ZONING MATTERS: A ‘SPLUMA’ SCORE-CARD
ONE YEAR ON

Creating trusts –
what should your client know?

Patent claim construction:
Numerical limitations

A smokey issue – the law relating to
the distribution of e-cigarettes

Reckless credit –
both sides of the story

Appraisal rights and
protection of minority
shareholders

New Public Protector holds
first media briefing

New International
Arbitration Bill

LSSA on –
withdrawal from ICC
Finance Minister
State of Capture report
ENSafrica | Africa’s largest law firm

ENSafrica.com
CONTENTS

DECEMBER 2016 | Issue 569
ISSN 0250-0329

Regular columns

Editorial 3
Letters to the editor 4
AGM News
- Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM 6
- Examination dates for 2017 8
- Activism with a purpose discussed at BLA AGM 9
- ‘I-generation’ law student discussed at FSLS AGM 11

News
- Office of the Public Protector will not name investigation reports to avoid tension with the state 13
- South Africa’s new International Arbitration Bill brings new dawn of new area 14
- Government obliged to give accessible quality education 14
- Tax master a middle man for reasonable billing between attorney and client 15
- National Moot School Court Competition: Opportunity for learners to understand the Constitution 17

LSSA News
- LSSA speaks out against withdrawal from ICC; welcomes withdrawal of charges against Finance Minister and release of State of Capture report 18
- LSSA recognises service to the profession by former Council members 19

People and practices 21

Practice management
- Susceptible to scams? 22

Practice note
- Reckless credit – both sides of the story 24
- No more delays on criminal trials 25

The law reports 40
New legislation 47
Employment law update 48
Book announcements 50
Recent articles and research 51
Zoning matters: A ‘SPLUMA’ score-card one year on

The purpose of this article is to briefly introduce a discussion around appraisal rights, their history and background, how they find application under our Companies Act 71 of 2008 (the Companies Act) and the impact they have had so far in our company law regime as far as the protection of minority shareholders is concerned. The article, written by Basil Mashabane, has been written in a contextual manner and focuses on appraisal rights and how they apply to fundamental transactions and, also includes a brief discussion of a recent High Court judgment, where the court was approached to make a ruling on a case involving the question of appraisal rights raised by shareholders.

Creating trusts – what should your client know?

When performing any given task, using the right tool for the job will make the task significantly easier to accomplish and will also ensure that the quality of the task is superior. The same holds true for estate planning exercises and there are few tools that are on par with a trust in this regard. A trust is a unique vehicle, which involves the exchange of assets for a complete separation of ownership and enjoyment of these assets from the personal estate of an estate planner, and with all things in life, there are some key elements that must be present before a trust will be able to serve the needs of the estate planner effectively. This article, written by Edrick Roux and Bindiya Desai is a brief discussion of the significance of the respective parties at the relevant stages.

Patent claim construction: Numerical limitations

Patent attorneys spend a great deal of time trying to find the ‘perfect’ word for a technical element of an apparatus or method in patent applications. They are required to conduct the same analysis for numerical limitations, including, numerical ranges. The construction of both words and numerals needs to take place in patent attorneys’ daily practices; with the latter equally applying to all fields of technology: Electrical, chemical, mechanical, biotechnological, etcetera. In this article, Ryan Tucker examines numerical limitations in patent claims in the United Kingdom (and by implication, South Africa), given their impact on patent drafting and prosecution, as well as on patent enforcement/litigation.

A smokey issue – the law relating to the distribution of e-cigarettes

Will electronic-cigarettes or e-cigarettes prevent people from smoking cigarettes? Are we just replacing one harmful device, namely, regular tobacco cigarettes, with another harmful and toxic device? These questions make legal minds struggle all around the world. In recent years the e-cigarette industry became a 3 billion dollar industry, with approximately 466 different brands of e-cigarettes on the market worldwide. In this article, Yda van Aartsen summarises the general impact and views of e-cigarettes, the health implications thereof, the regulation by legislation, the regulatory struggle and recent developments in legislation.
Conveyancing work encroached upon

As 2016 draws to an end we ponder on the happenings of the year. This is an opportune time to lament on the many instances the attorneys’ profession has been encroached upon. One such instance is the proposed business model by Proxi Smart Services (Pty) Limited (Proxi Smart).

Proxi Smart seeks to render certain conveyancing-related services, which are currently exclusively performed by conveyancers – who are regulated by the statutory, provincial law societies. The view of the Law Society of South Africa (LSSA), the provincial law societies and the Attorneys Fidelity Fund (AFF) is that the proposal by Proxi Smart cannot be supported as the full conveyancing process is regarded as reserved work, and should remain so in the interest of the public. Proxi Smart has been informed accordingly.

An application to the Gauteng Division of the High Court has subsequently been served on the LSSA for an order to the following effect:

Declaring that the steps in the transfer process identified by Proxi Smart do not contravene the Attorneys Act 53 of 1979, the Legal Practice Act 28 of 2014, the Deeds Registries Act 47 of 1957 and the Regulations made under the Deeds Registries Act and that it does also not constitute the performance of conveyancing work reserved to attorneys or conveyancers.

The LSSA is opposing the matter and, by agreement, must submit an answering affidavit by 28 February 2017. The AFF, the Chief Registrar of Deeds and the Justice Minister are also respondents. The AFF has filed its notice to oppose. At this stage, a joinder of the four provincial law societies as regulatory bodies of the attorneys’ profession is being considered.

During the annual general meeting of the Free State Law Society, Co-chairperson of the LSSA Jan van Rensburg said that if Proxi Smart manages to split the conveyancing work, then surely any other litigation can be split into reserved and non-reserved work for attorneys, which will mean that there will be very little left for attorneys to do. He added that some attorneys support it, especially those starting out. Mr van Rensburg stressed the fact that if the money does not go into trust accounts and goes to banks instead, the AFF will not have money to protect the public and to assist the profession (see p 12).

The matter is, understandably, of grave concern to the profession and the LSSA is prioritising the matter and is dealing with the interests of both the profession and the public. Attorneys are cautioned against participating in the Proxi Smart initiative and other initiatives of a similar nature and are advised that those who participate in such initiatives may find themselves acting in contravention of the Attorneys Act and the Rules of conduct of the Law Society.

To read the full notice of motion go to www.lssa.org.za.

Editor’s Note

Would you like to write for De Rebus?

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

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

- Please note that the word limit is 2000 words.

Follow us online:

@derebusjournal

De Rebus, The SA Attorneys’ Journal

www.derebus.org.za

DE REBUS – DECEMBER 2016

- 3 -
Interpretation and drafting of domicilium provisions

Domicilium provisions in contracts are largely considered to be standard provisions, which are often copied and pasted from one contract to another. A majority of contracts contain some form of a domicilium provision, which in turn sets out the manner in which notices and processes are delivered to the parties to the contract. These provisions can either relate to the service of judicial processes (such as a summons) or contractual notices. Judicial processes and contractual notices can either be dealt with separately or be bundled into a single provision, which the courts have dubbed as a ‘double provision’ (see for example: Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd [1984] 3 All SA 625 (W) at 641; Muller v Mulbarton Gardens (Pty) Ltd [1972] 1 All SA 190 (W) at 197; and SA Wimpy (Pty) Ltd v Tzouras 1977 (4) SA 244 (W) at 247). The way in which a provision is drafted will determine whether it is a double provision or not.

The manner in which a domicilium provision is drafted will also influence the requirements of the service of a summons. This was confirmed on appeal by Shepard v Emmerich 2015 (3) SA 309 (GJ). In that case, the domicilium provision required that the summons should be addressed to a specific person and served on the second floor of the building. It read: ‘Routledge Modise Moss Morris, 2 Pybus Road, Sandton (Marked for D Janks 2nd Floor).’

The appellant served the summons on the first floor of the building and was not marked for the attention of D Janks. The service did not strictly comply with the provisions of the domicilium provision and the question on appeal was whether the summons was properly served.

The issue pivoted around how the domicilium provision was drafted and whether the summons had been properly served. The court a quo found that where there was a specific method of service that was contractually agreed, it should be strictly complied with. The court a quo cited three foreign cases to support this argument, namely, McMullen Group Holdings Ltd v Harwood [2011] CSOH 132; Anglian Water Services Ltd v Liang O’Rourke Utilities Ltd [2010] EWHC 1529 (TCC); and Argo Capital Investors Fund SPC for Argo Global Special Situations Fund SP v Essar Steel Ltd [2005] EWHC 2587 (Comm). The Appeal Court found the court a quo’s argument to be persuasive. Also, the court found that there was nothing that prevented the appellant from complying with the requirements of the domicilium provision. The appellant did not adhere to the requirements of the contractually agreed method of service and the service of the summons was found to be defective. The appeal was dismissed.

This case illustrates that the way in which a domicilium provision is drafted could have an impact in the manner in which the provision is interpreted and ultimately enforced. Not only does this case show that the manner in which the domicilium provision is drafted can have far reaching consequences, but it also embodies the presumption of interpretation contracts in that there are no superfluous words in a contract (see: SJ Cornelius Principles of the Interpretation of Contracts in South Africa 2ed (Durban: LexisNexis 2007) at 122). Therefore, account must be taken of each word in a contract, even that of a domicilium provision. The mere copying and pasting and use of precedence must be cautioned and used with circumspection to ensure that unintended consequences do not occur in the interpretation and enforcement of the contract.

Michele van Eck, legal adviser, Johannesburg
Are court officials adequately protected?
The question to be answered is whether court officials are protected during the criminal proceedings in court? Who has a duty to protect court officials while conducting their scope of employment in court?

The true story is that as an attorney, I was physically attacked by the complainant as I was cross-examining the complainant. The complainant attacked me and was instructed by court to apologise. Indeed she apologised, but I noticed that the complainant was not remorseful and did not see anything wrong with her actions. The question that pops up is: Whether we are protected as court officials during court proceedings and by whom exactly? I feel that we are not protected at all.

Nokhanyo Makonco, candidate attorney, Mthatha

A criminal appeal puzzle
In S v Ntlanyeni 2016 (1) SACR 581 (SCA) three accused were convicted in the High Court for, inter alia, charges of rape.

The trial judge refused leave to appeal and thereafter the three separately, by petition applied to the President of the Supreme Court of Appeal (SCA) for leave to appeal. (They must have done so in terms of s 316(8)(a)(iii) of the Criminal Procedure Act 51 of 1977 (CPA).)

Two of the convicted persons were each granted leave to appeal by four judges in the two separate applications. In the Ntlanyeni matter the application was subsequently dismissed by two other judges. The President of the SCA, acting meromotu, considered the circumstances as exceptional in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 and referred the decision in the Ntlanyeni matter to the court for reconsideration.

The matter was argued and the result was that he was also granted leave to appeal to the full Bench of the High Court.

What is puzzling is how the SCA could have acted in terms of s 17(2)(f) of the Superior Courts Act as the case originated from a criminal trial in the High Court sitting as a court of first instance, a process that is regulated by the CPA. The definition of ‘appeal’ in the Superior Courts Act is: “Appeal” in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or in terms of any other criminal procedure law.

Appeals in criminal cases heard by a High Court are regulated by ss 315 and 316 of the CPA. Such appeals are, therefore, excluded from Ch 5 of the Superior Courts Act (see A Kruger Hiemstra’s Criminal Procedure (Durban: LexisNexis 2008) at 31-1 to 31-2). It is not clear how the SCA could have applied s 17(2)(f) of the Superior Courts Act to the Ntlanyeni matter.

Some criminal law practitioners and even ‘clever’ offenders serving sentences and whose applications to the President of the SCA in terms of s 316(8)(a)(iii) have been refused, now consider that their next step could be in terms of s 17(2)(f) of the Superior Courts Act.

I cannot agree and am anxious to learn whether I am missing a point here as the next possible step after a s 316(8)(a)(iii) application has been refused, is to approach the Constitutional Court provided a constitutional question is involved. More to the point: Can the SCA decision in the Ntlanyeni matter be correct?

JO van Schalkwyk, attorney, Johannesburg
Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM

The KwaZulu-Natal Law Society (KZNLS) held its annual general meeting (AGM) on 14 October in Durban. Former President, Kgalema Motlanthe, delivered the keynote address.

Former President Motlanthe began his address by saying that during the days of the freedom struggle, lawyers helped usher South Africa into democracy. He went on to name a few ‘giants in the noble profession’, such as Nelson Mandela, Oliver Tambo, Bram Fischer, Robert Sobukwe and Duma Nokwe. ‘Oliver Tambo led the team that led a path for democracy in South Africa. He would have celebrated his 99th birthday this year. In 1994 Tambo led the ANC leadership in the deliberations of the future that we hoped for,’ he added.

Former President Motlanthe asked: What is the role of a lawyer in the construction of a new society? He attempted to answer the question by saying that the role of a lawyer in society is to be worthy of being called an officer of the court. ‘I do not have an answer, but we need to attempt to analyse what it means to practice law during democracy. As we go ahead and formulise our state based on non-racialism, society is still struggling to emerge from the remnants of the Apartheid regime. Against this context, how will the lawyer of this new society practice? As the organised profession, there are a number of ways you can influence legislation and ensure public participation,’ he said.

Speaking about the future of the legal fraternity, former President Motlanthe said: ‘If we want to invest in the future, the future lawyers should have a culture of fighting for human rights and reinforcing constitutionalism. Lawyers of the future should be equipped with legal skills that will enable them to work towards the realisation of justice for all.’

Words from the LSSA

In the absence of the Co-chairpersons of the Law Society of South Africa (LSSA), Richard Scott, presented the Co-chairpersons Mid-term Report. Mr Scott said that the LSSA has been working towards implementing two resolutions that came from its 2016 AGM, namely, enhancing the role of women in the profession and creating an action group to deal with the past and present discrimi-
Take advantage of the Adams & Adams **ONE-THIRD ALLOWANCE** on all South African trade mark filing instructions — offered exclusively to our South African colleagues. The allowance for all referred trade mark applications lets you benefit from our expertise and world-class systems, while you retain exclusive contact with your client. The allowance typically amounts to around R1600 per application per class.

**CONTACT US AT** onethird@adamsadams.com **FOR ASSISTANCE**
Outgoing President of the KZNLS, Lunga Peter, presenting his report during the conference.

looked at against the backdrop of its annual spending, the opposite is true. For instance in the last six years the fund spent just over R1.6 billion on funding the activities of the profession to the exclusion of its own activities.

The LPA has brought with it certain fundamental changes in the regulatory environment of the practitioners. In the current environment, only the law societies have the power to carry out functions such as inspections of books of accounting, applications for the appointment of curators, as well as initiating prosecutions against practitioners guilty of theft although in certain amending legislation the fund has similar powers. The LPA vests these powers in the fund originally including the power to determine the rules associated with inspections, which it might carry out. This has necessitated the fund to adapt its business model to be able to carry out these functions in its own right.

**Words from the AIIF**

Risk Manager of the Attorneys Insurance Indemnity Fund (NPC) (AIIF), Thomas Harban, said that in the future practitioners would be called on to make a contribution towards their AIIF indemnity insurance. He stressed that the vast majority of claims are avoidable and are caused by negligence. 'We have seen instances where practitioners are blatantly reckless,' he added.

The AIIF tabled a report written by its Managing Director, Sipho Mbelle. The report stated that the AIIF has seen an annual increase in the number and value of claims. 'The outstanding claims liability was calculated at R388 million as at the end of March 2016. Professional indemnity claims have increased at a rate in excess of the official inflation rate on an annual basis,' the report states.

The report further states that the sole source of the AIIF’s funding remains the annual premium received from the AFF. 'The consideration of the sustainability of the AIIF includes re-looking at the funding model of the company. Practitioners will be called upon to make a contribution to the premium funding in the near future. We have warned the profession of this in our reports to the various structures in the last few years. The rates at which the members of the profession will be expected to contribute are being actuarially calculated. We are sensitive to the fact that the introduction of the payment regime should not create a barrier to entry into the profession,' the report states.

**Words from the KZNLS President**

Outgoing President of the KZNLS, Lunga Peter, presented his report during the conference. Speaking about the voluntary association for legal practitioners, Mr Peter said that the profession has agreed that it was imperative that a national voluntary association must be established as the unified voice of the profession representing members’ interests as the LPA only addresses issues of regulation of the legal profession.

Mr Peter encouraged members of the profession to make use of the facilities offered by the Attorneys Development Fund (ADF) should they qualify to apply for same. 'To this end the society has participated in joint venture workshops with the ADF and the AIIF in promoting the services offered by the ADF and the AIIF,' he added.

Mr Peter said that the National Law Library continues to provide a valuable service to members nationally and has established as a national resource library. 'As part of the awareness campaign around the library’s benefits the society has arranged workshops nationally in association with the ADF and the AIIF. The society records its gratitude to the ADF for its funding contribution towards the escalating costs of operating the library,' Mr Peter said.

**New councillors 2016/2017**

- Umesh Jivan (President)
- John Christie (Vice-President)
- Vernon O’Connell (Vice-President)
- Lunga Peter (Black Lawyers Association (BLA)) (Vice-President)
- Charmaine Pillay (National Association of Democratic Lawyers (NADEL)) (Vice-President)
- Dee Takalo (BLA)
- Eric Zaca (BLA)
- Nonduduzo Khanyile-Kheswa (BLA)
- Matodzi Neluheni (BLA)
- Raj Badal (NADEL)
- Asif Essa (NADEL)
- Poobie Govindasamy (NADEL)
- Xolile Ntsuluna (NADEL)
- Richard Scott
- Praveen Sham
- Manette Strauss
- Eric Barry
- Saber Jazbhay
- Gavin McLachlan
- Ebi Moolla

**Alternate councillors**

- Russell Sobey
- Sthembiso Kunene (BLA)
- Ilan Lax (NADEL)

---

**Examination dates for 2017**

**Admission examination:**
- 14 February
- 15 February
- 22 August
- 23 August

**Conveyancing examination:**
- 10 May
- 6 September

**Notarial examination:**
- 7 June
- 11 October

- For the Attorneys’ admission examination syllabus, see 2016 (Jan/Feb) DR 19.

- For the Notarial examination syllabus, see 2016 (April) DR 19.

Registration for the examinations must be done with the relevant provincial law society.
Activism with a purpose discussed at BLA AGM

The Second Annual Godfrey Pitje Memorial Lecture was to be delivered by advocate Mojanku Gumbi, in her absence, Judge George Maluleke of the Gauteng Division of the High Court delivered the address.

On the second day of the conference, member of the National Forum on the Legal Profession (NF) Kathleen Dlepu gave delegates an update on the workings of the NF. She said that the NF is a body that will pave the way for the Legal Practice Council (LPC). She added that the President of the BLA, Lutendo Sigogo, is chairing one of the committees that is tasked to deal with difficult issues such as employees and the assets. ‘There are various other tasks carried out by the various committees to ensure consensus and that what is decided is endorsed by the broader profession,’ she added.

Ms Dlepu said that the NF meets almost every Saturday and it hopes to not extend the time frame of its mandate. She noted that no resolution has been reached in terms of the elections for the LPC as some are advocating for quotas as in line with s 7 of the Legal Practice Act 28 of 2014. ‘A decision has been made that there will be two voter rolls, one for attorneys and another for advocates,’ she added.

Speaking about the funding of the LPC, Ms Dlepu said that after a cost analysis has been done, recommendations will be made to the Justice Minister with the view of efficient implementation of the LPA. ‘One of the challenges we have to deal with is that attorneys have clear data in terms of numbers in the profes-

The Black Lawyers Association (BLA) held its 39th annual general meeting and conference on 21 and 22 October in Kimberley under the theme: ‘Urgent need to redress skewed briefing patterns for quality legal work for all’.

Proceedings of the conference began with a gala dinner, which incorporated the Second Annual Godfrey Pitje Memorial Lecture. The lecture was to be delivered by advocate Mojanku Gumbi, in her absence, Judge George Maluleke of the Gauteng Division of the High Court, delivered the address.

Judge Maluleke began his address by welcoming the Pitje family and all those present at the dinner. He went on to say that Mr Pitje was the first director of the BLA Legal Education Center while he was the chairman of the legal education trust at the time. Reading from the speech, Judge Maluleke said:

‘The heading of this address is “Activism with a purpose”... We meet today at a time of great uncertainty in the world. The global south is suffering from the negative effect of economies that are growing at a pedestrian rate. Coupled with instances of insecurity, brought about by such activities of those credited out by groups such as Boko Haram and Al-Shabaab. Thrown into that is the slowing down in growth in China, the political and economic difficulties in Brazil, in Russia the disintegration of Serbia and its surrounds.

The global north is also not doing well, with the unknown long-term effects of Brexit, the rise of total authoritarianism represented by the fact that a man such as Donald Trump would even get to the stage where he is... The countries in the south of Europe are barely surviving with unemployment levels among the youth reaching as high as 43,9% in Spain.

Our country is also facing a myriad of challenges. It is at times like these when we remember that men such as Godfrey Mokgonane Pitje represented the best that this country had to offer. In his lifetime one found many manifestations of both defiance and compliance, non-racialism and anti-racism, anti-sexism and a healthy dose of patriarchal practices, internationalism and African nationalism, and other seemingly contradictory tendencies... I realised that what I thought were contradictory tendencies were in fact complimentary...

Mr Pitje was an ANC supporter, he believed totally in the principle of non-racialism, but he could have just as well been an African nationalist or an advocate of black consciousness.

In the inaugural lecture, then Deputy Chief Justice Dikgang Mosekete referred to the well-known case of R v Pitje [1960 (4) SA 709 (A)], which had at its subject the defiance that came to be identified with Mr Pitje. Mr Pitje had refused to sit in a corner reserved for Bantu lawyers in the courtroom in Boksburg, as a result of which he was charged with contempt of court. There are many other instances of defiance associated with Mr Pitje.

I am raising these two characteristics of Mr Pitje, defiance and unity, in an attempt to see if we can learn anything from that to find solutions to one of the most urgent national challenges in the cry of our young people under the banner of “fees must fall”. When the “fees must fall” movement started there was a unity of purpose exhibited by students from across party political lines, they identified their common enemy as the unaffordable costs of tertiary education. Soon after the movement started, it became clear that we the adults started trying to pull the students into some political camps... I want to suggest that if we may step back a little and allow the students debate the matter of the cost of higher education as a united force, as personified by Mr Pitje, we would have taken an important step towards resolution...’

Update on the National Forum

On the second day of the conference, member of the National Forum on the Legal Profession (NF) Kathleen Dlepu gave delegates an update on the workings of the NF. She said that the NF is a body that will pave the way for the Legal Practice Council (LPC). She added that the President of the BLA, Lutendo Sigogo, is chairing one of the committees that is tasked to deal with difficult issues such as employees and the assets. ‘There are various other tasks carried out by the various committees to ensure consensus and that what is decided is endorsed by the broader profession,’ she added.

Ms Dlepu said that the NF meets almost every Saturday and it hopes to not extend the time frame of its mandate. She noted that no resolution has been reached in terms of the elections for the LPC as some are advocating for quotas as in line with s 7 of the Legal Practice Act 28 of 2014. ‘A decision has been made that there will be two voter rolls, one for attorneys and another for advocates,’ she added.

Speaking about the funding of the LPC, Ms Dlepu said that after a cost analysis has been done, recommendations will be made to the Justice Minister with the view of efficient implementation of the LPA. ‘One of the challenges we have to deal with is that attorneys have clear data in terms of numbers in the profes-

Deputy Minister of Public Enterprises, Bulelani Gratitude Magwanishe, delivered the keynote address at the 39th Black Lawyers Association AGM.
sion, whereas the advocates do not have such,’ she added.

Update from AFF
Chairperson of the Attorneys Fidelity Fund (AFF), Nonduduzo Khanyile-Kheswa, said that the primary objective of the fund is to provide compensation to members of the public, while its secondary objective is to provide for professional indemnity insurance. ‘The AFF also funds the regulators to conduct its activities including education. … With regard to the financial position of the fund, the AFF has to mull over some of the activities that the AFF currently funds such as education and professional indemnity insurance,’ she added.

• See also ‘Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM’ at p 7.

Professional association update
Former President of the BLA, Busani Mabunda, noted that the issue of a professional association was not a new topic. He added: ‘There are implications which have arisen out of the LPA, things are not going to be the same. … The LPC creates a new regime, if we do not formulate an association for legal practitioners, we will be in a situation where we are left in a lurch. We have been made to understand that there are certain members of the profession that do not see a need of an association. The new association will not be a perpetuation of the status quo.’

• See also ‘Role of lawyers in a democratic society discussed at KwaZulu-Natal Law Society AGM’ at p 7.

Government’s commitment to transformation
Deputy Minister of Public Enterprises, Bulelani Gratitude Magwanishe, delivered the keynote address. Mr Magwanishe reiterated government’s commitment to the transformation of the legal profession. He added: ‘We recognise the critical role of lawyers in the broader transformation of our society, … The emergence of black law firms served to strengthen the fight against race dominance. This was evident in the coming into being of the Mandela and Tambo law firm.

The democratic government has a constitutional responsibility to correct the imbalances created by the past. … In the context of the South African economy dialogue the traditional white companies have for centuries dominated the economic space insofar as procurement of goods and services is concerned.

Out of the six state owned companies reporting to the department of public enterprises, four are being audited by black auditing firms and the remaining two by the auditor general of South Africa. …

An environment is being created where the genius of black legal practitioners can thus forth shine. The framework for the transformation of the state legal services issued by the Department of Justice and the promotion of capacity building by ensuring that historically disadvantaged practitioners have access to legal matters of substantive value [and the] promotion of sufficient flow of instructions to the historically disadvantaged legal practitioners.’

Need to advertise a vacancy immediately? Not able to wait for deadlines?
De Rebus Classifieds has the solution.

Immediate advertising will be available for the vacancies only on the De Rebus website from 16 January 2017.

2017 rate cards, booking forms and terms and conditions are available at www.derebus.org.za/rate-card

For more information contact Isabel at (012) 366 8800 or e-mail: yp@derebus.org.za
‘I-generation’ law student discussed at FSLS AGM

The Law Society of the Free State (FSLS) held its annual general meeting (AGM) in Clarens on 21 October. The AGM was preceded by a gala dinner where the North West University’s (NWU) Professor Pieter du Toit was the guest speaker. Prof du Toit who is a professor in the law faculty of the NWU spoke on the ‘i-generation’ law student.

The ‘i-generation’ law student

Explaining what the ‘i-generation’ law student is, Prof du Toit said it is ‘the student that we find in our university classrooms these days. They know no other world than the world of iPhones, Google, YouTube and the Internet.’ He then went on to provide an overview of the characteristics of ‘i-generation’ students.

According to Prof du Toit, ‘i-generation’ students relate to the world through technology. He added that they have already started to filter through to legal practice and soon they will do so in much larger numbers. ‘These students present huge challenges to legal education and the legal practice. However, I also believe that they have unique attributes and therefore have great potential as legal practitioners,’ he said, adding that information has always just been a click away for the ‘i-generation’. ‘Technology is more than just a tool, it is part of who they are. This has a number of implications for legal education,’ he said.

Prof du Toit said that through their cellphones students have immediate access to legislation and judgments even while the class is being presented. ‘Whenever any uncertainty regarding an aspect of the law arises during a lecture they can be asked to follow it up there and then and in fact they often do so of their own accord. Make no mistake they also force us to be better law teachers – we are kept on our toes. We must know the newest developments in the field we are teaching otherwise we may be embarrassed by students who do some research in class whilst we are teaching,’ he said.

Prof du Toit, however, noted that one of the challenges faced is that students often lack the ability to distinguish reliable material from unreliable and outdated material. He added that they may, for instance, tell you that you are feeding them incorrect information because they cannot find it in the legislation you are referring to. But on closer inspection one might find that they relied on an outdated electronic version.

Prof du Toit said: ‘Since they have immediate access to more information than one person could ever know or disseminate they simply do not see the professor as a front of all knowledge. They are often critical of what persons in positions of authority tell them. They see them merely as facilitators in their learning process. Research has found that they want more hands on, inquiry-based approaches to learning and are less willing simply to absorb what is put before them by teachers.’

Prof du Toit said many of the students are indifferent to authority and send communication such as e-mails in informal telegraphic style, adding that they ‘need strong guidance regarding the etiquette of a relatively conservative environment such as the law office and the court room, as well as guidance on certain societal skills.’

According to Prof du Toit, with a world of information at their fingertips, ‘i-generation’ students find memorising senseless. He said: ‘They focus on finding, interpreting and benefitting from information,’ adding that he also finds memorising a waste of time. ‘Very few of us had learnt much by memorising. Let us be honest, these days they are confronted with an overwhelmingly complex legal dispensation. In my view the traditional forms of assessment (which still persist in most law schools) will not achieve much. There should be a reduction of rote learning and memorising of facts. I have experimented with open book assessments and invited the students to bring any material they wish to the assessments. The assessments are problem based. In this manner they really start understanding how legislation works … . It allows for deeper learning and the assessment itself becomes a learning process. They do not necessarily fare better in these types of assessments and they tend to underestimate the extent of research and studying required. However, it also became clear to me that when the responsibility is placed in their hands and they fail to succeed, they tend to accept responsibility for the failure,’ he said.

He suggested that the Law Society of South Africa (LSSA) should also start rethinking the manner in which candidates are assessed in the admissions exams. He concluded by stating: ‘In this regard it must also be mentioned that they value feedback. They constantly want to know how they are doing and I expect they would also want to know this from their principal when they do their articles. They get impatient if marks are not made available quickly. And they always want to know what the precise answer to a question is and as we all know in law it is not always as simple as that. It is now settled practice at most universities to provide detailed feedback.’

He questioned what the legal profession was doing to understand the ‘i-generation’ and get the best out of them and added that it cannot be business as usual.

How to improve your law firm

The outgoing president of the FSLS, Deirdré Milton reflected on the International Bar Association (IBA) conference that she had attended a few weeks before the FSLS AGM took place. She said that at the conference there was a session on how to increase your fees by 30% in order to stay in the profession. She highlighted a few suggestions that were made that stood out for her. These were:

• Analysing your financial portfolio as firms do not know when they are making money or losing it. Ms Milton said that firms should appoint consultants on an annual basis to analyse their financial portfolio every year and be advised where the problem areas are, so that those areas can be corrected.

• To introduce and include the juniors in your firm to take part in your finan-
that organised crime cannot take place without the corruption of public officials. In other words, all these crimes are being aided and abated by public officials who will approve passports being passed and allow illegal immigrants to cross borders as legal. Public officials accept bribes because they are low paid for their services and for this reason, this crime has been successfully practiced on an ongoing basis,’ she said.

Proxi Smart
On the day of the AGM Ms Milton welcomed delegates to the AGM. Awards were given to the top three highest interest earners in small, medium and large law firms.

Co-chairperson of the LSSA, Jan van Rensburg gave the LSSA’s report. He also spoke on the establishment of a Legal Practitioner’s Association for South Africa.

Mr van Rensburg also spoke on the Proxi Smart case. He explained that Proxi Smart approached the LSSA with a proposal stating that it would like to do the administration work (or non-reserved work) that conveyancers are currently doing, and that it wanted the LSSA’s approval. Proxi Smart would, from the purchase agreement, gather all the information from clearance certificates to receiving deposits and arranging finances and issuing of guarantees. They would prepare a pack for the conveyancer, which he or she will check and draft a deed of transfer and sign which is the reserved work. The conveyancer will then get 15%.

Mr van Rensburg said that if Proxi Smart manages to split the work, then surely any other litigation can be split into reserved and non-reserved work for attorneys, which will mean that there will be very little left for attorneys to do. He added that some attorneys support this, unlike others who are against the idea, which will mean that there will be very little left for attorneys to do.

Mr van Rensburg explained that conveyancers are currently being split against their will without the consent of the LSSA. Mr van Rensburg said that Proxi Smart would be doing the same. Its new president is Sizane Jonase. Mr van Rensburg also spoke on the identification cards for practitioners. He said that the subscription fee for 2017 is R 1 881, which is inclusive of R 50 for the cards. The cards will be issued to all practicing attorneys. Candidate attorneys will not receive them. He said that the cards will serve as proof that individual is an attorney.

2016/2017 Council:
The council of the FSLS will remain the same. Its new president is Sizane Jonase.

• Sizane Jonase (National Association of Democratic Lawyers (NADEL)) (President)
• Vuyo Morobane (Black Lawyers Association (BLA)) (Vice-President)
• David Bekker
• Johan Fouche
• Etienne Horn
• Noxolo Maduba (BLA)
• Tsiu Matsepe (BLA)
• Joseph Mhlambi (NADEL)
• Deirdré Milton
• Jan Maree
• Cuma Siyo (NADEL)
• Henri van Rooyen.

Visit the LEAD website to see what other seminars/courses are currently being presented.

www.LSSALEAD.org.za
Office of the Public Protector will not name investigation reports to avoid tension with the state

The new Public Protector, Busisiwe Mkhwebane, at her office in Pretoria where she held her first media briefing in Pretoria on 20 October. She said her office will no longer use consultants for investigative work.

The new Public Protector, Busisiwe Mkhwebane, took office on 15 October, at her first media briefing at the offices of the PP in Pretoria, Ms Mkhwebane said her office will no longer name investigation reports to avoid unnecessary tension between the PP’s office and the state. She also announced that the office of the PP will no longer have use of consultants for investigative work, but will rather invest in building internal capacity to include the expertise that the PP offices do not have, such as forensics and auditing or utilising other government or public institutions as provided for by s 7(3) of the Public Protector Act 23 of 1994.

Ms Mkhwebane further said that the office of the PP will no longer use donor funds because of some of the risk associated with it. She said that she was not comfortable with foreign donors and that led to some of the changes and decisions she made when she took office. Ms Mkhwebane indicated that the matter of foreign donors and other information she presented to the Portfolio Committee on 19 October was already in the Annual Report that the former PP, advocate Thuli Madonsela, prepared.

Ms Mkhwebane added that, among other things, the office of the PP under her leadership, will prioritise aging cases through the establishment of a backlog project team that will be focusing on disposing of all cases older than two years. ‘We have a total of 260 cases older than two years under our Good Governance and integrity branch and 47 under Administrative Justice and Services Delivery: We will also prioritise critical posts, including that of a senior security personnel,’ she added.

Ms Mkhwebane stressed that it was important that both offices of the PP are secure, as well as the safe-keeping of sensitive information that is handled. She noted that the office of the PP has placed a moratorium on international travel, especially benchmarking exercises: ‘We believe that enough exchanging of notes with our counterparts elsewhere in the world has been done and I will be getting reports on the lessons we have learnt from all trips that have been undertaken so that we can assess how we have benefited from the engagements,’ she said.

Ms Mkhwebane said she will do her job as the PP without fear or favour. She said she wants to make it possible for an African child in Umhlabuyalingana to also enjoy the fruits of democracy and empower people to be able to hold their leaders to account. However, she said, unfortunately some people in society have misconstrued her message as meaning she will turn a blind eye on the so-called high profile cases. Ms Mkhwebane said the office of the PP is first to indicate that the ‘improper conduct’, that the Constitution, in s 182(1)(d), states that the office of the PP has the power to investigate allegations or suspicions of, is not limited to service delivery failure.

Ms Mkhwebane said it also includes instances of abuse of power and abuse of state resources. ‘In any event, when a Member of Parliament requests me to investigate allegations of contraventions of the Executive Ethics Code, I am obliged to investigate and report in 30 days, failing which, I must advise the President that I will not meet the deadline. For the record there is no merit in claims that I am going to turn a blind eye in such cases. It is simply not true,’ she said.

Ms Mkhwebane pointed out that the mandate of the office of the PP is not only limited to investigation. She referred to s 182(4) of the Constitution that enjoins the PP to be accessible to all persons and communities. Ms Mkhwebane added that her other priority was to enhance access and visibility of the PP’s office among far-flung communities through public awareness programmes. She said that she informed Parliament that in that area she plans to:

• negotiate and enter into a memorandum of understanding with the Department of Justice for the use of magistrates’ courts to bring the services of the office of the PP closer to the doorstep of their clients;
• negotiate and enter into a memorandum of understanding with the Public Broadcaster and other media houses for partnership that will enhance public awareness; and
• engage strategic stakeholders such as universities, schools and traditional leaders to assist the office of the PP in whichever way they can to advance its public awareness agenda.

Ms Mkhwebane said the ‘how’ part of the plans she has for her office will be worked out during the strategic planning session. However, in a nutshell, taking the office of the PP to the grassroots and increasing visibility among peripheral communities are the key aspects of her vision for the office over the next seven years.

Kgomotso Ramotso,
Kgomotso@derebus.org.za
South Africa’s new International Arbitration Bill brings new dawn of new area

The Deputy Minister of Justice and Constitutional Development, John Jeffery, said South Africa’s (SA) development of a new International Arbitration Bill, brings a new dawn of era in arbitration. Mr Jeffery was speaking at the International Arbitration - the Dawn of a New Era in South Africa Seminar held in Johannesburg on 14 October. He said the new Bill comes at an opportune time for SA, to opt into the international standard for the resolution of commercial dispute. 'Not only does it have the potential to attract foreign direct investment, but also give greater legal protection to South African investments abroad,' he said.

Mr Jeffery said SA was a party to the Convention and in 1976, SA acceded to the Convention without reservation. He added that SA enacted the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 in order to give effect to the principles of the Convention. He stated that the Arbitration Act 42 of 1965 governs arbitration proceedings in SA, however, he added that the Act makes no distinction between domestic and international arbitration and the Arbitration Act is not based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law.

Mr Jeffery said the International Arbitration Bill emanates from a report of South African Law Reform Commission dealing with international arbitration. 'The main thrust of the Bill is the incorporation of the United Nations Commission on International Trade Law Model Law, as the cornerstone of the international arbitration regime in SA.' He said: "The Model Law defines arbitration as "international" if parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States. This definition is used to determine, which arbitration matters qualify as "international" and are, therefore, subject to the Model Law," he added.

Mr Jeffery noted that the Bill seeks to incorporate the Model Law into SA law and that the provisions of the Bill reflect many of the provisions of the Model Law. He said provision is made for the Model Law to apply to all international agreements, irrespective of whether the agreement was entered into before or after the commencement of the envisaged legislation. Mr Jeffery, however, said the Bill will not apply to the proceedings for the enforcement of awards under the Recognition and Enforcement of Foreign Arbitral Awards Act or for the enforcement, setting aside or remittal or an award under the Arbitration Act.

Mr Jeffery pointed out that the proposed legislation will not only assist SA businesses in resolving their international commercial disputes, but will ensure that SA is an attractive venue for parties around the world to resolve their commercial disputes. He said that after Cabinet had approved the introduction of the Bill into Parliament, the Department of Justice received advice that the UNCITRAL Model Law could be adapted in order to accommodate local circumstances. 'We are now in the process of going back to Cabinet, with the suggested amendments, for noting and endorsement before proceeding with the introduction of the Bill into Parliament. And we expect that it will be introduced before the end of this year,' he said.

Government obliged to give accessible quality education

Former Deputy Chief Justice, Dikgang Moseneke, said the demand for access to further education, including higher education and further education and training is legally valid. Justice Moseneke was speaking at the 2016 Founders Lecture held at the University of South Africa on 27 October. He said the plea for the doors of education to open to all has been a core demand of a 'long glorious struggle over centuries'.

Justice Moseneke noted that the Constitution is silent on whether access to further education is subject to available state resources. He said government must prioritise or re-prioritise resources in order to give quality education. Justice Moseneke added that the entitlement of further education is to be contrasted with the right to basic education and adult education, which government must provide universally and without qualification of progressive access or availability of government resources.

Justice Moseneke said since 1994, government must oblige, devise and implement a masterplan that would afford, at the very least, its citizens universal and quality basic and adult education and increase access to higher education. He said government cannot hike fees every year, because the higher the fees the more education will be commoditised.

Justice Moseneke said the debate of ‘fees must fall’ must start where it should, which is with the Constitution. He said rising student fees, will reduce progressive access in higher education, and that only the rich will afford higher education. He pointed out that the violence that is connected to the ‘fees must fall’ campaign is totally unacceptable and should stop immediately. He said that the violence bares no justification whatsoever and said it amounts to punishable conduct. 'I urge young university students not lightly to flirt with terms like revolution and violence uprising. A revolution may be apt only when there is
The ‘fees must fall’ campaign is governed and that the true counterpart to claim to enrich ideas and new knowledge, universities were meant to be open spaces to disrupt. He further said there was no effective means to deal with violent uprising, adding that universities have universities are wrong targets for violent protest. He pointed out that tertiary institutions are in a good position to be given an opportunity to be heard in any accommodative way. He further said that government has not persuaded students that there is a solution to the fees crisis. ‘What we need to collectively do, in my humble view, is convene a negotiating forum a CODESA [Convention for a Democratic South Africa] of education. This should be convened not by the state but by civil society,’ he advised.

Justice Moseneke said that students in tertiary institutions are in a good position to resort to electoral correction if they are unhappy. He pointed out that universities are wrong targets for violent uprising, adding that universities have no effective means to deal with violent protest and disruption. He further said universities were meant to be open spaces to enrich ideas and new knowledge, and that the true counterpart to claim the ‘fees must fall’ campaign is government that universities can never give the right to access to free quality education. He stressed that society cannot sit and watch while universities get destroyed.

Justice Moseneke said the question must be asked: What has been done in 22 years for the country to find itself in a fight for education? He said it was not clear on the call for ‘fees must fall’ if every student irrespective of financial needs must be fully funded by government. Justice Moseneke said young people must be given an opportunity to be heard in an accommodative way. He further said that government has not persuaded students that there is a solution to the fees crisis. ‘What we need to collectively do, in my humble view, is convene a negotiating forum a CODESA [Convention for a Democratic South Africa] of education. This should be convened not by the state but by civil society,’ he advised.

Retired Gauteng Local Division, Pretoria, Judge Eberhard Bertelsmann said taxing masters are gatekeepers of fairness, between attorneys’ and their clients. They are there to see to it that clients are charged reasonably. Mr Bertelsmann was speaking at the first Legal Costs Indaba, on 7 October in Johannesburg.

Judge Bertelsmann said that many years ago, contingency fees were regarded as unacceptable, but in 1997 following a British example, the Contingency Fees Act 66 of 1997 was implemented. He explained that, the existence of the Contingency Fees Act was to facilitate access to justice. He added that the focus of the contingency fees in 1997, was to ensure that people who could not afford to prosecute cases, were given an opportunity to through positively minded practitioners, to enforce claims. However, Judge Bertelsmann said the question remained, whether that motivation of the Contingency Fees Act is still the same.

The President of Law Society of the Northern Provinces, Anthony Millar said contingency fees have been a burning issue for many years. Mr Millar posed a question to Judge Bertelsmann asking if lawyers are selling a commodity or selling a bespoke service?

Judge Bertelsmann responded by saying that he did not regard contingency fees as a commodity, but said it is closer to a bespoke service. He said contingency relates to the fact that the client is unable to pay. Therefore, there is a risk in the preparation of the case as there are expenses that need to be negotiated and experts who need to be consulted. He said, in his experience, most experts are prepared to wait to get paid at the end of a case.

Judge Bertelsmann pointed out his concern, that a huge amount of money has been spent on matters that could have been settled on the first day. He gave an example of Road Accident Fund (RAF) matters where, in his opinion, the moment summons arrive at the RAF, the RAF should have done the assessment of the merits and assessments of the injuries and asked attorneys for a couple of weeks or months to complete all the assessments and not go to court.

He said it was unfortunate that the current cash flow problems experienced by the RAF started because someone decided to virtually oppose all matters.

Mr Millard asked, what influence does the defendants’ ability to pay, play in the contingency system? He said in an assessment of the risk the attorney will think before entering in agreement with the client and also consider the prospect that there will be no money at the end. Judge Bertelsmann answered the question by saying that the fact that the defendant cannot pay should not concern the judge.

Mr Millard asked Judge Bertelsmann to comment on how the RAF and other state entities, such as the Department of Health, have been seen as easy targets for attorneys, in order to commoditise litigation. Judge Bertelsmann answered by saying that it was tragic that the standard of the administration of in-

Tax master a middle man for reasonable billing between attorney and client

Retired Gauteng Division High Court Judge Eberhard Bertelsmann, discussing contingency fees with the President of the Law Society of the Northern Provinces, Anthony Millar, at the first Legal Cost Indaba on 7 October.
Taxation: No tailor made solution

Taxing master at the Gauteng Local Division, Johannesburg, Trudie Zeelie, said there are no easy answers or tailor made solutions, when it comes to taxation. Ms Zeelie was speaking about the generality of taxing client’s costs and counsel’s fees.

Ms Zeelie said that, the application for a taxation date must be submitted electronically to the taxation clerk. She said the application must include the case number, the citation of the parties, the number of items on the bill and the date the dies was completed on. She added that there are taxation principles and that no bill of taxation should be taxed if these principles are not met.

Ms Zeelie stated the following principles –
• the presenter of the bill, must be in possession of the office file of the attorney of record;
• the certificate of r 70 of the Rules Board for Courts of Law Act 107 of 1985, signed by the de facto attorney of record in the matter must accompany the bill; and
• a signed original court order has to be attached to the bill.

Ms Zeelie said, in the event of the taxation being unopposed, the attorney on record must send a letter to the taxing master, confirming that the matter is in fact unopposed. She added that in the matter of a settlement, the attorney on record must also send a letter confirming the settlement. She also spoke about the appearance of the cost of a tax consultant at the Gauteng Local Division, she said cost consultant appear and present the bill of cost.

Ms Zeelie said in the event of an objection to a cost consultant presenting a bill of cost or opposing it, taxation must be postponed to enable the instructing attorney to appear at taxation. She went on to speak about the dress code when legal practitioners and consultant’s present cost bills, she said the presentation and taxation of bills of cost is the culmination of the civil legal process, she said it is expected of legal practitioners and consultants to dress accordingly. ‘It goes without saying, that it is unworthy of attorneys and consultants to present the bill, without being properly attired. In general a gentleman must at least wear a coat, a formal shirt and tie, and a lady should wear formal shoes and a jacket,’ she said.

Ms Zeelie also spoke about professionalism and ethics, she said that in the current economic climate, money has been an extremely emotive matter and that taxation can turn into screaming matches. She urged that legal practitioners provide taxing masters with copies of the cases that practitioners will use during taxation and also give the taxing master full judgment on the matter, to enable the taxing master to understand the matter that they are going to deal with.

Ms Zeelie said legal practitioners must also be in a position to briefly address the taxing master on the nature and the merits of the matter, she said practitioners do not have to read the particulars of the plea, but tell the taxing master what it is all about. She noted that it was important that legal practitioners not correct the cost bill during taxation, which they omitted to ask for in open court.

Ms Zeelie said should legal practitioners have a portion of their costs reserved, costs have to be specifically unreserved or practitioners do not have those costs. She said if counsel in an open court did not see fit to raise it with the presiding officer to tell the judge to disallow the affidavit, the taxing master has no power to correct the bill. She added that the taxing master is empowered to interpret the judge’s order and give effect. ‘A taxing master can only work with what you give them,’ she added.

Ms Zeelie said between party and party, the court order does not make provision for the costs of more than one counsel, the practitioner cannot have the costs of more than one counsel. She added that the taxing master has no discretion on such a matter. She said that on liquidation matters, if a legal practitioner does not take an order that does not specifically deal with costs, the practitioner does not have those costs.

Ms Zeelie added that when a taxing master is taking on a review, the legal practitioner must attach the taxing master copy of the marked bill, to the application. She said when it is not stipulated in r 48 of the Uniform Rules of the High Courts, attaching the copy of the taxing masters marked bill assists the taxing master and will enable the taxing master to deal with the review sensibly and timely.

Ms Zeelie said in recent years, much has been said about counsel’s fees. She added that there is a debate regarding the commercial site of the practice to be balanced with the duty of care and service to the taxing master at the Johannesburg High Court. She stated that access to justice turns to be severely restricted because of astronomical legal fees being charged. Ms Zeelie said it would be helpful if counsel were to specify in their invoice in detail the professional services they have rendered. She said it would help in determination on both reasonableness and fairness of counsel’s charges.

Kgomotso Ramotssho,
Kgomotso@derebus.org.za

stitions such as the RAF and Department of Health and legal services they are bound to employ is perceived to be less than effective. He stressed that the issues of contingency fees where the Department of Health is concerned, has to be addressed and that there is a huge number of contingency agreements relating to medical negligence.

**FREE DE REBUS app**

Download the De Rebus app for all the latest De Rebus updates
National Schools Moot Court Competition: Opportunity for learners to understand the Constitution

On 9 October learners, Thembinkosi Msiza (17), Surprise Mahlangu (17) from Gauteng and Aviwe Vilane (16) and Emihle Majikija from KwaZulu-Natal were crowned champions at the sixth National School Moot Court Competition, held at the Constitutional Court. The team argued for the respondent.

Mr Mahlangu said he was shocked when they called out their names to announce his team as the winning team. ‘Everyone wanted it badly, I am quite excited that we won, it shows that we went an extra mile,’ he said.

The hypothetical case focused on human dignity, equality, supremacy of the Constitution, freedom of expression and assembly, demonstration, picketing and petition. The first leg of the competition, saw an approximate 64 learners, of teams of four from eight provinces. The Mpumalanga province was the only province that did not participate at this year’s competition.

The keynote speaker of the day, Deputy Minister of Justice and Constitutional Development, John Jeffery, said the annual competition was established in 2011 to create greater understanding of the Constitution and human rights in South African schools. ‘This year is particularly special for us as we celebrate the 20th anniversary of our Constitution. The competition aims to celebrate our Constitution, our constitutional rights and responsibilities, and strive to develop the potential of each participating learner,’ he said.

Mr Jeffery said it was always special that the final round of the competition takes place at the Constitutional Court. It reminded him of the words of late President Nelson Mandela when he formally opened the Constitutional Court on 14 February 1995, when he said – ‘The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues we were not. Today I rise not as an accused, but on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy.’

Mr Jeffery said, he would argue that the future of democracy is further enhanced by the calibre of learners and their participation in the National Schools Moot Court Competition. He said that having learners knowing the Constitution and human rights is of importance to his department. He announced that the Justice Department created a slimline version of the Constitution, and distributed over 500 000 copies to grade 11 and 12 learners in schools countrywide.

Mr Jeffery said for most learners it was the very first time they had ever read or had a copy of their own Constitution, as well as the Bill of Rights. He said during a dialogue the Justice Department held at Uitenhage, a learner from Phaphane High School, Ntombizanele Klaas, said the Constitution will help her with her school projects. ‘This competition aims to create greater awareness in schools and communities in South Africa, and the values that it embodies through active participation,’ he said.

Mr Jeffery said that the moot competition has many benefits and allows learners to improve their public speaking skills, learn to structure a legal argument, analyse cases and develop writing skills.

Acting Chief Justice of the day, Justice Nonkosi Mhlantla, thanked the learners for entering the competition, she further thanked them for having interest in the legal fraternity. ‘Hopefully some of you would consider law as a career,’ she said.

Winners received prizes that included bursaries from Cliffe Dekker Hofmeyr to study law.

Thando Mtombeni (17), Catelyn Cumberiege (17), Nompendulo Cele (15) and Kwanele Shange (15), who argued for the applicant, walked away with the runner-up prizes.
At the end of October and early in November 2016, the Law Society of South Africa (LSSA) spoke out publically against the government’s decision to withdraw from the Rome Statute of the International Criminal Court (ICC); then welcomed the decision by the National Director of Public Prosecutions (NDPP) to withdraw charges against the Minister of Finance, Pravin Gordhan, and then also welcomed the Gauteng Division of the High Court order that the Public Protector’s State of Capture report should be published.

In welcoming the order by the Gauteng Division of the High Court that the Public Protector’s report on the State of Capture had to be released by the Office of the Public Protector, on 2 November, the LSSA urged the court to consider punitive costs against the President for bringing what was patentently an unfounded application to interdict the release of the report and then withdrawing it. ‘The cost of all the teams of counsel should not be borne by the taxpayer,’ said LSSA Co-chairpersons Mvuzo Notyesi and Jan van Rensburg.

The LSSA also welcomed the remedial action by the previous Public Protector, advocate Thuli Madonsela, that the President was to appoint a commission of inquiry within 30 days headed by a judge solely selected by Chief Justice Mogoeng Mogoeng.

In addition, the LSSA welcomed the fact that the Portfolio Committee on Justice and Correctional Services had called National Director of Public Prosecutions (NDPP), advocate Shaun Abrahams, to brief it on the developments in the National Prosecuting Authority and specifically the withdrawal of charges against Finance Minister Gordhan.

On 31 October, the LSSA welcomed the belated decision by the NDPP, Mr Abrahams, to withdraw charges against Finance Minister Gordhan, Oupa Magashula and Ivan Pillay. ‘The LSSA, however, remains gravely disappointed that a matter of this magnitude and implications was decided clearly without first obtaining all the necessary information and that the charges were instituted in the first place. The action of bringing the charges and then dropping them appears to be consistent with the public perception that there is a politically motivated link,’ said Mr Notyesi and Mr van Rensburg.

The LSSA urges Mr Abrahams to consider his position in the light of the severe consequences his actions had on South Africa’s (SA) economy.

The Co-chairpersons added: ‘Mr Abrahams seems oblivious to and unpentant for the damage – both at home and internationally – caused by the unsubstantiated charge of fraud brought against the country’s sitting Minister of Finance by the country’s prosecuting services. Mr Abrahams himself announced the intention to institute charges at a public press conference. It would be fair to assume that the NDPP would have gone out of his way in this matter, but also in all matters – be they high profile or routine matters – to ensure that all relevant information had been reviewed and that criminal intent had been established. However, when the charges relate to fraud or theft by a high profile individual such as the Minister of Finance, the NDPP should have made doubly certain of the facts before inflicting the trauma he has on the economy, the image of the country as well as on the public. Mr Abrahams made the public announcement, he should take responsibility for bringing the National Prosecuting Authority, the criminal justice system and the country into disrepute.’

The LSSA called on Parliament to initiate an investigation into the actions of the Directorate for Priority Crime Investigation – the Hawks – in this matter, as well as in other cases involving high profile persons. Alternatively, the LSSA said the President should consider a judicial commission of inquiry into the actions of the Hawks. ‘Failing that, and as it stands, it is doubtful whether the Hawks, as an institution, have the public trust,’ said the Co-chairpersons.

ICC

On 25 October, the LSSA added its voice to those calling on the South African government to reconsider its withdrawal from the ICC. The LSSA said it was gravely disappointed at the unilateral decision by the government to initiate SA’s withdrawal process from the Rome Statute of the ICC by executive act. ‘This raises serious concerns about our government’s interpretation of its commitment to fighting impunity and providing accessible forums for victims of crimes against humanity and human rights abuses by those in power,’ said Mr van Rensburg and Mr Notyesi.

They added: ‘As we have said previously, we are currently in the fortunate position of having a strong and independent judiciary and other institutions supporting democracy. We can turn to these to challenge abuses of power by the state. However, this may not always be the case in future. Our Government appears hell-bent on closing and impeding access to regional, continental and international courts should a time come when South Africans can no longer rely on domestic remedies.’

The LSSA aligned itself with the statement by the International Bar Association that, ‘South Africa was one of the leading African countries in establishing the permanent court with a mandate to address atrocity crimes, yet it may be one of the earliest to walk away. If this decision holds, it would be an extraordinary and detrimental development for both international justice and for South Africa.’

In considering the preamble to our local Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 – ‘Mindful that –
• throughout the history of human-kind, millions of children, women and men have suffered as a result of atrocities which constitute the crimes of genocide, crimes against humanity, war crimes and the crime of aggression in terms of international law;
• the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations;
• the Republic of South Africa is committed to – bringing persons who commit such atrocities to justice, either in a court of law of the Republic in terms of its domestic laws where possible, pursuant to its international obligations to do so when the Republic became party to the Rome Statute of the International Criminal Court, or in the event of the national prosecuting authority of the Republic declining or being unable to do so,

LSSA speaks out against withdrawal from ICC; welcomes withdrawal of charges against Finance Minister and release of State of Capture report
in line with the principle of complementarity as contemplated in the Statute, in the International Criminal Court … .’

The LSSA asked what had changed in our government’s commitment to the fight against impunity?

Mr van Rensburg and Mr Ntoses point out that the withdrawal from the ICC followed our government’s agreement to changes brought about in 2014 to the Southern African Development Community (SADC) Summit Protocol. As it now stands, the SADC Protocol deprives citizens in the SADC region – including South Africans – of the right to refer a dispute between citizens and their government to the SADC Tribunal if they fail to find relief in their own courts. Only states can refer disputes to the SADC Tribunal. ‘The LSSA is challenging this in the Gauteng High Court,’ they said.

The LSSA also stressed that the African Court on Human and Peoples’ Rights (AfCHPR) had the potential to enforce human rights through proper judicial processes and has relative independence from political leaders. However, although SA had ratified the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights on 3 July 2002, it has yet to submit a declaration accepting the competence of the AfCHPR to receive cases under art 5(3) of the protocol. At least two cases from SA had been brought before the AfCHPR, but the court had to dismiss these cases due to lack of jurisdiction in the absence of the declaration by our government, as the AfCHPR may not receive any petition under art 5(3) involving a state party, which has not made such a declaration.

LSSA recognises service to the profession by former council members

The council of the Law Society of South Africa (LSSA) resolved earlier this year to present certificates to council members who had served on council and completed their term of service. The certificates are to recognise the contribution to the attorneys’ profession made by attorneys – many of whom are now judges – who have served as council members of the LSSA. It was also resolved that to present the certificates to former councillors attending the annual general meetings of their relevant provincial law society during October and November this year.

Service by the following councillors (who are no longer on the LSSA’s council) was recognised:

- Susan Abro (former Co-chairperson)
- Koos Alberts
- Allison Alexander
- John Anderson
- Eric Barry
- William Booth
- Daryl Burman
- Peter Childs
- Llewelyn Curlewis
- Mara de Klerk
- CP Fourie
- Iqbal Ganie
- Richard Scott (right)
- Judge Babalwa Mantame
- Clayton Manxiwa
- Jan Maree (former Co-chairperson)
- Percival Maseti
- Kathleen Matolo-Dlepú (former Co-chairperson)
- Judge Yvonne Mbathe
- Davies Mcelu
- Sithembile Mgxaja
- Judge Atkins Moleko
- Judge Jake Moloi (former Co-chairperson)
- Saloshna Moodley
- the late George Moolman
- McDonald Moroka
- Judge Segopotsie Sheila Mphahlele
- Henry Msimang (former Co-chairperson)
- Janine Myburgh
- Nosidima Ndlovu (former Co-chairperson)
- the late Edward Mvuseni Ngubane (former Co-chairperson)
- Silas Nkamun (former Co-chairperson)
- Judge Lister Nuku
- Christoff Pauw
- Judge Thoba Poyo-Dlwati (former Co-chairperson)
- David MacDonald (former Co-chairperson)
- Strike Madiba
- Pumzile Majeké
- Judge Atkins Moleko
- Jan Maree (former Co-chairperson)
- Percival Maseti
- Kathleen Matolo-Dlepú (former Co-chairperson)
- Judge Yvonne Mbathe
- Davies Mcelu
- Sithembile Mgxaja
- Judge Atkins Moleko
- Judge Jake Moloi (former Co-chairperson)
- Saloshna Moodley
- the late George Moolman
- McDonald Moroka
- Judge Segopotsie Sheila Mphahlele
- Henry Msimang (former Co-chairperson)
- Janine Myburgh
- Nosidima Ndlovu (former Co-chairperson)
- the late Edward Mvuseni Ngubane (former Co-chairperson)
- Silas Nkamun (former Co-chairperson)
- Judge Lister Nuku
- Christoff Pauw
- Judge Thoba Poyo-Dlwati (former Co-chairperson)
- David MacDonald (former Co-chairperson)
- Strike Madiba
- Pumzile Majeké
- Judge Babalwa Mantame
- Clayton Manxiwa
- Jan Maree (former Co-chairperson)
- Percival Maseti
- Kathleen Matolo-Dlepú (former Co-chairperson)
- Judge Yvonne Mbathe
- Davies Mcelu
- Sithembile Mgxaja
- Judge Atkins Moleko
- Judge Jake Moloi (former Co-chairperson)
- Saloshna Moodley
- the late George Moolman
- McDonald Moroka
- Judge Segopotsie Sheila Mphahlele
- Henry Msimang (former Co-chairperson)
- Janine Myburgh
- Nosidima Ndlovu (former Co-chairperson)
- the late Edward Mvuseni Ngubane (former Co-chairperson)
- Silas Nkamun (former Co-chairperson)
- Judge Lister Nuku
- Christoff Pauw
- Judge Thoba Poyo-Dlwati (former Co-chairperson)
- David MacDonald (former Co-chairperson)
- Strike Madiba
- Pumzile Majeké
- Judge Babalwa Mantame
- Clayton Manxiwa
- Jan Maree (former Co-chairperson)
- Percival Maseti
- Kathleen Matolo-Dlepú (former Co-chairperson)
- Judge Yvonne Mbathe
- Davies Mcelu
- Sithembile Mgxaja
- Judge Atkins Moleko
- Judge Jake Moloi (former Co-chairperson)
- Saloshna Moodley
- the late George Moolman
- McDonald Moroka
- Judge Segopotsie Sheila Mphahlele
- Henry Msimang (former Co-chairperson)
- Janine Myburgh
- Nosidima Ndlovu (former Co-chairperson)
- the late Edward Mvuseni Ngubane (former Co-chairperson)
- Silas Nkamun (former Co-chairperson)
- Judge Lister Nuku
- Christoff Pauw
- Judge Thoba Poyo-Dlwati (former Co-chairperson)
Normal price: R 940
Discount Price: R 752

Allen West - 20% discount for delegates who attended the Conveyancing seminar or who participate in the Conveyancing webinars. Contact Babalwa@LSSALEAD.org.za.

THE PRACTITIONER’S GUIDE TO
CONVEYANCING AND NOTARIAL PRACTICE

NOW INCLUDES
WORD AND PHRASES INDEXING

ABOUT THE AUTHOR: ALLEN WEST

Allen West was the Chief of Deeds Training from 1 July 1984 to 30 September 2014 and is presently a Property Law Specialist at MacRobert Attorneys in Pretoria. He is the co-author of numerous books on conveyancing and has published more than one hundred articles in leading law journals. Allen is a lecturer at the University of Pretoria and a moderator and consultant of Conveyancing subjects at UNISA. He has presented courses for the LSSA (LEAD) since 1984 and has served on the following boards: Sectional Title Regulation Board, Deeds Registries Regulation Board, and Conference of Registrars, as well as numerous other related committees. Until September 2014, Allen was the editor of the South African Deeds Journal (SADJ) since its inception.

2016 EDITION
The 2016 edition includes all new updates for the past year and now also has an index to assist both the student and professional alike.

The Guide has been updated with:
• more than 130 Conference Resolutions;
• all recent case law;
• the last two years new legislation and amended legislation
• the last two years Chief Registrars Circulars, in total exceeding 50; and
• the latest practice and procedures.

The Guide now incorporates:
• a subject index of all Chief registrars Circulars from 1940 to date; and
• a word and phrases index to facilitate research.

The Guide is:
• Concise and easy to read;
• A handy reference for further research on a topic; and
• A must-have for preparation of deeds and documents.

2016 Practitioner’s Guide to Conveyancing and Notarial Practice is sold by LEAD. To buy, please complete the order form or download the form from the website www.LSSALEAD.org.za.

Special offer: For more info, please contact Babalwa@LSSALEAD.org.za.

Lifelong learning towards a just society
People and practices

Compiled by Shireen Mahomed

New boutique law firm Nicqui Galaktiou Inc in Bryanston has new appointments and promotions.

Nicqui Galaktiou is the founder and director of NGInc.
Kameshni Naidoo has been appointed as a senior associate at NGInc.
Megan Ross has been promoted to a senior associate at NGInc.

Bowman in Johannesburg has two promotions.

Lefentse Bodibe has been promoted as a senior associate in the banking and finance department.
Dominique Saayman has been promoted as a senior associate in the corporate department.

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.

All People and practices submissions are converted to the De Rebus house style.

Advertise for free in the People and practices column. E-mail: shireen@derebus.org.za

Are you considering your future?

Southern Business School
Creating Leaders

Tel: +27 (0) 11 662 1444
Fax: +27 (0) 86 586 6969
info@sbs.ac.za
masters@sbs.ac.za
www.sbs.ac.za
@SouthernBSchool

REGISTER NOW

We offer the following registered qualifications in Law

Bachelor of Commerce in Law
Higher Certificate in Paralegal Studies

Running a business opens one to susceptibility to fraudsters who are continuously looking for new ways to make money. Scams against legal firms have been, and continue to be, on the rise. No firm is immune and should be on the lookout for potential scams attempted against them.

In order to position yourself and limit the probability of being scammed and - ultimately losing money to fraudsters - it is important that you have a good understanding of how your stakeholders operate, what their service offering is and how they would interact with you. Some of the attempts made by the fraudsters may appear to be obvious, but these may not be so obvious to everyone, and continue to be experienced by some legal firms. In this article, the Attorneys Fidelity Fund (AFF) will, in an attempt to raise awareness, share some of the scams perpetrated against attorneys.

It is recommended that this article is read together with the following articles -

* ‘Are you losing money through EFTs?’ (2014 (June) DR 18); and

Fraudsters often purport to be a stakeholder, for example, the AFF. It, therefore, becomes very important for the legal firm to take note of the following:

### Forms of scams

| The perpetrator will call the firm and advise that they mistakenly deposited an amount into the firm’s trust or business account when it was meant for another firm and would like a refund. | Depending on the form of the attempted scam, a legal firm should consider the following:
- Ascertain if your firm is expecting any refunds, whether for audit fees or bank charges and what the amounts applied for are.
- Check if the letterhead used is that of the purported stakeholder. This necessitates knowledge of the correct name of the stakeholder, the current logo of the stakeholder and the directors or senior personnel of the stakeholder, which would be reflected on the letterhead.
- Check if the e-mail address used is that of the purported stakeholder. It is important to know the extension of the e-mail addresses of the purported stakeholder. For instance, the e-mail addresses of the AFF have the extension fidfund.co.za after the @ sign. Fraudsters would perhaps use an e-mail address with an extension fidfund.co.za after the @ sign. |

| The perpetrator will advise the firm that an incorrect amount was refunded in respect of a refund application for audit fees and/or bank charges. They will then ask for a refund of a portion of the amount. | Frauds may purport to be an existing client and provide a different account number into which money due to them should be paid. |

| The perpetrator will call the firm purporting to be a client of the firm and ask for banking details of the firm in order to make a deposit. A few days later, the perpetrator will make another call suggesting that they incorrectly paid money into the account. | The perpetrator will send an e-mail to the firm advising that an amount was incorrectly paid into the firm’s trust or business account when it was meant for another firm. |

| The perpetrator will send post mail to the firm advising that an amount was incorrectly paid into the firm’s trust or business account when it was meant for another firm. | The perpetrator will send post mail to the firm advising that an amount was incorrectly paid into the firm’s trust or business account when it was meant for another firm. |

| • Check if the quoted amount was received in your trust or business account as claimed. • Check on the bank statement if the amount was paid in cash or cheque. If the amount was received as a cheque deposit, do not be pressured to make a refund until the cheque has been cleared and confirmed as such with the bank. The perpetrator will apply pressure on you to refund them, do not succumb to the pressure. • Inform the person requesting a refund that you will process a refund of the money as soon as it is cleared on your account and ask for proof of the deposit. • Ask the person requiring a refund to provide you with their banking details. It is important to know your stakeholders’ bankers and perhaps their bank details. Remember, the banking system recognises an account number and not an account name. The perpetrator can, therefore, give you an account name of your stakeholder that they are purportedly representing, but the account number will not be that of the stakeholder. • Inform the stakeholder affected before you even consider a refund. • When informing the purported stakeholder, do not use any of the contact details provided by the purported stakeholder representative, check the legitimate contact details on the stakeholder’s website or inquire with your provincial law society. |

| • • • • | • • • • |

| Forms of scams | Considerations to be made by the legal firm |
Forms of scams

A fraudster may hijack the identity of a senior partner in the practice, and send an e-mail to the bookkeeper containing a payment instruction.

Considerations to be made by the legal firm

Carefully check the sender's e-mail address to establish its veracity, and if there is any doubt, obtain confirmation that the e-mail is genuine.

As a general rule, the AFF would never advise attorneys to retain a portion of an amount that was erroneously paid into your account. If this should happen, it is guaranteed to be attempted fraud. Be on the lookout.

It is important to realise that should you fall victim of a fraudulent scam, specifically on your trust account, you will end up with a trust deficit position, and that has a number of negative implications for you as a practitioner and for your firm. Stay alert and do not fall victim.

Looking for a candidate attorney?

Legal Education and Development, Law Society of South Africa renders a free service which is beneficial to both prospective principals and prospective candidate attorneys.

This free of charge service operates as follows:

• Information regarding prospective candidate attorneys (law graduates) is gathered and kept in a databank. This information includes personal particulars, degree(s), working experience etcetera.
• Prospective principals contact Legal Education and Development (LEAD) if they need to appoint a candidate attorney.
• The data service will provide the prospective principal with the information required.
• The prospective principal then contacts the candidates of his/her preference to arrange interviews.

This project is made possible through the subvention by the Attorneys Fidelity Fund.

Should you wish to participate in this project, please feel free to contact: Dianne Angelopulo at (012) 441 4622 or e-mail: dianne@LSSALEAD.org.za

De Rebus welcomes contributions in any of the 11 official languages, especially from practitioners. The following guidelines should be complied with:

• Contributions should be original and not published or submitted for publication elsewhere. This includes publication in electronic form, such as on websites and in electronic newsletters.
• De Rebus only accepts articles directly from authors and not from public relations officers or marketers.
• Contributions should be useful or of interest to practising attorneys, whose journal De Rebus is. Preference is given, all other things being equal, to articles by attorneys. The decision of the editorial committee is final.
• Authors are required to disclose their involvement or interest in any matter discussed in their contributions.
• Authors are required to give word counts. Articles should not exceed 2 000 words. Case notes, opinions and similar items should not exceed 1 000 words. Letters should be as short as possible.
• Footnotes should be avoided. Case references, for instance, should be incorporated into the text.
• When referring to publications, the publisher, city and date of publication should be provided. When citing reported or unreported cases and legislation, full reference details must be included.
• All sources in the article should be attributed.
• De Rebus will not publish plagiarised articles.
• Authors are requested to have copies of sources referred to in their articles accessible during the editing process in order to address any queries promptly.
• Articles should be in a format compatible with Microsoft Word and should either be submitted by e-mail or, together with a printout on a compact disk. Letters to the editor, however, may be submitted in any format.
• The Editorial Committee and the editor reserve the right to edit contributions as to style and language and for clarity and space.
• Articles should be submitted to De Rebus at e-mail: derebus@derebus.org.za or PO Box 36626, Menlo Park 0102 or Docex 82, Pretoria.
• In order to provide a measure of access to all our readers, authors of articles in languages other than English are requested to provide a short abstract, concisely setting out the issue discussed and the conclusion reached in English.
• Articles published in De Rebus may not be republished elsewhere in full or in part, in print or electronically, without written permission from the De Rebus editor. De Rebus shall not be held liable, in any manner whatsoever, as a result of articles being republished by third parties.
• For further information contact De Rebus at (012) 366 8800 or e-mail: derebus@derebus.org.za
O
one of the purposes of the National Credit Act 34 of 2005 (as amended) (the Act) as set out in its preamble, is ‘to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting.’ It is, therefore, clear that, in the prevention of reckless credit, obligations exist not only for a credit provider, but also for a prospective consumer.

When does reckless credit occur?

When making a determination whether a credit agreement is reckless, one must focus one’s attention on the period when the consumer applied for credit (s 80(1) of the Act).

If, during this period, a credit provider failed to conduct an assessment in terms of s 81(2) of the Act or if, having conducted such an assessment, a credit provider entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that the consumer did not understand or appreciate the risks, costs or obligations under the proposed credit agreement or entering into that credit agreement would make the consumer over-indebted, the credit agreement is reckless in terms of s 80(1).

What are a credit provider’s obligations and when are these obligations created?
The obligations of a credit provider are set out in s 81(2), which states that a credit provider must not enter into a reckless credit agreement, and requires ‘reasonable steps’ to be taken to first assess the proposed consumer’s general understanding and appreciation of the risks, costs, rights and obligations under the credit agreement, the proposed consumer’s debt repayment history, and the existing financial means, prospects and obligations of the proposed consumer.

Thus, a credit provider’s obligations come into existence when a consumer applies for credit.

The requirement that a credit provider must take ‘reasonable steps’ in its assessment was described by Louw J at para 60 in the judgment of Absa Bank Ltd v De Beer and Others 2016 (3) SA 432 (GP) as an assessment which is done ‘reasonably, ie not irrationally.’

A credit provider’s obligation to conduct an assessment in terms of s 81(2) was discussed at some length by Satchwell J at para 24 to 28 in the judgment of Absa Bank Limited v Kganakga (GP) (unreported case no 26467/2012, 18-3-16) (Satchwell J). The issues to be covered by the assessment are –

• a consumer’s state of mind as it relates to his or her understanding of the risks and costs of the proposed credit and the consumer’s right and obligations under a credit agreement;

• a consumer’s previous experience and behaviour as a consumer under a credit agreement; and

• the finances of a prospective consumer at the time of the application must be disclosed to ensure that the consumer can afford to pay the instalments in terms of the credit agreement.

A further assessment is required in terms whereof, a credit provider must assess whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement. The commercial purpose must, therefore, relate directly to the application for credit and, as appears at para 31 of the Kganakga judgment, the ‘commercial purpose does not pertain to any other or underlying agreement with other persons.’

For purposes of conducting the assessment contemplated in s 81, the credit provider may in terms of s 82(1) of the Act, determine for itself the evaluative mechanisms or models and procedures to be used, provided that this will result in a fair and objective assessment. It is interesting to note that the wording of s 82(1) does not place an obligation on the credit provider insofar as determining its own evaluative mechanisms or models and procedures. However, a credit provider is ultimately not left with any alternative if it wishes to comply with its obligations in terms of the s 82(1).

This was illustrated in the Kganakga judgment, where it was found that no proper assessment was done by the credit provider even though ‘reasonable steps’ were in place to conduct the necessary assessment.

The obligations of a credit provider are, however, not limited to the requirements of s 81(2). In what can almost be described as a verbatim repetition of s 81(2) (and perhaps a further reminder to credit providers not to enter into reckless credit agreements with consumers). Section 81(3) spells out that the credit provider must not enter into a reckless credit agreement with a prospective consumer. It is unlikely that the legislature ever intended to unintentionally repeat itself and this peremptory provision creates a further obligation for credit providers.

What are a consumer’s obligations and when are these obligations created?

Before examining the nature and duration of a prospective consumer’s obligations, one must consider their underlying purpose – to assist a credit provider with its assessment as contemplated in s 81(2).

The obligations of a prospective consumer in the prevention of reckless credit are set out in s 81(1), which states that: ‘[W]hen applying for a credit agreement, and while that application is being considered by the credit provider, the prospective consumer must fully and truthfully answer any requests for information made by the credit provider as part of the assessment....’

A prospective consumer’s obligations therefore come into existence at the moment when applying for credit, and continue to exist while the application for

DE REBUS – DECEMBER 2016

- 24 -
credit is being considered by the credit provider. During this time, a prospective consumer must fully and truthfully disclose the information required by the credit provider in making its assessment.

What remedies are available to a consumer when a credit agreement is believed to be reckless?

Depending on the circumstances, a consumer may either raise reckless credit as a defence, or make application to court or to the National Consumer Tribunal (the tribunal) to have a credit agreement declared reckless.

If a consumer alleges that a credit agreement was concluded recklessly, sufficient facts must be presented in support of such an allegation. Our courts have not been inclined to declare credit agreements reckless in the absence of substantiated and detailed allegations. This was clearly illustrated in the judgment of SA Taxi Securitisation (Pty) Ltd v Mbathe and Two Similar Cases 2011 (1) SA 310 (GSJ). At para 26 of this judgment, Levenberg AJ noted with some concern that there is a tendency for defendants to make bland allegations that they are ‘over-indebted’ or that there has been ‘reckless credit’. He continued by saying that a bald allegation that there was ‘reckless credit’ will not suffice.

Should a consumer be successful in proving that a credit agreement was concluded recklessly, the court or tribunal may make an order in terms of s 83(2) of the Act whereby all or part of the consumer’s rights and obligations under the agreement are set aside, or suspend the force and effect of the agreement.

Again with reference to the De Beer judgment, the court or tribunal should be mindful that the remedy must be ‘just and equitable’, taking into account factors such as the ‘extent of the recklessness’.

What defences are available to the credit provider?

Although the Act clearly creates more obligations for a credit provider than for a consumer, it does provide a credit provider with a complete defence to an allegation of reckless credit.

The defence is set out in s 81(4) and states that, if a consumer failed to fully and truthfully answer any requests for information made by a credit provider as part of its assessment, and such failure materially affected the ability of the credit provider to make a proper assessment, the credit provider will have a complete defence to the consumer’s allegation of reckless credit.

Despite the provisions of s 81(4), a credit provider may still have a defence regardless of whether a consumer made a full and truthful disclosure.

To illustrate this point, one can refer to the judgment by Ebrahim J in Standard Bank of South Africa Ltd v Herselman (FB) (unreported case no 328/2015, 3-3-2016) (Ebrahim J), where the consumer was found to have made a full and truthful disclosure. However, the credit provider complied with its obligations in that it conducted the required assessment. It was, therefore, held that the defence of reckless credit was without merit.

A consumer must, therefore, be very careful in circumstances where he or she may, in fact, be the one throwing stones in a glass house.

Conclusion

Reckless credit is not a one-way street. The Act creates obligations for both the consumer and the credit provider, and each party is therefore, in its own way, equally responsible for preventing the conclusion of a reckless credit agreement.

By Kgomotso Ramotšho

The office of the Judge President Gauteng Division of the High Courts of South Africa, released a new Practice Note that intends to remove unnecessary delays in criminal trials and introduce necessary enhancements, as well as trial dates.

The Practice Note states that amendments to the process and procedures set out in it will be considered on an ongoing basis in light of the experience gained by all participants in the course of the application of the Practice Note. All criminal trials shall be preceded by a pre-trial conference to be held in terms of the Practice Note.

The Practice Note also states that all trials transferred from the magistrates’ courts to the High Court roll for the first time shall be subject to a pre-trial conference. In terms of the Practice Note, all notifications regarding the holding of pre-trial conferences, as well as other related matters, where necessary will be issued by the Chief Registrar.

Furthermore, pre-trial conferences held in terms of the new Practice Note will be presided over by judges designated by the Judge President and the pre-trial conference in all cases must be attended by –

- the accused;
- the legal representative of the accused; and
- a representative of the Director of Public Prosecutions.

It also states that all parties may seek directives from the judge presiding in any pre-trial conference in regard to the implementation of any pre-trial procedures. The new Practice Note applies to all criminal trials to be heard in the Gauteng Division, Gauteng Local Division, and Gauteng Division Acting as the Mpumalanga Division of the High Court. The Practice Note took effect on 7 October.

No more delays on criminal trials

Kris Harmse LLB (UJ) is an attorney at Smit Sewgoolam Inc in Johannesburg.

Kgomotso Ramotšho Cert Journ (Boston) Cert Photography (Vega) is the news reporter at De Rebus.
Zoning matters: A ‘SPLUMA’ score-card one year on

By Peter Murray

Planning law shapes and determines our daily activities in important and pervasive ways. The buildings in which we work and live; the roads on which we drive; the reservoirs and substations that supply water and electricity, were all planned, authorised, and continue to exist within a complex legal system of interlinked Acts, ordinances, regulations and town planning schemes.

Many participants in the property industry have, for some time believed, that a systemic overhaul of planning law was needed. In 2001 the White Paper on Spatial Planning and Land Use Management described as part of its findings ‘an extraordinarily complex and inefficient legal framework, with planning officials in all spheres of government having to deal with numerous different systems within the jurisdiction of each province, and indeed within most municipalities.’

Pursuant to the White Paper, the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) was passed into law on 1 July 2015. SPLUMA refers in its preamble to the fragmentation, duplication and unfair discrimination, which characterised pre-existing planning law. One of the main aims of the legislation is, therefore, to create a uniform, recognisable and comprehensive system of spatial planning and land use management throughout South Africa (SA).

This article examines whether – one year since its commencement – SPLUMA has changed our understanding of and approaches to spatial planning and land use management, and whether it has succeeded – from the perspective of planning practice – in its stated aim of ushering in a unified and coherent system of planning law.

Pre-existing legislation

Prior to SPLUMA planning legislation consisted principally of provincial ordinances and Acts. Only two provinces (Northern Cape and KwaZulu-Natal) adopted post-1994 legislation to deal with planning matters; the other provinces continue to utilise ordinances that pre-date democratic constitutionalism. Although SPLUMA now applies nationally, pre-existing provincial legislation has not been repealed and it remains in force. A more coordinated approach would have been to enact SPLUMA only when the provinces were in a position to repeal their planning legislation. SPLUMA is, therefore, an overlay to – rather than a replacement of – existing provincial acts and ordinances. It is not clear how long it will take to phase out the existing provincial legislation.

The existence of coinciding national and provincial planning regimes inerv-
 prescribe 'an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner inconsistent with the provisions of this Act'. In practice, deciding whether an alternative or parallel mechanism is inconsistent with SPLUMA presents considerable interpretive difficulties, and conflicting legal interpretations.

Rather than introducing a uniform system, SPLUMA has added another legislative layer to the already complex myriad of legislation which it sought to replace. SPLUMA attempts to address this difficulty in s 2(2), which provides that legislation other than SPLUMA may not

Spatial development frameworks

In terms of s 12 of SPLUMA each sphere of government must prepare its own spatial development framework (SDF). The framework interprets and represents the spatial development vision of that sphere of government. SPLUMA sets out extensive checklists for the contents of an SDF.

Three conceptual difficulties arise, namely:

- The courts have held that planning is, constitutionally, an exclusive area of municipal competence (see, for example, City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC)). The role and function of national and provincial SDFs is, therefore, not clear, and SPLUMA provides no guidance. This apparent conflict between the Constitution and SPLUMA’s reference to SDFs is still to be resolved.

- The Local Government: Municipal Systems Act 32 of 2000 already deals with SDFs. It is not clear why the mechanism has been repeated in SPLUMA and how conflicts between the two enactments must be understood.

- Section 18 of SPLUMA provides that the Minister may publish an SDF for 'any region of the Republic', however, a region is not defined and it is not clear how this will work in practice.

An intractable problem, which causes practical difficulties on a daily basis, arises from s 22 of SPLUMA, which determines the legal status of SDFs. Section 22(1) provides that neither a planning tribunal nor any other authority may make a decision 'which is inconsistent with a municipal spatial development framework'; in terms of s 22(2) decision-makers may depart from the provisions of an SDF 'only if site-specific circumstances justify a departure'.

Although this formulation gives significant flexibility to decision-makers, the sub-sections appear contradictory.

In their written motivations, and in oral arguments before the tribunal, practitioners should be aware that all land use applications must be motivated in terms of the five principles.

Furthermore, the Minister of Rural Development and Land Reform, must in terms of s 8 of SPLUMA prescribe a set of norms and standards for land use management and land development. These must reflect national policy and promote social inclusion and spatial equity. The norms and standards have not yet been published; it is also not clear how they will relate to and intersect with the development principles.

The norms and standards have not yet been published; it is also not clear how they will relate to and intersect with the development principles.

DE REBUS – DECEMBER 2016

- 27 -
tions to any person in the service of a modernised.

fore, been considerably widened and deciding land use applications has, there-

innovative and will hopefully be utilised for co-opting experts and expertise are

management. The SPLUMA mechanisms experience of spatial planning and land use appointees who have knowledge and ex-

either municipal officials or council

are either municipal officials or council consists of at least five members who are either municipal officials or council appointees who have knowledge and experience of spatial planning and land use management. The SPLUMA mechanisms for co-opting experts and expertise are innovative and will hopefully be utilised extensively in practice.

Tribunals have powers to -
• approve or refuse land use applications;
• impose reasonable conditions;
• conduct investigations;
• give directions relevant to their func-
tional framework; and
• decide questions of their own jurisdic-
tion.

Various different types of applications are mentioned in s 41, namely -
• township establishment;
• subdivision of land;
• consolidation of land;
• the amendment of a town planning scheme; or
• the removal amendment, or suspen-
sion of a restrictive condition.

Section 42 sets out the factors, which a tribunal must take into considera-
tion in deciding applications. Previously decision-makers would take into con-
sideration the need for and desirability of proposed land use change. In terms of SPLUMA these factors have been re-
placed with -
• public interest;
• constitutional transformation impera-
tives;
• facts and circumstances relative to the application;
• respective rights and obligations of all those affected;
• the state of and impact on engineering services, social infrastructure, and open space requirements; or
• any factors that may be prescribed.

The nature and extent of factors that must be taken into consideration in de-
ciding land use applications has, there-

in terms of s 45 of SPLUMA applica-
tions may be submitted by an owner, an agent, or any person in terms of a land availability agreement. An innovation is that a service provider responsible for the provision of infrastructure to the land may also apply for the rezoning of land.

One of the most notable omissions from the SPLUMA is that in providing land use change procedures it does not mention that interested and affected parties may object to applications. This has been a key feature of planning procedures for many decades, and it has provided a valuable procedural remedy to neighbouring property owners, residents, activists, and even competitors who oppose proposed land use change. Regulation 14(1) (d) of the SPLUMA regulations (GN R239 GG38594/23-3-2015) provides that municipalities must provide - in terms of by-laws - for ‘the manner and extent of the public participation process for each type of land development and land use application.’ Some by-laws provide for an objection procedure. It is not inconnec-
table, however, that some by-laws might not provide one. Practitioners will have to consider the by-laws of the municipality concerned before deciding how best to oppose a land use application or to resist an objection.

Although SPLUMA does not provide a uniform objection remedy across SA it does introduce a new intervener petition process (s 45(2)). Any person who is interested in or affected by proposed land use change may apply for intervener status. The intervener petition may seem-

ingly be launched at any time, even if the window period for objections (in terms of the applicable by-laws) has closed.

Any person whose rights are affected by a decision taken by a tribunal may, within 21 days, lodge an appeal. This is a wider formulation than previous ones where only objectors could lodge appeals.

Appeals are heard either by the execu-
tive authority of the municipality (the exec-
utive committee or the executive mayor) or by a body or institution outside of the municipality. In terms of reg 23 the appeal authority may hear the appeal by means of a ‘written hearing’ or an ‘oral hearing’. I submit that both formulations are unfortunate. Firstly, in some munici-
palities the executive authority will serve as the appeal authority. In others, an out-
side body will be designated. A greater degree of objectivity can, naturally, be expected from outside bodies. Secondly, the decision to hold a hearing or not is discretionery and no objective criteria are set out for purposes of exercising the discretion. In practice, very few appeal proceedings are held. In the previous planning paradigm most provinces con-
vised a Townships Board for purposes of hearing appeals. Large amounts of institutional expertise developed within the boards, as well as a high degree of objectivity. This might now have been lost.

Land use management systems

Chapter 5 of SPLUMA deals with land use management.

Section 24 of SPLUMA is a welcome innovation in terms of which every mun-
icipality must, after public consulta-
tion, and within five years from the com-
mencement of SPLUMA, approve a single land use scheme for its entire area of jurisdiction. At present some munici-
palities have more than one scheme. Many areas within SA fall outside of the area of a scheme. Areas, which previously did not fall under a town planning scheme, will in the future fall within a unified scheme area.

SPLUMA sets out a checklist of impor-
tant matters, which must be included in any new land use scheme. Furthermore, s 25 modernises the purpose of a land use scheme and now refers to economic growth, social inclusion, efficient land development and minimum impact on public health, the environment and natural resources. A further innovation is that a municipality must review its land use scheme at least every five years. Pre-
viously land use schemes were not re-
viewed for years or even decades.

Conclusion

Prior to the advent of SPLUMA planning law was severely fragmented, consisting as it did of levels and layers of confusing, disparate legislation. There was a dire need for reform.

SPLUMA constitutes an important step towards a uniform system, which is na-
tionally applicable and more modern in its approach to planning. However, given the central role of planning in guiding and regulating the manner in which our cities, towns and rural areas develop and change, a valuable opportunity has been missed. SPLUMA should have re-
placed the provincial planning regimes; the time lapse between SPLUMA and the new by-laws is problematic in practice; and the new schemes should have been ready for simultaneous implementation. This is particularly regrettable given the lapse of 15 years between the White Pa-
per and the SPLUMA effective date. Fur-
thermore, some of the procedures in and substance of SPLUMA appear not to have been conceived having sufficient regard for the practice of planning law, and with a clear vision of the systemic change that was and is required. It will remain, un-
fortunately, for the courts, and future legis-
vative amendments, to iron out the creases.

Peter Murray BA (Hons) LLB (Rhodes) is an attorney at Murray van Rensburg Inc in Johannesburg.
CLIMATE CHANGE
Law and Governance in South Africa

TRACY HUMBY, LOUIS KOTZÉ, OLIVIA RUMBLE, ANDREW GILDER (EDITORS)

Published in loose-leaf format and updated annually, *Climate Change: Law and Governance in South Africa* provides a comprehensive analysis of climate change, the relevant laws and policies and their intersection with international governance structures.

This *first* South African *comprehensive & critical scholarly treatise* on the subject:

- maps the field and explains the framework of climate law and governance in Southern Africa;
- engages with climate governance and is multi-disciplinary, encompassing legal, economic, humanitarian, and socio-political insights;
- focuses on law and the regulatory role of law in promoting adaptation to climate change and its effects;
- covers a wide range of issues including concepts of climate law and governance, climate change ethics, climate change science, and the history of South Africa’s journey in the complex climate change landscape;
- is authored by leading South African academics and lawyers in the field.

Loose-leaf 730 pages ZAR 1,200

*Price for main volume includes 14% VAT, and is valid until 30 June 2017. Excludes delivery and the cost of future loose-leaf revision service updates.*
The purpose of this article is to briefly introduce a discussion around appraisal rights, their history and background, how they find application under our Companies Act 71 of 2008 (the Companies Act) and the impact they have had so far in our company law regime as far as the protection of minority shareholders is concerned.

The concept of appraisal rights is to enable shareholders who disagree and/or dissent from a corporate decision of a company to exit the company by having the company pay them for the fair value of their shares.

The overall and accepted premise is that 'fair value of the shares paid to the dissenters must compensate shareholders for their investments, expectations, and results in a corporation' (Garza Castañeda (op cit at 821) taking into account the inherent risks involved in running a business including the highs and lows and the lack of luck involved sometimes.

Appraisal rights are available only under limited circumstances that result in a change of control of a company and involve:

• implementation of a proposed merger involving the company;
• a share exchange agreement resulting in a control acquisition of the company's shares;
• a sale of all or a substantial part of the company's property other than in the usual and regular course of business; and
• an amendment to the company's articles that has a material and/or adverse effect on the rights of the dissenter's shares.

The Companies Act came into effect in May 2011 and the Act has, as one of its main aims and purposes, the provision of appropriate redress for investors and third parties involved in companies and in particular, minority shareholders. To that end, the Companies Act has established entities that have the responsibility of interpreting and applying the provisions designed to achieve this purpose, one of them being the Takeover Regulation Panel, which has, as its main purpose, the protection of the rights of minority shareholders during offers to ensure that the shareholders are provided with sufficient information and adequate time to make informed decisions about offers and transactions undertaken by a company.

The Companies Tribunal is also established as an alternative dispute resolution body to deal with mainly shareholders' and other company law-related in a relatively quick and less costly manner.

The main provisions of the Companies Act created to serve the above purposes is s 163, which seeks to provide relief to shareholders or directors from oppressive or prejudicial conduct enabling a

T
shareholder to apply to court for relief where he or she believes that conduct by the company is unfairly prejudicial to his or her rights and interests as a shareholder, or that the business of the company is being run in an unfair or prejudicial manner to his or her rights and/or interests as a shareholder.

The second major provision is s 164, which deals with appraisal rights available to dissenting shareholders. The provision and the manner in which it is written borrows extensively from the MBCA under the US laws. It enables a dissenting shareholder during an offer and under very limited circumstances -

- to inform the company of his or her intention to vote against a special resolution; and
- within a prescribed time to require that the company pay him or her the fair value for all the shares he or she holds in the company.

As with the MBCA, the provision also makes reference to 'fair value' but takes it a step further by stating under s 164(15) that the court will determine 'fair value' and may use its discretion to appoint one or more appraisers to assist in determining same and very interestingly, the court has a discretion to allow reasonable interest to be added to the amount payable to a dissenting shareholder from date of the adoption of the special resolution to date of payment.

The Companies Act does not, however, provide guidance as to how the court needs to go about in determining 'fair value'. Therefore, one foresees a similar situation as in the US, in terms of which, the courts will rely on to determine what constitutes 'fair value' and the appropriate mechanics of determining same.

As is also the case under the MBCA, the appraisal rights enabling a dissenting shareholder to exit by being paid the fair value are limited to a company effective material amendments to its Memorandum of Incorporation or a company involved in a fundamental transaction that involves -

- a company effecting a disposal of a majority of its assets or major part of its business;
- a scheme of arrangement whose purpose is mainly to expropriate shareholders; or
- a proposed amalgamation or merger in terms of s 113 of the Companies Act.

A company proposing any of the above corporate actions is further required under s 164(2)(b) to include a statement in the transaction document informing shareholders of their rights in terms of the provision and it is important that the statement be provided without any interpretation and merely as a summary of the provision with a copy of the s 164 part of the Companies Act also attached to the transaction document.

**Case law**

The case of Justpoint Nominees (Pty) Ltd and Others v Sovereign Foods Investments Limited and Others (BNS Nominees (Pty) Ltd and Others Intervening) (ECP) (unreported case no 878/16, 26-4-2016) (Stretch J) is one of the first cases heard on appraisal rights.

The brief facts of the case are that Justpoint Nominees (Pty) Ltd (Justpoint) were the registered shareholders in Sovereign Foods Investments Limited (Sovereign Foods) and the latter proposed a fundamental transaction, in terms of which, it sought to have a scheme of arrangement proposed between itself and its shareholders enabling it to re-purchase its own shares in Sovereign Foods using the provisions of s 488(0) of the Companies Act read with s 114 requiring that the transaction be effected in terms of a scheme of arrangement, which among others, requires that a special resolution approving the transaction be adopted and passed at a properly constituted meeting of shareholders before it could be implemented.

Justpoint expressed unhappiness with the proposed resolution and sent their written demand in terms of s 164(6) to be paid fair value for their shares in order to exit the company.

Sovereign Foods had included in its transaction documents, a condition precedent, to the effect that the transaction would not be implemented if it had received objections in the aggregate of 5% of its shares from shareholders exercising their appraisal rights. Sovereign Foods sent notices to shareholders in terms of ss 164(5) and 164(8) unless it decided to waive the condition precedent. The notices had been sent to the shareholders by the company.

Justpoint and an intervening party to the case, BNS Nominees (Pty) Ltd objected to the resolutions in terms of s 164(4) and the objections received amounted to more than 5% which meant that Sovereign Foods would have had to make a decision on whether the condition precedent had been fulfilled or have same waived in terms of the provisions indicated above.

Sovereign Foods failed to waive the condition precedent within the stipulated time but, instead it conjured up a new transaction (revised transaction) in terms of which it intended to re-purchase less than 5% of its shares, which would mean that the revised transaction would not fall under s 488(0) read with s 114 and that the appraisal rights would be excluded and could not apply to the transaction.

The revised transaction also sought to exclude dissenting shareholders from voting on it on the basis that they had, by exercising their rights in the initial transaction, lost their normal shareholder rights in terms of s 164(9) except for receiving fair value for their shares and, therefore, could not vote on the resolutions of the revised transaction.

The court flatly rejected the argument by holding that the failure to waive or fulfil the condition precedent meant that the initial transaction could not be operative, therefore, the shareholders could not be prevented from voting on the revised transaction on this basis and that their rights as shareholders including the right to vote as protected under s 37 must be respected.

The court also accepted the argument of BNS based on s 163 of the Companies Act, that the conduct of Sovereign Foods was both oppressive and unfairly prejudicial to its rights and interests and the court determined that the conduct of Sovereign Foods in denying the shareholders to vote on the revised transaction on the basis that they must first withdraw their appraisal rights on a transaction that was not operative was manifestly unjust, unfair and ‘denies the dissenting shareholders fair participation in the affairs of Sovereign’, being the company.

The important outcome of this case in my view is on its interpretation of s 164(9) by arguing that non-waiver or fulfillment of a condition precedent effectively means that a transaction has failed, and therefore, cannot be used to rely on s 164(9) in order to deny shareholders their right to vote on a separate transaction unless if they withdrew their appraisal rights.

**Conclusion**

The remedy of appraisal rights is an interesting inclusion in our company law and as seen above also a very strong weapon that shareholders can use to protect their rights and to withdraw from a company that has experienced a profound change from the one they had initially invested in.

Further that and as seen from the Justpoint case, the courts will adopt an equity-based approach when deciding questions such as these which means effectively that companies cannot use case technical arguments to deny minority shareholders the right to participate in the affairs of a company including exercising or withdrawing their appraisal rights.

A question has been asked on the role of the Takeover Regulation Panel in this process. Reading through the provisions of the Act, it is clear that the legislature deemed it appropriate that matters relating to appraisal rights must be primarily and directly handled by the courts.

Therefore, the panel does not have a significant role to play and whether this is correct or not remains to be seen taking into account the role and function of the regulatory body.

Basil Mashabane LLB (UP) LLM Cert in Corporate and Securities Law (Unisa) is an attorney at the Takeover Regulation Panel in Johannes-burg.
When performing any given task, using the right tool for the job will make the task significantly easier to accomplish and will also ensure that the quality of the task is superior. The same holds true for estate planning exercises and there are few tools that are on par with a trust in this regard.

A trust is a unique vehicle, which involves the exchange of assets for a complete separation of ownership and enjoyment of these assets from the personal estate of an estate planner, which in turn leads to enhanced protection from creditors. Flexibility when making use of the funds held in trust and of course the removal of assets will also reduce estate duty payable by an estate planner in future as these assets can no longer be attributed to him.

As with all things in life, there are some key elements that must be present before a trust will be able to serve the needs of the estate planner effectively, among others:

• The trust deed must be drafted meticulously and it is crucial that it be drafted specifically with the needs of the estate planner in mind. Making use of a template could lead to undesired, and sometimes disastrous, consequences such as the situation which arose in the case of Potgieter and Another v Potgieter NO and Others 2012 (1) SA 637 (SCA).
• The parties to the trust should be identified – not only with convenience in mind – but also in respect of potential benefits, which may be available.

The tax consequences surrounding the use of a trust must be considered. This discussion should not confine itself to a tactical discussion, but should instead extend to a strategic discussion, particularly in light of the recent proposals made by the Davis Tax Committee.

Each party involved in the creation of a trust deed is exceptionally important, and each has their own unique considerations to take into account.

The parties involved in the creation of the trust, and those who are later involved in the administration of the trust, are of critical importance.

It should be noted that not all of the parties who are involved in the trust deed will necessarily be involved in the administration of the trust. What follows is a brief discussion of the significance of the respective parties at the relevant stages.

Parties to a trust

The parties involved with a trust deed can generally be divided into three categories:

• The founder of the trust – this is the individual who has created the trust and makes the initial donation of funds to the trust. This is usually, but not always, the estate planner.
• The trustees of the trust – these are those individuals or entities who take responsibility for the effective administration of the trust and will ultimately handle the day to day activities of the trust.
• The beneficiaries of a trust – these are those individuals or entities, which may benefit from the trust.

Of the above, only the founder and the trustees will have a role in the creation of the trust and the conclusion of the agreement to create the trust will make the parties enter into an agreement, which is essentially a stipulatio alteri.

The founder

The identity of the founder merits some consideration, particularly since the founder of a trust can never be amended or replaced in any way and will likely continually play a role in the trust.

The founder may be involved with the trust as a trustee, a beneficiary or could even be required to take part in decisions in respect of any future amendment of the trust. Where the founder of a trust is chosen carelessly or simply based on convenience, far reaching consequences could arise.

These consequences could range from unnecessarily incurring transfer duty, which could be limited to some degree by careful planning, or could even render the amendment of the trust deed next to impossible in the event where the founder is required for the amendment and can no longer be traced.

Trustees of the trust

In South African law a trust is not a legal person, save in terms of certain pieces of legislation, but is regarded as a sui generis entity – which can only operate through the trustees – which must be appointed by the Master of the High Court, who has jurisdiction over the area where the trust is created.

Arguably, this makes the appointment
of the trustees of the trust the most important decision that needs to be made when creating a trust. The individuals appointed as trustees must act in a fiduciary capacity, in accordance with the provisions of the trust deed and must ensure that the best interests of the beneficiaries are paramount when taking any action in their capacity as trustee.

Who can, and for that matter who should, act as trustees of a trust is a matter of great importance, yet from a practical point of view it is often treated almost casually.

The question is often raised as to how the following individuals fit into the scope of trusteeship, namely:

- the estate planner;
- an independent trustee; and
- a protector.

What follows is a brief discussion of the above.

**Estate planner as trustee and the concept of a ‘sham trust’**

In the past it was regarded as a risk for the estate planner to be intricately involved in the trust administration.

It was seen as creating the impression of control over the trust assets, which could later be used against him or her should creditors, or even a spouse in the process of instituting divorce proceedings, wish to lay a claim on the assets held in trust.

This would be done on the basis of such a trust being an alter ego of the estate planner.

This is often referred to, incorrectly, as a claim that the trust is a so-called ‘sham trust’ and, therefore, the assets should be regarded as being that of the estate planner. Although the terms ‘sham’ and ‘alter ego’ are often used interchangeably, from a legal technical point of view this is incorrect and could theoretically lead to pleadings being excisable.

The term ‘sham trust’ refers to a trust which is created incorrectly, thus due to a failure to ensure that one or more of the **essentia**l **a** **t** **i** **ll**ia of a trust are present, the trust never validly came into existence and is, therefore, void **ab initio**.

It is for this reason that an investigation surrounding a ‘sham trust’ will involve an investigation of the trust deed to determine whether all of the **essentialia** are present, whereas an alter ego investigation will revolve around the use of the trust assets and the measure of control, which is afforded to an estate planner.

Although there is no prohibition on an estate planner being a trustee of his or her own trust, such an appointment must be done with the proper checks and balances taken into account to minimise the risk that a trust may be found to be the alter ego of an estate planner.

**The independent trustee**

The designation of a trustee as an independent trustee has become relatively common in practice and the norm has become that a trust will have an independent trustee appointed. An independent trustee is essentially a trustee that will act in the best interests of the beneficiaries at all times.

By the very nature of the designation, an independent trustee should not be a beneficiary of the trust. Where a trust does not contain an independent trustee, the measure of control afforded to the trustees of the trust, provided that they are also beneficiaries of the trust, is substantial and accordingly the risk factor of the trust increases.

The concept originally came into the limelight as a result of the case of **Parker (Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA); Parker NO and Others v Land and Agricultural Bank of SA [2003] 1 All SA 258 (T))**. An aspect which is often overlooked, however, is that the mention of the independent trustee does not form part of the *ratio dicadendi* at all, but was, in fact only mentioned as an *obiter dictum*.

Quite often it is misconstrued as being a legal requirement to have an independent trustee appointed to a trust deed, but this is simply not the case. Failure to appoint an independent trustee will not have any effect on the validity of the trust, however, it may affect the level of control of the estate planner.

Thus it is always preferable, but strictly speaking not necessary from a legal perspective, to have an independent trustee appointed.

**A protector**

A concept which is foreign to our law, the protector, is the ultimate guardian of the trust and although the protector has no authority to actively administer the trust, as such power always remains with the trustees, the protector does possess the authority to dismiss trustees should they fail to adhere to their duties.

Similar powers could easily be drafted into a trust deed by a skilled drafter, however, great care should be taken to ensure that the estate planner is not exposed to unnecessary risks.

The appointment of a protector could also lead to unintended tax consequenc-es as the effective management of the trust may then be deemed to follow the location of the protector and not the trustees.

**The beneficiaries**

One of the cornerstones of trust law is that there must be identifiable, or clearly ascertainable, individuals who are to receive the benefit of the trust, colloquially known as the beneficiaries of the trust.

These beneficiaries, who must be defined in the trust deed itself, can comprise of natural persons, juristic persons or even in some instances further trusts that are created as part of an estate planning process.

Practically the difference between an identified beneficiary and identifiable beneficiaries can be illustrated as follows:

- an identified beneficiary is one who is specifically mentioned in the trust deed for example, John Doe (ID No: XXX); or
- an identifiable beneficiary generally refers to a specific class of beneficiaries for example, the children of John Doe.

What is important to note, however, is that a group of beneficiaries must not be too widely defined, as a lack of identifiable beneficiaries could lead to the trust being invalid and could lead to unintentional consequences.

Although the beneficiaries are part of the trust deed, they have no control over the trust or the management thereof and unless they are in possession of a vested interest in the trust assets, which can only occur in certain circumstances, they may only have a hope to be benefitted, known as a *‘espous*’ and thus can have no claim on performance by the trustees.

**Conclusion**

The importance of ensuring that one obtains expert advice when dealing with an estate planning exercise cannot be emphasised enough. Every step taken in the process, beginning with the first consultation with your client through to the delivery of the final draft of a trust deed needs to be tailored to cater for the specific needs of each individual client at hand.

There is only one way to achieve this level of personal service and that is by ensuring that you have a skilled and trusted adviser who can assist you throughout the entire process. If such an expert is not involved in the process, the risk of having ones estate planning resulting in unwanted costs, which could likely have been avoided, becomes much higher.

Importantly it is necessary to take into account that such an adviser must not only be versed in the laws surrounding trusts and estates, but should ideally be skilled in virtually all areas of law, with particular emphasis on the laws of taxation.

These advisers, although generally few and far between, are well worth seeking out as they can ensure that the wishes of the estate planner are catered for as far as possible while also adding value to any discussions surrounding estate planning.

**Edrick Roux LLB (UP) and Bindiya Desai BCom Law LLB (UP) are senior associates at PricewaterhouseCoopers Africa in Johannesburg.**
Patent attorneys spend a great deal of time trying to find the perfect word for a technical element of an apparatus or method in patent applications. They are required to conduct the same analysis for numerical limitations, including, numerical ranges. The construction of both words and numerals needs to take place in patent attorneys’ daily practices; with the latter equally applying to all fields of technology: Electrical, chemical, mechanical, biotechnological, etcetera.

Using Smith & Nephew Plc v ConvaTec Technologies Inc [2015] EWCA Civ 607, this article will examine numerical limitations in patent claims in the United Kingdom (UK) (and by implication, South Africa (SA)), given their impact on patent enforcement/litigation.

Facts of the case
The critical issue for the court was deciding the numerical limits of the first claim of ConvaTec’s UK method Patent No. 1, 343, 510, entitled ‘Light Stabilized Antimicrobial Materials’ (the patent). This contained a third integer, which read –

‘(c) subjecting said polymer, during or after step (b) to one or more agents selected from the group consisting of ammonium salts, thiosulphates, chlorides and peroxides which facilitate the binding of said silver on said polymer [the agent being present in a concentration between 1% and 25% of the total volume of treatment], which material is substantially photostable upon drying, but which will dissociate to release said silver upon rehydration of said material.’

Smith & Nephew had developed a process that it thought would not infringe the patent, by changing the concentration of binding agent to no more than 0.77%, and this required an interpretation of the numerical limitations of the bracketed phrase in the above integer.

In a nutshell: Did Smith & Nephew’s ‘modified process’ infringe on NovaTec’s patent, which allowed for a range, namely, between 1% and 25%?

Court of Appeal’s judgment
The Court of Appeal dealt, ultimately, with one principal issue: The correct construction of the phrase ‘the agent being present in a concentration of between 1% and 25%.’

The court began its assessment by restating the approach to interpretation of patent claims as considered by Lord Hoffman in Kirin-Amgen Inc v Hoechst Marion Roussel Ltd & Ors [2004] UKHL 46.

As explained, interpretation of claims is objective and the question is always what would a skilled person have understood the patentee’s words (or numerals) to mean?

Furthermore, Lord Hoffman’s principles were summarised by Jacob L.J. in Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd [2009] EWCA Civ 1062 at para 5 as follows:

• The first overarching principle is that contained in art 69 of the European Patent Convention, which provides that the monopoly conferred by the patent must be determined by the claims. However, the description and drawings may be used to interpret the claims. In short the claims are to be construed in context. It follows that the claims are to be construed purposively - the inventor’s purpose being ascertained from the description and drawings. The question to ask is what a skilled person having the necessary skill and expertise would have understood from the patent, including the description and drawings?

• It follows that the claims must not be construed as if they stood alone – the drawings and description only being used to resolve any ambiguity. Purpose is vital to the construction of claims.

• When ascertaining the inventor’s purpose, it must be remembered that he or she may have several purposes depending on the level of generality of his or her invention. Purpose and meaning are different concepts. The patentee may have several purposes depending on the generality of his or her invention. Generally, a patentee may have one or more specific embodiments of his or her invention, as well as a generalised concept. However, there is no presumption that the patentee intended the widest possible meaning consistent with the purpose to be given to the wording he or she used in the patent.

• Thus purpose is not the be-all and end-all. One is still at the end of the day concerned with the meaning of the language used. Hence the other extreme of protocol – a mere guideline - is also ruled out by art 69 itself. It is the words or terms of the claims that delineate the patentee’s monopoly.

• It follows that if the patentee has included what is obviously a deliberate limitation in these claims, it must have a meaning. One cannot disregard obviously intentional elements or limitations.

• It also follows that where a patentee has used a word or phrase that, for contextually, might have a particular meaning (narrow or wide), it does not necessarily have that meaning in context.

• It further follows that there is no doctrine of equivalents’.

• On the other hand, purposive con-
Patent claim construction: numerical limitations

Numerical limitations on the meaning and scope of a numerical range in the patent claim must be ascertained in light of common general knowledge and in the context of the specification as a whole.

- It may be that a skilled person would understand that the patentee has chosen to express the numerals in the claim to a particular but limited degree of precision, and so intends it to include all values within the claimed range when stated with the same degree of precision.

- Finally, whether this is so will depend on all of the circumstances, including the number of decimal places to which the numerals in the claim have been expressed.

The critical phrase in the patent claim is ‘the agent being present in a concentration between 1% and 25% of the total volume of treatment’, which raised two questions for the court:

- Would a skilled person believe that the patentee intended the values of 1% and 25% to be taken as exact/absolute values, or would this person understand that the patentee used a standard number convention to express the limits of the claim to a lesser degree of accuracy?

- On the assumption that the numerical limits in the claim did not define exact/absolute values, would a skilled person understand the numbers to be expressed in terms of whole numbers (zero decimal places) or in terms of significant figures?

The court affirmed the court a quo’s rejection of Smith & Nephew’s primary case, that the limits of the claim be the range exactly between 1% and 25%. This left the court in no doubt that a skilled reader would not believe that this is how the patentee intended the claim limits to be understood. Instead, a skilled reader would believe that the patentee intended the limits to be understood in a less precise way.

Number rounding vs significant figures approaches

The court went on to discuss the ‘number rounding’ or ‘whole number’ approach.

At the bottom of the range, 1% includes all those values, which round to 1% when expressed to the nearest whole number.

The court held the ‘significant figures’ approach to be a little more complex, summarising the relevant rules as follows:

- i) non-zero digits are always significant;
- ii) zeros between non-zero digits are always significant;
- iii) leading zeros are never significant ... ; and
- iv) in the absence of a decimal point, trailing zeros are not generally significant unless stated otherwise ...

The court pointed out that the ‘significant figures’ approach gives rise to ‘very strange results if applied to the teaching in the body of specification’, citing examples from ConvaTech’s diagrams. On the contrary, the ‘number rounding’ approach produces a symmetrical distribution of random errors around a number (namely, ‘1’ incorporates all values greater than or equal to 0,5% and less than 1,5%).

The court stated that there can be no logical basis for preferring the ‘significant figures’ approach over the ‘whole number’ (or zero decimal place) approach in interpreting numerals in claims, ultimately siding with ConvaTech’s view that it is not the number of significant figures that is important in this context, but the precision with which the number is written.

Comments

In this judgment the UK Court of Appeal has shown a preference for the ‘number rounding’ approach over the ‘exact values’ and ‘significant figures’ approaches, unless the description of the specification indicates expressly otherwise.

However, the ‘number rounding’ approach, although simple to apply when construing numerical limitations and ranges, is not without its weaknesses. In this case, the result lead to 0,5% being the lowest value to be below (relative to the number ‘1’) in order to overcome the patent, which is a relatively large margin to overcome (0,5%), in my view.

Other foreign jurisdictions may interpret numerical ranges and limitations differently. Therefore, there is the possibility for variation in solutions on the same inquiry – territory by territory. This is important to take into account, as South African courts, driven by the constitutional imperative, may refer to any foreign judgments in its own assessment of a particular case. This is of particular relevance in intellectual property (including patent) matters.

Ryan Tucker BSc Genetics Developmental Biology Microbiology Biotechnology LLB (Wits) is an attorney at RM Tucker Attorneys in Johannesburg.
A smokey issue – the law relating to the distribution of e-cigarettes

Will electronic-cigarettes or e-cigarettes prevent people from smoking cigarettes? Are we just replacing one harmful device, namely, regular tobacco cigarettes, with another harmful and toxic device?

These questions make legal minds struggle all around the world. In recent years the e-cigarette industry became a 3 billion dollar industry, with approximately 466 different brands of e-cigarettes on the market worldwide (Olivia Rose-Innes ‘E-cigarettes – the slow way to poison yourself?’ www.news24.com, accessed 26-7-2016).

I will summarise the general impact and views of e-cigarettes, the health implications thereof, the regulation by legislation, the regulatory struggle and recent developments in legislation.

Composition of e-cigarettes

The one major difference between the two alternatives is that cigarettes contain tar, while e-cigarettes do not. This, however, does not mean that e-cigarettes are not harmful. The smoking of an e-cigarette will cause the heating of a liquid, which consists of nicotine, tobacco-specific nitrosamines, tobacco alkaloids, aldehydes, propylene glycol and/or glycerine, metals, volatile organic compounds and flavouring agents (Lauren K Lempert, Rachel Grana and Stanton A Glantz ‘The importance of product definitions in US E-cigarette laws and regulations’ https://tobacco.ucsf.edu, accessed 4-11-2016).

The similarities between e-cigarettes and regular tobacco cigarettes are that both contain nicotine, which is addictive and also a harmful toxin. Although different brands of e-cigarettes contain different amounts of nicotine when consumed, more surprising is that e-cigarettes also contain the toxic compound, which is found in anti-freeze (‘Summary of results: Laboratory analysis of electronic-cigarettes conducted by FDA’ www.fda.gov, accessed 18-7-2016). Another problem is that the labels on e-cigarettes are very misleading as to the levels of nicotine actually contained in the product (see table on the next page).
Health outcomes

E-cigarettes have an inflammatory effect on the epithelial cells lining the inside of the lungs. Even without the nicotine in the e-cigarettes, the other substances in e-cigarettes cause harm to these cells and make them more susceptible to infections, especially in younger persons (‘Link between e-cigarettes and respiratory infections’ www.health24.com, accessed 19-7-2016).

The carcinogen formaldehyde, contained in e-cigarettes, can be up to 15 times more toxic and cancer causing when consumed with higher voltages vapour released in e-cigarettes (‘Watch out for cancer-causing formaldehyde in new generation e-cigarettes’ www.health24.com, accessed on 19-7-2016).

Other health issues is that nicotine has a stimulating effect on the cardiovascular system, increasing the blood pressure and heart rate and it carries risk of negative effect on foetal development. There is no research showing that a regular inhalation of vapour into our lungs shows that after six to 12 months on e-cigarettes, smokers could not be cured from their tobacco cravings and were still smoking regular tobacco cigarettes (Brandel France de Bravo, Sarah Miller, Jessica Becker and Laura Gottschalk ‘Are e-cigarettes safer than regular cigarettes?’ www.stopcancerfund.org, accessed on 18-7-2016). The result is that e-cigarettes have created a population of dual-smokers, and access to smoking to the younger population, who cannot purchase regular tobacco cigarettes. Mark van der Heever, Deputy Director of Communication for the Western Cape Department of Health, stated that e-cigarettes renormalised smoking. Resultantly, the province is seriously looking at amendment to the current tobacco legislation to prevent this trend from continuing (Rose-Innes (op cit)).

E-cigarettes should thus not be excluded from tobacco products legislation, as this will undermine the intention of the legislator of tobacco legislation (Lempert et al (op cit)).

E-cigarettes in the United States (US)

After several years of uncertainty, the District of Columbia Circuit Court asserted with this dilemma when it gave judgment in the matter of Sottera Inc v US Food & Drug Administration 627 F.3d 891 (D.C Cir 2010). The question was whether e-cigarettes should be regulated by the same regulations as tobacco products by the Food and Drug Administration (FDA) or under the Tobacco Act. The e-cigarette manufacturers argued that their products were promoted as being for ‘smoking pleasure’, rather than therapeutic or for smoking cessation. Because the product was not promoted to be falling in the ‘therapeutic’ category, it does not fall within the ambit of the group of products, which the FDA could regulate.

The court decided that e-cigarettes could not be regulated under the FDA’s drugs/devices authority unless they are ‘marketed for therapeutic purposes,’ and also not regulated under FDA’s tobacco product authority, unless FDA deems them to be ‘tobacco products’. This was affirmed by the Appeal Court.


Regulation and legislation of e-cigarettes in the US

Imperative to the solution to regulate e-cigarettes and keep intact the anti-smoking legislation, is to include e-cigarettes in the definition of ‘tobacco products’, or to include in the definition of ‘smoking’ the smoking of e-cigarettes. This will automatically subject e-cigarettes under the same anti-smoking legislation, regulation and tax. Between 2010 and 2014 there were already 46 laws in 40 states of the US, which established a proper definition for e-cigarettes and the health advocates in the US are fighting to include e-cigarettes in all ‘clean air and tax laws’ as a ‘tobacco product’ or ‘product derived from tobacco’. The onus will then fall on the tax payer to demonstrate that their products do not contain a tobacco derivative to be excluded from tobacco taxes (Lempert et al (op cit)).

Other parts of the world on e-cigarettes

The World Health Organisation (WHO) described the uncertainty about the regulation of e-cigarettes as a ‘loophole’ to legally use nicotine, a tobacco derivative. Switzerland, Brazil and Singapore have banned indoor smoking altogether, while Canada and France have regulated their use (Sheree Bega and Kashiefa Ajam ‘Bid to stop all smoking’ www.iol.co.za, accessed 19-7-2016). The WHO also indicated that e-cigarettes should be categorised either as tobacco products, or used for prescribed medicinal purposes. The American Heart Association and the European Respiratory Society concurred herewith.

Britain is the only country (so far) to take a different approach towards e-cigarettes. During 2015 the British have welcomed the use of e-cigarette as a healthier and safer alternative to regular tobacco cigarettes, which does not carry the health risks associated with regular tobacco cigarette smoking. They would like to get it licensed to be used as a cure for smoking (‘UK health officials endorse e-cigarettes’ www.health24.com, accessed 19-7-2016).

Certainly, this worldwide dilemma is causing the opposing views on e-cigarettes, will only be resolved after the long effects of e-cigarettes are studied.

<table>
<thead>
<tr>
<th>Study conducted by:</th>
<th>Matrix:</th>
<th>Deviation from label:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goniewics</td>
<td>Refill solution</td>
<td>-75% to 28%</td>
</tr>
<tr>
<td>Kirstner</td>
<td>Refill solution</td>
<td>-50% to 40%</td>
</tr>
<tr>
<td>Cameron</td>
<td>Refill solution</td>
<td>-66% to 42%</td>
</tr>
<tr>
<td>Cheah</td>
<td>Cartridge</td>
<td>-89% to 105%</td>
</tr>
<tr>
<td>Trehy</td>
<td>Refill solution</td>
<td>-100% to 100%</td>
</tr>
<tr>
<td>Cobb</td>
<td>Cartridge</td>
<td>-80% to 77%</td>
</tr>
</tbody>
</table>
E-cigarettes in South Africa (SA)

Due to the nicotine composition of different e-cigarettes of the same brand and batch differing from cigarette to cigarette, complicates the process of defining e-cigarettes in a single ‘all including’ category or group (Lempert et al (op cit)).

Twisp, SA's largest e-cigarette distributor promotes their product as available in 'all major shopping centres' in SA. Their glamorisation of their product certainly attract more e-cigarette consumers. Interesting to note is that their product is not advertised as an anti-smoking device, neither to assist smokers to quit smoking. Twisp promote their ‘unique’ product to be available in different flavours to ‘tantalise all your senses' (www.twisp.co.za, accessed on 26-7-2016). It might be argued that this suggests the product is marketed for enjoyment purposes.

The Medicines and Substances Related Act 101 of 1965 was amended in 2012 to state that e-cigarettes are scheduled devices that should be bought only from a pharmacy with a doctor’s prescription. Unfortunately, the e-cigarette distributors found a loophole around this, by selling e-cigarettes over the counter in any shopping mall by not mentioning that e-cigarettes can be a therapeutic device, have health benefits, or help with smoking cessation (Rose-Innes (op cit)).

With these controversial views, SA’s Minister of Health, Aaron Motsoaledi, has taken a firm stand against e-cigarettes and indicated that he will push for new legislation against all forms of smoking of e-cigarettes in 2016 (Bega and Ajam (op cit)).

The Tobacco Products Control Act 83 of 1993 (the Act) does not include any specific reference to e-cigarettes, and currently reads as follows: ‘…a product containing tobacco that is intended for human consumption, and includes, but is not limited to, any device, pipe, water pipe, papers, tubes, filters, portion pouches or similar objects manufactured for use in the consumption of tobacco…’

The promotion of e-cigarettes also relates to s 3(1)(d) of the Act: ‘No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.’

It can be assumed that e-cigarette advertisements, promoting e-cigarette smoking, will cause the public to have an increased tendency to have a more positive attitude towards buying of tobacco products as well (SE Adkison, RJ O’Connor, M Bansal-Travers, A Hyland, R Borland, HH Yong, KM Cummings, A McNeill, JF Thrasher, D Hammond and GT Fong 'Electronic nicotine delivery systems: International tobacco control four-country survey' www.ncbi.nlm.nih.gov, accessed 19-7-2016).

Effects of e-cigarettes on non-smokers

E-cigarette smoke cause a visible vapour that is able to be smelled by non-smokers depending on the flavours and other contents of the fluid. The vapour is discharged into the air only when the user exhales. This is in contrast to regular cigarettes that discharge smoke continuously while kept alight, and when the user exhaled. Research shows that e-cigarette smoke can cause a 20% increase in the concentration of polycyclic aromatic hydrocarbons in the air of a ventilated room, after volunteers smoked e-cigarettes for two hours in the room (‘Electronic smoking devices and secondhand aerosol’ www.no-smoke.org, accessed 27-10-2016). The new trend to smoke e-cigarettes due to their advantages, causes more people to smoke them indoors, for example, in shopping malls, churches, offices and their own homes. Although e-cigarettes do not contain the harmful smoke of regular cigarettes, there are still very harmful emissions, which can cause health issues to non-smokers. The vapour, or aerosol, contains different concentrations of nicotine, ultrafine particles and low levels of toxins that are known to cause cancer (‘Electronic Smoking Devices and Secondhand Aerosol’ www.no-smoke.org, accessed 27-10-2016).

For full links to the articles referenced in this article, visit the De Rebus website at www.derebus.org.za

Discussion and conclusion

Not all e-cigarettes contain nicotine or the same concentrations of nicotine, making it difficult to regulate all e-cigarettes under one ‘all inclusive’ ban. The issue with e-cigarettes is that the absence of tar causes it to be less harmful in certain instances but it is more harmful if smoked at high voltages (‘Watch out for cancer-causing formaldehyde in new generation e-cigarettes’ (op cit)).

My opinion of the only feasible solution to this dilemma is to regulate e-cigarettes on two levels:

• Firstly, prescribed as medicinal treatment in specific quantities and voltages according to specific medicinal requirements to stop and/or cure smoking regular tobacco cigarettes.

• Secondly and together herewith, to include all other consumption of e-cigarettes in the tobacco products regulation legislation (‘Watch out for cancer-causing formaldehyde in new generation E-cigarettes' (op cit)).

The reality is, that all tobacco and tobacco-related product consumption contain risks to develop cancer and other health issues. Simply put, it causes the same harm as regular tobacco cigarettes and should be regulated accordingly.
J Brand, F Steadman, C Todd

Commercial Mediation sets out the processes for court-referred and voluntary mediation in commercial matters. It includes specimen agreements, chapter summaries, and discusses the new mediation rule.

Soft cover | 170 pages | ZAR | R300

Indigenous Knowledge & Intellectual Property
(Contemporary Studies in Law and Applied Research)
WJ du Plessis, C Ncube

The United Nations Declaration on the Rights of Indigenous People has extended the rights of indigenous peoples to the protection of their knowledge and culture. This book is concerned with how to craft an appropriate regulatory scheme to achieve protection for indigenous knowledge. Its chapters are premised on the realisation of the shortcomings of a legal paradigm based on a market economy.

Soft cover | 114 pages | ZAR | R295

Investigating Misconduct and Incapacity
M Opperman

This book sets out practical steps to compile and prepare relevant evidence for disciplinary enquiries, and explains how to structure the evidence for the best presentation of cases against offenders in the workplace.

Soft cover | 362 pages | ZAR | R475

The Law of Banking and Payment in South Africa
R Sharrock (Managing Editor)

The Law of Banking and Payment in South Africa explains some of the more important aspects of the law applicable to banks and banking in South Africa, along with the principles that govern payment and payment systems in this country.

Soft cover | 532 pages | ZAR | R375

Principles of Criminal Law (5th edition)
JM Burchell

This comprehensive discussion of major judicial pronouncements includes judgments of the Supreme Court of Appeal and the Constitutional Court, and legislative amendments relevant to criminal law.

Soft cover | 1068 pages | ZAR | R795

The Medicines Act: Old and new – A comparative consolidation
Juta Law Editors

The Medicines Act provides a visual comparison of the amending Acts and the effects of their amendments, which will aid in understanding the new Act when it is in effect.

Soft cover | 142 pages | ZAR | R250

(Juta’s Pocket Statutes)
Juta’s Statutes Editors

This 2-volume Pocket Statute set incorporates the Acts and regulations. The current editions reflect the law as at 7 October 2016. These titles are also available separately.

Soft cover - pocket size | ZAR | R260

For further details and to purchase visit our website, or contact Juta Customer Services: email orders@juta.co.za, fax 021 659 2360, call 021 659 2300.
Invalidity of legislation for failure to facilitate adequate public involvement in the legislative process: The Restitution of Land Rights Act 22 of 1994, which deals with restitution of land rights or practices, set the cut-off date for lodging claims for restitution as 31 December 1998. Desirous of extending the right to restitution and communities deprived of rights in land as a result of racially discriminatory laws or practices, the cut-off date for lodging claims for restitution was extended to 30 June 2019.

The issue in Land Access Movement of South Africa and Others v Chairperson, National Council of Provinces and Others 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC), was not about the substance but the process by which the Amendment Act was brought about. The applicants, the Land Access Movement of South Africa and others, sought in the main, a CC order declaring the Amendment Act unlawful for having been passed by the National Council of Provinces (NCOP) contrary to s 72(1)(a) of the Constitution, which requires the NCOP to facilitate public involvement in its legislative and other processes, as well as those of its committees. The gist of the complaint was that there was 'unexplained rush' in the manner in which the first respondent, the NCOP, and the other respondents, 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.

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.
matter the NCOP adopted a truncated time line for itself and provincial legislatures to facilitate the involvement of the public in the legislative process. That time line was the root cause of all the deficiencies in the process. Given the gravitas of the legislation and the thoroughgoing public participation process that was warranted, the truncated time line was inherently unreasonable. Objectively, on the terms stipulated by the time line, it was simply impossible for the NCOP, and by extension the provincial legislatures, to afford the public a meaningful opportunity to participate.

Consumer credit agreements – execution against primary residence

Primary home should not be declared executable if there are good prospects of reinstatement of the credit agreement: Before its amendment in 2014, and which came into effect in March 2015, s 129(3) of the National Credit Act 34 of 2005 (the NCA) provided among others that at any time before the credit provider had cancelled the agreement, the consumer could reinstate it by paying all amounts that were overdue together with default charges and reasonable costs of enforcing the agreement up to the time of reinstatement. The agreement would be reinstated. From the date of reinstatement the default judgment would have no legal force. If the property was sold by virtue of an attachment following a declaration of executability, the agreement would not be capable of being reinstated and the respondents would lose their home. The potential for that to occur had to be a factor to be taken into account in an application to declare the property executable. The significance thereof was that, unlike many of the other factors that relate to alternative ways of satisfying the entire judgment debt, reinstatement did not require payment of the full contract amount but only the arrears and other specified charges. In the instant case there was a reasonable prospect that the agreement was capable of being reinstated within a relatively short period.

Firststrand Bank, applied for default judgment in which it sought against the respondents, Mr and Mrs Mdletye, payment of the total contract amount outstanding, as provided for in the acceleration clause, interest and costs on attorney and client scale. Furthermore, it sought an order declaring the property, which was the respondents’ primary residence, executable. The court granted the order relating to payment of the outstanding contract amount, interest and costs but adjudged sine die the issue relating to executability of the property.

Gorven J held that if the arrears could be eliminated and the amounts referred to in s 129(3) paid (default charges and reasonable costs of enforcing the agreement up to the time of reinstatement) the agreement would be reinstated. From the date of reinstatement the default judgment would have no legal force.

The legal document exchange

Subscribers have access to our National Correspondent Network that offer services at a fixed rate.

Our digital authenticated documents are accepted by all courts: eRegistered mail, Section 129, eSummons, eNotice to Defend, eFile, eServe, court dates, etc.

Contact us for more information: info@legalserve.co.za • 062 278 5153 • www.legalserve.co.za

Delict

Doctrine of abuse of rights:

In Koukoudis and Another v Abrina 1772 (Pty) Ltd and Another 2016 (5) SA 352 (SCA); [2016] 3 All SA 398 (SCA), the first respondent, Abrina, was the owner of property situated in Centurion, City of Tshwane Municipality (Pretoria), which was zoned ‘agricultural’. As the first respondent wanted to develop it into a shopping centre and conduct a steakhouse business there, it applied for its rezoning into a township. The first appellant, Koukoudis (K), lodged an objection against the rezoning and thus started a long delay caused by the appeal process that followed, which also included litigation and court orders. The reasons given by K for his objection, included failure by the respondent to address fundamental issues such as environment impact assessments, traffic issues and requirements of statutes such as the National Environmental Affairs Act 107 of 1998 and the like. However, as it later transpired, the real reason for the objection was to prevent the establishment of a shopping centre in the vicinity of a shopping mall, which was only some 600 metres away and was owned by companies in which K had an interest as a director and shareholder. In brief, the purpose of the objection was to protect the commercial interests of K and his companies.

Eventually approval to establish a shopping centre was granted. Thereafter, the first respondent instituted a claim for damages against the first appellant and one of his companies, alleging that their objection to its rezoning was an abuse of the right to object and resulted in financial loss by delaying commencement of its business activities. It was alleged that K had acted with the specific intention of frustrating development of the shopping centre and causing financial harm. The GP, per Tolmay J, upheld the claim for damages.

An appeal against the High Court order was upheld with costs by the SCA. Leach JA (Majiedt, Pillay JJA, Victor and Baartman AJJA concurring) held that the weight of academic opinion was to the effect that conduct should not be regarded as being unlawful where it advanced a legitimate right of the person exercising it, even if in doing so another could be prejudiced. In order to constitute an abuse of right both the subjective requirement that an act be done with the sole or predominant intention to harm another and the objective requirement that the act serve no appreciable or legitimate interest should be present. In considering the question of the appellant’s liability one had to have regard, first, to the subjective requirement, namely whether the objection to the development was done with the sole or predominant intention to harm the respondents; and then second, the objective requirement, namely whether the objection served no appreciable or legitimate interest of the appellants. Such was not the case in the present matter as the appellants sought to protect their commercial interest in the nearby shopping mall.

The respondents had thus failed to prove an abuse of the right to object to rezoning of the property.

Intentional interference by third party with contractual
orders were granted with costs.

Love J held that the Aquillian action was available against a third party for the intentional interference with contractual relationship, which had the effect that a contracting party was deprived of the opportunity of obtaining the performance to which he was entitled, arising from the contract or where the contracting parties’ contractual obligations were increased. The requisites of a delict had to be satisfied in each case. Once such requisites were satisfied, liability would arise. Provided the requirements for the interdict had also been met, the wronged party would be entitled to an order restraining unlawful conduct.

Dolus eventualis was sufficient as far as intent was concerned. Concerning wrongfulness, the first respondent had acted unlawfully and wrongfully by at least usurping the applicant’s exclusivity entitled to conduct the business of a supermarket. As a result, a prima facie right had been established by an unlawful act of the first respondent, which constituted interference in the contractual relationship between the applicant and the second respondent and which had been committed with the necessary form of intent. That satisfied the requirements to be met for a successful claim based on the interference in contractual relationship in the context of the usurpation of a right.

Expropriation

Calculation of compensation: Section 16 of the Land Reform (Labour Tenants) Act 3 of 1996 (the Land Reform Act) gives the LCC the power to award a part of the farm to a labour tenant, meaning a farm worker who lives on the farm, to use as his homestead, for grazing his livestock and growing crops. As that is obviously expropriation, the Land Reform Act provides that the owner of the land so expropriated should be awarded compensation as provided for in s 25 of the Constitution, which deals with the issue. Section 25(3) provides that the amount of compensation, the time and manner of payment has to be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

In Msiza v Director-General, Department of Rural Development and Land Reform and Others 2016 (5) SA 513 (LCC) the LCC having awarded Msiza a portion of the farm for residential, cropping and grazing purposes, the issue was the amount of just and equitable compensation to be paid for that portion. The parties, the Department of Rural Development and Land Reform (the Department) and the owner of the farm, the Dee Cee Trust, agreed that the market value of the property should be looked at in terms of its potential for development as a township, which value was R 4,36 million. The LCC rejected both contentions and held that the just and equitable compensation was an amount that was adjusted downwards to R 1,5 million. No order as costs was made.

Ngcukaitobi AJ (Canca AJ concurring) held that the market value was not the basis for the determination of compensation under s 25 of the Constitution where property or land had been acquired by the state in a compulsory fashion, as was the case in the instant matter. The point of departure for determination of compensation was justice and equity. Market value was simply one of the considerations to be borne in mind when a court assessed the just and equitable compensation. Market value was, therefore, not a pre-eminent consideration. The object was always to determine compensation which was just and equitable, not to determine the market value of the property. In determining what was just and equitable, a balance had to be struck between the interests of the private landowner and the public interest. Therefore, compensation which was below the market value could be compliant with the Constitution, if it qualified as just and equitable.

The development potential of the property, as a factor in the calculation of market value, was far-fetched and speculative as there were no development plans in place but only a remote hope. Following that approach, would distort the real value of the land and produce outcomes, which were inconsistent with the purposes of compensation. That approach could also create a perverse incentive for landowners to artificially raise the potential value of their land if they knew that by the simple device of generating interest in the land, its market value could be significantly altered. The purpose of s 25 of the Constitution was not to reward property speculators but to serve public in-
Established in 1993, the Southern African Legal Information Institute (SAFLII) is an independent, non-profit, public interest organisation dedicated to the promotion and accessibility of the law. SAFLII’s mission is to provide free access to the law to all, on a publicly available website. This not only empowers citizens but also provides a platform for the rule of law and support to the judicial system.

SAFLII is currently facing a crisis. SAFLII needs to raise at least R2 million per annum in order to continue our work. SAFLII’s website is a vital resource for legal information, providing a wide range of legal resources to the public. In order to continue to provide this service, we need your support.

We are therefore asking for your support in order to continue our work. Your donation will help us to continue providing access to the law, promoting the rule of law and supporting our democracy.

3 EASY WAYS TO MAKE YOUR DONATION

1. CREDIT CARD: Make a credit card payment or set up a monthly debit order on www.saflii.org

2. EFT PAYMENT: Make a bank transfer to the following account:
   - Bank: Standard Bank
   - Branch code: 025009
   - Account number: 07 152 2387
   - Ref: SAFLII

3. SNAP SCAN: Snap the barcode to make an instant donation

Once payment is made you will receive a tax certificate.

Email: donations@saflii.org
Tel: +27 21 650 1725

FOR MORE INFORMATION PLEASE VISIT OUR WEBSITE AT WWW.SAFLII.ORG

YOUR SUPPORT NEEDS YOUR HELP
SAFLII needs at least R2 million per annum to continue its work.

DEPENDING ON DONATIONS
SAFLII depends on donations and has previously been able to operate thanks to donor funding which is now no longer accessible.

SAFLII is running out of money and will cease to exist as of January 2017 without your support.

VITAL ROLE
SAFLII’s work in promoting judicial accountability and access to our law is vital in helping to promote the rule of law and ensuring that our democracy thrives and our nation prospers.

HOW MUCH DO WE NEED TO RAISE?
SAFLII needs to raise at least R2 million per annum in order to continue to provide you with an invaluable tool. The more funds made available the more opportunity there will be to improve the content offering and to cover the costs of the small team of staff and the technical requirements.

Whether the constitutional right to adequate housing is infringed by defective construction of houses for low-income group: In City of Cape Town v Khaya Projects (Pty) Ltd and Others 2016 (5) SA 579 (SCA) the appellant, City of Cape Town (the City), entered into an agreement in terms of which the second respondent, Peer Africa, was to oversee development of an informal settlement in Atlantis, a small coastal town outside Cape Town, into a formal residential area. Construction work was done by the first respondent, Khaya, with whom Peer Africa concluded an agreement to do so. There was no contract between the City and Khaya. After completion of construction work the second respondent issued certificates of acceptance of the houses. Shortly thereafter it turned out that a number of the houses built had severe defects. As a result the City, seeking to put a stop to the alleged widespread problem of contractors building government-funded low-cost
houses, which were defective, sought a court order declaring that the first respondent failed to comply with a constitutional obligation to construct adequate houses in terms of s 26 of the Constitution. The WCC, per Mantame J, dismissed the application. An appeal against that order was dismissed with costs by the SCA.

Victor AJA (Maya DP, Majiedt, Seriti and Willis JJA concurring) held that the second respondent undertook to make sure that the buildings would comply with all legal requirements and regulations. However, there was no contractual nexus between the City and the first respondent. Also, there was no reference at all to any constitutional obligation on the part of the first respondent when it concluded the agreement with the second respondent. That being the case there was, therefore, no basis for a finding that the first respondent, a construction company, which was neither controlled by the appellant nor performed a nationwide public function, was an entity in the position of an organ of state. The first respondent agreed with the second respondent, and not the appellant, to construct houses. It did not enter into any contract with the appellant, and also did not undertake that the appellant’s constitutional obligations would be effectively achieved in regard to the housing project. Accordingly, it would be wrong to impose a constitutional obligation ex post facto on the procurement event. Doing so would be inconsistent with the principles of fairness. It would also not be equitable or transparent. In light of a finding that there was no constitutional obligation on the first respondent, the declaration sought could not be granted.

* See law reports ‘Fundamental rights’ 2015 (April) DR 41.

**Government procurement**

A tender bid is required to comply with all the specifications, prescripts, requirements or conditions specified in a tender document: In Afrifline Civils (Pty) Ltd v Minister of Rural Development & Land Reform and Another; Asla Construction (Pty) Ltd v Head of the Department of Rural Development and Land Reform and Another [2016] 3 All SA 686 (WCC) the first respondent, the Department of Rural Development and Land Reform (the Department), invited tenders for construction of bulk irrigation revitalisation in the Western Cape. The tender documents specified the requirements, which the tenderers had to meet, which included, among others, a valid tax clearance certificate issued by the South African Revenue Service and valid registration as a contractor with the Construction Industry Development Board (CIDB). If a tenderer were to make use of a sub-contractor the name thereof had to be specified, each sub-contractor in turn having to comply with the requirements of tax clearance certificate and registration with the CIDB. The tender bid of Afrifline Civils (Afrifline) was rejected as it did not attach the tax clearance certificate of one of its sub-contractors, namely TT Innovations (TT). Furthermore, Afrifline’s registration with the CIDB lapsed before the tenders could be considered. In the case of Asla, its tender bid also failed to attach the tax clearance certificate of TT. The tender was awarded to Exeo because it was able to attach the tax clearance certificate of TT, which the other two tenderers did not do. As a result Afrifline and Asla applied for an order reviewing and setting aside the award of the tender to Exeo. The application was dismissed with costs.

Dlodlo J held that the award of a tender by an organ of state constituted administrative action under the Promotion of Administrative Justice Act 3 of 2000 and had to be lawful, procedurally fair and justifiable. It was an established principle that non-compliance with specifications, requirements or conditions included in the tender documents would render a tender bid unacceptable or non-responsive and liable to be disqualified. If unacceptable or non-responsive tenders were to be further considered despite failing to comply with the mandatory requirements, the consequences would be that the tender process as a whole would not be transparent as required by the provisions of the Preferential Procurement Policy Framework Act 5 of 2000 and s 217(1) of the Constitution. Non-compliance with the specifications stated in the tender document could be condoned only if the document conferred a discretion on the administrative authority to condone such non-compliance with a mandatory requirement, which was not the case in the instant matter.

**Decision to cancel a tender is non-reviewable executive action and not administrative action:** The facts in SAAB Grintek Defence (Pty) Ltd v South African Police Service and Others [2016] 3 All SA 669 (SCA) were that in 2009 the first respondent, the South African Police Service (SAPS), acting through the second respondent, the State Information Technology Agency (SITA), invited tenders for the supply of mobile vehicle data command and control solution (command solution). The validity period of the tender bid was to expire in January 2011. The appellant, SAAB Grintek (SAAB), together with another company, Britehouse, were shortlisted. However, the tender was never awarded. After the expiry date of the tender period an extension was granted, followed by further extensions. The appellant’s tender bid was recommended by the Procurement Committee but no award was made. In August 2012 the first respondent advised SAAB that the tender had been cancelled as a long period had elapsed, this rendering the technology offered out of date in relation to its business needs. As a result the appellant approached the High Court for an order reviewing and setting aside the decision of the first respondent to cancel the tender, as well as an order directing that the tender be awarded to it and a contract between the parties be concluded. The GP, per Makgoba J, dismissed the application, holding that extension of the tender period was invalid as it was done after lapse of the tender in January 2011. An appeal to the SCA was dismissed with costs.

Mpati P (Cachalia, Theron, Wallis JJA and Victor AJA concurring) held that when the SAPS, as an organ of state, took the decision to procure the command solution and later cancel the tender relating thereto, it did so in the exercise of executive authority. Therefore, its decision to cancel the tender was not susceptible to review in terms of the Promotion of Administrative Justice Act 3 of 2000. As a result, the submission that SAPS’s decision to cancel the tender constituted an administrative action was not correct. It was inconceivable that the decision of SAPS to cancel the tender, which would otherwise have been taken in the exercise of executive authority could suddenly change character and become one of an administrative nature. A decision as to procurement of goods and services by an organ of state was one that lay within the heartland of the exercise of executive authority by that organ of state.

**Labour law**

Affirmative action – legality of exclusion of adequately represented or overrepresented groups from appointment: Before its amendment by the Employment Equity Amendment Act 47 of 2013 the Employment Equity Act 55 of 1998 (the EE Act) provided that when assessing whether a designated employer was implementing employment equity in compliance with the EE Act, one of the factors that ‘must’ be taken into account was the extent to which suitably qualified people from different designated groups were equitably represented within each occupational group level in that employer’s workforce in relation to the demographic profile of the national and regional profile.
of the 'national' and 'regional' economically active population. After the amendment the word 'must' was changed to 'may', thus making taking the relevant factors into account a discretionary rather than obligatory function.

In Solidarity and Others v Department of Correctional Services and Others 2016 (5) SA 594 (CC); 2016 (10) BCLR 1349 (CC), members of the first applicant trade union, Solidarity, and who were coloured persons, applied for certain positions in the respondent Department of Correctional Services (the Department). Although they were suitably qualified for the positions and were recommended by the interviewing panels, the Department rejected their appointment on the ground that coloured persons were overrepresented in the occupational levels for which they sought appointment. In reaching that decision the Department took into account the 'national' profile of the economically active population to the exclusion of the 'regional' profile, the region being the Western Cape where coloured persons were in the majority.

The LC held that the Department had discriminated against the job applicants unfairly and had also engaged in unfair labour practice. However, it did not declare the decision of the Department unlawful so as to set it aside. Moreover, it did not grant the applicants the relief sought but instead left it to the Department to take necessary measures. The LAC dismissed an appeal to it.

The CC granted leave to appeal and upheld the appeal, making no order as to costs. The decision of the Department not to appoint the applicants was declared unlawful and set aside. The court denied, by word only, that it was granting the applicants a 'protective promotion' (but of course did exactly so). In the case of applicants who sought posts which were still vacant, they were appointed with retrospective effect to the date when they should have been appointed in the first place.

In the case of the positions which had since been filled, the applicants were ordered to keep their current lower positions but were entitled to receive, with retrospective effect, the remuneration and other benefits which they would have received had they been appointed.

Delivering the majority judgment, Zondlo J (Nugent AJ dissenting and Cameron J concurring in that dissenting judgment) held that the Barnard principle, namely the case of South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC); 2014 (10) BCLR 1195, was not limited to overrepresentation of White candidates only. Black candidates, whether they were African, Coloured or Indian people, were also subject to the overrepresentation principle. That had to be so as transformation of the workplace entailed that the workforce of a designated employer had to be broadly representative of the people of South Africa. The level of representation of each group had to be broadly in accordance with its level of representation among the people of the country. Therefore, a designated employer was entitled, as a matter of law, to deny an African, Coloured or Indian person appointment to a certain occupational level on the basis that African, Coloured or Indian people, as the case might be, were already overrepresented or adequately represented in that occupational level. Equally, an employer was entitled to refuse to appoint a man or woman to a particular level on the basis that men or women, as the case might be, were already overrepresented or adequately represented at that occupational level.

However, the Department used a wrong benchmark to determine the overrepresentation, namely by taking into account the national profile, to the exclusion of the regional profile, of the economically active population. In doing so the Department acted in breach of its obligations in terms of s 42(a) and accordingly acted unlawfully.

In Jacobs v Department of Land Affairs and Others 2016 (5) SA 382 (LCC) were that by 1889 the Gordonia area (now Upington in the Northern Cape) was under control of British Government and administered as part of British Bechuanaland (now Botswana) and occupied by a Coloured community known as Basters (NB although the name may seem derogatory, the community nevertheless called themselves such). One Abraham September was granted permanent quit-rent rights (rights of occupation, use and enjoyment) over a farm in the area. Thereafter, Gordonia was annexed, with the consent of the British Government, by the Cape Colonial Government and became part of the Cape Colony.

Because of the Orange River the area offered great potential for irrigation. For that reason commercial farmers came up with several strategies to dispossess the Coloured people of their land. After the death of September, his sons – who had inherited the farm – ‘sold’ it to a commercial farmer, one Thorne, in 1906 in what turned out to have been a fraudulent sale as Thorne took advantage of the illiteracy of the sellers. Moreover, afterwards Thorne confessed that he bought the land for nothing as he did not pay anything. An attorney acting for the sellers was also attorney for the buyer Thorne and became an accomplice to the fraud perpetuated by Thorne. As if that was not enough an officer in the Deeds Registry turned a blind eye to the fraud, reporting that everything appeared normal. Thorne having in turn sold the farm to a new owner at a market value of 5 000 pounds sterling, the lat-
ter evicted September's sons from the land in 1921.

In the present case the claimants, Jacobs and 393 others, all being direct descendants of Abraham Sep-
tember and his wife Eliza-
thed compensation for the lost farm, from the defendant, Department of Land Affairs and Rural Devel-
upment, and not from past or present owners of the farm, in terms of s 2(1)(c) of the Restitution of Land Rights Act 22 of 1994 (the Restitu-
tion Act). Restitution of the farm not being feasible, they sought an order which was just and equitable in the form of financial compensation.

The value of the farm at the time of dispossession was R 5000000, which translates to R 423 000 in current monetary terms. However, apart from that amount the claimants sought a further R 36 454 000 for loss of the land and addition-
all R 58 330 000 for loss of use of the land. Their approach was based on the 'fiction' of undisturbed perpetual ownership and commercial exploi-
tation of the land.

The court held that the 'fiction' approach was at odds with the views endorsed by the CC with regard to the object of compensation un-
der the Restitution Act. If the court were to follow that approach it would not only be acting contrary to the CC authority as decided in *Flor-
cence v Government of the Rep-
public of South Africa* 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137, but would also open a vortex of speculative claims premised on unknown vari-
ables of the trajectory of the land and its use absent the dispossession. The law was clear that, the object of just and equitable compensation was to place the dispossessioned persons in the same financial position they would have been in im-
mediately after the dispossession. There was logic in that approach as nobody knew what would have happened to the land had it not been for the racially motivated dispos-
session. Furthermore, it was not known in what manner

the value of the land would have been affected over time.

The starting point was that the claimants were entitled to the amount of Р 2 423 000, which was the current equiva-
 lent of the actual financial loss suffered as a result of uncompensated racial dis-
 possession. However, that amount failed to have regard to the particular hardship vis-
it upon the Septemberers as a result of their dispossession and ejectomy from the land. Accordingly, the amount was adjusted upwards to Р 10 mil-
lion since the market value of the property lost, was a factor and not a goal in itself. The adjusted amount of Р 10 mil-
lion determined as just and equitable applied to the value of the land and its use. The Department's scheme was ordered to pay costs, less payments al-
ready made to the claimants.

### Prescription

**When without prejudice of-
fer of settlement does not in-
rupt prescription:** In *KLD
Residential CC v Empire Earth
Investments 17 (Pty) Ltd* 2016
(5) 485 (WCC); [2016] 3 All SA
832 (WCC) the plaintiff, KLD,
sued the defendant, Empire Earth,
for commission earned after sell-
ing certain erven in a develop-
ment project and transferring ownership to buyers. The commission was earned between October 2008
and November 2009 when the transfers took place. The summons claiming commis-
sion was issued and served in June 2013, being a period that was more than three years after the last commis-
sion was earned, which meant that the claim had prescribed. However, the plaintiff alleged that the running of prescrip-
tion had been interrupted when, in July 2011, the de-
fendant’s attorneys, acting as the defendant’s authorised representatives, wrote a letter to the plaintiff’s attor-
neys in which they acknowled-
edged that, after taking into account certain deductions, the plaintiff was entitled to a certain amount in respect of which a cheque was at-
tached. Rogers J held that the acknowledgment of debt, and the offer of settlement made to the plaintiff in a without

prejudice offer, did not inter-
rupt prescription. As a result the plaintiff’s claim had pre-
scribed and was, therefore, dismissed with costs.

The court held that the without prejudice rule was based on public policy. Par-
ties to disputes were to be encouraged to avoid litiga-
tion, with the expense, delay, hostility and inconvenience it usually entailed, by resolving their differences amicably in full and frank discussions, without the fear that any ad-
missions made by them dur-
ing such discussions could be used against them in the ensuing litigation. The law al-
lowed some exceptions to the without prejudice rule. One such exception was where a party alleged that the settle-
ment discussions resulted in a compromise agreement. Certain other exceptions based on public policy have also been recognised. If the without prejudice commu-
nication contained a threat or constituted an act of in-
solvency, and if the making of the threat or the commis-
sion of an act of insolvency was relevant to particular proceed-
ings, evidence of the communication could be ad-
duced despite its without prejudice character. A further exception was an admission by a company of its commer-
cial insolvency. An admission of part of a liability was suf-
ficient to interrupt prescrip-
tion. Before a creditor could rely on an acknowledgment of part of the liability as an interruption of prescription there had to be admissible ev-
idence of the partial acknowl-
edgment. In many without

prejudice negotiations the al-
leged debtor would not make any admission of liability. Although such negotiations could appear to be worth pursuing, the running of pre-
scription was not suspended. The three-year period of pre-
scription was not an ungener-
ous allowance of time. If the parties needed more time, the creditor could make further talks conditional on agree-
ment to hold prescription in abeyance. That was often done in practice.

### Other cases

Apart from the cases and ma-
terial dealt with or referred to above the material under review also contained cases dealing with: Abuse of pro-
cess of enquiry into the af-
fairs of a company, business rescue, contempt of court, derivative action, destruc-
tion of sectional title scheme and certain exclusive use ar-
eas, effect of delay in serving sentence, fraud and money laudering, granting of bail pending application for access to the Constitutional Court, interruption of extinct-
tive prescription, jurisdiction of Advertising Standards Authority on non-members, jurisdic-
tion of Consumer Af-
fairs Court, loss of earnings in personal injury claims, member of Parliament not al-
lowed to impugn integrity of other members, recognition of foreign court order, pre-
scribed minimum sentence for rape, right of farm worker to bury family members on the farm and sale of insolvent estate's property prior to sec-
ond meeting of creditors.

---

**On the lighter side:**

It was Benjamin Franklin who first gave voice to the quip "Necessity knows no law; I know some attorneys of the same", in its modern form calling a judge Old Necess-
ity.”

Prof Ellison Kahn 'The seven lamps of legal hu-
mour' 1984 (June) *DR* 251.
New legislation

Legislation published from 3 – 28 October 2016

Defence Act 42 of 2002
Individual Grievances Regulations. GN R1263 GG40347/14-10-2016.

Development Bank of Southern Africa
Act 13 of 1997
Amendment of regulations. GenN643 GG40334/7-10-2016.

Liquor Act 60 of 1989

Military Pensions Act 84 of 1976
Determination of amounts. GN R1234 GG40335/7-10-2016.

National Environmental Management
Act 107 of 1998

National Health Act 61 of 2003
Procedural regulations pertaining to the functioning of the Office of Health Standards Compliance and handling of complaints by the ombud. GN1275 GG40350/13-10-2016.

Promotion of National Unity and Rec
conciliation Act 34 of 1995
Amendment to the regulations on exhumation, rebural or symbolic burial of deceased victims. GN R1305 GG40362/21-10-2016.

Property Valuers Profession Act 47 of
2000
Amendment of the rules for the property valuers profession. BN166 GG40359/21-10-2016.

Public Service Act 103 of 1994
Amendment of sch 1 (Secretary for the Police Service). Proc 56 GG40334/7-10-2016.

Public Service Commission Act 46 of
1997

Road Accident Fund Act 56 of 1996
Adjustment of the statutory limit in respect of claims for loss of income and loss of support to R 251 990 with effect from 31 October 2016. BN167 GG40375/28-10-2016.

Sectional Titles Schemes Management
Act 8 of 2011
Amendments to the rules for the property valuers profession.

Small Claims Courts Act 61 of 1984
Establishment of a small claims court for the area of Soweto. GN1248 GG40346/14-10-2016.

Establishment of a small claims court for the area of Mokgophong. GN1249 GG40346/14-10-2016.

Establishment of a small claims court for the area of Atamelang. GN1250 GG40346/14-10-2016.

Establishment of a small claims court for the area of Mankwe. GN1251 GG40346/14-10-2016.

Establishment of a small claims court for the area of Ottosdal. GN1252 GG40346/14-10-2016.

Establishment of a small claims court for the area of Tarkastad. GN1253 GG40346/14-10-2016.

Establishment of a small claims court for the area of Wepener. GN1321 GG40375/28-10-2016.

Establishment of a small claims court for the area of Galeshewe. GN1322 GG40375/28-10-2016.

Establishment of a small claims court for the area of Tsomo. GN1323 GG40375/28-10-2016.

Social Assistance Act 13 of 2004
Increase in respect of social grants. GN R1210 GG40323/3-10-2016.

Tax Administration Act 28 of 2011
Duty to keep records, books of account or documents. GN1334 GG40375/28-10-2016.

Water Research Act 34 of 1971

Draft delegated legislation

Regulations relating to the registration of a speciality in forensic social work in terms of the Social Service Professions Act 110 of 1978 for comments. GN R1274 GG40349/14-10-2016.

Declaration of certain substances as Group I or II hazardous substances in terms of the Hazardous Substances Act 15 of 1973 for comments. GN1242 and GN1243 GG40346/14-10-2016, GN1291 and GN1292 GG40359/21-10-2016.

Regulations relating to the registration of a speciality in clinical social work in terms of the Social Service Professions Act 110 of 1978 for comments. GN R1304 GG40361/21-10-2016.

Draft Prevention and Combating of Hate Crimes and Hate Speech Bill. GenN909 GG40367/24-10-2016.

Amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009 for comments. GN R1354 GG40380/28-10-2016.

---

*Philip Stoop BCom LLM (UP) LLB (Unisa) is an associate professor in the department of mercantile law at Unisa.*
Employment law update

Monique Jefferson BA (Wits) LLB (Rhodes) is an attorney at Bowman Gilfillan in Johannesburg.

Section 197 transfers: Can the new employer be joined to proceedings subsequent to the conciliation process?

In Temba Big Save CC v Kunyaza and Others [2016] 10 BLLR 1016 (LAC), the respondent employees alleged that their dismissals were automatically unfair as Big Save had not complied with s 197 of the Labour Relations Act 66 of 1995 (the LRA) when it purchased the business of ACE Wholesalers. Big Save had not been a party to the conciliation proceedings and the respondent employees then sought to join Big Save to the proceedings in the Labour Court (LC). Big Save filed an answering affidavit out of time. The LC, per Steenkamp J, joined Big Save to the proceedings sub-sequent to the conciliation process.

Big Save argued that the LC should not be joined to proceedings if it was not a party to the conciliation process. However, it interpreted the CC’s decision in Intervalle to mean that in disputes involving s 197 of the LRA it was not necessary to refer both the old employer and the new employer to conciliation and the new employer could in fact be subsequently joined to proceedings.

The Labour Appeal Court (LAC), per Waglay JP, held that the general principle is that a referral to conciliation is a pre-condition to the LC having jurisdiction to determine a dispute about an unfair dismissal and thus, it is not permissible to join a party that was not party to the conciliation proceedings at a later stage. However, the LC held that this principle is not applicable where a dismissed employee refers an unfair dismissal dispute against his or her employer and then subsequently discovers that the business has changed hands and thus their relief lies against a new employer in terms of s 197 of the LRA.

This is because the consequences of s 197 are that the new employer steps into the shoes of the old employer as the new employer would not be necessary to refer the dispute in respect of the old employer, it would not be necessary to refer the dispute to conciliation in respect of the new employer as the new employer would simply step into the shoes of the old employer.

The LAC found that there was no basis to interfere with the LC’s decision regarding joinder as it was up to the trial court to determine whether or not s 197 applied. The appeal was accordingly dismissed with costs.

Reconstruction of record in review proceedings

In Francis Baard District Municipality v Rex NO and Others [2016] 10 BLLR 1009 (LAC), the municipality instituted review proceedings in respect of an arbitration award in which reinstatement was ordered. The record of the arbitration proceedings was only partially complete in that the testimonies of some of the witnesses were not transcribed. Furthermore, the evidence of the employee was only partly transcribed. The employee objected to the record and suggested to the municipality that the parties attempt to reconstruct the record.

A few months later, the attorneys for the municipality responded that it would not be possible to reconstruct the record as no notes of the evidence lead at the arbitration had been taken. It advised the employee that the municipality would stand and fall by the partial record and invited the employee to file an answering affidavit based on the partial record.

The LC, per Morgan AJ, refused to determine the review based on the partial record as there were missing parts that were material to the dispute. In determining whether to dismiss the review application or remit it to the bargaining council, Morgan AJ found that a diligent attempt had not been made to reconstruct the record. The review application was accordingly dismissed.

The municipality appealed against the decision of the LC on the basis that the LC’s decision was incorrect as the matter could have been determined based on the partial record, failing which, the matter should have been remitted to the bargaining council for a fresh hearing. It was also argued that sufficient weight had not been given to the municipality’s right to institute review proceedings.

The LAC, per Musi JA, held that it is the duty of the applicant in review proceedings to take all reasonable steps to ensure that the record placed before the court is as complete as possible. In circumstances where there is an incomplete record before the court, the court must determine whether the missing parts of the record are material to the dispute. The next inquiry is whether the applicant took all reasonable steps to reconstruct the record. This must be determined by the facts on a case by case basis. In this case, the municipality had refused to try and reconstruct the record as per the employee’s suggestion.

As regards the right to review proceedings, Musi AJ held that review proceedings should not be dismissed lightly. However, after considering the facts of this case, Musi AJ was of the view that the other factors outweighed the right to review proceedings and the municipality only had itself to blame for the situation it found itself in. The appeal was accordingly dismissed with costs.
The Prescription Act: Consistent or inconsistent with the LRA?

FAWU obo Gaoshabelwe and Others v Piemans Pantry (Pty) Ltd (unreported case no: JA20/15, 8-9-2016) (Sutherland JA (Ndlovu JA and Murphy AJA concurring)).

Does the Prescription Act 68 of 1969 apply to unfair dismissal disputes referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) and if so, is prescription interrupted when a dispute is referred to the CCMA in terms of s 191(1) of the Labour Relations Act 66 of 1995 (the LRA)?

These were the questions before the Labour Appeal Court (LAC).

Prior to the hearing of this appeal, the LAC, in three consolidated matters of Myathaza v Johannesburg Metropolitan Bus Service (SOC) Ltd v/ a Metrosbus Mazibuko v Concor Plant Cellulose (Pty) Ltd v Communication Workers Union on behalf of Peters (2016) 37 IJL 413 (LAC) had recently held that the Prescription Act did apply to arbitration awards. This decision, however, did not dispose of the aforesaid questions, which sought to determine whether litigation under the LRA, prior to rendering an award or judgment, is subject to the Prescription Act.

Background

The appellant union, Food and Allied Workers Union (FAWU) referred an unfair dismissal dispute to the CCMA on behalf of its members on 7 August 2001.

The CCMA referred the dispute by way of prescription runs contrary to the aims and purpose of the LRA, which is to promote labour stability and peace. Hence in light of the public interest placed on labour peace, due weight should be given to the effect of s 210 of the LRA, which – as a result thereof – ought to exclude the Prescription Act in matters dealt with under the LRA.

The LAC noted that the argument based on public policy and equity were rejected in Myathaza where the LAC held that once the requirements for a plea of prescription have been met, a court is bound to uphold such a plea without having regard to the considerations of equity and public policy. The LAC in casu saw no need to disturb the legal position as set out in Myathaza.

A further argument advanced by FAWU was that the LRA sets out specific time frames for disputes to be referred to the CCMA, for conciliation to take place and for adjudication thereafter. Thus the LRA created its own time frames for when claims are made and actions instituted and in addition, gives a court or an arbitrator the power to condone a party for not adhering to such time frames. Not only was this an inconsistency between the two statutes as contemplated in s 16(1) of the Prescription Act, this inconsistency further meant that neither the LRA nor an arbitrator could condone a period longer than three years even if the party applying for condonation could establish good cause.

In addressing this argument the court began by stating that inconsistency between statutes is not borne out of a mere difference in procedure between the two statutes. What is required is an examination of the relevant provisions to determine whether the two statutory regimes are functionally “inconsistent”; if they can be reconciled, there cannot be an inconsistency. Put differently, do the relevant sections in the LRA and that of the Prescription Act share the same purposes; if so there would be no inconsistency between the two statutes.

The employer argued that the LRA and the Prescription Act are not inconsistent with one another. In arguing this point the employer gave the following interpretation:

‘An appropriate and useful approach to the interpretation of the two statutes is to imagine each as constructing a regime which may be overlaid upon one another as a pair of concentric circles.

The inner circle is the LRA which requires of parties to refer a dispute within 30 or 90 days during which conciliation may occur, and upon expiry and the failure of conciliation efforts, a party has 90 more days to refer the matter to the Labour Court or go to arbitration as the case may. In the present case, that next step was to the Labour Court by the filing of statement of case. The discretion of the Labour Court to condone late filing operates within, and not in competition with, the scope of the periods stipulated by the Prescription Act.

Therefore according to the employer, s 191 creates time bars and not an alternative to the Prescription Act, and thus there was no inconsistency between the two statutes.

In accepting this argument the LAC held that the powers of a court to grant condonation is not a substitution or alternative to prescription.

The court further rejected the argument that a claim for reinstatement, as was the claim made by FAWU on behalf of its members at the LC, was not a debt as envisaged in the Prescription Act.

Having made these findings and in answering the first question posed, the court found that the Prescription Act applied to all litigation conducted under the LRA including disputes referred under s 191.

The next issue was whether FAWU’s referral to the CCMA on 7 August 2001, interrupted prescription in terms of s 15(1) of the Prescription Act which reads:

‘The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt’ (my italics).

Section 15(6) defines the word ‘process’ as:

‘… includes a petition, a notice of motion, a rule nisi, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced’ (my italics).

FAWU argued that the debt arose on
dismissal and that the referral to the CCMA interrupted prescription in terms of s 15(1) of the Prescription Act.

While the LAC agreed with the submission that the debt arose on dismissal, it nevertheless rejected the argument that a referral to the CCMA interrupts prescription. The court held:

What section 15(1) of the Prescription Act requires to interrupt prescription is a “process ... whereby legal proceedings are commenced”. A referral does not do so because a referral does not commence legal proceedings. ... A referral is no more than a condition to be fulfilled to obtain access to a forum that can adjudicate a dispute.

In the case of a matter that must, like the present one, be ventilated in the Labour Court, the referring party must after the referral and exhaustion of conciliation in terms of section 191(5)(b) “refer the dispute to the Labour Court for adjudication”, which involves, in accordance with Rule 6(1) of the Labour Court Rules, the filing of a statement of case, which, in terms of section 191(11)(a), must be done within 90 days of the certificate of non-resolution. This is the act [which] initiates, as the text expressly states, “adjudication” (as distinct from conciliation) and which, for that reason constitutes the “process” which interrupts prescription.’

The appeal was dismissed with no order as to costs.

Book announcements

Access to information
By Ronée Michelle Robinson SC
Durban: LexisNexis
(2016) 1st edition
Price: R 435.48 (incl VAT)
311 pages (soft cover)

Retrenchment Law in South Africa
By Rochelle le Roux
Durban: LexisNexis
(2016) 1st edition
Price: R 469.99 (incl VAT)
228 pages (soft cover)

HIV and the Law in South Africa – A Practitioner’s Guide
By Amelia Vukeya Motsepe
Durban: LexisNexis
(2016) 1st edition
Price: R 500 (incl VAT)
279 pages (soft cover)

Questions and answers on business rescue and winding-up of close corporations
By Leigh Hefer
Cape Town: Genesis Corporate Services CC
(2016) 1st edition
R 459 (incl VAT)
751 pages (soft cover)

Questions and answers for accounting officers and members of close corporations on the New Companies Act and Amended Close Corporations Act
By Leigh Hefer
Cape Town: Genesis Corporate Services CC
(2016) 1st edition
R 499 (incl VAT)
593 pages (soft cover)

Questions and answers for auditors and accounts on the Companies Act and Amended Auditing Profession Act
By Leigh Hefer
Cape Town: Genesis Corporate Services CC
(2016) 1st edition
R 399 (incl VAT)
506 pages (soft cover)

Questions and answers on South African Companies Act
By Leigh Hefer
Cape Town: Genesis Corporate Services CC
(2016) 2nd edition
R 399 (incl VAT)
437 pages (soft cover)

Notes on South African Companies Act
By Leigh Hefer
Cape Town: Genesis Corporate Services CC
(2016) 2nd edition
R 570 (incl VAT)
1 077 pages (soft cover)

Valuations handbook: Business, company and commercial property valuations
By Dr John W Hendrikse
Cape Town: Genesis Corporate Services CC
(2016) 1st edition
R 645 (incl VAT)
772 pages (soft cover)
Recent articles and research

Please note that the below abbreviations are to be found in italics at the end of the title of articles and are there to give reference to the title of the journal the article is published in. To access the article, please contact the publisher directly. Where articles are available on an open access platform, articles will be hyperlinked on the De Rebus website at www.derebus.org.za.

Accessing articles from publishers

- For LexisNexis articles contact: customercare@lexisnexis.co.za for the publication details.
- For individual journal articles pricing and orders from Juta contact Michelle Govender at mgovender@juta.co.za.
- For journal articles not published by LexisNexis or Juta, contact the KwaZulu-Natal Law Society Library through their helpdesk at help@lawlibrary.co.za (their terms and conditions can be viewed at www.lawlibrary.co.za).

Abbreviation | Title | Publisher | Volume/issue
---|---|---|---
EL | Employment law | LexisNexis | (2016) 32.5
ILJ | Industrial Law Journal | Juta | (2016) 37 October
LDD | Law, Democracy and Development | University of the Western Cape | (2016) 20
LitNet | LitNet Akademies (Regte) | Trust vir Afrikaanse Onderwys | (2016) 13(3) September
PER | Potchefstroom Electronic Law Journal/ Potchefstroomse Elektroniese Regsblad | North West University, Faculty of Law | (2016) September
SALJ | South African Law Journal | Juta | (2016) 133.3
SLR | Stellenbosch Law Review | Juta | (2016) 27.2

Administrative law
Konstant, A ‘Administrative action and procedural fairness – Minister of Defence and Military Veterans v Motau’ (2016) 133.3 SALJ 491.
Marais, EJ ‘A common-law presumption, statutory interpretation and s 25(2) of the Constitution - a tale of three fallacies. A critical analysis of the Constitutional Court’s Arun judgment – Arun Property Development (Pty) Ltd v Cape Town City’ (2016) 133.3 SALJ 629.

Cession
Hutchison, D ‘Agreements in restraint of cession: Time for a new approach’ (2016) 27.2 SLR 273.

Commercial law
Wallis, M ‘Commercial certainty and constitutionalism: Are they compatible?’ (2016) 133.3 SALJ 545.

Company law


Consumer law
Lim Tung, OJ ‘Genetically modified food and feed in South Africa: Labelling and the right to disclosure of information’ (2016) 133.3 SALJ 600.

Constitutional law
French, D “Brexit”: A constitutional, diplomatic and democratic crisis. A view from the trenches’ (2016) September PER.

Costs
Du Plessis, J ‘The right of an attorney to claim payment of costs from a third party’ (2016) 27.2 SLR 292.

Customary law
Estoppel
Myburgh, F 'On constitutive formalities, estoppel and breaking the rules' (2016) 27.2 SLR 254.

Harmonisation of laws

Health law
Pieterse, M 'Geography, marginalisation and the performance of the right to have access to health care services in Johannesburg' (2016) 20 LDD 1.

Human rights
Stevens, C and Ntlama, N 'An overview of South Africa's institutional framework in promoting women's right to development' (2016) 20 LDD 40.

International trade
Vinti, C 'A spring without water: The conundrum of anti-dumping duties in South African law' (2016) September PER.

Judicial reasoning
Olivier, P 'Deriving the ratio of an over-determined judgment: The law after Turnbull-Jackson v Hibiscus Coast Municipality' (2016) 133.3 SALJ 522.

Judiciary
Masengu, T 'Gender transformation as a means of enhancing perceptions of impartiality on the Bench' (2016) 133.3 SALJ 475.

Labour law
Bassuday, K 'Disciplinary sanctions in the alternative' (2016) 37 October ILJ 2251.

Pension law
Marumoagae, MC 'Concern Regarding the “debt” created by rule 14.10.9 of the Government Employees’ Pension Fund Rules' (2016) September PER.

Mhango, M 'Does the South African Pension Funds Adjudicator perform an administrative or a judicial function?' (2016) 20 LDD 20.

Prescription law
Loubser, M 'The prescription period applicable to a debt secured by notarial bond' (2016) 27.2 SLR 374.

Property law
Erlank, W 'Don’t touch my virtual property: Justifications for the recognition of virtual property' (2016) 133.3 SALJ 664.

Sentencing law
Du Toit, PG 'Publisiteitsbevele as vonnisopse vir regspersone – publicity orders as sentencing option for juristic persons' (2016) September PER.

Sporting law
Plasket, C 'The fundamental principles of justice and legal vacuums: The regulatory powers of national sporting bodies' (2016) 133.3 SALJ 569.

Tax law
Titus, A 'May an investment in interest-bearing securities constitute a trade for the purposes of the Income Tax Act?' (2016) 133.3 SALJ 504.

Unjust enrichment
Sonnekus, JC 'Subsidiëriteit as kernbegrip by verrykingsese, sekerheidsregte en statutêr nie-uitwinbare vorderings' (2016) 27.2 SLR 415.

---

There's no place like home.
We have our place.
They have theirs.
Visit nspca.co.za for more about the hazards of capturing and breeding exotic animals.

For links to open access law journals and open access websites visit the De Rebus website at www.derebus.org.za

Meryl Federl BA HDip Lib (Wits) is an archivist at the Johannesburg Society of Advocates library. E-mail: merylfederl@yahoo.co.uk

---

DE REBUS – DECEMBER 2016
- 52 -
The Co-Chairpersons of the Law Society of South Africa, Mvuzo Notyesi and Jan van Rensburg, as well as the Council, Management and Staff of the Law Society of South Africa wish you a peaceful festive season and a happy and prosperous New Year.
We help make managing trust fund investments simple, not ordinary.

The Investec Corporate Cash Manager (CCM) is a secure online platform that offers you:

- Superior System
- Personalised Services
- Competitive Rates
- Unique Products
- Free online guarantees
- No charges

With Investec Corporate Cash Manager, you can manage your client’s trust funds easily and effectively online. This free, secure online cash management system offers highly competitive interest rates on a unique set of products to ensure that your clients continue to have access to personalised service.

For more information, email ccmsales@investec.co.za