattern Task Team drafting briefing protocol for the profession

A Briefing Pattern Task Team, chaired by Johannesburg attorney and former Law Society of South Africa (LSSA) Co-chairperson, Busani Mabunda, is drafting a briefing protocol for attorneys and advocates. The task team, which was constituted as an outcome of the LSSA Summit on Briefing Patterns held at the end of March this year (see 2016 (May) DR 6), meets on a monthly basis to discuss and implement the resolutions taken at the summit.

Besides Mr Mabunda, the task team includes attorneys Mvuso Notyesi and Richard Scott (respectively the current and a former LSSA Co-chairperson), as well as Dion Masher – who represents the large firms - advocates Ish Semenya SC, Anthea Platt SC and Thandi Norman SC represent the advocates' profession and Varsha Sewlal from the Department of Justice and Constitutional Development (DoJ&CD). Dr Tsili Phooko is the LSSA facilitator for the project.

The advocates and Mr Scott have been delegated to prepare a draft briefing protocol.

The task team resolved the following:

• The role of the DoJ&CD is pivotal to the process as it needs to coordinate briefing instructions through the Office of the State Attorney. There should be close cooperation with the new Director-General of Justice, Vusi Madonsela, as the task team would need to also consider the policies being drafted by the department as they related to briefing.

• The LSSA would continue to seek information on briefing and the distribution of legal work generally from state-owned enterprises and government departments to build on the report that was produced for the summit.

• The task team expressed its grave concern at the apparent lack of cooperation from business organisations and undertook to seek the active participation of various business and industry bodies with the work of the task team.

• Briefing patterns at local government level should also be investigated by both the task team and the DoJ&CD.

• The task team would approach the judiciary for its perspective, as well as to discuss concerns that have been raised at various levels of the judiciary regarding briefing issues. Mr Mabunda, Mr Masher and Ms Platt would arrange to meet Judge President Dunstan Mlambo of the High Court Gauteng Division, who had attended the summit and who had offered his cooperation in this regard.

• The various mentorship initiatives on the attorneys’ and advocates’ profession would be taken into consideration as they impacted on skills development and briefing.

• Various funding opportunities would be explored as the task team members were of the view that the initiative should be a properly resourced and funded transformation initiative by the profession.

The Law Society of South Africa (LSSA) fielded a team of over 300 attorney election observers at the local government elections on 3 August 2016. The LSSA was to provide a preliminary report to the Electoral Commission (IEC) within 48 hours of the close of the polls and then a full report by 12 August.

The week before the elections, on 27 July, LSSA Co-chairpersons Jan van Rensburg and Mvuso Notyesi attended the launch of the National Results Operations Centre for 2016 Municipal Elections at the Tshwane Events Centre in Pretoria. Later that evening they addressed a networking session of the National Press Club on the LSSA election observer mission.

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Gildenhuys Malatji in Pretoria has appointed Sayi Nindi-Tshiani as a senior associate in the commercial litigation and public law department.

Mothle Jooma Sabdia Inc in Pretoria has seven new promotions.

Front from left: Nicolene Komar has been promoted as a senior associate, Thipe Mothele is a director, Ebrahim Jooma is a director, and Adèle van der Merwe has been promoted as a senior associate. Back row, from left: Sian Butterworth has been promoted as an associate, Mohammad Mamod has been promoted as an associate, Michelle Gioia has been promoted as an associate, and Telana van Niekerk has been promoted as an associate.

Please note, in future issues, five or more people featured from one firm, in the same area, will have to submit a group photo. Please also note that De Rebus does not include candidate attorneys in this column.

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Applying for a Fidelity Fund Certificate

Section 41 of the Attorneys Act 53 of 1979 requires a practitioner to be in possession of a Fidelity Fund Certificate (FFC) in order to practice on his or her own account or in partnership. The section further states that should a practitioner practice or act in contravention of the requirement, the practitioner shall not be entitled to any fee, reward or disbursement in respect of anything done by him or her while so practising or acting. FFCs are issued by the Attorneys Fidelity Fund (AFF) through its appointed agencies, namely, the four statutory law societies. The validity period for each issued FFC is a year, from January to December of that year, for example, from 1 January 2016 to 31 December 2016. Practitioners are able to apply for their FFCs for the following year from 1 October of the year preceding the year for which the FFC is required.

In order to qualify for an FFC, the following requirements must be satisfied:

- The firm's opening (in the case of new firms) or year-end trust audit report must be approved by the law society to which the firm belongs. It should be noted, however, that some new firms may not yet have reached their due date for submission of their opening trust audit reports at the time of applying for the FFC, such firms are exempted from this requirement. Other firms may be exempted by their law societies for various reasons from submitting trust audit reports.

- The practitioner applying for the FFC must have satisfied the practice management training (PMT) requirements. This training became compulsory for all practitioners who started practising on their own account or in partnership after 14 August 2009. However, the law society may exempt some practitioners who start practising after that date.

Until 2015, a practitioner would complete an FFC application form, submit it to the law society, and the law society would issue the FFC should the applicant be compliant with all requirements. With effect from the 2016 year, the AFF provided an automated system to the law societies to administer the issuance of these FFCs. This system went live at the beginning of November 2015, and all applications for the 2016 period were processed through the online application. Data utilised by the system to facilitate the issuance of the FFCs is integrated from the law societies' member system, and this is data already residing with and known to the law societies. The aim of the AFF in providing this online system is to utilise the financial and other information provided on the system for its risk management initiatives.

We noticed, while attempting to utilise the information for our risk management initiatives that the information is not necessarily correctly captured. In anticipation of the next round of a peak season for issuance of the FFCs, we therefore felt it necessary to assist new and existing practitioners with how to complete the required financial information correctly. The section below deals with how to correctly capture the financial information required in terms of s 16 of the FFC application form, gazetted on 30 September 2015, on the online system (GN R898 GG39239/30-9-2015).

Section 78(1)

This section requires the balance/s of all the trust account/s of the firm, individually reported, as at the end of the following preceding periods -

- 1 October - 31 December;
- 1 January - 31 March;
- 1 April - 30 June; and
- 1 July - 30 September.

In order for the practitioner to report these balances per trust account, the practitioner needs to go to 'manage bank accounts', assign the accounts to s 78(1) where it says 'assign to section'. Should any of the trust accounts opened in the name of the firm not appear on the list of trust accounts, the practitioner can add the missing trust account and also assign it to the section.

Once the trust account is assigned to the section that account number will reflect under the tab for s 78(1), and the practitioner is able to capture the balances. Practitioners should be ready with the following information in order to complete the balances:

- The bank balances as at 31 December, 31 March, 30 June and 30 September as reflected in the trust bank statement.
- The service fee formula as provided by the bank.
- The interest rate that was applicable on the credit balances as at the reported periods.

Section 78(2)(a)

This section requires the balance/s of all the s 78(2)(a) trust investment accounts of the firm, individually reported, as at the end of the following preceding periods -

- 1 October - 31 December;
- 1 January - 31 March;
- 1 April - 30 June; and
- 1 July - 30 September.

The s 78(2)(a) investments refer to all investments done by the firm, in the name of the firm, taken from excess funds in the trust account and do not belong to a specific trust creditor. The interest earned on these investments is due to the AFF.

In order for the practitioner to report these balances per s 78(2)(a) trust investment account, the practitioner needs to go to 'manage bank accounts', assign the accounts to s 78(2)(a) where it says 'assign to section'. Should any of the trust investment accounts opened in the name of the firm not appear on the list of trust accounts, the practitioner can add the missing trust investment account and also assign it to the section.

Once the trust investment account is assigned to the section, that account number will reflect under the tab for s 78(2)(a), and the practitioner is able to capture the balances. Practitioners should be ready with the following information in order to complete the balances:

- The bank balances as at 31 December, 31 March, 30 June and 30 September as reflected in the trust investment bank statement.
- The service fee formula as provided by the bank.
- The interest rate that was applicable on the credit balances as at the reported periods.

Section 78(2A)

This section requires the combined balances of all the s 78(2A) trust investment accounts opened by the firm on behalf of specifically identifiable trust creditors, as at the end of the following preceding periods -

- 1 October - 31 December;
- 1 January - 31 March;
- 1 April - 30 June; and
- 1 July - 30 September.

The s 78(2A) trust investment accounts refer to all investment accounts opened by the firm in the name of an identifi-
Practitioners should ensure that they correctly assign the amounts to the breakdown section and that the allocation of the reported balances per reported period.

**Investments**

This section requires the combined balances of all the pure investment accounts opened by the firm on behalf of specifically identifiable clients, as at the end of the following preceding periods:

- 1 January – 31 March;
- 1 October – 31 December;
- 1 January – 31 March;
- 1 April – 30 June; and
- 1 July – 30 September.

The pure investment accounts refer to all investment accounts opened by the firm in the name of an identifiable client. The client may or may not be a trust creditor. Where the client is a trust creditor, it could be that the invested funds have no relation to the matter that the practitioner is providing legal services on. The interest earned on these investments is due to the client and the practitioner may levy reasonable administration fees for administering the investment.

Practitioners should be ready with the following information in order to complete the required balances:

- The combined investment balances as at 31 December, 31 March, 30 June and 30 September as reflected in the trust investment bank statements.
- The breakdown of the reported balances as follows –
  - commercial matters;
  - conveyancing matters;
  - Road Accident Fund matters;
  - litigation matters;
  - estate matters (only those that went through the s 78(1) trust accounts);
  - investments (pure investments with no underlying transactions, opened by the firm on behalf of specifically identified client, but incorrectly invested under s 78(2A)); and
  - any other matters.

Practitioners should ensure that they correctly assign the amounts to the breakdown section and that the allocation tallies to a 100% of the reported balance per reported period.

**Estates**

This section requires the combined balances of all the estate matters administered by the practitioner or where the practitioner is the appointed executor, and separate estate accounts have been opened with funds on these matters not flowing through the main trust account/s, as at the end of the following preceding periods:

- 1 October – 31 December;
- 1 January – 31 March;
- 1 April – 30 June; and
- 1 July – 30 September.

Please ensure that the estate balances already captured under s 78(2A) and reflected in the breakdown are not recaptured under this section as that distorts the reported financial information.

**Property**

This section requires the combined balances of all other property, other than liquid cash, entrusted with the practitioner. This refers to property like houses, cars, investment coins, etc., which require that they are fairly assessed to determine their value as at the end of the following preceding periods:

- 1 October – 31 December;
- 1 January – 31 March;
- 1 April – 30 June; and
- 1 July – 30 September.

Please ensure that the balances reported under this section for property such as houses are not the balances reported under conveyancing matters reported under s 78(2A).

**Conclusion**

In conclusion, practitioners are urged to apply for their 2017 FFCs on time to avoid the rush and frustration should they find themselves not eligible to receive their certificates for whatever reason. This will allow them time to attend to whatever requires attention. Practitioners are further urged to refrain from practising without a valid FFC as they are in breach of the requirements of legislation when they do so.

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Trust account risk and risk to the practice’s business

Whenever I do an audit on an attorney’s trust account, I am reminded of the uniqueness of the accounting and systems related to attorney trust accounts. As opposed to the accounts of other businesses, it reflects receipts and payments only, but instead of income and expenses, assets and liabilities are created. Client accounts are in credit, whereas in business accounts they are in debit. This is enough to throw the most experienced commercial bookkeeper off track.

But therein lies the rub. Most attorneys I speak to, place almost complete reliance on their bookkeeping staff and computer systems to ensure that the transactions related to the trust accounts are correctly recorded. In general, bookkeeping staff only obtain their knowledge of trust account bookkeeping from experience and not from formal training. They mostly receive their computer system training from the supplier of the system, so errors in the system are hardly ever noticed or questioned.

Computer systems for legal practices vary in their robustness and some even automate transactions to balance imbalances, without taking the validity of underlying transactions into account.

In a business, the clients would act as whistle-blowers to identify errors that the system does not prevent. Most of the clients of a legal practice are not ‘financially literate’ enough to determine whether their account is correct. That is, if they ever receive a final statement of account.

This places the practice at substantial risk, not only of non-compliance with the rules and the Attorneys Act 53 of 1979, but also of other business risks. The potential for claims from clients emanating from loss of funds is the most obvious risk and we do not need to elaborate on that, but the risk to the business of the legal practice is one that is most often overlooked.

Business risks would include risks of the business incurring losses through advancing undue credit, and the business experiencing negative cash flows and loss of clients, to name a few.

The outlook is mostly that the trust account does not affect the business. Therefore, if the trust account balances and is not in a shortfall situation, there is nothing to worry about regarding the business. It should be remembered that trust accounts will still balance, even if the transactions recorded are incomplete. Losses do not only occur, owing to theft or fraud, but also owing to incorrect recording of transactions, which do not highlight resultant shortfalls.

The quality of staff and the systems within which they perform their duties are of paramount importance to the practice.

There are five common reasons for increased business risk to an attorney practice:

- **Inadequate training of bookkeepers/accounting staff**
  You want to be comfortable that the person you employ to be custodian of your clients’ money knows exactly how the transactions affect the bookkeeping entries and the legal requirement to keep the client account funded.

- **Administrations systems**
  Different services are recorded on a ‘one size fits all’ basis.
  A detailed assessment of each type of service in the practice needs to be conducted when designing your administration system. Different services bring different challenges and they can culminate in substantial business risks, if not attended to. Litigation would bring a cash flow challenge, as counsel and other expenses may be substantial and advances from clients sometimes slow in being received. Property transfer transactions are less risky, as they are backed by a property sale agreement as security.

- **Incomplete transactions**
  Misallocation of transactions or their incorrect recording in the business books will cause client trust accounts to be incorrect and incorrect recoveries or fees being levied from clients. A robust system of controlling the processing of transactions by suitable levels of staff will address this problem.

- **Over-reliance on computer systems**
  A trust account trial balance that balances is not an indication that transactions have been correctly recorded. Systems that force entries through to balance the trust account do not always highlight the root cause of a problem, which may have to be corrected with different entries. The maturity and experience of staff overseeing the process can alleviate risks attached to this problem.

- **Lack of supervision**
  The size of the accounting staff component relative to the volume of transactions being processed mostly does not leave enough time for proper checking and supervision of activities, whether by superiors or partners. The system should allow for checking and reporting functions, the frequency being relative to the amounts and risk involved, in order for errors to be identified in time. Relying on the annual audit to ascertain whether the trust account books are satisfactory is one of the extreme, unsatisfactory scenarios that I have encountered.

As Paul Ehrlich once said: ‘To err is human, but to really foul things up you need a computer’.

I submit that the greatest service a legal practitioner can do to his practice is to invest time and effort in the training of the accounting staff and develop the administration and computer systems for them to provide the controls and reports that you require to have peace of mind.

Jannie Dannhauser BCompt (Hons) (Unisa) CA (SA) RA is an audit risk specialist at the Lumenrock Group in Johannesburg.
The validity of a verbal antenuptial contract

Very few people, even legally qualified ones, are aware of the fact that a verbal (non-registered) antenuptial contract can be binding [inter partes] because the term antenuptial contract is normally understood in the narrow sense of a contract incorporated in a formal document, executed before a notary public and registered in the deeds office. However, the term antenuptial contract can either mean an informal contract, not complying with the formalities required by s 87 of the Deeds Registries Act 47 of 1937 (the Act) or it can mean a formal contract duly registered under the provisions of the Act (see Lagesse v Lagesse 1992 (1) SA 173 (D)).

In Honey v Honey 1992 (3) SA 609 (W) it was held that the term ‘antenuptial contract’ is not synonymous with the term ‘duly registered antenuptial contract’. It was further held that an antenuptial contract is valid between the parties and [inter partes] regulates their matrimonial property system even if it is not registered. A duly registered antenuptial contract on the other hand regulates the parties’ matrimonial property system also as regards third parties.

The position under common law

In Ex Parte Spinazze and Another NNO 1985 (3) SA 650 (A), Corbett JA (as he then was) sketched the position under common law as follows: According to the law of Holland, no particular formalities were required for the execution of antenuptial contracts. Not even writing was necessary. In general, writing was regarded as serving the object of providing easier proof of the existence of the contract and its terms, but was not essential to the validity of the contract itself. The validity of a verbal antenuptial contract was established as early as 1599 by two decisions of the Hooge Raad. These decisions were to the effect that a verbal antenuptial contract, satisfactorily proved, was not only valid [inter partes] but also effective against creditors of either party to the contract. Later Roman-Dutch authorities suggest, however, that to be effective against creditors and third parties the contract had to be entered into in writing and in a public manner.

Legislation

Section 86 of the Act reads as follows: ‘86 Antenuptial contracts to be registered
An antenuptial contract … executed after the commencement of this Act, shall be registered in the manner and within the time mentioned in section eighty-seven, and unless so registered shall be of no force or effect as against any person who is not a party thereto.’

Sections 87(1) and 88 of the Act are also relevant, and reads as follows: ‘87 Manner and time of registration of antenuptial contracts
(1) An antenuptial contract executed in the Republic shall be attested by a notary and shall be registered in a deeds registry within three months after the date of its execution or within such extended period as the court may on application allow.
88 Postnuptial execution of antenuptial agreement
Notwithstanding the provisions of sections eighty-six and eighty-seven the court may, subject to such conditions as it may deem desirable, authorize postnuptial execution of a notarial contract having the effect of an antenuptial contract, if the terms thereof were agreed upon between the intended spouses before the marriage, and may order the registration, within a specified period, of any contract so executed.’

The interpretation of ss 86, 87(1) and 88 of the Act by our courts

In Ex Parte Minister of Native Affairs In Re Molefe v Molefe 1946 AD 315 it was held: ‘At common law a husband and wife can, as between themselves, by an antenuptial agreement, regulate their proprietary rights after marriage. Such an agreement is binding between the spouses, but is of no effect so far as persons not parties thereto are concerned, unless it is duly entered into and registered in accordance with the law governing ante-nuptial contracts (See secs. 86 and 87 of Act 47 of 1937).’

In the Spinazze matter it was held: ‘It is clear that in terms of s 86 of the Act an antenuptial contract not registered in the manner and within the time mentioned in s 87 is of no force or effect against any person who is not a party thereto. Having regard, however, to the common law and legislative background to the Act …, an antenuptial contract which has not been so registered is valid and effective as between the parties thereto.’

In Mathabathe v Mathabathe 1987 (3) SA 45 (W) it was held: ‘The existence of such informal antenuptial agreements is expressly recognised by the Legislature in s 88 of the Deeds Registries Act 1937. Its subject-matter is: “Postnuptial execution of antenuptial agreement”. If an antenuptial agreement was in existence at between intending spouses, no matter how informally, the Court is empowered by the Legislature to authorise the postnuptial execution thereof before a notary, and its registration.’

A verbal antenuptial contract

In Ex Parte Kloosman et Uxor 1947 (1) SA 342 (T) the court allowed an application for leave to notarially execute and to register after marriage an verbal antenuptial contract, on being satisfied that the alleged verbal agreement had been proven.

In the Spinazze matter it was held: ‘[I]t seems likely … though it is not necessary to decide this point and though ss 86 and 87 deal with written ante-nuptial contracts … that even a verbal antenuptial contract, if properly proved, would have such validity [inter partes].’

In the case of Odendaal v Odendaal 2002 (1) SA 763 (W), the husband in a divorce action had relied on an alleged verbal antenuptial agreement entered into between him and his wife in terms whereof they had agreed to be married out of community of property, with the exclusion of the accrual system.

The court [a quo] accepted his evidence that he had informed his intended wife ‘that what was his was his and what was hers was hers’ and held that the parties had agreed to be married out of community of property with the exclusion of the accrual system.

On appeal against the judgment of the court [a quo] it was held that the parties in fact agreed to be married out of community of property, but given the husband’s ignorance of the accrual system at the time of contracting that the husband did
not discharge the onus of establishing that the parties also agreed to exclude the accrual system.

Conclusion
No particular formalities are required for an antenuptial contract to be valid and enforceable between the parties thereto. However, to also be effective against third parties it has to comply with the formalities required by s 87 of the Act. Consequently any antenuptial contract, which is proved to have been entered into between the intended spouses, no matter how informally, will be valid inter partes.

The effect of registration is merely to give notice to the world of the existence of the antenuptial contract and thereby (in a certain way) to bind persons who are not parties thereto.

Magdaleen de Klerk BA (Hons) BProc (UFS) Dip Human Rights (UP) is an attorney at DDKK Attorneys Inc in Polokwane.

PRACTICE NOTE – PENSION FUND LAW

By Andrew Stansfield

The Pension Funds Act 24 of 1956 (the Act) imposes a clear obligation on employers to pay over retirement contributions timeously, which in the absence of strict compliance becomes a criminal offence. The purpose of this article is to sensitize all persons responsible for practice management to the seriousness of the risks, which may arise in instances where there is non-compliance with the provisions of the Act.

What are the requirements when paying contributions to a pension or provident fund?
Section 13A of the Act deals with the payment of contributions to pension and provident funds. The employer must pay all contributions, whether member contributions or employer contributions, that are due and owing to the fund by the 7th of the month, following the month in respect of which the contributions are due. What this means is that all contributions due for the month of, for example, February must be paid to the fund by 7 March. In addition the employer must submit a monthly reconciliation schedule of all contributions so that the fund may correctly allocate the contributions to the members’ records. The reconciliation schedule must be submitted to the fund no later than 15 days after the end of the month in respect of which the payment was made.

Personal liability for contributions to a pension or provident fund
With effect from 28 February 2014, the Act states that the following persons shall be personally liable for compliance with s 13A and for the payment of any contributions –
(a) if an employer is a company, every director who is regularly involved in the management of the company’s overall financial affairs;
(b) if an employer is a close corporation registered under the Close Corporations Act [69 of 1984], every member who controls or is regularly involved in the management of the close corporation’s overall financial affairs; and
(c) in respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer’s overall financial affairs.’

If an employer fails to comply with the requirements of s 13A, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of this provision.

Penalties for non-compliance
As set out above, certain persons at the employer shall be held personally liable for non-compliance with s 13A of the Act. The amendment to the Act has made this contravention a criminal offence. Any person who contravenes or fails to comply with s 13A of the Act may be found guilty of an offence and liable on conviction to a fine not exceeding R 10 million or to imprisonment for a period not exceeding ten years.

Trustee duties
The trustees of a pension or provident fund must report any non-compliance to the Financial Services Board.

Practitioners are advised to take note and to circulate this article as appropriate.

Andrew Stansfield BCompt (Hons) (Unisa) Post Grad Dip Tax (UCT) is the Finance Executive of the Attorneys Fidelity Fund and Chairperson of the Legal Provident Fund.

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DE REBUS – SEPTEMBER 2016

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The Special Voluntary Disclosure Programme: Recent developments

During February National Treasury announced a Special Voluntary Disclosure Programme (the SVDP), which is to apply for a limited window period from 1 October 2016 to 31 March 2017 in order to provide an opportunity for qualifying non-compliant persons to regularise their tax and exchange control affairs as relates to offshore assets and income.

All SVDP applications are to be submitted after the commencement date of the SVDP (online via the South African Revenue Service (Sars) e-filing website or at any Sars branch) to the SVDP unit, which will be jointly operated by Sars and the Financial Surveillance Department of the South African Reserve Bank (the FSD).

The tax SVDP

In accordance with the most recent version of the draft tax legislation dated 19 July (the draft legislation) an application in terms of the tax SVDP must be made under and subject to the requirements of the permanent voluntary disclosure programme (the permanent tax VDP) as contemplated in the Tax Administration Act 28 of 2011 (the Act). A tax SVDP application may not be made by or on behalf of a trust, although a trust may qualify under the permanent tax VDP. (There are specific rules for trusts in the tax SVDP discussed below). In addition, no tax SVDP application may be made in respect of an asset that has been disclosed to Sars in terms of an international tax agreement, or in respect of applicants who are under actual or pending audit or investigation into these matters.

The SVDP is focussed on offshore assets held by a person during the period 1 March 2010 to 28 February 2015, which assets were wholly or partly derived from amounts not declared to Sars for income tax or estate duty purposes (undeclared assets).

The relief provided in the tax SVDP would be available to a successful applicant in addition to the voluntary disclosure relief currently available in terms of the permanent tax VDP. Accordingly, in terms of the draft legislation read with the Act, a successful tax SVDP applicant would be entitled to the following relief:

- Relief from criminal prosecution.
- Full/partial relief in respect of under-statement penalties.
- Full relief in respect of administrative non-compliance penalties (excluding penalties for the late submission of returns).

Additional SVDP relief

- Exemption from income tax, donations tax and estate duty in respect of historic undeclared income, which gave rise to the undeclared assets.

The exchange control SVDP (excon SVDP)

Information pertaining to the excon SVDP was released in terms of Exchange Control Circular No 6/2016 on 13 July 2016 (the circular). The circular indicates that the FSD would be entitled to grant administrative relief in terms of reg 24 of the Exchange Control Regulations of 1961 to successful applicants who submit excon SVDP applications in respect of unauthorised foreign assets in accordance with the specifications and requirements set out in the circular.

Excon SVDP applications will not be entertained prior to the official commencement date of the SVDP (indicated as 1 October 2016) and any party involved in a matter currently under investigation by the FSD will not qualify for relief in terms of the SVDP.

The circular provides that a South African resident who is the donor in relation to a non-resident discretionary trust, may in certain circumstances elect that any foreign asset which was held by the discretionary trust on 29 February 2016 be deemed to be held by that resident for purposes of the SVDP. The relevant date on which the trust held the asset for purposes of exercising the election in terms of the excon SVDP (29 February 2016) differs from the date during which the trust should have held the assets in order for an applicant to exercise the election for purposes of the tax SVDP (1 March 2010 to 28 February 2015 – as indicated above).

An applicant who successfully applies for the regularisation of unauthorised offshore assets in terms of the excon SVDP will be required to pay a levy based on the market value of such assets as at 29 February 2016 as follows:

- A levy of 5% will be payable on the value of unauthorised foreign assets or the sale proceeds thereof if such assets are repatriated to South Africa. Such levy must be paid from foreign-sourced funds.
- A levy of 10% will be payable on the value of unauthorised assets if such assets are retained abroad. The 10% levy must be paid from foreign sourced funds, failing which the levy will be increased to 12%.

Applicants will not be allowed to deduct any exchange control allowance from any leviable amount and the levy may not be reduced by any fees or commissions (for example, fees incurred in order to sell the relevant asset and repatriate same to South Africa).

It will remain possible for persons to
approach the FSD on a voluntary basis outside of the excon SVDP regime to regularise their affairs. A settlement amount ranging from 10% to 40% of the market value of the unauthorised assets may then be levied.

Should a person be in default as to their tax and/or exchange control affairs and not opt to regularise same in terms of the SVDP regime, the permanent tax VDP, or voluntary approach to the FSD outside of the excon SVDP, the consequences could be severe. In addition to criminal prosecution, *inter alia* understatement penalties of up to 200% of any tax default may be leviable in terms of the Act and exchange control levies of up to 100% of the market value of unauthorised offshore assets may be levied by the FSD.

At the time of writing this article, the draft legislation was open for public comment until 8 August.

- The 2016 Tax Indaba takes place on 5 to 9 September at Vodaworld Conference Centre in Johannesburg. Visit www.tax-indaba.co.za for more.

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**Criminal Law in South Africa**

By Gerhard Kemp (ed)

Cape Town: Oxford University Press


Price: R 509,95 (incl VAT)

698 pages (soft cover)

This book by Gerhard Kemp, as editor, is core course material for any student, but by no means is this book a mere academic treatise on criminal law and may be regarded as a definitive work on the subject. It is a book that is aimed at both the law student, as well as the practitioner and both can equally benefit from it. It is a book that sets out the most important provisions of all related legislation and comments on the important sections thereof. Each section deals with applicable case law to substantiate the substantive law. It is then followed by concise notes on the salient features of the section. These notes are largely based on case law, which reveals how each section has been interpreted and applied in practice. Sometimes background information is provided and fundamental principles enunciated. The information is up-to-date and the format eminently helpful.

The book provides an in-depth debate and analysis of contentious issues, as well as recent legal developments on the topic at hand.

The notes which accompany each section are sufficiently detailed. They deal with more than the bare essentials. They do not engage in profound academic discussion. Anyone who wants to go into an in-depth discussion of each provision can obviously refer to the cases which are cited. Not all the cases in criminal law are referred to but only those which are important for the understanding of each section are Briefly discussed. The information is presented in a well-structured and user-friendly manner and is easily readable.

The general principles of criminal law, the elements of specific common law crimes and statutory offences are all covered in the text. The influence of the Bill of Rights read with comparative perspectives and international law on each subject, supports the legal theory referred to.

Reading any act is on its own rather dry and uninteresting. These notes make it more digestible for the reader. They are written in clear and lucid language and all essential material is canvassed. The work is comprehensive and the practical explanation straight forward.

Although this book is of immense value for the student, it is equally useful to a practitioner who needs a quick reference to a particular provision or who needs some guidance on a moot point of criminal law. The usefulness of the book is enhanced by the word index at the end. Not to repeat myself, sufficient to say that this book succinctly explains criminal law principles with excellent case illustrations, to balance out otherwise rigorous theory. One of the chapters (ch 2) even provides for a broad outline of the South African criminal procedure system.

Criminal law being a practical subject has to be taught in a practical way without ignoring the principles on which it is based. It is often illuminating to know why a particular provision has been made. Any book that deals with principles of substantive law has to captivate the imagination of the reader and draw his attention to the value of this subject. It is guaranteed that this book will achieve this objective and will also be a useful guide to practitioners. It will definitely be a worthy addition to the literature on this subject.

I was extremely impressed by the book's introduction to several new offences, such as the criminal provisions of the Companies Act 71 of 2008, as well as crimes such as terrorism, torture and human trafficking which are all treaty-based and a world-wide phenomena.

This textbook is available at most academic bookshops through-out South Africa and also directly from Oxford University Press at www.oxford.co.za.

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**BOOKS FOR LAWYERS**

Robert Gad BA LLB LLM (UCT) Post Grad Dip in Tax (UCT) and Alexa Muller BCom LLB (Stell) H Dip in Tax are attorneys at ENS Africa in Cape Town. Mr Gad is also the Chairperson of the ISSA Tax and Exchange Control Committee.
In the context of legal professional ethics, the terms ‘confidentiality’ and ‘privilege’ are often used interchangeably. While these two terms may overlap in some respects, they remain two distinct concepts. The distinction between confidentiality and legal professional privilege is absolutely essential insofar as their differences ensure the proper functioning of the South African legal system, which is dependent on freedom of communication between legal practitioners and their clients.

By Kristen Wagner and Claire Brett

I heard it through the grapevine:
The difference between legal professional privilege and confidentiality
A brief consideration of confidentiality

‘Confidentiality’ refers to the duty of an attorney to preserve the confidentiality of all communications between himself or herself and the client (Willem de Klerk et al Clinical Law in SA 2nd (Durban: LexisNexis 2006) at 42). The norm is that this duty may present itself as an express or tacit term of a contract, by virtue of a fiduciary relationship or even in terms of a delictual duty prohibiting such disclosure. Confidentiality is said to be far wider than the doctrine of legal professional privilege as information may be confidential even when it is not protected by legal professional privilege. Confidentiality extends to all information in respect of the clients’ affairs, whether oral or documentary in nature. The right to have communications protected belongs solely to the client and only the client will be able to expressly waive this right (De Klerk op cit). This duty survives termination of the mandate between attorney and client and even the death of the client. This (mostly) contractual duty is essential as it ensures that the client is (without fear) able to confide in and disclose all relevant information to the legal practitioner as he pertains to the circumstances or case. Legal practitioners must ensure that confidentiality is respected, protected and upheld at all times. A breach of this duty by a legal practitioner may lead to an action for damages against himself or herself or may culminate in the granting of a prohibitory interdict against further disclosure. The duty of confidentiality remains in effect at all times and not just in the face of legal demands for information.

Demarcating the distinction: Understanding legal professional privilege

The International Code of Ethics prohibits legal practitioners from disclosing, unless lawfully ordered to do so by a court or in terms of statute, communications made to them in their capacity as legal practitioners, even after ceasing to be the client’s attorney/legal practitioner (J Auburn Legal Professional Privilege: Law and Theory (USA: Hart Publishing 2000) at 23). On this basis, one needs to consider the doctrine of legal professional privilege as it applies in South Africa. This doctrine maintains that certain communications between practitioners and clients may not be used in evidence. As delineated in Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) there are said to be four require-ments for legal professional privilege to apply, namely:
• The legal practitioner must have acted in a professional capacity. This goes beyond the mere fact that the legal practitioner is an admitted attorney or advocate. Other indicators such as the payment of fees or recorded holding of consultations may also be considered for this requirement to be met.
• The client must have consulted with the legal practitioner in confidence. At this point, the overlap between confidentiality and privilege becomes apparent as confidentiality is a necessary precondition for the claiming of privilege. A communication must have been intended to be confidential for it to be privileged. This requirement applies to all communications between the legal practitioner and client, whether written or oral. This requirement is often contested and one may find confidentiality is absent where, for example, the attorney acts for both parties in a case.
• The communication must have been made for the purpose of obtaining legal advice (or, at the least, closely connected thereto). A distinction is drawn between –
- legal advice privilege, which pertains to all communications between the legal practitioner (attorney/advocate/salaried in-house legal adviser) and the client (in order to give the client advice in a professional capacity); and
- litigation privilege, which pertains to and protects all communications between the legal practitioner and the client or between either of them and a third party with respect to actual or contemplated litigation, insofar as the case is in the process of investigation and/or preparation for trial.

In the recent case of South African Airways Soc v BDFM Publishers (Pty) Ltd and Others 2016 (2) SA 561 (GJ) [2016] 1 ALL SA 860 (GJ), the court was tasked with considering the applicability of an interdict as a form of relief to an applicant whose confidential legal advice had been leaked into the public domain in an unauthorised manner. The applicant, South African Airways (SAA), had previously sought and obtained an interdict against the respondent (three media houses) preventing further dissemination of a legal impact analysis document prepared by SAA’s in-house legal adviser. In November 2015 the confidential legal text was leaked and published in various national newspapers.

In setting aside the previous order, Sutherland J emphasised the distinction between legal advice and litigation privilege; declaring that while the common law right to legal professional privilege is a necessary means of protecting South Africa’s adversarial justice system, it is not an absolute right. Sutherland J remarked that the right to legal professional privilege is a ‘negative right’ making inadmissible as evidence, legal advice provided to a client by a legal practitioner. This right cannot be interpreted as being a positive right, which would otherwise entitle a client to suppress publication once confidentiality has already been breached. As such, legal professional privilege cannot be claimed against the world at large; providing protection from involuntary disclosure. Granting of an interdict in circumstances where harm has already occurred is futile. As such, once the public becomes aware of confidential legal communications between the client and legal practitioner, no remedy exists to restrain further dissemination. (See law reports ‘Civil Procedure’ 2016 (June) DR 40 and ‘Evidence’ 2016 (June) DR 44.)
• The advice given must not facilitate the commission of a crime or fraud. This applies regardless of the fact that the attorney may be completely unaware of such crime or fraud. In the case of Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W), a tape recording was introduced into evidence wherein the defendant, in discussion with his attorney, intended to fabricate evidence in order to mislead the court. While accepting that the tape recording was unlawfully made, the court admitted it into evidence; stating that the legal professional privilege so claimed by the defendant was forfeited as a result of the criminal intention behind the communication.

In addition, legal professional privilege will not apply to communications, which are not intended to be privileged, communications not intended to be confidential, the name of the client and facts learnt through the legal practitioners own means and methods (De Klerk op cit at 42). The privilege belongs to the client and only the client may expressly waive such privilege.

In the case of Mohamed v President of the Republic of South Africa and Others 2001 (2) SA 1145 (CC) it was held that legal professional privilege extends to salaried legal advisers in the employ of the government. Furthermore and in terms of Van der Heever v die Meester en Andere 1997 (3) SA 93 (T) legal professional privilege was further extended to salaried legal advisers in the employ of a private body such as a firm giving tax advice. The courts are not, however, willing to extend privilege to persons giving legal advice who do not have a law degree, which would enable them to be admitted as an attorney or advocate. An example hereof would be a chartered accountant giving tax advice.
Relevant examples of the applicability of legal professional privilege and statutory challenge?

In the recent case of *A Company and Others v Commissioner, South African Revenue Service* 2014 (4) SA 549 (WCC) it was held that certain portions of the applicant’s attorney’s tax invoice were protected from disclosure due to legal professional privilege. In the past, whenever South African Revenue Service (Sars) required information from a taxpayer regarding an audit or interview, the taxpayer could refuse on the grounds of the information being legally privileged. However, in terms s 42A of the Tax Administration Laws Amendment Act 23 of 2015, a taxpayer claiming the applicability of legal professional privilege will now have to prove the validity of such privilege by providing a list of extensive information which includes – but is not limited to – a description of each and every document not provided and full details of the legal practitioner.

Interestingly, and as another topical issue currently being considered, the Financial Intelligence Centre Act 38 of 2001 (FICA), provides major barriers to the doctrine of legal professional privilege. In terms of sch 1 of FICA, accountable institutions such as banks and attorneys are required to comply with various duties. The most contested of these duties is the onerous duty placed on accountable institutions to report all suspicious activities or transactions to the Financial Intelligence Centre (FIC). Failure to report any suspicious activities relating to the client may result in a hefty fine being imposed on the practitioner of up to R 10 million or up to 15 years’ imprisonment. It is argued that the inclusion of attorneys in anti-money laundering legislation such as FICA is unconstitutional and threatens the independence of the legal profession. There is a need to maintain the rules of legal professional privilege in order for the legal profession to remain independent. Such duties erode away at the doctrine of legal professional privilege. Suggestions have been made, which include FICA being amended to allow attorneys to report suspicious transactions to the provincial law society as opposed to the FIC. As it stands, FICA provisions – as they apply to attorneys – remain in force as it is contended that attorneys are often used by money launderers and their trust accounts are most often the vehicles used to launder money.

Conclusion

The contractual duty of confidentiality and the common law doctrine of legal professional privilege are essential in maintaining the independence of the legal profession and in assuring clients that any information communicated between them and the legal practitioner will not be disclosed. Confidentiality remains in effect infinitely while legal professional privilege must be claimed by the client and generally ensures that all communications between client and legal practitioner are not admissible in subsequent legal proceedings.

While FICA and the Tax Administration Laws Amendment Act 23 of 2015 present concerns for legal practitioners insofar as the doctrine of legal professional privilege is concerned, we remain hopeful that such concerns will be remedied in the near future; preserving this essential doctrine.

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Cases and Materials on Criminal Law (4th edition)
J M Burchell

The fourth edition of Cases and Materials on Criminal Law includes 26 new extracts covering a range of topics, including the principle of legality, punishment, causation, consent in rape cases, dolus eventualis, knowledge of unlawfulness, common purpose, conspiracy, consensual child sexual experimentation, defamation, robbery, corruption, contempt of court, racketeering and criminal confiscation.

Principles of Criminal Law (5th edition)
J M Burchell

The fifth edition of this established work on criminal law includes detailed discussion of major judicial pronouncements on dolus eventualis (Pistorius), the limits of common purpose liability in its active association form (Dewnath), robbery with aggravating circumstances (Masingili), treason (the Boeremag Treason trial), racketeering/retrospectivity (Savoi) and consensual child sexual experimentation (Teddy Bear Clinic). Judgments of the Supreme Court of Appeal, the Constitutional Court and legislative amendments relevant to criminal law up until the end of 2015 have been included in this fifth edition of Principles of Criminal Law.

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S Williams, H Woolaver (Editors)

The theme of Civil Society and International Criminal Justice in Africa is the contribution of African civil society organisations to international, regional and national international criminal justice mechanisms. This volume provides a number of perspectives on this theme, with contributions from academics, practitioners, and civil society representatives. This book is also available in hard cover format as Acta Juridica 2016.

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When is it appropriate for the sentencing court to interfere with parole?

By Nicholas Mgedeza and Dumisani Masuku

In practice there are judicial officers who impose a sentence that the accused will undergo a certain period of imprisonment and will not be eligible for parole. In the matter of S v Mpharu (FB) (unreported case no 147/2014, 4-9-2014) (Pohl AJ), the matter was brought under special review, after the accused in the matter had been charged on 23 June 2014 with ‘housebreaking with the intent to steal and theft.’ He was legally represented and pleaded guilty to the charge and was duly convicted. Subsequently, the magistrate imposed a sentence of three months’ imprisonment and further made an order that the accused would not be eligible for parole. In this article, we scrutinise whether the magistrates’ courts are vested with the powers to impose a sentence where parole is denied? What does the Criminal Procedure Act 51 of 1977 and the authorities say in this regard? What factors does the judicial officer need to take into account in determining a sentence that the prisoner should not be entitled to be paroled or have his sentence remitted?

Law and analysis

Section 276(1) of the CPA provides that:

1. Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed on a person convicted of an offence, namely:
   (a) ... 
   (b) ... imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B(1); 
   (c) periodical imprisonment; 
   (d) declaration as a habitual criminal; 
   (e) committal to any institution established by law; 
   (f) a fine; 
   (g) ... 
   (h) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'

At the first instance, the statute does not provide for circumstance where the court can order the accused not to be entitled to parole. Section 276B(1) and (2) of the CPA provides that:

1. (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
   (b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

2. If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)(b), fix the non-parole-period in respect of the effective period of imprisonment.’

Undoubtedly, this section confines the court the right to curtail the time of which the prisoner must be kept in detention prior to being eligible for parole. By way of illustration, the matter of S v Kodisang (GP) (unreported case no A421/15, 20-6-2015) (Thobane AJ), which was brought to the High Court under special review. The synopsis of the mischief is that after the accused pleaded guilty to the charge of fraud, the magistrate sentenced the accused to 36 months’ imprisonment and simultaneously ordered that the accused will not be eligible for parole for a period of 36 months. The court held that the fact that the order of non-parole covered the entire term of imprisonment was misdirection. On this point alone the magistrate’s order of imposing of non-parole sentence was accordingly set aside. The court further held that the approach to be adopted by the sentencing court that wishes to impose the non-parole period is to make a determination as to whether exceptional circumstances are present and in casu such circumstances did not exist. Furthermore, in the matter of S v Pauls 2011 (2) SACR 417 (ECG), pursuant to plea of guilty to a charge of theft, the regional magistrate sentenced the appellant to undergo eight years of imprisonment, two of which were suspended for five years on certain conditions. The magistrate also imposed a further condition, in terms of s 276B of the CPA that the appellant had to serve a minimum of four years of the sentence before he could be considered for parole. The court held that s 276B should be invoked in exceptional circumstances, and the court must exercise proper care and caution when considering whether exceptional circumstances exist. Moreover, the court held that the proper judicial considerations can only be considered where both the state and the defence have made submissions on the issue;
and where exceptional circumstances are found to exist in a particular case; it is the duty of the judicial officer to set them out explicitly in the judgment or they must be apparent therefrom (see also S v Mogama 2014 JDR 0582 (GSJ)).

Both of the aforementioned cases, confirm the position that prior to the imposition of s 276B sentence, discernible exceptional circumstances must be present and must emanate from both the state’s and the defence’s submissions and the judicial officer must set them out in the judgment.

The right to be heard and to be given the opportunity or to be considered to be eligible for parole is to a certain extent circumscribed by the aforementioned sections in that the prisoner will have to be incarcerated for a stipulated period before the issue of parole can be considered. Our submission is that this does not confer automatic right to parole, but places the prisoner in a position to be considered for parole by the Parole Board. In the matter S v Stander 2012 (1) SACR 537 (SAC) at para 12 and 13 respectively, the court held that: ‘Despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power. Ultimately, the case-management committee submits a report on each prisoner to the relevant Correctional Supervision and Parole Board. The report deals with the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of the prisoner and the likelihood of his or her relapse into crime. In order to fulfil these functions the Department employs suitably skilled people. The Correctional Supervision and Parole Board considers the report submitted to it and also takes into account the views of the complainant in certain identified instances of serious crime. Such a complainant has the right in terms of s 299A of the Act to attend the meeting of the Correctional Supervision and Parole Board and make representations when the parole of the perpetrator is considered. This serves to illustrate that the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to the conduct of the prisoner after the imposition of sentence. This short summary of the statutory procedure prescribed for the consideration of a prisoner’s release on parole illustrates why the Department, and not a sentencing court, is far better suited to make decisions about the release of a prisoner on parole, not only because it remains desirable to respect the principle of the separation of powers in this regard.’

Likewise in S v Mahlatsi 2013 (2) SACR 625 (GNP), at para 27, the court held that: ‘As was already hinted above, the Department of Correctional Services, the parole board or their employees are empowered to consider such things as recommendations for parole. They might not interpret the parole legislation correctly or refuse parole for flimsy reasons, which means that a person, although legally entitled to be considered for release on parole, might not be released. This is not a far-fetched, speculative hypothesis, as the premature release of some of the so-called “Waterloof Four” due to a miscalculation of the legislative requirements bears testimony. The same mistake can just as easily be made regarding an omission to consider, or refusal to release on parole. Once again, therefore, sentencing and appeal courts should not rely on the current parole provisions and policies when determining an appropriate sentence. While the date for consideration to be released on parole is now the same for everyone, lifers or people sentenced to otherwise unnecessarily long periods of imprisonment such as 100 years, the fact remains that some of them might not be so considered or released, and their remitties might be limited to obtain redress. No one can lose sight hereof, especially not sentencing courts or courts of appeal. Parole is the function of the executive arm of government, and the courts should steer well clear of interfering, unless authorised by law to do so.’

In principle, the issue of whether the prisoner is eligible for the parole falls exclusively within the purview of the executive, not the judiciary. The executive has to follow certain procedures and processes in formulating an opinion whether to confer parole to the prisoner (see also S v Tcoeib 1996 (1) SACR 390 (NNS) at 394 B – C).

Separation of powers outlook

Section 8(1) of the Constitution provides that ‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’ Accordingly, the courts fall under the ambit of judiciary. Furthermore, s 165(2) of the Constitution provides that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Without a shadow of a doubt, the Constitution applies and binds the courts. Moreover, s 12(1)(e) of the Constitution, provides for the right ‘not to be treated or punished in a cruel, inhuman or degrading way’. As a point of departure, the courts that impose a sentence, which has the express provision that the prisoner will undergo a certain period of direct imprisonment and is not entitled to remission or parole, is arbitrary and is a flagrant disregard of the constitutional right of a prisoner as it contravenes s 12 of the Constitution. Prof Devenish A commentary on the South African Constitution 6ed (Durban: LexisNexis 2004) at 240 provides the following: ‘The judiciary dare not to usurp the function and role of the legislature. This will constitute a violation of the doctrine of separation of powers. The creative role of the judiciary in interpreting and applying the Constitution and other statute law must be exercised within the clearly defined parameters.’

The main objective of the separation of powers is to ensure the notion of checks and balances and the Constitution depicts the legislature, the executive and the judiciary as separate entities, each with a distinctive backdrop. Thus, when the court imposes a sentence which provides that the prisoner is not entitled to parole, it is usurping and encroaching on the executive function, to wit, Correctional Services Department, the latter being an entity vested with the right by the legislature to entertain the dynamics of parole.

Conclusion

The sentence, which provides that the prisoner is not eligible for parole, is in contravention of the principles of legality, the doctrine of separation of powers and is arbitrary. It stands to be severed from the sentence and the parole board (executive) will deal with the issue of parole at the appropriate time. Where a magistrate seeks to invoke the s 276B sentence, they must determine whether there are exceptional circumstances and they must spell them out in their judgments. Lastly, in order to militate the encumbrance of the High Court, judges with legion special reviews, the magistracy needs to exercise great caution when applying s 276B sentence and must utterly obviate imposing the sentences without parole, as this is not distinctive from encroaching on the executive terrain.

- See feature articles Understanding imprisonment – an in-depth discussion’ 2016 (June) DR 34; ‘Understanding parole – an in-depth discussion’ 2016 (July) DR 34; and ‘Understanding parole – an in-depth discussion continued’ 2016 (Aug) DR 22.

Nicholas Mgedeza

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The history of the ‘dying declaration’

The dying declaration is based on the Latin maxim ‘nemo moriturus prae sumitur mentiri’. Literally translated it means ‘a man will not meet his maker with a lie in his mouth’. It originated in English law.

As early as the 1720’s, the use of the dying declaration was used as an exception to the hearsay rule and was admissible, provided it complied with certain legal principles set out under English common law.

The hearsay rule is a rule of evidence, which prohibits admitting testimony or documents into evidence when the statements contained therein are offered to prove their truth and the maker of the statement does not testify and is not subject to cross-examination on the contents thereof.

In South Africa (SA) we adopted the English common law and followed the same legal principles.

Applicable legal principles

The English principles were set out in State v Gabathuwalwe 1996 BLR 540 (HC).

The court held that the dying declaration is a statement that may be oral or written or taken in the form of signs or gestures. It need not be made with the deceased’s dying words or dying breath. Although used in cases to incriminate the accused, they are equally admissible in his defence.

Admissibility is depended on the following factors:

- The statement must be one, which the deceased could have repeated in court had he or she lived. Therefore, if the deceased was not a competent witness or if the statement itself was based on inadmissible hearsay evidence, then it could not be admitted as a dying declaration.
- The death of the deceased must be the subject, both of the charge and the statement itself and were held to be inadmissible under the head of charges of perjury, robbery or rape.
- The statement must be made in the ‘settled, hopeless expectation of death’. Death must be expected soon albeit not immediately. If the deceased entertains even a faint hope of recovery at the time he or she makes the statement, it will be excluded.

One of the earliest decisions on the admissibility of a dying declaration

In the 1961 American decision of Connor v State 171 A.2d 699 (Md.1961), the Maryland Court of Appeal had to consider whether evidence admitted at the trial, which consisted of a statement made by the deceased to the police, was inadmissible as a dying declaration due to its opinion form. The court held that dying declarations made under certain conditions are admissible as an exception to the hearsay rule. The justification for its admissibility is based on two broad grounds namely necessity and reliability. The test of whether or not a dying declaration is an opinion is ‘whether the statement is the direct result of observation through the declarant’s senses, or comes from a course of reasoning from collateral facts’ (LM Katz ‘Admissibility of Opinions in Dying Declarations – Connor v State’ (1962) 22 Maryland Law Review 42 at 44). If it is the former, it is admissible; if it is the latter, it is inadmissible.

The position in SA prior to 1988

In SA the provisions of s 223 of the Criminal Procedure Act 51 of 1977 (CPA) governed the admissibility of a dying declaration, and read as follows:

‘The declaration made by any deceased person upon the apprehension of impending death shall be admissible as evidence if made under the head of charges of perjury, robbery or rape.

One of the earliest decisions on the admissibility of a dying declaration

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The position in SA after 1988

The Law of Evidence Amendment Act 45 of 1988 (the Act), changed how courts dealt with the evidence of a dying declaration. Section 9 of the Act repealed the provisions of s 223 of the CPA.

Hearsay evidence under the Act means evidence whether oral or in writing, the probative value of which, depends on the
credibility of any person other than the person giving such evidence.

Section 3 provides:

‘(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings or

(c) the court, having regards to -

(i) the nature of the proceedings;

(ii) the nature of the evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; or

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.’

The SA courts approach post 1988

In S v Mbanjwa and Another 2000 (2) SACR 100 (D), the High Court dealt with the admissibility of statements made by the deceased prior to her death. The state and defence conceded that this was hearsay evidence.

The court considered the following, namely:

• The six considerations in s 3(1)(c) of the Act.

• That this was a criminal case and the reluctance of courts to permit untested evidence against an accused.

• The witnesses who testified were independent, unbiased, impressive and their evidence was substantially true.

• The court assessed the reliability and completeness of what the deceased said by considering the sincerity, memory, perception and narrative capacity of the witnesses.

• The court considered that the deceased statement could have been admissible under the common law exceptions to the rule against hearsay evidence, namely dying declarations and spontaneous statements.

The court found that there were certain safeguards present in the objective facts which guaranteed the reliability of the hearsay evidence and concluded that it was in the interests of justice that it be admitted.

In S v Shuping (NWM) (unreported case no CC161/05, 1-1-2006) (Hendricks J), the accused, Mrs Shuping, was convicted of murder and arson. The state did not have any eyewitnesses but relied on circumstantial and hearsay evidence. The hearsay evidence consisted of statements, which the deceased allegedly made to state witnesses shortly after he was burned. The state applied to have evidence admitted in terms of s 3(1)(c) of the Act. Henricks J stated that the hearsay evidence must be excluded unless he was of the opinion that it should be admitted in the interests of justice. The court had regard to each of the six considerations in the Act. The court held that it was not necessary to determine conclusively whether the deceased’s statements would definitely have qualified either as a dying declaration or spontaneous statement. It held that the interests of justice demands the admissibility of the hearsay evidence and that compelling justification for admitting and relying on that evidence.

In S v Ramavhale 1996 (1) SACR 639 (A) Schutz JA stated that a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so. Hearsay evidence was long recognised to be unreliable and continues to be so. He further stated that: ‘An accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness.’

In S v Mitopo 1993 (2) SACR 109 (N) it was held that the reception of hearsay evidence under s 3(1)(c) of the Act ‘should not logically be divorced from a consideration of those factors which at common law made for admissibility or not.’

In Metzi v S [2009] 3 All SA 246 (SCA) the Supreme Court of Appeal (SCA) dealt with the admission of the statement by the deceased to the police officer identifying his attacker after he was shot and before he died. It was argued that the statement was inadmissible hearsay evidence and that the court should not have admitted it as evidence. This was regarded as a dying declaration. The SCA held that there can be no doubt that the statement uttered by the deceased, if it was admitted to prove the identity of his killer, constitutes hearsay evidence. The court held that: ‘Although it is arguable that the statement in question was admitted in compliance with the requirements of section 3(1)(c), for the purposes of this judgment, I am willing to assume in the applicant’s favour that its admission did not comply with that section. I am willing to assume further that such failure amounted to an irregularity. For, if the utterance by the deceased is dis-counted from the body of evidence implicating the applicant, the remaining evidence would still be sufficient to sustain his conviction.’

In Van Willing and Another v State (SCA) (unreported case no 109/2014, 27-3-2015) (Schoeman AJA) the SCA had to deal with the admissibility of hearsay evidence in terms of s 3(1)(c) of the Act. The person who made the statement was the deceased, after he was shot. The appellants were convicted of murder. The state elicted evidence that the deceased told at least three witnesses the identity of the perpetrators. The SCA, when dealing with the probative value of the evidence, assessed it under two heads, namely, the reliability and completeness of the witness transmission of the deceased’s words and the reliability and completeness of whatever it was that the deceased did say. The court found that the admission of the hearsay evidence was in the interests of justice. When a court admits hearsay evidence after exercising its discretion in terms of s 3(1)(c), it has the effect that the person who made the statement cannot be cross-examined. The question that arises is whether this is in conflict with an accused’s constitutional right to challenge evidence. The SCA in S v Ndlovu and Others 2002 (2) SACR 325 (SCA) held that it is not.

Procedure to be followed when a party wishes to introduce hearsay evidence

In the Ndlovu matter, Cameron JA, alluded to a careful approach to be followed before such evidence will be admitted at a criminal trial. The court must be asked clearly and timeously to consider and rule on its admissibility. It was stated that an accused cannot be ambushed by the late or unheralded admission of hearsay evidence and before the state closes its case the judge must rule on admissibility so that the accused can appreciate fully the evidentiary ambit he or she faces.

Conclusion

Our courts do not like to strictly classify a statement as a dying declaration or a spontaneous statement. They accept that statements of the deceased are hearsay in nature and apply the provisions of s 3 of the Act to determine admissibility. More often than not courts admit the statements if it is in the interests of justice.

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Evictions – a sad reality in South Africa

By Madeleine Truter

South Africa's history is one where the majority of people have been deprived of land, and have experienced a lack of access to housing. Our Constitution took effect on 4 February 1997, and s 26(3) provides that no one may be evicted from their homes, or have their homes demolished, without an order of court, made after considering all the relevant circumstances.

On 4 October 2000, the Constitutional Court handed down its landmark judgement in Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC). Irene Grootboom, a housing rights activist, was made famous when the Constitutional Court found in her favour and held that the South African Government had not met its obligation to provide adequate housing for the residents of Cape Town’s Wallacedene informal settlement. The ruling provided clear legal support for housing-rights campaigns in South Africa. It is ironic and tragic that at the time of her death in August 2008, she was still living in a shack.

The PIE Act

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) governs the eviction process in the event of a land invasion. The aim of the PIE Act is to protect both the occupiers and the landowners. All residential tenants are covered by PIE, including illegal occupants and defaulting tenants. Satisfactory grounds for eviction under the PIE Act exist when an occupier –
• did not make payment of rental;
• is a nuisance to the neighbours;
• causes damage to the property;
• has a fixed lease, which has not been renewed, has subsequently expired, and has been properly terminated in terms of the provisions of the lease agreement; or
• has breached provisions of an existing lease agreement.

An application under the PIE Act can only be launched if the occupant of the property is considered to be in illegal occupation. In the event of a breach of any provision of the lease agreement, the provisions of the breach clause of the lease agreement should be followed. In addition to basic requirements such as proper notice of the eviction proceedings being served on the persons concerned, three major principles have been established by the South African courts in their interpretation of the PIE Act.

The first principle is that people should generally not be evicted into a situation of homelessness. Temporary alternative accommodation should be provided to those facing homelessness by the relevant public authorities, usually municipalities.

The second principle is that people facing eviction from their homes should be given a meaningful opportunity to participate in the resolution of the eviction dispute. This can take the form of mediation (where a third party tries to assist the parties to reach an agreement), or more structured processes involving in-depth negotiations between municipal officials, private landowners, communities and the organisations supporting them.

The third general principle is that evictions, which might lead to homelessness, are never just private disputes – they always involve the state – whose duty to provide emergency housing may be triggered by an eviction. When there is a possibility of people being left homeless, relevant organs of state (usually municipalities) must be joined as necessary parties to the legal processes for eviction.

What is a ‘home’?

To date, the Constitutional Court has not finally decided the question of what constitutes a ‘home’. The question of whether a structure is a home must be decided by a court, which properly evaluates the background and circumstances of the people who built the structure, and the reasons for its construction. The Socio-Economic Rights Institute of South Africa (SERI) made the following argument: ‘The primary determinant of whether a shack is a “home” must surely be what else is available to the person who constructed it. If the person who constructed the shack was homeless before, and would be homeless if it was demolished, it requires little imagination to conclude that the shack itself – however modest or ill-furnished – is his or her home’ (Fisher and City of Cape Town v Ramahlele and 46 Others (Fisher interdict application) (www.seri-sa.org, accessed 22-7-2016)).
On 4 June 2014, the question as to what constitutes a ‘home’, was considered by the Supreme Court of Appeal (SCA) in the case of Fischer and Another v Ramahlele and Others 2014 (4) SA 614 (SCA). The Fischer case involved an application to court by the owner of land in Philippi East, Iris Fischer, for an order preventing the unlawful occupation of her property by a number of people erecting informal dwellings on her land. In response to that application, members of the community instituted legal proceedings against the city, who they argued had destroyed more than 30 of their structures on the land illegally. This counter-application was based on a common law remedy known as a ‘mandament van spolie’, which is aimed at restoring possession to people who have been unlawfully deprived of their peaceful and undisturbed possession of property (even if that possession is unlawful). The remedy is aimed at discouraging people or public authorities from taking the law into their own hands by speedily restoring possession without going into the merits of the underlying rights of the parties. The High Court held that the demolition of the structures on the land was unlawful, commenting that they were reminiscent of Apartheid style evictions. Gamble J accordingly ordered the city to rebuild the structures. The city then appealed this judgment to the SCA. The SCA held that the key issue in the case was whether the affected community members were in fact occupying the structures when these were demolished. If they were, then the city would have taken the law into its own hands and acted unlawfully in demolishing the structures. The residents would be entitled to have the structures rebuilt and restored to them. However, if the structures were vacant and unoccupied (as the city alleged) then the city was entitled to remove them. The SCA held that the High Court should have heard evidence on whether the structures were occupied or not at the time of their demolition. It referred the case back to the High Court for evidence to be heard on this. The Fischer case centres on the question of whether the factual requirements for the mandament van spolie were met. But it also raises the question of what constitutes a ‘home’. The purpose of s 26(3) and the PIE Act is primarily to protect people’s homes.

Suspension of eviction order relating to Newcastle informal settlement

On 14 December 2015, the Western Cape High Division of the Court (City of Cape Town v Those Persons Occupying and/or Intending or Attempting to occupy or Erect Structures on erf 18370, Khayelitsha (WCC) (unreported case no 13700/14, 14-12-2015) (Nuku AJ)) temporarily suspended an eviction order against occupants who have been living on the land directly behind the Endlovini informal settlement (known as the Newcastle Informal Settlement) in Khayelitsha, since May 2014 (Barbara Maregele ‘Court stops City from evicting Newcastle residents’ www.groundup.org.za, accessed 22-7-2016).

Nuku AJ lashed out at the City of Cape Town (the city) for its ‘failure to engage’ with Newcastle’s residents before obtaining an eviction order against them. Nuku AJ handed down judgment nearly five months after the court battle started, ordering that the eviction be stayed. Just two months after erecting their structures in May 2014, the residents claimed, they were informed that the courts had granted an eviction order to the city. The residents then lodged a counter application, challenging the city’s compliance with the PIE Act. The residents insisted that the city did not comply with the eviction order granted in 2014 by Western Cape High Court Judge Thandazwa Ndita. The city submitted an application for leave to appeal and challenged the ruling in the SCA. In his judgment, Nuku AJ said the following: “[t]here is a matter where the PIE Act applies for an eviction it is bound to act reasonably. Part of acting reasonably is the engagement with those who are to be evicted as that ensures that they are treated with dignity in the process ... but has also failed to provide reasons why.” Nuku AJ continued to state that instead of meeting with residents, the city chose to ‘dictate’ to the residents on what it would be prepared to discuss. There was in other words no engagement with the respondents prior to the launching the application for their eviction. The reasons provided in support of the eviction application were that some residents refused to give their details, were hostile, and threatened officials. Justice Nuku said after the city obtained the eviction order, it did not ‘deal with the issue of alternative accommodation’ or hold a meeting with the residents. The other factor that weighed heavily with Nuku AJ is the city’s attitude that it is not obligated to provide alternative accommodation to the occupants. According to Nuku AJ, in instances where the person is to be evicted from land owned by an organ of state, the protection afforded in the PIE Act must be available even if the person occupied the land for less than six months. Nuku AJ also highlighted the residents’ poor living conditions and urged the court to ‘resolve the matter as soon as possible.’

Ndhifuna Ukwazi (NU), an activist organisation and law centre that promotes the realisation of constitutional rights and social justice, welcomed Nuku AJ’s ruling. NU researchers and attorneys assisted the residents during the court action, stating in a press statement that: ‘Land occupations like this are common in a city where security of tenure, access to land and adequate housing is in short supply for many black working class families. ... This latest judgment enforces the notion that the City purposefully fails to engage meaningfully with poor communities. ... Attempting to appeal a clear cut order is an undue delay of the City’s constitutional responsibilities’ (Maregele op cit).

Conclusion

Despite the progress made by the legislature and judiciary to ensure that no South African is left homeless, land evictions are still rampant, and officials on the ground are finding ways to circumvent the overarching test of ‘Justice and equity’, introduced by the PIE Act. A case in point is the argument being used by the City of Cape Town’s Anti-Land Invasion Unit that they are ‘simply preventing the occupation of private land by removing unoccupied and incomplete structures’ (Sandra Liebenberg ‘What the law has to say about evictions’ www.groundup.org.za, accessed 22-7-2016), in other words that they have not breached constitutional or legislative provisions as no ‘homes’ were destroyed, because the structures are supposedly not occupied and/or completed.

Given the strong winds which have been destroying homes thus far, we can only hope for strong winds of change that will persuade officials at all levels of government, as well as the private sector, to treat those facing homelessness in a way that promotes the value of human dignity, which lies at the heart of the housing rights enshrined in the Constitution. In the words of Albie Sachs J: ‘It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies, rather than mitigates, their marginalisation’ (Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC)).

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On the relativity of property rights in the Constitution

The very first founding provision of the Constitution declares that the Republic is a state founded on values. Our social order is in the first place a value based society, and not rule based. The importance of this point of departure can hardly be underestimated, because it means that the rules must be adapted from time to time to give clearer expression to those values which the Constitution entrench, namely, human dignity; human rights and freedoms; and social justice. The Constitutional Court (CC) plays a decisive role in this process of the continuous adaption of rules to better express, protect and promote our constitutional values: ‘The challenge for South African courts is to develop a substantive account of the values and purposes which the socio-economic rights protect …’ (S Liebenberg Socio-Economic Rights (Cape Town: Juta 2010) at 42).

This article aims to consider briefly, and in very broad strokes, how the concept of property rights in a democratic constitution differs from the pre-consti-
tion was lost, the ability to trump competing use rights of others, and the stringent requirements, and extraordinary long time periods, to achieve acquisitive prescription. This notion of property rights is the product of a particular world order and could be described as the liberal perception of rights.

However, this perception of rights is no longer acceptable in a constitutional dispensation: ‘The idea behind this liberal perception of rights is that property rights are natural rights that predate social or state organisation and that they are therefore absolute or inclusive of all conceivable entitlements in their “normal” form; restriction comes later through state intervention that follows the social contract. Accordingly, restrictions that limit the pre-existing right require special authorisation and, in suitable cases, compensation. However, the classic liberal notion of property rights is outdated. Most theorists now accept that property, like any other economic right, is a social construct that depends on social, political and legal rules for its existence, its nature and its scope’ (AJ Van der Walt Constitutional Property Law 3ed (Cape Town: Juta 2011) at 172) (my italics).

In Europe, this development is referred to as the ‘social dimension of ownership’ (V Sagaert ‘The Gradual Erosion of the Distinction between Deprivation and Regulation of Ownership’ in S Scott & J Van Wyk (eds) Property Law Under Scrutiny (Cape Town: Juta 2015) at 94).

The values that underlie property rights

Property rights have a profound enabling and facilitating effect on human dignity, personal security, and security of tenure, and these values are evidently a matter of public interest. Property rights have a direct and fundamental impact on the landless and poor masses, as well as on the wealthy elite of landowners. Thus these rights do shape society, and have the potential to benefit innumerable occupiers, and could enhance and materially increase the quality of life especially of large numbers of rural dwellers. ‘Judging from European Convention case law and recent South African case law, the courts might bend over backwards to protect socially or economically insecure land-use rights, particularly residential rights that affect the human dignity and personal security of people’ (Van der Walt (op cit) at 187). There can be no doubt that the increased security of tenure, and of pride of possession, shall establish and elevate the perceived and experienced dignity of persons who are not landowners.

Property rights can no longer be viewed in isolation, and are relative to the rights and interests of non-property rights holders. The Constitutional Court has held on a number of occasions that the core constitutional values of human dignity, equality and freedom are implicated in circumstances of material deprivation’ (Liebenberg (op cit) at 100). Property rights cannot be exercised in isolation, but only in the public arena. The public interest in private property rights refers to the social dimension of ownership, which ‘requires a private owner to take into account the effects of the exercises of ownership on society as a whole. … The pendulum has swung in the direction of communication of ownership since the twentieth century: “land ownership entails communityship”’ (Sagaaert (op cit) at 95) (my italics).

This mantra, ‘land ownership entails communityship’ captures the essential values, which underlie and inform the concept of private property rights in the Constitution. The public interest in property rights affect a large number of people and directly impact on the material quantity and spiritual quality of their lives, and these must be weighed against the private individual interest of an individual who, at common law, was entitled to yield the mere absence of consent, and nothing else, to undermine and frustrate the aims of social justice.

It follows that ‘... existing and new property interests are recognised and protected when and in so far as it is necessary to establish and uphold an equitable balance between individual property interests and the public interest, with due regard for the historical context within which property holdings were established and the constitutional context within which they are protected’ (Van der Walt (op cit) at 189).

In the premises the very same values that promote the public interest and social justice, namely dignity, equality and freedom, also underlie the concept of private property rights.

Environmental justice

The constitutionally sanctioned values of property rights outlined above also offer a rational basis to facilitate, and give effect to, the environmental imperatives in the Constitution.

When approached with a communal sense of ownership, it becomes possible to provide for the protection of the environment in a holistic fashion. The rules, which would ensure that the environment is protected for future generations, will often impact on the sphere of private property rights and interfere with the domain of the landowner. In a pre-constitutional dispensation such regulation was largely subject to the whims of the individual landowner. This, however, is changing.
Not surprisingly, theoretical frameworks have been developed to allow for the shift in the concept of property rights with a view to accommodating environmental justice. In this regard, see for instance ‘Re-examining the Ownership Paradigm: Rights of Ownership or Rights of Use?’ The Need for a New Conceptual Basis for Land Use Policy’ (ET Freyfogle, MC Blumm and B Hudson Natural Resources Law: Private Rights and the Public Interest (West Publishing Company 2015) and ‘The Public Trust Doctrine as a Background Principle of Property Law’ (MC Blumm and MC Wood The Public Trust Doctrine in Environmental and Natural Resources Law 2ed (Carolina Academic Press 2016).

Constitutional Court

The CC had occasion from time to time to give account of the changing rules of property rights.

In First National Bank of SA Ltd t/a Weshbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Weshbank v Minister of Finance 2002 (4) SA 768 (CC) the CC found that: ‘The purpose of s 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions’ (para 50).

Invariably, the references to Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape and Others 2015 (6) SA 125 (CC) in the majority judgment of Froneman J should be extensive, as the CC decided: ‘… to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself. The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of the protection afforded to that holding will be stronger than where no relation of that kind exists’ (paras 43 to 50) (my italics).

The FNB and Shoprite cases dealt with the concept of property in the context of what constitutes property, In Molusi and Others v Voges NO and Others 2016 (3) SA 370 (CC) an eviction application in terms of Extension of Security of Tenure Act 62 of 1997 (ESTA) brought s 26(3) to the fore and the CC had occasion to pronounce on the concept of property in the context of how s 25 property rights should be limited. The court, referring to the common-law claim for eviction, decided ‘… that common-law claim is now subject to the provisions of ESTA. The provisions of ss 8, 9, 10 and 11 of ESTA have the result that the common-law action based merely on ownership and possession, as in Graham v Ridley [1931 TPD 476], is no longer applicable’ (para 37).

In Molusi the CC also referred to how the balancing of the rights of the owner and that of the occupier must be done in order to infuse justice and equity into the inquiry, and referred to Hattingh and Others v Juta 2013 (3) SA 275 (CC), where the court held: ‘[T]he part of s 6(2) of ESTA that says: “balanced with the rights of the owner or person in charge” calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity into the inquiry required by s 6(2)(d)’ (para 32).

Conclusion

Property rights, in the context of either s 25 or s 26 of the Constitution are no longer absolute. Molusi was the final nail in the coffin of absolute private property rights at common law, and the balancing exercise described in the Hattingh and in Molusi cases confirmed the relativity of constitutional property rights, and paved the way for interpreting, and balancing, property rights in future.

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THE LAW REPORTS


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

The majority (per Jafta J; Mogoeng CJ, Mosenekwe DCJ, Khampepe J, Matojane AJ, Nkabinde J and Zondo J) held that interference with the factual findings of the High Court was not warranted. Instead, the majority held that the matter had to be approached on the basis that an agreement between Makate and Geissler was established. The majority rejected the High Court’s faulty conflation of estoppel and ostensible authority, which were distinct concepts. This conflation had resulted in the attribution of elements of estoppel to ostensible authority. However, estoppel was not a form of authority, but a rule that if the principal had conducted himself in a manner that misled a third party into believing that the agent had authority, he was precluded from denying it. It held that ostensible authority required the element of representation, but lacked the other elements of estoppel. Ostensible authority was the authority of an agent as it appeared to others while estoppel was no authority at all. Since Makate alleged in his particulars that Geissler had ostensible authority and Vo-

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Abbreviations
CC: Constitutional Court
ECG: Eastern Cape Division, Grahamstown
ECP: Eastern Cape Local Division, Port Elizabeth
GJ: Gauteng Local Division, Johannesburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Agency
Ostensible authority: The decision in Makate v Vodacom Ltd 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC), enjoyed a fair amount of media attention. The court considered a number of legal concepts, including agency, ostensible authority and estoppel.

The crisp facts were as follows: During 2000 the appellant, Makate, was employed as a trainee accountant by the respondent, Vodacom. During his employment with Vodacom, and because his girlfriend at the time could not afford airtime to phone him, Makate conceived the idea of Vodacom’s lucrative ‘Please Call Me’ service. It allowed Vodacom’s prepaid users to send a free text message to Vodacom’s lucrative ‘Please Call Me’ service. It allowed Vodacom’s prepaid users to send a free text message to Vodacom’s prepaid users to call them back. Vodacom launched the service in February 2001. It was a major success, netting Vodacom several billion rands. Makate’s role in conceiving the idea was acknowledged shortly thereafter in Vodacom’s internal newsletter.

Geissler, Vodacom’s then director of product development, verbally agreed to remunerate Makate for his idea. The parties deferred negotiations on the amount of compensation to a later date. They further agreed that if no agreement was reached, compensation would be determined by Vodacom’s Chief Executive Officer (CEO). No agreement on compensation was, however, reached, and later the then CEO of Vodacom, Knott-Craig, falsely claimed that ‘Please Call Me’ was his idea. Having received no compensation for his idea at all, Makate left Vodacom late in 2003. In 2008, some four years after the launch of the ‘Please Call Me’ product, he instituted a High Court action to enforce his agreement with Geissler, which, according to the undisputed evidence of Makate, was that the parties would enter into bona fide negotiations over compensation. Vodacom disputed the existence of any such agreement and contended in the alternative that Geissler lacked actual or ostensible (apparent) authority to bind the company.

The High Court held that Makate had proved the compensation agreement between him and Vodacom and that Knott-Craig did not invent ‘Please Call Me’. However, it dismissed Makate’s claim on the ground that Geissler had lacked ostensible authority and also because the claim had prescribed under s 111(d) of the Prescription Act 68 of 1969 (the Prescription Act). It held that the word ‘debt’ had to be widely interpreted to include a claim that the defendant (here: Vodacom) comply with its obligations under a contract. Invoking the estoppel-as-shield analogy, the court found, moreover, that Makate should have pleaded ostensible authority in repilation instead of raising it in his particulars of claim.

Makate applied for leave to appeal to the CC.

In deciding the matter, the CC handed down both a majority and a minority decision.

The majority (per Jafta J; Mogoeng CJ, Mosenekwe DCJ, Khampepe J, Matojane AJ, Nkabinde J and Zondo J) held that interference with the High Court’s factual findings of the High Court was not warranted. Instead, the majority held that the matter had to be approached on the basis that an agreement between Makate and Geissler was established. The majority rejected the High Court’s faulty conflation of estoppel and ostensible authority, which were distinct concepts. This conflation had resulted in the attribution of elements of estoppel to ostensible authority. However, estoppel was not a form of authority, but a rule that if the principal had conducted himself in a manner that misled a third party into believing that the agent had authority, he was precluded from denying it. It held that ostensible authority required the element of representation, but lacked the other elements of estoppel. Ostensible authority was the authority of an agent as it appeared to others while estoppel was no authority at all. Since Makate alleged in his particulars that Geissler had ostensible authority and Vo-

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dacom denied this in its plea. Ostensible authority became one of the issues to be determined at trial. The majority found that Geissler had indeed had ostensible authority to bind Vodacom. It reasoned that Geissler was Vodacom’s director of product development and thus in charge when dealing with third parties in relation to new products. He was further a member of Vodacom’s board, he had power over new products, and the role that he played within Vodacom’s organisational structure, gave the appearance that Geissler had authority to negotiate all issues relating to the introduction of new products at Vodacom. The majority further rejected the reasoning in the High Court that Makate’s claim had prescribed. In this regard it held that the term ‘debt’ as used in the Prescription Act had to be narrowly interpreted so that it least impaired the right of access to courts. But since Makate’s claim for an order forcing Vodacom fell beyond the scope of a ‘debt’ as defined by ruling precedent, namely an obligation to either pay money, deliver goods or render services, it was not necessary to precisely determine its meaning. The trial court had attached an incorrect meaning to the word. Because a ‘debt’ contemplated in s 10 of the Prescription Act did not cover the present claim, it did not prescribe.

Makate sought the enforcement of a pactum de contra hendo, that is, an agreement to agree, on fair compensation for his idea. Such pacta were enforceable if they provided a deadlock-breaking mechanism, should the parties fail to reach consensus. Here a deadlock-breaking mechanism was in place: If the parties disagreed on compensation, it would be determined by Vodacom’s CEO. The majority confirmed that the CEO could not represent Vodacom at the negotiations, but could only be approached to break deadlock. It accordingly held that Vodacom was bound by the agreement between Makate and Geissler. Vodacom was ordered to commence negotiations in good faith with Makate within 30 days for determining reasonable compensation payable to him in terms of the agreement. Vodacom was further ordered to pay the costs of the present action.

Suffice it mention here that the minority (per Wallis AJ, Cameron, Madlanga and Van der Westhuizen JJ) agreed that Makate was entitled to the relief stipulated by the majority. However, the minority reasoned that it was settled law that, where there was no actual authority, ostensible authority was a form of estoppel.

Civil procedure
Citation of trust: In Pro-Khaya Construction CC v Trustees for the time being of the Independent Development Trust [2016] 2 All SA 909 (ECP) the applicant, Pro-Khaya, sought to have an arbitration award made an order of court, in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Act), as well as an order for payment by the respondent, the Trust, of the various sums of money awarded to Pro-Khaya by the arbitrator.

The arbitration arose from an agreement between Pro-Khaya and the Trust in terms of which, the former was to construct a multi-storey classroom development and certain other buildings in Uitenhage, in return for payment by the Trust of R 27 586 305.69. The Trust raised a number of objections to Pro-Khaya’s application. I will refer to only some of them here. The first of these objections was that the Trust was cited as ‘The Trustees for the time being of the Independent Property Trust’. The Trust took the point that all the trustees were not individually cited and that the Trust was not properly before the court.

Roberson J held that the notice of motion in the counter-application cited all 11 trustees by name. In those circumstances, the objection was highly technical and could not be upheld. Effectively, all the trustees were before the court in their capacities as trustees and there
was no real failure to cite all the trustees.
A further objection was that there was no agreement to refer the disputes to arbitration. The court rejected that submission. It held that the Trust’s inactivity could not avail it in the circumstances.

It was concluded that the Trust had failed to establish any grounds for the setting aside of the arbitration award. The award was accordingly made an order of court.

Company law

Delinquent directors: In Gihwala and Others v Grancy Property Ltd and Others [2016] 2 All SA 649 (SCA) the court confirmed that a delinquency order against delinquent directors of a company is not unconstitutional.

The crisp facts in the Gihwala case were as follows: In 2005 an overseas investor, Mawji, accepted an invitation from Gihwala to invest in a joint venture with the Dines Gihwala Family Trust and Manala, using Seena Marena Investments (Pty) Ltd (SMI) (of which Gihwala and Manala were the directors and shareholders) as the front company.

In terms of this 2005 agreement, Grancy Property Ltd, Grancy, a company controlled by Mawji, acquired one-third of the shares in SMI. Grancy also made a loan to Manala to pay half of the amount he needed for his one-third contribution to SMI. SMI used the funds provided by the three investors (Grancy, Manala and the Trust) to acquire a 58% shareholding in Ngatana Property Investments (Pty) Ltd (Ngatana), the company registered for purposes of a BEE scheme enabling black investors to obtain shares in a listed company – Spearhead Property Holdings Ltd – at a reduced price. Eventually these were exchanged for shares in Redefine Income Fund Ltd after a takeover by the latter.

After a payment was made by Ngatana to SMI of R 6 657 673, a total of R 4 million was paid to the Trust, Gihwala and Manala but nothing to Grancy. R 2 million was invested in a company in which Gihwala’s wife had an interest, but this company was liquidated and the money was lost. Ngatana also paid R 750 000 each to Gihwala and Manala as ‘directors’ fees’ because of SMI’s assistance in setting up the original BEE scheme. SMI also made two loans to Manala without the knowledge of Grancy.

Ngatana eventually sold all its shares in Redefine and SMI received a dividend of R 5 572 727. This amount was paid in equal shares to the Trust and Manala. The relationship between Mawji and Gihwala became acrimonious and several High Court actions followed. (See also law report ‘Companies’ for Grancy Property Ltd v Manala and Others, 2016 (4) SA 313 (SCA); [2013] 3 All SA 111 (SCA) (2015 Aug) DR 46.)

A number of issues arose for determination on appeal. For space considerations I will restrict my discussion to only two of these issues, namely:

- Whether the 2005 agreement was breached and, if so, in what respects?
- Whether the High Court was correct to make orders of delinquency in relation to Gihwala and Manala.

Wallis JA held that the 2005 agreement contained various tacit terms, inter alia, that Grancy was to become holder of one-third of the shares in SMI. Although it was not a partnership agreement, it was similar to one in many respects. Gihwala and Manala stood in a fiduciary relationship to Grancy to protect its interest as a shareholder.

There were clear breaches of the agreement, inter alia, by Gihwala and Manala refusing to acknowledge Grancy as a shareholder; and by refusing the latter to exercise certain rights of a shareholder.

Finally, the court upheld the orders of delinquency in relation to Gihwala and Manala. It held that they had acted with gross negligence and in breach of their fiduciary duties to SMI by appropriating benefits received from Ngatana for themselves while it should have gone to the company and then to its three shareholders. Their actions fell squarely within the grounds for a delinquency order as described in s 162(5)(c) of the Companies Act 71 of 2008 because they grossly abused their position as directors and intentionally or, at the very least, through gross negligence, caused harm to SMI.

The court further held that s 162(5) was not a penal provision but intended to protect the investing public against directors who engage in serious misconduct and act in breach of the trust that shareholders place in them. This is not an arbitrary or capricious provision limiting their right to choose a profession but is in the public interest.

The appeal was dismissed and Gihwala, Manala and the Trust were declared liable, jointly and severally to Grancy.

Contempt of court

Failure to follow direction: At stake in MT v CT 2016 (4) SA 193 (WCC) was the question of whether a plaintiff, the mother, who appeared for herself in a divorce matter, was guilty of contempt of court where the presiding judge gave the mother directions in terms of Uniform Rule 37(8)(c), but she failed to adhere to.

The principle issue in the divorce action was the care and contact arrangements in relation to the parties’ minor son (the son). The son was living with the mother. At a pre-trial hearing on 6 November 2015 the court directed the mother in terms of r 37(8)(c) to facilitate a meeting with a representative of the family advocate’s office in order to allow the latter to complete an assessment of the son in his domestic environment. The mother failed to adhere to the direction.

The mother was ordered to appear before the present court to answer to charges of contempt of court for her failure to answer to the direction given by the court.

In the contempt of court charge the mother was represented by an advocate who appeared amicus curiae.

It was argued on behalf of the mother that a direction in terms of r 37(8)(c) is not an order of court and that contempt proceedings were accordingly not appropriate.

Gamble J held that, provided the mother has acted with wilfulness or mala fides, her failure to adhere to the direction given on 6 November 2015 is indeed capable of being addressed through contempt proceedings.

The mother’s assumptions of bias on the part of the representative of the office of the family advocate were manifestly unreasonable in the context of clear directions to participate in the obligatory investigation being conducted by the family advocate.

The court accordingly held...
that the mother acted in contempt of court. It decided to afford an opportunity to the parties to address the court afresh on the aspect of an appropriate sanction, before handing down such action. The matter was accordingly postponed to a later fixed date.

Credit law

Reinstatement of credit agreement: In Nkata v FirstRand Bank Ltd 2016 (4) SA 257 (CC); 2016 (6) BCLR 794 (CC), the CC brought clarity on the vexed question whether debtors can reinstate a credit agreement in terms of s 129(3) of the National Credit Act 34 of 2005 (the NCA).

The facts were that a consumer, Nkata, who was in default of a mortgage loan agreement, paid all overdue instalments, but did not make separate payment of the ‘costs of enforcing the agreement‘, which the credit provider FirstRand Bank (the bank) had debited to her account. She brought an application for the rescission of a default judgment obtained against her by the bank, together with an application for the cancellation of the sale in execution of her immovable property.

The High Court refused rescission, but at its own instance reinstated the credit agreement in terms of s 129(3)(a) of the NCA. This section allows reinstatement if a consumer pays all overdue amounts, including the default administration costs and reasonable enforcement costs. This right may, however, only be exercised before -

- the creditor cancels the agreement; and
- where, the property has been sold in execution of any other court order enforcing that agreement. When Nkata again fell into arrears, the bank caused the property to be sold in execution.

The High Court held that a judgment was only actually executed when money was raised pursuant to a sale of attached property and paid to the judgment creditor. Accordingly, s 129(4) was no bar to the reinstatement of the agreement in terms of s 129(3). It also held that on the facts the agreement had been reinstated and it accordingly cancelled the execution sale.

The bank appealed to the SCA. The SCA held that for a consumer to be able to reinstate a credit agreement, the debtor did not need to pay the full accelerated debt, but only the arrear instalments and the costs. It also held that since the property had been sold in execution, the agreement could not be reinstated.

Nkata appealed to the CC where the Cameron J, for the majority held that the main objective of the NCA is the protection of consumers. This protection, however, must be balanced against the interests of credit providers. The court emphasised that the NCA was a clean break from the past and encourages dialogue between consumers and credit providers.

It is trite that subjss 129(3) and (4) introduced a novel relief of reinstatement. A consumer is entitled to reinstate the agreement if it has not been cancelled and is also entitled to return of the attached property. Cancellation can only take place after the credit provider has initiated enforcement proceedings by issuing a s 129 notice. Section 129(3) requires only the

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arrear instalments to be paid, and not the full accelerated amount of the debt as the latter approach would make the remedy meaningless.

Section 129(3) requires the consumer to pay all the amounts that are overdue plus the permitted default charges and reasonable costs of enforcing the agreement. The legal costs, however, only becomes due and payable when they are reasonable, and agreed or taxed, and on due notice to the consumer.

Reinstatement takes place by operation of law when the consumer has made the necessary payments. There is no requirement that the reinstatement needs to be communicated to the credit provider to be effective. In the present case the bank never demanded payment of the costs. It simply added them to the bond account without any notice to the consumer. The costs were never agreed or taxed and had therefore never become due. The court held that the bank should have demanded payment of the reasonable costs of enforcing the agreement separately from Nkata’s arrears, and brought them to her attention.

The appeal was accordingly allowed and the court held that the agreement was validly reinstated and the execution sale rescinded. It ordered the bank to pay Nkata’s costs in the High Court, the SCA and the present court.

- See case note ‘NCA: The line for All and Others 2016 (4) SA 63 (SCA); [2016] 1 All SA 369 (SCA), the court was asked to consider the parameters of the constitutional right to education. The salient facts were that the Department of Basic Education (the department) adopted a new curriculum for schools. The new curriculum included new textbooks. However, the department failed to provide textbooks to certain public schools in Limpopo. The respondents, Basic Education for All (BEFA), was a voluntary association based in Limpopo and was formed in response to the education crisis in Limpopo.

BEFA obtained a High Court order declaring the constitutional rights of the affected children. The court ordered the department to deliver the books. The department appealed to the SCA. Navsa JA held that the issue at stake here was whether the constitutional right to a basic education as enshrined in s 29(1)(a) of the Constitution included a right of each learner to be given the textbook prescribed for each subject before the start of teaching of that subject. Although s 29(1)(a) does not spell out the details of the right to basic education, the centrality of textbooks in the realisation of the right to a basic education is uncontested. Clearly learners who do not have textbooks are adversely affected. The failure to provide textbooks to learners in the present circumstances was a violation of the rights to a basic education, equality, dignity and of s 195 of the Constitution.

The appeal was dismissed with costs and the department was ordered to provide every learner with every textbook prescribed for his or her grade before commencement of the teaching of the course for which the textbook is prescribed.

Nuisance

Neighbour disputes: The facts in BSB International Link CC v Readam South Africa (Pty) Ltd and Another 2016 (4) SA 83 (SCA); [2016] 2 All SA 633 (SCA) were as follows: The first respondent, Readam, successfully applied for an order in the court a quo directing that a building owned and constructed by the applicant, BSB, in Parkmore, Sandton be demolished to the extent necessary to ensure compliance with the applicable town planning scheme. The primary relief sought by Readam in terms of r 53 of the Uniform Rules of Court, was directed at reviewing and setting aside the building plans approved by the municipality in terms of s 7 of the National Building Regulations and Building Standards Act 103 of 1977 (the Act). Despite that, the second respondent – the Johannesburg Metro Municipality (the municipality) – filed no answering affidavit and took no part in the proceedings.

In response to Readam’s application, BSB launched a counter-application founded on the complaint that it was prejudiced in its defence of the main application, by the inadequate record furnished by the municipality. It also sought orders against Readam and the municipality directing Readam to itemise all documents and other information, which Readam contended were missing from the record filed by the municipality. Finally, an order was also sought staying the review proceedings pending the municipality’s furnishing of the missing portions of the record. The counter-application was dismissed, and on appeal, BSB sought leave to appeal primarily on the basis that the court a quo had erred in dismissing its counter-application, asserting that it had been denied a proper opportunity to be heard and defend itself against the challenges made by Readam.

BSB also submitted that there was a dispute of fact on the papers as to whether the requirements of the scheme had been contravened with regard to the permissible coverage of the building on the site, and the provision of adequate parking.

On appeal to the SCA Ponnan and Swain JJA in a joint judgment decided that BSB’s submissions were without merit. It held that it was clear
that BSR’s construction had infringed on the relevant zoning provisions in respect of coverage and parking. A court hearing an application in terms of s 21 of the Act, has no latitude not to order the complete demolition of a building once the jurisdictional fact, namely that the building was erected contrary to the Act, was established. Only a local authority or the minister has locus standi to bring an application in terms of s 21 before a magistrate. The statutory right to seek the remedies provided for in s 21 is clearly intended to enable local authorities and the minister, to ensure compliance with the provisions of the Act in relation to town planning schemes. Consequently, an individual with standing to bring an application to review and set aside the unlawful approval of building plans by a local authority would not have locus standi to pursue the remedies provided for in s 21. However, Readam was not without a remedy. In the case of encroaching structures, the owner of the land which is encroached on can approach the court for an order compelling his or her neighbour to remove the encroachment. Despite the above rule the court can, in its discretion, in order to reach an equitable and reasonable solution, order the payment of compensation rather than the removal of the structure. This discretion is usually exercised in cases where the cost of removal would be disproportionate to the benefit derived from the removal. The court a quo failed to appreciate that it was possessed of that kind of discretion. BSB was warned that it was acting illegally and in spite of such warning, it deliberately persisted with its construction. The order granted by the court a quo which directed that the property be demolished to the extent necessary to ensure compliance with the scheme was correct. The appeal was dismissed with costs.

Sale

Implied term: In Grainco (Pty) Ltd v Van der Merwe and Other

ers 2016 (4) SA 303 (SCA) the facts were as follows: Grainco Investments (old Grainco) sold its business assets, including its goodwill, as a going concern to BKB Ltd. Old Grainco was subsequently liquidated as a company. Although the contract referred to certain shareholders, that is,Thembecka Capital and two family trusts, they were not cited as parties to the agreement. Old Grainco was represented by Van der Merwe and Kitshoff, who were instrumental in the success of old Grainco. The sales agreement included a five-year restraint of trade on Van der Merwe and Kitshoff. BKB then sold the business assets to a new company, which was renamed Grainco. Grainco employed both Van der Merwe and Kitshoff during the five-year period that their restraint of trade was valid.

The court refused the application by BKB to adduce proof of a restraint of trade. The restraint of trade was not an implied term in the sales contract. In this regard the court referred with approval to the decision in Grainco v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A). Applied to the present facts the court held that the first applicant was obliged to demonstrate compliance. It failed to do so. The series of errors relative to the exact amount payable by the respondents in respect of the rates left the applicants’ case dissatisfactory.

The application was accordingly dismissed with no order as to costs.

Wills

Execution: In Mlanda v Mhlaba and Others 2016 (4) SA 311 (EGC) the testatrix, or a person purporting to be the testatrix, signed her will by making a mark. The applicant averred that she is the step-daughter of the testatrix and the sole beneficiary of the intestate estate of the testatrix. Section 21(1)(a)(v) of the Wills Act 7 of 1953 (the Act) requires in such a situation that the attending commissioner of oaths attach a certificate to the will, in which he or she certifies that he or she was satisfied as to the identity of the testatrix, and that the will was indeed her will. Section 21(1)(a)(v) is intended to prevent an imposter marking the will; or when the mark-maker is genuine but unable to read, ensuring the document reflects his or her wishes. Section 21(1)(a) provides that if the certificate does not comply with the Act’s requirements, then the will is invalid.
In the present case the commissioner wrote in his certificate that ‘[t]he testator signed in my presence and of the two witnesses’. The question was whether the certificate complied with the requirements of the Act.

Pickering J held that use of the precise words of the Act was not required. What was required was that from the words used it could be inferred without doubt that the commissioner was satisfied of the facts stipulated in the Act. From the words used, doubt remained as to whether the commissioner had satisfied himself of the testatrix’s identity.

Because one of the statutory formalities requirements was not complied with, the court found the will to be invalid and of no effect.

The application was dismissed.

Other cases
Apart from the cases and topics that were discussed or referred to above, the material under review also contained cases dealing with: Administration of justice, civil procedure, criminal law, customs and excise, delict, divorce, immigration, lease, local authority, marine insurance, prescription and provincial governments.

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On a lighter note: Law a practical affair
Gillespie v Macmillan 1957 JC 31 at 40 (High Court of Justiciary of Scotland)

Lord Justice-Clerk Thomson: ‘If law were an exact science or even a department of logic, there might be something to be said for this argument. By relying on the disparate qualities of space and time the logician can prove that in a race the hare can never overtake the tortoise.

But law is a practical affair and has to approach its problems in a mundane common-sense way. We cannot expect always to have a tidy and interrelated picture; in real life a surrealistic element is apt to creep in, and the picture, though untidy and inharmonious, may be a picture all the same’.

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Lockout of members of trade unions not party to a bargaining council

Transport and Allied Workers Union of South Africa v Public Utility Transport Corporation Ltd [2016] 6 BLLR 537 (CC)

Section 64(1)(a) of the Labour Relations Act 66 of 1995 (LRA) provides:

‘(1) Every employee has the right to strike and every employer has recourse to lock-out if –

(a) the issue in dispute has been referred to a council or to the Commission as required by this Act, and –

(i) a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days, or any extension of that period agreed to between the parties to the dispute, has elapsed since the referral was received by the council or the Commission; ...

Section 213 of the LRA defines ‘issue in dispute’ in relation to a strike or lock-out as ‘the demand, the grievance, or the dispute that forms the subject matter of the strike or lock-out’ (my italics).

Section 64(1)(c) provides:

‘[I]n the case of a proposed lockout, at least 48 hours’ notice of the commencement of the lockout, in writing, has been given to any trade union that is a party to the dispute, or, if there is no such trade union, to the employees, unless the issue in dispute relates to a collective agreement to be concluded in a council, in which case, notice must have been given to that council; ...’.

Facts
In 2002 the applicant, a registered trade union and the respondent entered into a recognition agreement in accordance with the LRA. This agreement continued to be in force at all material times between the applicant and the respondent. In April 2012 a collective agreement on wages and other conditions of employment was concluded between the parties present at the bargaining council. The applicant a member of the bargaining council at the time, omitted to sign the collective agreement.

The collective agreement continued to apply to the applicant until July 2013 due to the extension by the Minister of Labour in accordance with s 32 of the LRA.

In August 2012 the applicant terminated its membership with the bargaining council. However, in February 2013, the applicant attempted to have its membership reinstated by forwarding a letter to the bargaining council.

On 14 February 2013, the bargaining council notified the applicant that its central committee would consider the application for the reinstatement of its membership at a meeting to be held on 17 April 2013.

On 17 April, industry wage negotiations gridlocked at the bargaining council and two trade unions gave notice to employers that their members would be embarking on a strike. On 18 April, before the strike began the applicant advised the respondent that its members would not take part in the strike. The strike subsequently commenced on 19 April.

On even date the respondent forwarded a notice to the bargaining council, notifying them that it intended to lock-out all of its employees on Sunday, 21 April at 9:00 am.

On the same day of receiving the notice the applicant’s secretary general contacted a senior executive of the respondent’s corporate services to enquire whether the lockout applied to its members.

The executive had e-mailed the applicant’s secretary general and provided the notice was a response to the strike
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notice issued by the two other trade unions. It was also confirmed that as the applicant was not a member of the bargaining council and not a party to the dispute, which caused the lockout and in the given circumstances the applicant’s member would not be striking.

The bargaining council had also on said day sent a letter to the applicant advising that its request made in February 2012 was considered and the applicant was now invited to apply for membership in accordance with bargaining council’s constitution.

On 23 April 2012 the respondent instituted a lock, which, it provided, applied to all employees including those whom where members of the applicant.

The applicant had then attempted to interdict the respondent from continuing to lockout its members at the Labour Court and was successful. The respondent had then appealed to the Labour Appeal Court (LAC) and its appeal was upheld. The applicant had then proceeded to appeal to the Constitutional Court (CC).

Issue before the CC

The court noted the main issue was whether s 64(1) read with s 213 of the LRA permits an employer to lockout members of a trade union - that is not a party to a bargaining council - where a particular dispute has arisen and has been referred for conciliation.

CC’s judgment

The court noted the demands in respect of wages could only be made at the bargaining council and, therefore, the notice sent out by the respondent did not constitute a demand.

The court noted further that a lockout notice cannot constitute a demand and a notice at once as the LRA differentiates between a notice and demand and does not use said terms interchangeably.

The court held that the applicant was not a party to the dispute ‘as it was not a member of the bargaining council where the dispute arose.’ This was because ‘on a proper interpretation of section 64(1), the employees referred to in section 64(1)(c) are employees who were party to the dispute that was referred for conciliation in terms of section 64(1)(d). Notice under section 64(1)(c) can be given only to employees who were party to a bargaining council where the dispute arose and was referred for conciliation.’

The court held further that the LAC’s conclusion that the applicant was a party to the dispute was due to the fact that it had an interest in the dispute was ‘untenable.’ This was due to the fact that the applicant’s interest in the dispute amounted only to ‘a mere hope or expectation…; its interest in the negotiations was confined to a hope that a favourable collective agreement would eventually be forthcoming’.

The applicant’s appeal accordingly succeeded and the court set aside the order made by the labour appeal court.

Conclusion

This judgment is important as in light of it, members of trade unions not party to a bargaining council cannot be locked out by their employer.

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n the matter of Reynecke v OdinFin (Pty) Ltd, the plaintiff sued his previous employer (the defendant) for its failure to follow a fair debarment process in terms of the Financial Services and Intermediary Services Act 37 of 2002 (the Act), which prevented him from earning an income as a representative for approximately 12 months.

These are the facts, in summary, which led to the plaintiff’s claim:

- The plaintiff breached his employment contract with the defendant by attending an induction program at Nedbank to pursue a new employment option.
- The defendant instituted disciplinary proceedings against the plaintiff regarding this incident, which the plaintiff failed to attend.
- At the hearing, the plaintiff was summarily dismissed by the chairperson from the defendant’s employ on the basis of misconduct in that he was found to be dishonest about his training at Nedbank.
- After the plaintiff had left the defendant’s employ, he accepted a permanent employment position at Nedbank to render financial services as its representative.
- Without any further notice, the defendant took a decision to debar the plaintiff from rendering financial services in terms of the Act, which led to the termination of his employment contract with Nedbank.
- The decision to debar the plaintiff was based on the findings of the chairperson at the disciplinary proceedings without any further process or investigations by the defendant.
- The decision to debar the plaintiff was taken by the defendant in terms of s 14(1) of the Act and recorded by the Financial Services Board (FSB) as follows: ‘[Reynecke] does not comply with personal character qualities of honesty and integrity.’
- The plaintiff took the defendant’s decision on review to the High Court where it was subsequently set aside as being unlawful administrative action.
- After the review proceedings had been finalised, the plaintiff sued the defendant for loss of income that he sustained for the period July 2013 to March 2014, during which time he was effectively debarred and did not receive income.

The plaintiff’s case as pleaded was that the defendant had owed him a legal duty to exercise its administrative powers in terms of the Act in a fair manner, which the defendant had breached by, inter alia, not providing him with...
adequate notice of the debarment proceedings and by not providing him with a reasonable opportunity to make representations. The particulars of claim alleged further that the defendant, in performing its statutory duty, had acted negligently and unlawfully.

During the trial, the defendant conceded that its decision to debar the plaintiff without notifying him of its intended decision and by not giving him an opportunity to be heard amounted to unfair administrative action, which fell to be reviewed and set aside.

The main issue to be decided by the court was whether the defendant’s conduct was wrongful in the circumstances.

It was argued by the defendant that the plaintiff’s cause of action was similar to that of Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) SA 121 (CC). In Steenkamp, the court held that a breach of an administrative duty is normally rectified by means of public law remedies (such as judicial review) and that an aggrieved party does not have private law remedies for damages.

In line with Steenkamp, the defendant’s point of departure was that administrative action exercised in a negligent manner is not wrongful in the delictual sense and does not give rise to liability for damages unless policy considerations require that the plaintiff should be compensated for such losses.

It was accordingly argued by the defendant that their conduct was not wrongful in that the Act did not confer any discretion on them to debar the plaintiff, or not. According to the defendant, the provisions of the Act are mandatory in that they are obliged to debar any representative who had acted contrary to the fit and proper requirements. The court, however, rejected this argument by holding that the defendant had in fact made a finding that the plaintiff was not fit and proper for which a fair process should have been followed by them.

It was further argued by the defendant that the imposition of delictual liability on the defendant in the exercise of its administrative function would have a ‘chilling effect’ on all Financial Service Providers (FSPs) when exercising their functions in terms of the Act. By this the defendant meant that an FSP would for instance be more cautious to debar a representative for fear of exposing itself to potential claims in the future. The court, however, held that the FSP could prevent such risks by merely following a fair procedure prior to a debarment.

In para 21 of the Reynecke judgment, Louw J stated as follows:

“If an FSP acts responsibly and follows a fair administrative process before making a bona fide finding that a representative does not comply with the fit and proper requirements and thereafter debars the representative, it is unlikely that such a representative will succeed with a damages claim against the FSP. But if it debars a representative without following a fair administrative process and thereby potentially causing serious financial harm to the representative, the bona fides would not, in my view, require that the FSP be protected from delictual liability.’

Weighing up relevant policy considerations and facts of the matter, the court held that the defendant’s conduct towards the plaintiff was wrongful and negligent, and as a result whereof the defendant was held liable for the damage, which the plaintiff is able to prove for damages unless policy considerations require that the plaintiff should be compensated for such losses.

How does the Reynecke decision affect the role of the FSPs and the FSB in debarment proceedings?

The following points are important to consider:

- That a decision to debar a representative constitutes an administrative action, which is subject to the Promotion of Administrative Justice Act 3 of 2000.
- That there is a duty on FSPs and the FSB to follow a fair debarment process when the debarment of a representative is contemplated.
- From the policy underlying the Act, it is wrongful for any FSP or the FSB to debar a representative without following a fair process, which conduct may result in the FSP or the FSB being liable for damages sustained by the representative during the period of debarment.
- I submit that the court’s decision to award damages for economic loss to an aggrieved representative, is the first claim of this nature under the Act and possibly even in the context of administrative law under South African law. It is hoped that FSPs and the FSB will take the necessary steps to ensure that fair administrative process is followed by them when exercising any of their powers in terms of the Act.
- De Bruyns Attorneys Inc were the instructing attorneys for the plaintiff.
NEW LEGISLATION

New legislation

Legislation published from 1 – 29 July 2016

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Bills introduced

Liquor Products Amendment Bill B10 of 2016.

Selected list of delegated legislation

Basic Conditions of Employment Act 75 of 1997
Amendment of Sectoral Determination 11: Taxi sector. GN857 GG40157/25-7-2016.
Collective Investment Schemes Control Act 45 of 2002
Exemption of a manager of a collective investment scheme in securities from certain provisions. BN136 GG40166/29-7-2016.
Commission for Gender Equality Act 39 of 1996
Complaints handling procedures. GG40111/1-7-2016.
Engineering Profession Act 46 of 2000
Rules: Continuing professional development and renewal of registration. BN97 GG40125/8-7-2016.
Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947
Prohibition on the import, export, possession, acquisition, sale, use and disposal of agricultural remedies containing certain substances. GN862 GG40160/29-7-2016.
Health Profession Act 56 of 1974
Registration of specialists in family medicine. GN777 GG40110/1-7-2016.
Labour Relations Act 66 of 1995
Amendment of regulations. GN R816 GG40128/8-7-2016.
Repeal of the Essential Services Committee Regulations. GN R817 GG40128/8-7-2016.
Local Government: Municipal Systems Act 32 of 2000
Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers. GenN380 GG40117/1-7-2016 and GenN381 GG40118/4-7-2016.

Measurement Units and Measurement Standards Act 18 of 2006
National Measurement Standards. GN814 GG40125/8-7-2016.
National Measurement Units. GN813 GG40125/8-7-2016.
Mine Health and Safety Act 29 of 1996
National Environmental Management Act 107 of 1998
Identification of the Minister of Environmental Affairs as competent authority for the consideration and processing of environmental authorisations and amendments thereto for activities related to the integrated resource plan 2010-2030. GN779 GG40110/1-7-2016.
National Environmental Management: Biodiversity Act 10 of 2004
Alien and invasive species list, 2016. GN864 GG40166/29-7-2016.
Appeal Regulations. GN R815 GG40128/8-7-2016.
National Land Transport Act 5 of 2009
Establishment of the National Public Transport Regulator. GenN378 GG40110/1-7-2016.
Private Security Industry Regulations Act 56 of 2001
Amendment of the Improper Conduct Regulations. GN R790 GG40116/1-7-2016.
Public Service Act 103 of 1994
Tax Administration Act 28 of 2011
Organs of State or institutions to which a senior Sars official may lawfully disclose specified information. GN R819 GG40128/8-7-2016.
Veterinary and Para-Veterinary Professions Act 19 of 1982
Amendment of the regulations (fees). BN408 GG40140/15-7-2016.

Draft legislation

Best practices in terms of the Consumer Protection Act 68 of 2008 applicable to the motor industry for comment. GenN402 GG40134/11-7-2016.
Proposed Emergency Medical Services Regulations in terms of the National Health Act 61 of 2003. GN830 GG40140/15-7-2016.
Draft Public Administration Management Regulations on Conducting Business with the State and the Disclosure of Financial Interests in the Public Services, 2016 in terms of the Public Administration Management Act 11 of 2014 for comments. GN R838 GG40141/15-7-2016.
Revised rules of conduct for registered persons in terms of the Project and Construction Management Professions Act 48 of 2000 for comments. BN104 GG40149/20-7-2016 and BN135 GG40163/27-7-2016.
Amendment of the regulations relating to the qualifications for registration of dental assistants in terms of the Health Professions Act 56 of 1974 for comments. GN850 GG40154/22-7-2016.
Amendment of general regulations made in terms of the Medicines and Related Substances Act 101 of 1965 for comments. GN858 GG40158/25-7-2016.
Proposed industry code and ombudsman scheme for the advertising and marketing industry in terms of the Consumer Protection Act 68 of 2008 for comments. GenN449 GG40159/26-7-2016.

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**Affirmative action measures in the absence of an employment equity plan**

In *Solidarity obo Pretorius v City of Tshwane Metropolitan Municipality and Another* [2016] 7 BLLR 685 (LC) the applicant employee, a white male, applied for a post but was unsuccessful after having been shortlisted and interviewed for the position. The post was then left vacant for a period and was re-advertised approximately three months later. He again applied and was not shortlisted this time. It later came to the attention of the applicant that when he applied for the post initially the process had been nullified because the approval of the short list was subject to the condition that only applicants from designated groups would be shortlisted and interviewed. This condition had been based on the workplace profile statistics, which reflected that there were too many white males in the group.

The applicant argued that he had been unfairly discriminated against on the basis of race and gender when he was not appointed to the post, which was a post that he had been acting in for a period of time. The municipality admitted that it discriminated against the applicant by failing to consider him for the position as he was not a member of a designated group but argued that this was not unfair as it was permitted to do so under the Employment Equity Act 55 of 1998.

Given the fact that the municipality admitted that it discriminated against the employee, the onus was on the municipality to prove that the discrimination was fair. The court held that if the municipality had acted in accordance with an affirmative action plan when discriminating against the applicant then the discrimination could not have been unfair. The municipality, however, conceded that it did not have an employment equity plan in place at the time that it discriminated against the applicant. It nevertheless argued that it had acted in accordance with its staffing policy contained in a collective agreement and thus this constituted an affirmative action measure under s 15 of the Employment Equity Act.

Coetzee AJ held that an affirmative action measure should be based on prescribed information and should set out numerical goals and the time period during which to achieve those goals. An affirmative action measure must, furthermore, be capable of being measured and monitored. It was held that the staffing policy did not comply with the Employment Equity Act as it was not a structured approach to the implementation of affirmative action measures as envisaged in the Employment Equity Act. An applicant who is excluded from promotion would not be able to challenge the process and to uphold the right to human dignity if the employer relied on a document to justify the discrimination that did not contain measurable numerical targets and measures.

It was held that the Employment Equity Act requires employers to have an employment equity plan setting out measurable targets before simply excluding candidates for appointment on the grounds of race or gender. Thus, the exclusion of the applicant because he was a white male in the absence of an employment equity plan amounted to unfair discrimination.

The municipality was ordered to appoint the applicant to the post with retrospective effect.

**Vicarious liability for sexual harassment in the workplace**

In *PE v Ikwezi Municipality and Another* [2016] 7 BLLR 723 (ECG), an employee was sexually molested and pestered by her superior during working hours on a number of occasions. The complainant alleged that she suffered post-traumatic stress disorder as a result of the sexual harassment and eventually was forced to resign. The complainant then instituted a claim for damages against the municipality and the perpetrator.

The municipality admitted that it had a legal duty to protect the complainant’s rights and prevent her from suffering from trauma but argued that it had taken reasonable steps to protect her and thus was not liable for damages. In this regard, the municipality alleged that it had taken reasonable steps to protect the complainant by requiring the perpetrator to attend a disciplinary inquiry and keeping the complainant and perpetrator at separate sites pending the outcome of the disciplinary inquiry. The alleged perpetrator was found guilty during the disciplinary inquiry and was issued with a final written warning and a two-week suspension without pay. The municipality argued that it was bound by the decision of the chairperson in the disciplinary proceedings and thus it had no alternative but to allow the perpetrator to return to work after the suspension had lapsed. The court, however, held that this was incorrect as the municipality was not required to simply accept the sanction handed down by the chairperson but could have taken the sanction on review.

The court held that the perpetrator was liable to pay the complainant damages to the extent that she is able to prove that she suffered harm as a result of his actions.

As regards the municipality’s liability, the court considered vicarious liability in the context of a working relationship where there is an unequal balance of power between the complainant and the perpetrator. Pickering J acknowledged that different factors apply when harassment is carried out by a superior. In this regard, where an employee is placed in a position of trust, the employer should ensure that the employee is capable of trust and thus an employer should be vicariously liable if that person abuses that trust. Reference was also made to case law in the United States of America where it has been held that where the harasser is in a position of power the employer is strictly liable. The court held the employer and the perpetrator jointly and severally liable for damages that the complainant may prove were caused by the sexual harassment.
CCMA writ – a legal fiction

CCMA v MBS Transport CC and Others, CCMA v Bheka Management Services (Pty) Ltd and Others (unreported case no J1807/15, J1706/15, JA94/2015, 28-6-2016) (CJ Musi JA with Davis JA and Murphy AJA).

Armed with separate and unrelated arbitration awards in their favour, two employees working for two different employers, individually approached the Commission for Conciliation, Mediation and Arbitration (CCMA) to have their respective awards enforced in terms of s 143 of the Labour Relations Act 66 of 1995 (LRA), this after both employers failed to abide by the remedies set out in the respective awards. Once both awards were certified in terms of s 143, the employees delivered same to the relevant Sheriff for the latter to execute on.

Both employers approached the Labour Court (LC) on an urgent basis for an order to stay the enforcement awards pending their applications to review and set aside the arbitration awards granted in favour of their respective employees.

As both urgent applications called on the court to address the same question in law, the two applications were consolidated and served before Phatshoane AJ.

When hearing the applications the court a quo mero motu raised the question of whether the CCMA was mandated to issue writs of execution in respect of arbitration awards delivered under its auspices. Having examined the relevant sections of the LRA and taking into account the fact that the CCMA was not a court of law, the LC found that the CCMA was not assigned the statutory power to issue writs and, therefore, set aside both applications to review and set aside the arbitration awards granted in favour of the respective employees.

The LC held that the word ‘provided’ did not feature in s 143. The instructive phrase when interpreting s 143 was ‘as if it were an order of the LC in respect of which a writ has been issued’. When interpreting this phrase the LC said:

‘By using the words “as if it were”; the legislature created a legal fiction. The CCMA is not a court of law and writs are issued by courts of law and not administrative tribunals like the CCMA. In order to overcome this reality, the legislature had to create this fiction. The legislature deemed the CCMA to have a status which it would not otherwise have, and consequently established an arrangement which, without the fiction, would be objectionable because it is incompatible with legal principle… A legal fiction therefore requires us to assume as fact that which we know is not true.

Therefore, section 143(1) read with section 143(3) means that when an arbitration award is certified by the Director, it may be enforced as if it were an order of the Labour Court in respect to which a writ has been issued. We must therefore not only assume that it is an order of the Labour Court but also assume that a writ has been issued in respect of that order.’

On this interpretation the LAC found that the court a quo erred in its finding that the CCMA issues writs of execution when certifying an award. The correct interpretation was that a certified award, in terms of the 2014 amendments, is equivalent to an order of the LC to which a writ has been issued. In addition the LAC held that the LC is seized with the power to stay the enforcement of an award, which will include a certified award.

For these reasons the LAC set aside the LC’s findings and ordered that both matters be remitted to the LC for a hearing de novo. No order as to costs was made.

The LAC turned next to Phatshoane AJ interpretation of s 143; the judge found that on the clear language of s 143 ‘the award of the CCMA may be enforced as [if it] were an order of the Labour Court provided a writ has been issued in respect thereof.’

The LAC held that the word ‘provided’ did not feature in s 143. The instructive phrase when interpreting s 143 was ‘as if it were an order of the LC in respect of which a writ has been issued’. When interpreting this phrase the LAC said:

‘By using the words “as if it were”; the legislature created a legal fiction. The CCMA is not a court of law and writs are issued by courts of law and not administrative tribunals like the CCMA. In order to overcome this reality, the legislature had to create this fiction. The legislature deemed the CCMA to have a status which it would not otherwise have, and consequently established an arrangement which, without the fiction, would be objectionable because it is incompatible with legal principle… A legal fiction therefore requires us to assume as fact that which we know is not true.

Therefore, section 143(1) read with section 143(3) means that when an arbitration award is certified by the Director, it may be enforced as if it were an order of the Labour Court in respect to which a writ has been issued. We must therefore not only assume that it is an order of the Labour Court but also assume that a writ has been issued in respect of that order.’

On this interpretation the LAC found that the court a quo erred in its finding that the CCMA issues writs of execution when certifying an award. The correct interpretation was that a certified award, in terms of the 2014 amendments, is equivalent to an order of the LC to which a writ has been issued. In addition the LAC held that the LC is seized with the power to stay the enforcement of an award, which will include a certified award.

For these reasons the LAC set aside the LC’s findings and ordered that both matters be remitted to the LC for a hearing de novo. No order as to costs was made.
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Dugard, J 'International criminal law, the International Criminal Court and civil society' (2016) AJ 3.


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Gevers, C 'Back to the future: Civil society, the “turn to complementarity” in Africa and some critical concerns' (2016) AJ 95.


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