

MUSLIM WIDOWS' RIGHT TO INHERIT RENOUNCED BENEFITS FROM THEIR HUSBAND'S ESTATE

Does SA have the required
framework for **mutual legal
assistance and extradition?**

A right to consular assistance:
Some general observations

**Determining the crime for
concealment of birth**

The implications of giving
informal legal advice



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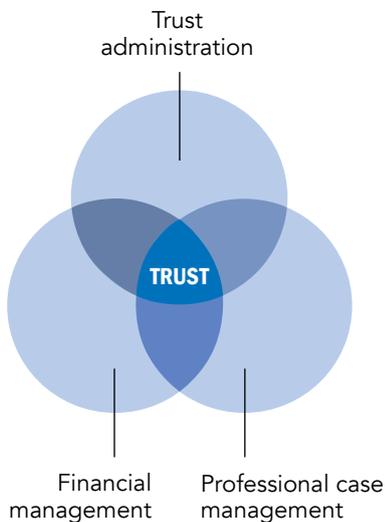
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**The ranking of the business rescue
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- ADF launches a law hub



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FEATURES

10 Muslim widows' right to inherit renounced benefits from their husband's estate

Historically, the South African public policy was crafted on Eurocentric ideals, which regarded everything that was not in line with western and Christian moral values as invalid and unlawful. One such practice is polygamy as practiced under customary law or polygyny as observed under Muslim religion. Section 15 of the Constitution provides that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion'. This entrenches the right of every individual in SA to live according to the customs and traditions prescribed by their religion, which includes the right to observe their religious family law systems. This article, written by legal practitioner and Senior Lecturer **Clement Marumoagae**, particularly discusses the right of Muslim women to inherit benefits renounced by their husbands' descendants in circumstances where they were only married in terms of Islamic personal law and not subsequently married in accordance with civil law.

14 A right to consular assistance: Some general observations

In June 2018, the media was abuzz about 51 young South Africans who had been detained by the authorities in China after having found themselves embroiled in a visa scam. The group had seemingly been enticed by an agent to travel to China on study visas while planning to work as English teachers. As such an arrangement contravened the immigration laws of the People's Republic of China, they were arrested and detained. The South African Embassy in Beijing intervened and provided them with consular assistance. Following subsequent ministerial intercession, they were all released and were able to return home safely a few days later. It is against this setting that legal adviser and a former Principal State Law Adviser **Riaan de Jager** writes this article and examines the legal basis, nature and extent of consular assistance, which our embassies, high commissions and consulates-general (missions) render on a daily basis to our nationals abroad.

17 Does SA have the required framework for mutual legal assistance and extradition?



It is generally accepted that once a crime has been committed, it should be investigated, the perpetrator should stand trial and on conviction be punished for their unlawful conduct. Senior Magistrate **Mohammed Moolla** writes that the challenge which arises is how can this be ensured where the perpetrator is outside the borders of the country in which the crime was committed or where the effect of the crime was felt.

19 Determining the crime for concealment of birth

The offence of concealing the birth of a new born baby is often perpetrated instantaneously after birth. After careful appraisal of all the relevant circumstances surrounding a particular case the evidential material, which may initially appear to disclose a concealment of birth, may well culminate to murder. Diverse dynamics potentially come into play when dealing with these matters, and they often impact on the judgment of the court. Retired Senior Magistrate and High Court Assessor **Louis Radyn** writes that these features will be discussed in this article. He has structured diverse scenarios applicable to adjudication in matters, which may give rise to conviction on a variety of offences.

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Do you have insurance for cybercrime?

The Legal Practitioners' Indemnity Insurance Fund NPC (LPIIF) - previously named the Attorneys Insurance Indemnity Fund NPC - has since 1 July 2016 excluded insurance cover for cybercrime related claims. This has raised many concerns from legal practitioners. In essence, the profession is concerned that public funds are insured for intentional misappropriation or theft and not insured for instances when theft arises due to the negligence associated with cybercrime.

The LPIIF provides a level of professional indemnity insurance cover to all practitioners in possession of a valid Fidelity Fund Certificate on the date that the cause of action arose. According to the LPIIF, cybercrime is not a professional indemnity risk, but rather a business risk faced by all business enterprises and individuals - the risk is not unique to the practice of law or any other profession. The LPIIF has further stated that this is a business commercial risk that can be covered under various cyber risk and commercial crime products available on the market.

The current LPIIF Master Policy defines cybercrime as:

'Cybercrime: Any criminal or other offence that is facilitated by or involves the use of electronic communications or information systems, including any device or the Internet or any one or more of them. (The device may be the agent, the facilitator or the target of the crime or offence).'

Under the exclusions, clause 16, the LPIIF Master Policy states:

'16. This policy does not cover any liability for compensation:

...

c) which is insured or could more appropriately have been insured under any other valid and collectible insurance available to the Insured, covering a loss arising out of the normal course and conduct of the business or where the risk has been guaranteed by a person or entity, either in general or in respect of a particular transaction, to the extent to which it is covered by the guarantee. This includes but is not limited to Misappropriation of Trust Funds, Personal Injury, Commercial and Cybercrime insurance policies;

...

o) arising out of Cybercrime'.

Answering a question posed by the editor as to why the LPIIF decided to exclude cover for cybercrime, the LPIIF stated:

'Clause 16(o) of the LPIIF policy excludes claims arising from cybercrime and also excludes risks (such as cybercrime) that are more appropriately insured under another policy (clause 16(c)). Cybercrime is thus not a risk that falls within the ambit of the cover intended under the LPIIF professional indemnity policy.

The LPIIF has warned the profession of the risks associated with cybercrime since 2010. Since 2015, the profession and the [provincial] law societies were warned of the impending amendments to the LPIIF policy to exclude cybercrime from the Master Policy - the exclusion only came into effect on 1 July 2016. The draft policy including the cybercrime exclusion was published in February 2016 informing the profession that the amended policy would be implemented from 1 July 2019.

Since the cybercrime exclusion came into effect on 1 July 2016, 128 such claims have been notified. The total value of the excluded cybercrime claims is R 80 947 146,87. This figure excludes the investigation and defence costs that would have been expended in respect of these claims, as well as any interest that would have been payable.

The LPIIF is funded by way of single annual [payment] received from the Legal Practitioners' Fidelity Fund. The current premium is R 147 472 806,96. Had the cybercrime claims been covered, 55% of the annual premium would have been used to pay claims arising out of just this one risk. This would pose a serious risk to the long-term sustainability of the company.

The Solvency Assessment and Management (SAM) regulatory regime for insurance companies (which also applies to the LPIIF) prescribes that insurance companies must proactively manage their risks. The exclusion of cybercrime was part of the LPIIF's risk management process and a measure aimed at protecting the long-term sustainability of the company and ensuring that the company meets



Mapula Sedutla - Editor

the prescribed minimum solvency requirements for insurers.

The practitioners who have fallen victim to cybercrime have failed to comply with the Rules with regards to the implementation of internal controls and the verification of banking details before making payments as prescribed by Rule 54.13 in particular.'

The legal profession exists in a world where digital communication, the use of electronic gadgets and the Internet in business makes life easier. All this then brings all the risks associated with conducting business electronically. The Law Society of South Africa (LSSA) has set up a Cybersecurity Helpdesk with the view of assisting legal practitioners on matters related to cybersecurity and cyber liability insurance. In the near future, a list of underwriters providing cyber liability insurance (listed by the South African Insurance Association) will be published on the LSSA website. This will provide contact information of underwriters or their accredited brokers, who legal professionals may approach in addressing this critical aspect of legal professional's cybersecurity management (see www.lssa.org.za).

See also:

- 'Cyber liability insurance' 2019 (Jan/Feb) DR 42.
- 'Technology: Protecting against cybersecurity compromise' 2019 (March) DR 7.
- 'Business e-mail compromise: Attorneys' liability' 2018 (Sept) DR 35.



LETTERS

TO THE EDITOR

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Letters are not published under *noms de plume*. However, letters from practising attorneys who make their identities and addresses known to the editor may be considered for publication anonymously.

Is s 54(2) of the Administration of Estates Act constitutional?

Section 54 of the Administration of Estates Act 66 of 1965 (the Act) (Chapter 2: Deceased Estates) provides for the removal from office of an executor by the court and the Master of the High Court. Section 54(1)(b)(i) to (vi) sets out the grounds on which the Master of High Court may remove an executor from office. Section 54(2) reads as follows:

"Before removing an executor from his office under sub-paragraph (i), (ii), (iii), (iv) or (v) of paragraph (b) of subsection (1), the Master shall forward to him by registered post a notice setting forth the reasons for such removal, and informing him that he may apply to the Court within thirty days from the date of such notice for an order restraining the Master from removing him from his office'. I submit that the words 'within thirty days from the date of such notice' in s 54(2) of the Act is unconstitutional because it enables the Master of the High Court to limit or even prevent access of an executor to the court, which is a basic human right protected by s 34 of the Constitution. I recently had the matter where the Master of the High Court gave notice to an executor in terms of s 54(2) and such notice was dated 3 January, but was only posted 11 days later on 14 January. It was only received by the executor on 22

January, which made it impossible for the executor to approach the court in a normal manner and the executor had to apply for an interim interdict on an urgent basis. The present wording of s 54(2) makes it possible for the Master to post the notice a day before the 30th day of the period allowed for lodging of an application expires, effectively rendering it impossible for an executor to lodge an application as contemplated by s 54(2) to prevent their removal timeously, thus rendering the constitutional protections afforded to executors nugatory. I submit that the wording of the section could easily be rendered constitutionally compliant if the wording were amended to read 'within thirty days from the date of delivery of such notice'.

Delivery of the notice can easily be proved because the Master is required to send a notice in terms of s 54(2) of the Act by registered mail and the courts have extensively dealt with the manner in which delivery of notices sent by registered mail in the context of other legislation are to be proved.

Henk Venter, legal practitioner,
Magaliesburg

De Rebus newsletter - January/February 2019

I have been in law for more than 40 years, and I have always liked books that were slightly musty smelling, yellowing

at the edges and showed the scars and handling of many lawyers.

Tragically, all things must change. As we move into the high-speed electronic media world we must follow it or get left behind.

I know that the journal in its new format will enjoy the same success and respect as the paper of old.

Darryl Morris, legal practitioner,
Johannesburg

The team at De Rebus are innovative, less printing saves the environment

Dear De Rebus team,

Thank you for providing online copies of De Rebus. The journal is innovative and could have a positive impact on our environment as we know it.

Your articles are extremely thought-provoking and what I enjoy the most is, just as the law constantly changes for the better and with the times, your team has also done the same.

I cannot be grateful enough with your new method of utilising the Internet the way it was developed to be utilised.

I can affirm that your future is looking brighter than the screen in front of me, Thank you once again.

Amish Gopie, legal practitioner,
Dundee





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By Sizwe
Snail Ka
Mtuze and
Vilimile
Gumede

Domain name disputes – a discussion of SAIPL adjudicated disputes



In light of the recent dispute of the well-publicised case of *African National Congress v Unwembi Communications* (ZA2018-0350, 31-1-2019), it has become abundantly clear that the alternate dispute resolution (ADR) in the domain name dispute platform is not being used efficiently enough to protect the rights of trade mark owners, due to the lack of knowledge by their legal representatives and themselves on how to prepare and argue domain name disputes.

The frustration that the African National Congress (ANC) has been experiencing before the domain name adjudicator in recovering its domain name – due to insufficient evidence – is a predicament no *bona fide* owner of a trade mark or anyone with a right in a domain name should have to bear (see *Mxit Lifestyle (Pty) Ltd v Andre Steyn* (ZA2008-0020, 30-9-2008)). A discussion on some cases where complaints were lodged with .ZADNA, the domain name authority for the .za namespace in South Africa (SA) follows below.

Online ADR in SA

In A van der Merwe and S Snail 'A Brief Excursus on the South African Online Alternative Dispute Resolution' 2008 (2) *Journal of Information, Law & Technology* (<https://warwick.ac.uk>, accessed 6-3-2019), different types of infringements of commonly known trade marks, as well as trading names in the co.za space, since the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act) came into effect were examined.

One of the problems identified therein, was that High Court litigation on domain name disputes is expensive and often results in a cost order, in the event of a negative finding against the plaintiff. In discussing the grounds for filing a dispute, reg 3 of the ECT Act, requires that –

- complainants have to prove a balance of probabilities that they have rights in respect of a name or mark;
- the name or mark is identical or similar to the domain name; and
- the domain name in the hands of the registrant is an abusive registration.

Van der Merwe and Snail (*op cit*) go on to list the types of complaints, which can be seen as 'abusive registrations' and 'offensive registrations' in terms of reg 4 of the ECT Act. These complaints, include when a –

- person registers another person's name for financial gain;
- registrant passes off his own business as being associated with that of the complainant;
- person registers another's name to unfairly disrupt the business of the complainant;
- person registers another's name to unfairly prevent them from exercising their rights in the name; and
- person registers a series of intentionally incorrectly spelled names with the aim of generating internet traffic (typo-squatting).

According to Van der Merwe and Snail (*op cit*), there are two known remedies provided by the ADR process, namely, the refusal of a dispute, or the transfer of the domain name to the complainant.

In the disputes discussed below the outcome was the former, which illustrates the purpose of this article.

Van der Merwe and Snail (*op cit*) also discuss other remedies available to the parties in domain name disputes, including –

- the appointment of three adjudicators forming an Appeal Board;
- the usual route of civil litigation in a court of law; and
- an action in terms of unlawful competition, and any other common law grounds.

Domain name disputes

- *Allstates Global Karate Do, Inc d/b/a World Seido Karate Organization v Suids Karate (Suliman Said)* (AP2009-0030, 2-12-2009)

In this dispute, a complaint was lodged with the South African Institute of Intellectual Property Law (SAIPL) by Allstates Global Karate against one Mr Suliman Said for the latter's use of the www.seido.co.za domain name. Allstates had registered the www.seido.com domain name during the course of 1996, whereas Mr Said's .za domain name was registered five years later.

It was common cause that a relationship in the form of a licensing agreement between the parties had conferred rights on Mr Said to conduct karate courses, however, the adjudicator, in coming to the decision to refuse Allstates' dispute, made the following findings:

- Allstates did not hold an exclusive right on the trade mark SEIDO in SA and that registration of the domain name in the United States did not give Allstates rights protection under South African law.
- The licensing agreement between the parties did not, in itself, create any rights for Allstates to be protected in terms of South African law.
- There was no evidence that the SEIDO trade mark was registered at the time of the licensing agreement.
- The only reputation of the name SEIDO happened as a result of this trade mark being registered by Mr Suliman in SA.
- Allstates failed to prove – on a balance of probabilities – that it had a right in respect of a mark that is identical/similar to the domain name and that the domain name registration was not abusive.

- *Growthpoint Properties Ltd v Alex Modisane* (ZA2015-0218, 8-1-2016)

In this dispute, which was lodged with the SAIPL, Growthpoint Properties was the proprietor of a number of trade marks registered during the course of 2007 and in relation to a range of services, including valuation, insurance and advertising.

Growthpoint Properties submitted that the www.Growthpoint.co.za domain name registered by Mr Modisane was confusingly similar to its registered trade mark GROWTHPOINT and that Mr Modisane had registered the disputed domain name in relation to the same ser-

vices as those of Growthpoint Properties. A distinguishing aspect of this dispute is that Growthpoint Properties admitted to having no proof that Mr Modisane was aware of its Growthpoint trade marks when he registered the domain name.

The adjudicator in making a decision to refuse the dispute, found that Growthpoint Properties had been unsuccessful in proving the elements constituting abusive registration in terms of regs 3, 4 and 5 of the ECT Act. It was also found that the services offered by the parties respectively were not identical or similar; and that there was no evidence to suggest that GROWTHPOINT is a well-known trade mark in SA.

• *African National Congress v Umwembi Communications*

This dispute involved three former government employees who formed a company (Umwembi) to provide information technology services to the ANC, which included domain name registration and renewal. The www.anc.org.za domain name was the subject of the dispute in an agreement between the ANC and Umwembi in which it was agreed that ownership of the domain name would remain with the latter, until such time as the ANC had settled amounts owed for services rendered in relation to the domain name.

The adjudicator found that no evidence was produced by the ANC to prove

that it had instructed Umwembi to register the domain name on its behalf and, as result thereof, failed to establish its rights in the domain name. The adjudicator drew on World Intellectual Property Organization decisions, as well as reg 3 of the ECT Act to conclude that –

- the ANC had failed to prove its rights in terms thereof;
- the domain name in the hands of Umwembi constituted an offensive registration; and
- the ANC had at least reached the ‘fairly low’ threshold in proving similarity, and therefore, the dispute was refused.

Conclusion

It is clear from the above, as well as other decisions of the SAIPL adjudicators that there is a serious lack of understanding in the area of domain names – not only among legal practitioners with some background in intellectual property law – but also risk and compliance officers, information and communications (ICT) companies, small, medium and micro-sized enterprises and other professionals in the ICT space.

The problems associated with cyber-squatting or sour relationships and/or agreements between parties over the use of domain names can result in lengthy litigation and failed attempts at amicable solutions. In the same breath, it appears that –

- there is no in-depth knowledge of the various facets within intellectual property law relating to domain names such as understanding what a domain name is;
- understanding the processes in ADR;
- the rights one can have in a domain name;
- the interplay between trade marks and domain names;
- defences, appeals, and grounds for referral to a domain name authority or the refusal of a dispute; as well as
- other remedies available to complainants.

It is, therefore, recommended that awareness be raised by relevant stakeholders such as domain name authorities, the Department of Telecommunications and Postal Services and law faculties at various academic institutions in the country as the regulations contained in the ECT Act relating to ADR in domain names have the advantage of providing them with speedy solutions to domain name disputes.

Sizwe Snail Ka Mtuze LLB (UP) LLM (Unisa) is an adjunct research fellow at Fort Hare University and a legal practitioner and Vilimile Gumede BA Law (UP) is a candidate legal practitioner at Snail Attorneys @ Law Inc in Pretoria.



By
Brett
Bentley

NCA s 129(1)(a) notice – a practical perspective on the interpretative challenge

The National Credit Act 34 of 2005 (NCA) in modern South Africa, has been the focus of many legal cases, mostly dealing with the interpretation of its meaning, one of the largest contributors being the provisions of s 129(1)(a). The purpose of this article is not a legal analysis of applicable case law on s 129(1)(a) but rather a practical critique of the poor drafting of this subsection that has rendered its effectiveness and application problematic. Moreover, there are core shortcomings, which are being largely ignored and not receiving proper redress.

Jurisprudence on s 129(1)(a) notices has challenged credit providers and legal practitioners alike. Any credit provider or legal practitioner dealing with, what should be a simple matter of sending a registered letter, seems bound to have to read the latest judgments on the requirements thereof, only to be condemned later to repeat this task for what seems an eternity.

Few issues in our judicial history have been examined by more High Courts, been the subject of a 100 page plus Supreme Court of Appeal judgment and yet still required multiple examinations by the Constitutional Court (CC). All for

a seemingly simple issue of what constitutes proper delivery of a s 129(1)(a) notice by registered mail.

Delivery

Judgments on the matter originally comprised two schools – the first required proof of actual delivery (*ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD)) while for the other, proof of despatch alone by registered post being sufficient (*Rosouw and Another v First Rand Bank Ltd* 2010 (6) SA 439 (SCA)). While the former proved a substantial challenge to credit providers, as proving actual subjective

receipt of the notice by the debtor is an evidentiary nightmare, it was a heaven-sent to dilatory debtors and their legal practitioners.

Section 129(1) of the NCA provides as follows:

'If the consumer is in default under a credit agreement, the credit provider –

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.'

Between the CC cases of *Sebola and Another v Standard Bank of South Africa Ltd and Another* 2012 (5) SA 142 (CC) and *Kubiyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) the issue of whether the amount of the debtor's default should appear in the s 129(1) (a) notice or not, was resolved by the CC. However, the recent case of *Amar-dien and Others v Registrar of Deeds and Others (Woman's Legal Centre Trust as amicus curiae)* 2019 (2) BCLR 193 (CC) showed that other interpretative challenges still remain.

The legislature's limited attempt to remedy the defects of the NCA with the National Credit Amendment Act 19 of 2014 (NCAA), added subss (5) to (7) to s 129, as an attempt to bring certainty to the method of sending these notices and the degree of proof required for delivery thereof. The NCAA thus provided that:

'(5) The notice contemplated in subsection (1)(a) must be delivered to the consumer –

(a) by registered mail; or

(b) to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

(7) Proof of delivery contemplated in subsection (5) is satisfied by –

(a) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(b) the signature or identifying mark of the recipient contemplated in subsection (5)(b).'

The NCAA, therefore, limits delivery methods to registered post or personal service, as elected by the debtor.

I submit that these methods are not

only archaic and costly but in the case of registered mail, also ineffective. In the *Mkhize* case the poor success rate of registered mail actually being collected was highlighted at para 29:

'I have also been provided with an affidavit by an attorney who attends to ABSA's home loan and asset and vehicle finance matters in Pretoria. He too has not kept detailed statistics but estimates that 70% of the registered s 129 letters his office sends out are returned unclaimed.'

Based on my experience, I concur with this estimate.

Modernising the process

Despite the legislature's resolve to remain attached to antiquated delivery methods, there does appear to be a modern solution in the offing through s 19(4) of the Electronic Communications and Transactions Act 25 of 2002 (ECTA), which states:

'Where any law requires or permits a person to send a document or information by registered or certified post or similar service, that requirement is met if an electronic copy of the document or information is sent to the South African Post Office Limited, is registered by the said Post Office and sent by that Post Office to the electronic address provided by the sender.'

If this provision were in operation, it would allow e-mails or even electronic text messages such as SMSs, to serve as valid s 129(1)(a) notices.

A Pew Research Centre research paper released in June 2018 showed that 51% of South Africans have smart phones, a further 40% had other forms of cellular telephones and 59% had access to the Internet. Furthermore, South Africa, since 2015, lead the increase in internet users globally. (www.pewglobal.org, accessed 22-2-2019). Unfortunately, the poor receipt rate of conventional registered mail makes it plain that electronic communication has become a far more effective means of communication to general consumers.

Those reliant on registered post for legal compliance were thus excited by the South African Post Office's (SAPO) announcement in May 2016 that it was launching 'eRegistered Mail' (www.fin24.com, accessed 22-2-2019). Unfortunately, based on various meetings with sales representatives of SAPO and other players in the communications industry over a two-year period, it is, my opinion, that SAPO itself is not confident in the service as it is practically cumbersome and based on 'pull' as opposed to 'push technology'. It is, therefore, no surprise that the general public has not embraced nor made much use of it since inception.

There are, however, a number of private companies currently claiming to offer viable 'push technology' solutions.

Based on use of such products, I believe at least one may be a potential answer to ensuring electronic service of legal notices while maintaining a sound evidentiary trail. The challenge lies with s 19(4) of ECTA. While many service providers claim SAPO's endorsement, the communications –

- do not appear to be sent by the sender to SAPO as required; and
- do not appear to be sent by SAPO to the electronic address provided by the sender.

Additionally, there is some uncertainty as to whether these electronic communications are registered by SAPO.

Therefore, a *lacuna* exists, which could be resolved by SAPO either partnering with an efficient service provider or, alternatively providing a service of comparable quality, to achieve the goal of ensuring compliance with the ECTA. This would be of benefit not only with NCA compliance, but serve a similar purpose with other legislation referring to registered mail.

The purpose of s 129(1)(a) notices

The most important shortfall of the s 129(1)(a) saga appears to have been overlooked, namely is s 129(1)(a) serving the purpose for which it was enacted?

I submit that the most apt description of the purpose of s 129(1)(a)'s is found in *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 (6) SA 63 (KZD), where the court held at para 10:

'That notice invites the debtor to refer the credit agreement (not the debt) to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. The purpose of such reference is either to resolve a dispute that may exist in relation to that agreement or to reach agreement on a plan that will enable the debtor to bring his or her payments under the agreement up to date. In other words, what is contemplated is a consensual process mediated by the person to whom the credit agreement has been referred. This is a process entirely distinct from the general debt review under section 86, which depends upon the debtor being over-indebted.'

However, does consensual mediation actually take place, or is it simply an added compliance requirement for credit providers in the collection process and one being exploited as a spurious defence tool for recalcitrant debtors?

I have, since 2012, been fortunate enough to annually deliver Legal Debt Collection seminars for the Law Society of South Africa around the country, aimed primarily at legal practitioners acting for credit providers. The question constantly posed to attendees is – has any of the s 129(1)(a) third parties ever contacted them in response to a s 129(1)

(a) notice, with a view to consensual mediation? I confirm that in over seven years and in seven cities across the country, the total affirmative replies has not exceeded five in total.

The NCA does not make provision for the payment of any third-party mediators, essentially disincentivising debt counsellors from being involved in the process. However, with the Credit Ombud being a government funded service, this could be a possible tool for overburdened debtors receiving s 129 notices. In view of this, a few years back, I contacted the erstwhile Deputy Credit Ombud, inquiring as to how many consumers had contacted them for a s 129(1)(a) mediation. The answer was that they were uncertain as the majority of debtors contacting them were lodging a dispute but unfortunately the Ombud did not question consumers as to what had prompted the contact and thus there exists no definitive statistics. The Deputy

Ombud, however, felt that s 129 notices served a meaningful purpose by affording the debtor an opportunity to contact credit providers directly and negotiate the debt, thereby possibly avoiding litigation. While this may be true, I submit that –

- this is not the described purpose of the s 129(1)(a); and
- this result achieves little more than a normal letter of demand and certainly should not be a prerequisite for litigation or a determinant of jurisdiction (*Blue Chip 2 (Pty) Ltd t/a Blue Chip 49 v Ryneveldt and Others (National Credit Regulator as Amicus Curiae)* 2016 (6) SA 102 (SCA)).

Conclusion

To summarise the opinion expressed – s 129(1)(a) of the NCA is a poorly drafted provision; one that has caused an excessive number of judgments on delivery by registered post. Furthermore, the failure

to properly remedy this defect through the NCA, has bound the delivery requirements of s 129(1)(a) to anachronistic processes, replete with practical shortcomings and the only potential saviour (SAPO through ECTA) is itself struggling to modernise and provide service more efficiently.

Moreover, the majority of deliberations still centre on ‘the best route to the room’ rather than the fact that the room is occupied by a colossal myth – that s 129(1)(a) is achieving its purpose of creating a third-party mediation process to relieve overburdened consumers. The reality is that s 129(1)(a), with its noble intents, has turned out to be little more than red tape.

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By
Thomas
Harban

The implications of giving informal legal advice

It is not uncommon that, on an informal basis, a legal practitioner would be asked for a view on a legal matter that a particular person is facing with at the time. This may happen in a social gathering or some other informal setting where there is no formal relationship between the practitioner (*qua* legal practitioner) and the person seeking the advice (as client) in respect of the matter concerned. The same could also happen in the offices of the law firm where someone seeks to ‘just run something by you’ or ‘bounce an idea off you’.

This is a common occurrence from which a number of possible questions arise, including:

- In the event that the person seeking the views of the legal practitioner acts thereon and later suffers damages, would there be any liability on the part of the legal practitioner concerned?
- Does the legal practitioner owe the person asking the question a duty of care?
- Does the question of legal professional privilege arise in these circumstances?

These are questions, which some may argue are too remote to even seriously consider, taking into account the everyday interaction legal practitioners have with members of society in general. The

judgments handed down by the courts in other jurisdictions lead me to argue that these questions must be considered by South African legal practitioners and that liability may well arise for legal advice given informally.

Social interaction with clients and members of society in general is part of every legal practitioner’s life. It may not be possible to avoid being faced with questions of law or requests for a view on a legal subject in every social or informal setting.

Though I have not been able to find any South African cases – where the question of whether or not there is any liability on the part of a legal practitioner giving advice on an informal basis – there have been a number of cases in other jurisdictions internationally where the courts have had to deal with this question. It is important that the views of the courts in the other jurisdictions are considered, as a South African court can be called on to adjudicate on this question and will have regard to the foreign decisions.

Selected cases from foreign jurisdictions are highlighted below.

Australia

In *Abu-Mahmoud v Consolidated Lawyers Pty Ltd* [2015] NSWSC 547 (www.

austlii.edu.au, accessed 5-3-2019) the legal practitioner concerned (a solicitor) had allegedly discussed certain tax related matters with a client over two lunches. There was a problem with the advice given by the solicitor and the client later sued the legal practitioner for the damages suffered. The legal practitioner denied giving the advice, but the court preferred the version of the client over that of the legal practitioner. The client insisted that the legal practitioner had given the advice and asked that the court not accept the evidence of the legal practitioner to the contrary unless it could be independently verified. Needless to say, these being lunch meetings, the legal practitioner had not kept notes. The court considered the evidence and found that there was a relationship as legal practitioner and client between the defendant and the plaintiff and that the former thus owed a duty of care to the latter. The court commented that ‘[w]hilst it may be congenial, informal and relaxing for a solicitor to meet with a client in such circumstances, this case demonstrates the pitfalls of attempting to provide serious advice about serious matters in such a setting’. The legal practitioner was held liable to the client in the amount of A\$ 2,3 million.

Malcolm Heath of the professional indemnity insurer Lawcover (in a video clip appropriately titled: 'Is There Advice on the Menu?' <https://lawcover.com.au>, accessed 18-2-2019) comments that it is important that legal practitioners separate social activities from formal legal advice and suggests that file notes be made of all discussions with clients.

The importance of making and keeping notes of all discussions with clients cannot be overemphasised. The facts of this case show that this will be difficult in the event that the discussion takes place in an informal setting like a lunch (or even a braai or at a golf game in the South African context). With no record of the discussion or the advice given, the legal practitioner will be on the proverbial back-foot in defending a professional indemnity (PI) claim or even an inquiry by the regulator in these circumstances.

The United Kingdom (UK)

I have also not been able to find a specific case in the UK where this question was considered.

In the matter of *Howes v Hinckley & Bosworth Borough Council* [2008] UKEAT 0213-08-0407 an employee sought the disclosure of legal advice given to her employer. The employee argued that the legal practitioner from whom the advice was sought was acting as an employment consultant and not as a legal practitioner when the advice was given to her employer. Her contention was thus that legal professional privilege could not be claimed in these circumstances. It was found that despite the fact that the advice was not given in the capacity as a qualified solicitor, it did attract legal privilege. Peter Steel, a legal practitioner in the UK, is thus of the view that because legal professional privilege applied in these circumstances, the door is open for professional obligations to arise as well ('The dangers of giving informal advice' <https://blogs.lexisnexis.co.uk>, accessed 20-2-2019).

Caparo Industries PLC v Dickman [1990] UKHL 2 is a leading English case on the test for a duty of care. The House of Lords, following the Court of Appeal, set out a three-fold test holding that, in order for a duty of care to arise in negligence -

- harm must be reasonably foreseeable as a result of the defendant's conduct;
- the parties must be in a relationship of proximity; and
- it must be fair, just and reasonable to impose liability.

The United States

In *Togstad v Vesely, Otto, Miller and Keefe* 291 N.W.2d 686 (Minn. 1980), Mr Togstad, the first plaintiff, suffered from severe headaches caused by a large aneurism. His wife, Mrs Togstad, the sec-

ond plaintiff, met with a legal practitioner, Mr Miller, regarding her husband's condition. Neither of the plaintiffs were acquainted with Mr Miller or his law firm prior to the consultation. Mrs Togstad testified that she told the legal practitioner 'everything that happened at the hospital,' including certain statements and conduct from the nursing staff that had raised her concerns. Mrs Togstad had not brought any medical records with her to the consultation. Mr Miller had made notes and asked a number of questions during the consultation, which lasted between 45 minutes and an hour. Mr Miller expressed doubt about the prospects of success in the case but indicated that he would discuss the matter with his partner. The plaintiffs heard nothing further from Mr Miller and assumed that his view on their prospects of success remained unchanged. No fee arrangements were discussed, no medical authorisations were requested, nor was Mrs Togstad billed for the interview. The plaintiffs successfully sued the attorney for the losses suffered as a result of missing the prescription date for their claim. The court made a number of interesting remarks on the attorney client relationship, including that:

'In a legal malpractice action of the type involved here, four elements must be shown: (1) that an attorney-client relationship existed; (2) that defendant acted negligently or in breach of contract; (3) that such acts were the proximate cause of the plaintiffs' damages; (4) that but for defendant's conduct the plaintiffs would have been successful in the prosecution of their medical malpractice claim. See, *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970).

...

Under a negligence approach it must essentially be shown that defendant rendered legal advice (not necessarily at someone's request) under circumstances which made it reasonably foreseeable to the attorney that if such advice was rendered negligently, the individual receiving the advice might be injured thereby. See, e.g., *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928). Or, stated another way, under a tort theory, "[a]n attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice." 63 Minn.L.Rev. 751, 759 (1979). A contract analysis requires the rendering of legal advice pursuant to another's request and the reliance factor, in this case, where the advice was not paid for, need be shown in the form of promissory estoppel. See, 7 C.J.S., Attorney and Client, at 65; Restatement (Second) of Contracts, at 90.'

How to avoid possible liability for informal legal advice

Legal practitioners can avoid possible liability by avoiding 'off-the-cuff advice' by politely explaining to the person seeking the opinion that advice can only be given formally after a proper instruction is given and all the facts and legal issues are properly considered. Where the question involves an area of law outside of that in which the legal practitioner normally practices, inform the person accordingly.

Mark Stubbs (<https://blogs.lexisnexis.co.uk> (*op cit*)) suggests that legal practitioners can also:

- clarify that they are only providing general principles and not formal advice;
- keep the advice general and do not provide detailed discussion or instructions;
- suggest that the individual seek formal advice from a legal practitioner; or
- clarify the basis on which serious advice is being given.

Also, remember that if your defence in an action will be that you were not providing a legal service, this will be taken into account in assessing whether or not you will be indemnified under the Legal Practitioners' Indemnity Insurance Fund NPC (the LPIIF) Master Policy. A claim arising from advice that was not part of the provision of legal services will not be indemnified. The policy will only respond to claims brought against an insured legal practitioner (see clauses XVI, 5 and 6) arising out of the provision of legal services. Legal services are defined in the policy (clause XX) as '[w]ork reasonably done or advice given in the ordinary course of carrying on the business of a Legal Practice in the Republic of South Africa in accordance with the provisions of section 33 of the Legal Practice Act'. A copy of the Master Policy can be accessed at <https://lpiif.co.za>.

Conclusion

Though it may be socially impolite, legal practitioners should, as far as possible, avoid giving legal advice in informal or social settings. Displaying your expansive, impressive legal expertise in a social engagement on matters where you do not have all the relevant facts (and the environment is not necessarily conducive to proper interrogation of the issues) may improve your social standing with the immediate audience, but may put your professional integrity and all you have worked for at risk.

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Muslim widows' right to inherit renounced benefits from their husband's estate

Picture source: Gallo Images/Getty



By
Clement
Marumoagae

Historically, the South African public policy was crafted on Eurocentric ideals, which regarded everything that was not in line with western and Christian moral values as invalid and unlawful. This resulted in some of the practices of the native people of South Africa (SA), as well as people who follow the Muslim religion being regarded as against public policy. One such practice is polygamy as practiced under customary law or polygyny as observed under Muslim religion. Section 15 of the Constitution provides that '[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion'. This entrenches the right of every individual in SA to live according to the customs and traditions prescribed by their religion, which includes the right to observe their religious family law systems (N Moosa 'Polygynous Muslim marriages in South Africa: Their potential impact on the incidence of HIV/AIDS' (2009) 3 *PER* 65 at 71).

While the Constitution recognises the right to religion, Muslim marriages in particular are yet to receive legislative recognition. In other words, there is currently no legislative framework for the regulation of the proprietary consequences of Muslim Marriages in SA. On 21 January 2011, the Muslim Marriages Bill was published in the *Government Gazette* (Gen37 GG33946/21-1-2001). The Bill emanates from an investigation by the South African Law Reform Commission (the SALRC) on Islamic Marriages and related matters and sets out a draft statutory framework for the legal recognition of Muslim marriages and their consequences. Due to the divergence of views on the envisaged legislation, this Bill is 'still subject to intense debate in the Muslim community and as such has not yet been passed' (M Harrington-Johnson 'Muslim marriages and divorce' 2015 (May) *DR* 40). This has proved to be particularly challenging during divorce, not only for women who are parties to Muslim marriages, but also for those whose husbands have passed away. As the law stands, these women can neither obtain a divorce from a civil court nor inherit from their husband's estate as 'surviving spouses' in terms of the laws of intestate or testate succession in SA. This article

lines regarding Muslim marriages and the legal consequences that flow therefrom, South African courts have been progressive by continuously making orders that give effect to some of the obligations arising from Muslim marriages (see L Mbatha, N Moosa and E Bonthuys 'Culture and religion' in E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (Cape Town: Juta 2007) 158 to 194 and the cases discussed there). For example, the CC in *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at para 109, declared s 1 of the Intestate Succession Act 81 of 1987 and s 2(1) the Maintenance of Surviving Spouses Act 27 of 1990 unconstitutional and invalid because they omitted from their reach a husband or a wife married in accordance with Muslim rites in a *de facto* monogamous union. Before these provisions were declared unconstitutional, a party to a Muslim marriage on the death of 'her' spouses could neither inherit in 'her' spouse's intestate estate nor lay a claim for reasonable maintenance from such an estate. It is worth noting that in terms of Islamic Law 'the conclusion of a marriage per se, results in the marriage being automatically out of community of property, with all forms of profit sharing being excluded. This, however, does not prevent the spouses from entering into a contractual arrangement in terms of which they may mutually agree to enter into an acceptable partnership or proprietary arrangement' (SALRC 'Islamic marriages and related matters report' Project 59 (July 2003) at 10). It has been argued that '[w]here both parties to a marriage have contributed assets to that marriage,

each retains ownership of those assets, both during and on termination of the marriage. The estate is thus considered to be one in which separate assets are mixed but

are not merged into one estate' (S Breslaw 'Muslim spouses: Are they "equally" married?' 2013 (Dec) *DR* 30). This also enables a party to a Muslim marriage during his lifetime to determine through a Will how 'his' assets should be distributed among 'his' heirs on his death. This can have detrimental repercussions for women whose marriages were not also registered as civil marriages or even as civil unions where on their husbands' death, the testamentary heirs thereto renounce their inheritances (F Moosa 'Renunciation of benefits from a will: Who is a "spouse"?' 2018 (Jan/Feb) *DR* 28). Section 2C(1) of the Wills Act 7 of 1953 prevents such 'women' from inheriting the renounced benefits merely on the basis that they are not recognised as surviving spouses for the purposes of that Act.

The court in *Harneker* was called on to

interpret s 2C(1) of the Wills Act in the context of a polygynous marriage, which provides that '[i]f any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse'. In this case, the husband was married to two women in accordance with the tenets of Islamic Law, one of whom he subsequently married in terms of the civil law. This subsequent civil marriage was motivated by the desire to qualify for a housing loan, which he could not obtain because the South African legal system did not recognise polygynous Muslim marriages and treated them as a common law crime. He agreed with both of his wives to conclude a civil marriage with the first wife, which enabled him to purchase the marital home, wherein they lived together with all of their children.

The marriage to the second wife was neither registered as a civil marriage, nor was it formalised under the Civil Union Act 17 of 2006. The husband executed a Will wherein he distributed 'his estate' between his wives and children. Nonetheless, all his surviving children renounced their benefits due to them under the Will. They agreed in writing that their respective shares should be inherited by their father's wives in equal shares. The executor of the husband's deceased estate chose not to follow the Islamic Law with regard to renunciation and relied on s 2C(1) of the Wills Act, wherein he considered both wives 'to be a "surviving spouse"' (at para 9). The executor then sought to effect registration of transfer of the deceased's one-half share of the marital home into the joint names of both wives. The Registrar of Deeds had no difficulty registering the property in the name of the wife who was subsequently married under civil law but refused to register the property under the name of the second wife who was married only under Islamic Law, on the basis that she was not a surviving spouse in terms of the law as it was applied at the time.

The Registrar of Deeds argued that all benefits renounced by the descendants of the deceased born of his marriage to the second wife, should vest in the children of those descendants under s 2C(2) of the Wills Act. The second wife's argument was that there was a clear unfair discrimination in respect of widows who are both married in accordance with Muslim polygynous marriages wherein the one who was also married in terms of civil law is regarded as 'a surviving spouse' whereas the other spouse is not. Basically, the second wife felt that her marriage, which was not subsequently registered in terms of civil law, was re-



particularly discusses the right of Muslim women to inherit benefits renounced by their husbands' descendants in circumstances where they were only married in terms of Islamic personal law and not subsequently married in accordance with civil law. This will be done by critically reflecting on *Moosa NO and Others v Harneker and Others* 2017 (6) SA 425 (WCC) (*Harneker*), which was subsequently confirmed by the Constitutional Court (CC) in *Moosa NO and Others v Minister of Justice and Others* 2018 (5) SA 13 (CC) (*Moosa*). There is an urgent need for the legislative recognition of Islamic law of succession in a way that conforms with the foundational values of the Constitution. In the absence of any legislative guide-

garded as less important than civil marriages and customary marriages which are legally recognised in South Africa. The *amicus curie* also demonstrated to the court that non-recognition of Muslim marriages prejudices Muslim women and subjects them to ‘many intersecting forms of disadvantage and discrimination’ (*Harneker* at para 18).

The impact of the Registrar’s interpretation of the phrase ‘surviving spouse’ and the total disregard of the second wife’s Muslim marriage was to effectively deny her the opportunity to inherit the benefits, which her husband’s descendants had renounced. At the same time, the first wife received these benefits merely because her marriage was also registered as a civil marriage. Section 2C(1) of the Wills Act does provide to any of the beneficiaries that possesses the necessary capacity right to refuse to receive the benefit accorded to them under the Will. Should that happen, this provision mandates that such benefit should be given to the surviving spouse. Linguistically, it cannot be doubted that the legislature was referring to a situation where there was only one marriage at the time of the testator’s death. This effectively excluded forms of marriages, such as where a person at the time of his death married more than one wife. In other words, this provision espouses Eurocentric and Christian value of two heterosexual persons joined together in ‘holy’ matrimony, which is out of touch with modern times wherein different forms of family unions exist. In declaring s 2C(1) of the Wills Act invalid and inconsistent with the Constitution to the extent that it excluded the second wife from its ambit, Le Grange J held that the second wife was ‘directly discriminated against, premised upon her religion and marital status’ (*Harneker* at para 32). He was of the view that this provision ‘can only be cured by a reading-in of

words that the term “surviving spouse” ... encompasses in its meaning ... every “surviving” husband or wife who was married by Muslim rites to a deceased testator’.

This matter was subsequently taken to the CC for confirmation. Cachalia AJ in a unanimous judgment confirmed and endorsed Le Grange J’s order and reasoning (*Moosa* at para 12). Nonetheless, Cachalia AJ emphasised the dignity element of this matter by acknowledging that the non-recognition of the second wife’s right ‘to be treated as a “surviving spouse” for the purposes of the Wills Act, and its concomitant denial of her right to inherit from her deceased husband’s will, strikes at the very heart of her marriage of 50 years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman’ (*Moosa* at para 16). While the right to equality and the need to discourage unfair discrimination is important, I nonetheless, submit that not only the right but the value of dignity makes for a better argument when considering the prejudices that Muslim women in particular experience from the law and certain religious practices, which might not be in line with the Constitution. Their dignity as persons who are worthy of recognition as autonomous beings of all the protections the law has to offer must be respected. They ought not to be dehumanised and put on trial merely because certain laws unjustifiably deny them benefits that are accorded to similarly placed women from other religions and cultures. Such laws do not only unfairly discriminate, they also fundamentally challenge Muslim women’s right to dignity and self-worth. In the *Moosa* case, in order to restore the dignity of Mus-

lim women who found themselves being discriminated by s 2C(1) of the Wills Act, Cachalia AJ read the following: ‘For purposes of this sub-section, a surviving spouse includes every husband and wife of a de facto monogamous and [polygamous] Muslim marriage solemnised under the religion of Islam’ into this provision (*Moosa* at para 17).

In conclusion, this judgment entails that every person who has entered into a Muslim marriage irrespective of whether or not such marriage has been subsequently registered in terms of the Marriage Act 25 of 1961, Recognition of Customary Marriages Act 120 of 1998 or Civil Union Act will be regarded as a surviving spouse on the death of the person they are married to in as far as the Wills Act is concerned. It is disappointing, however, that vulnerable Muslim women in relation to their proprietary rights such as maintenance, pension interest and now a right to receive a renounced benefit have to always approach the courts for relief. I submit that there is an urgent need for the legislature to thoroughly engage the Muslim community to understand their differences, in order to pave a way for the legal framework that will enable parties to the Muslim marriages to safeguard their interests when their marriages dissolve either by divorce or death.

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A right to consular assistance: Some general observations



By
Riaan
de Jager

In June 2018, the media was abuzz about 51 young South Africans who had been detained by the authorities in China after having found themselves embroiled in a visa scam. The group had seemingly been enticed by an agent to travel to China on study visas while planning to work as English teachers. As such an arrangement contravened the immigration laws of the People's Republic of China, they were arrested and detained. The South African Embassy in Beijing intervened and provided them with consular assistance. Following subsequent ministerial intercession, they were all released and were able to return home safely a few days later. It is against this setting that I write this article, my main aim being to examine the legal basis, nature and extent of consular assistance, which our embassies, high commissions and consulates-general (missions) render on a daily basis to our nationals abroad.

The Constitution, the foundation of our law, provides in s 232 that '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' Since the Vienna Convention on Consular Relations of 1963 (the Convention) is a multilateral treaty that codifies consular law, it is advisable to start here. The Convention has been incorporated into our domestic law by virtue of s 2(1) of the Diplomatic Immunities and Privileges Act 37 of 2001.

Consular functions

Article 5 of the Convention sets out what consular functions consist of and they include a variety of essential services that ensure the protection of the interests of South Africa (SA) and its nationals at the most fundamental level. The list of 12 functions is, however, not exclusive, since paragraph (m) of art 5 authorises consular officers (consuls) to perform any other functions entrusted to them by the sending state and which are not prohibited by the receiving state (see LT Lee and J Quigley *Consular Law and Practice* 3ed (Oxford University Press 2008) at 110). Consuls are mostly appointed by sending states in order 'to protect the practical, legal, and commercial interests of its own nationals in ... [the receiving state], and their contacts for this purpose with the host State are with regional, local, or police authorities rather than with the ministry of foreign affairs or other departments of central government' (see I Roberts (ed) *Satow's Diplomatic Practice* 7ed (Oxford University Press 2016, Kindle



Edition) at 120). Consuls have thus 'become closely assimilated to diplomats in the manner of their appointment and in many of the functions they perform, though not in the methods whereby they carry out these functions' (Roberts (*op cit*)).

Although I am in essence dealing here with consuls and their activities, it is worth mentioning that diplomatic agents are in terms of art 3.2 of the Vienna Convention on Diplomatic Relations of 1961 permitted to perform consular functions. It follows that diplomatic agents, attached to our missions abroad, will be able to perform consular functions where SA does not also have consular posts elsewhere in that particular country. For more on the difference between the various categories of diplomats, see Riaan de Jager 'Diplomatic immunity: Its nature, effects and implications' 2018 (July) *DR* 26.

Protection of nationals

For purposes of this article, my main focus will be on South African (SA) nationals who are arrested or detained abroad and in need of assistance and protection. '[P]rotecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law' in terms of art 5(a) of the Convention is the most important of all the functions of a consul. 'Protection may involve assisting or repatriating the destitute and victims of robbery, ... visiting nationals in hospital if they are injured or become ill on holiday, helping them with their arrangements, and tracing the relatives of victims of an air disaster, storm, or flood in the receiving State' (Roberts (*op cit*) at 131-2). Consuls must, however, be cautious when rendering such assistance and protection, as they cannot transgress local law or interfere in the internal affairs of the receiving state (art 55.1).

Sending states may entrust a consular post established in a particular state with the exercise of consular functions in a third state, unless there is express objection by one of the states concerned (art 7). Moreover, it is common practice among states to provide consular services on behalf of another where one maintains a consular post while the other does not (art 8).

The protection of nationals, however, raises a number of legal questions, one of which, is a receiving state's obligation to permit such protection. A receiving state must allow a consul to act on behalf of the sending state's nationals and this obligation has long been established (Lee and Quigley (*op cit*) at 116 and 124). For a sending state's national, who desires protection, consuls are widely regarded as being under an obligation to provide it and states have often characterised consular services as being owed to their nationals (Lee and Quigley (*op cit*) at 131). However, a consul will not be entitled to protect a national who rejects such protection for whatever reason (Lee and Quigley (*op cit*)).

Consular protection versus diplomatic protection

Granted that diplomatic protection falls outside the scope of this article, it is noteworthy that a clear distinction must be drawn between consular protection and diplomatic protection although the two may be exercised successively or even on occasion simultaneously in respect of the same events.

States have a right to exercise diplomatic protection on behalf of their nationals although they are not obliged to do so (*Kaunda and Others v President of the RSA and Others (2)* 2004 (10) BCLR 1009 (CC) at para 23 and 236; and J Dugard, DL Bethlehem, M du Plessis and A Katz *International Law: A South African Perspective* (Cape Town: Juta 2005) at 290). Before a state may exercise its right of diplomatic protection of its national, it is essential that the national must have exhausted all available legal remedies before the judicial or administrative courts or bodies of the state alleged to be responsible (Roberts (*op cit*) at 145; and Dugard (*op cit*) at 292). The rules form part of the international law on state responsibility (E Denza *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 4ed (Oxford University Press 2016, Kindle Edition) at 36).

Regarding consular protection, its primary purpose is to assist nationals in the pursuit of local remedies, whether with the local authorities or with prison or judicial bodies or to assist with personal matters.

Nationals charged with criminal offences

A major protective function of a consul is to communicate with nationals who are in pre-trial detention on a criminal charge or who have been sentenced to prison after being convicted. This function has assumed growing importance as a result of the increase in travel for employment, business and pleasure. Drug offences account for many arrests of nationals.

Article 36.1 of the Convention is of particular importance here. The International Court of Justice (ICJ) in *LaGrand (Germany v United States of America)* (ICJ Reports 2001, p 466) p 492 ruled (at para 74) that art 36.1 'establishes an interrelated regime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: The right of communication and access [art 36.1(a)]. This clause is followed by the provision which spells out the modalities of consular notification [art 36.1(b)]. Finally [art 36.1(c)], sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving state'. This interpretation of art 36.1 was confirmed by the ICJ in a subsequent judgment in the *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (ICJ Reports 2004, p. 12)

p 43 at para 61. Sending states will, for all practical purposes, be prevented from exercising their rights under art 36.1 if they are unaware of the detention of their nationals due to the failure by receiving states to provide the requisite consular notification without delay (the *Avena case (op cit)*).

In the *Avena* case, the ICJ also held that receiving states are under an obligation to provide consular information pursuant to art 36.1(b) of the Convention in respect of foreign nationals detained by the former. Moreover, the court ruled that the phrase 'without delay' in art 36.1(b) should be interpreted to mean that there is an obligation on a receiving state to provide consular information as soon as it realises that the arrested person is a foreign national or that there are grounds for thinking that he is probably a foreign national (at paras 87 and 88).

Dual nationality

Consular protection is based on the status of the individual requiring protection as a national of the sending state. If there is uncertainty regarding the individual's nationality status or if the individual is a national of more than one state, difficulties could arise. The Convention does not, however, address this issue and the matter is thus left to general international law (Lee and Quigley (*op cit*) at 125) and the practice of individual states.

Some sending states endeavour to protect individuals in this situation and seek to provide protection, although the receiving state may reject a consul's efforts, in particular if the individual is resident in the receiving state (Lee and Quigley (*op cit*)). International practice, however, varies in this respect.

A pertinent example worth mentioning is when the Egyptian authorities arrested and detained Sheikh Abdul Salaam Bassiouni, a dual South African-Egyptian national, in December 2014 on unspecified terrorism charges. The sheikh travelled to Egypt to attend his daughter's engagement celebrations. In an attempt to gain access to Dr Bassiouni to provide him with consular assistance, the South African Embassy in Cairo addressed various diplomatic notes to the Egyptian Foreign Ministry. These requests for access were, however, denied by Egypt based on the fact that Dr Bassiouni's SA nationality was in terms of Egyptian law not deemed relevant.

Permanent residents

Consular protection is also sometimes extended to permanent residents. Although the legal basis for it is uncertain, protection activity for a permanent resident is typically confined to inquiries

and expressions of concern, especially if the country of which they are nationals declines to afford them assistance and protection (Lee and Quigley (*op cit*) at 203). Receiving states may under such circumstances allow such provision of protection in the absence of objection by the state of nationality (Lee and Quigley (*op cit*) at 204).

Conclusion

It is trite that nationals have a right to consular assistance and protection from missions although it must be rendered and exercised within the confines of the domestic law and practice of the receiving state and subject to available resources. Moreover, consuls should tread carefully in order not to interfere in the internal affairs of the receiving state. It is in all travellers' best interest to have the contact details of the mission in the country of destination, as well as the names and contact details of their next of kin with them at all times. They are also encouraged to register with the Department of International Relations and Cooperation (DIRCO) before travelling or after arrival at their destination to ensure that all their personal details and those of their next of kin are available to DIRCO in the event of an emergency.

Travellers are also advised to demand that the nearest SA mission should be informed in the event of their arrest or detention in order to acquire consular assistance as soon as possible. DIRCO, through its Chief Directorate: Consular Services, furthermore, provides advice and instructions to nationals on its website (www.dirco.gov.za) on what our missions can and cannot do in the event that they require assistance.

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Does SA have the required framework for mutual legal assistance and extradition?

It is generally accepted that once a crime has been committed, it should be investigated, the perpetrator should stand trial and on conviction be punished for their unlawful conduct. The challenge that arises is how this could be ensured where the perpetrator is outside the borders of the country in which the crime was committed or where the effect of the crime was felt.

The Extradition Act 67 of 1962 (the Act) regulates South Africa's (SA's) extradition procedure.

Extradition is defined as the physical surrender by one state (the requested state), at the request of another state (the requesting state), of a person who is either accused or convicted of a crime by the requesting state.

South Africa currently has extradition agreements with the following countries:

- Algeria;
- Australia;
- Botswana;
- Canada;
- China;
- Egypt;
- India;
- Israel;
- Lesotho;
- Malawi;
- Nigeria;
- Swaziland;
- the United Arab Emirates (UAE); and
- the United States.

Extradition treaties with these countries have been signed but need to be ratified –

- Argentina;
- Hong Kong; and
- Iran.

Extradition treaties with these countries have been negotiated, but not yet signed –

- Brazil;
- Cuba;
- Hungary;
- Mexico;
- Namibia;
- South Korea;
- Taiwan; and
- Zambia.

Extradition treaties or agreements

The consensus in international law is that a state does not have any obliga-

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Picture source: Gallo Images/Getty

tion to surrender an alleged criminal to a foreign state, because one principle of sovereignty is that every state has legal authority over the people within its borders.

The requested state may surrender the requested individual only after there has been compliance with an extradition agreement between the requesting and requested state; and the domestic laws of the requested state.

The extradition agreement between the requested state and the requesting state determines the offences in respect of which the extradition is possible and the circumstances in which extradition may be refused, whereas domestic law as outlined in legislation prescribes the procedure to be followed in extradition proceedings and some of the circumstances in which extradition may be refused.

Foreign states are divided into three groups

• **States with which SA has an extradition agreement:** South Africa has entered into a number of extradition agreements. In 2003 SA also acceded to the multilateral European Convention on Extradition of 1957 and in doing so became a party to an extradition agreement with a further 50 states.

• **States designated by the president in terms of s 2(1)(b) read with s 3(3) of the**

Act: The President has designated the following states, namely Ireland, Namibia, Zimbabwe and the United Kingdom (UK).

• States in respect of which the president has consented to the surrender of the fugitive.

Formalities

Article 12 of the Convention prescribes the following formalities:

- Requests shall be in writing and communicated through diplomatic channel (other means may be communicated by arrangement or direct agreement).
- The request shall be supported by –
 - an original or authenticated copy of conviction and sentence/detention order immediately enforceable or of a warrant of arrest;
 - a statement of offences for which extradition is requested. Time and place of their commission, their legal description and relevant legal provisions set out as accurately as possible; and
 - a copy of the relevant enactments or where not possible, a statement of the relevant law and as accurate a description as possible of the person claimed together with any other information which will help establish identity and nationality.

Procedure

- The Minister of Justice receives the ex-

tradition request from a foreign state via diplomatic channels (s 4(1)).

- The minister will then issue a notification to a magistrate who in turn will issue a warrant of arrest (s 5(1)(a)).
- The arrest and detention are aimed at conducting an extradition inquiry.
- A person detained under a warrant of arrest is brought before the magistrate in whose area of jurisdiction the person is arrested whereupon the magistrate must hold an inquiry with a view to surrender such person to the foreign state concerned (s 9(1)).
- If on consideration of evidence adduced at the inquiry, the magistrate finds that the person before them is liable to be surrendered to the foreign state, the magistrate shall issue an order committing such person to prison to await the minister's decision with regard to their surrender (s 10(1)).
- The magistrate must, forthwith, issue the committal order together with the copy of the record of proceedings to the minister. The minister may order or refuse surrender to the requesting foreign state (ss 10(4) and 11).
- Any person against whom an order under s 10 has been issued has the right to appeal to the High Court and no order for surrender of such person shall be executed before the right of appeal has been exercised or waived (ss 13 and 14).

An extradition inquiry is regarded as a judicial and not an administrative proceeding. Extradition proceedings nevertheless remain *sui generis* in nature and can, therefore, not be described as criminal proceedings. There is an important difference between judicial and executive roles in extradition proceedings.

Although a magistrate fulfils an important screening role to determine whether or not there is sufficient evidence to warrant prosecution in the foreign state, the decision to extradite a person is ultimately an executive one. The pivotal role of the executive in extradition proceedings has been criticised.

Section 14 of the Act provides that an order for extradition may not be executed before the period allowed for an appeal (15 days) has expired, unless the right to appeal has been waived in writing or before such an appeal has been disposed of.

Bail

In terms of s 13(3) a person who has lodged an appeal in terms of subs 1 may at any time before such appeal has been disposed of, apply to the magistrate who issued the order in terms of ss 10 or 12 to be released on bail on condition that such person deposits with the clerk of the court or with a member of the Department of Correctional Services or with any police official at the place where such person is in custody, the sum of money determined by the magistrate.

In terms of s 13(4), if a magistrate orders that the applicant be released on bail in terms of subs 3 the provisions of ss 66, 67, 68 and 307(3) to (5) of the Criminal Procedure Act 51 of 1977 (the CPA), shall *mutatis mutandis* apply to bail so granted.

It leaves no doubt that the proceedings are criminal in nature. Furthermore, the Act itself does not provide for its own process for a bail application.

In the case of *S v Tucker* 2018 (1) SACR 616 (WCC) it was stated: 'In my view, bail application proceedings in extradition proceedings are in essence criminal in nature, as they in substance deal with the determination of sufficient evidence to warrant the arrest, detention and surrender for prosecution of persons accused or convicted of certain offences, and for incidental matters. ... [Section] 65 of the CPA is a mechanism for an appeal to the High Court against the refusal of bail or the imposition of a condition of bail by a lower court, and that bail appeals are inherently urgent in nature.' Such appeal may be heard by a single judge of the High Court.

In the case of *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC) at para 4 it was stated that an extradition procedure works both on international and domestic plane. On the international plane a request from one foreign state to another for extradition of a particular individual and the response to the request is governed by public international law. The general legal basis for extradition is treaty, reciprocity or comity. However, before the requested state may surrender the requested individual there must be compliance with its own domestic laws. Each state is free to prescribe when and how an extradition request will be acted on and the procedures of arrest and surrender of the requested individual.

It is important that the extradited person have a fair trial. The South African domestic extradition law provides that a person will not be extradited if the extradited person will be prejudiced at their trial in the requesting state by reason of their gender, race, religion, nationality or political opinion.

The matter of *S v Dewani* (WCC) (unreported case no CC15/2014, 8-12-2014) (Traverso DJP) is noteworthy in this regard. In November 2010, while UK citizen Shrien Dewani and his wife were on honeymoon in Cape Town, Mrs Dewani was shot and killed during a hijacking. Dewani soon thereafter left SA with the permission of the South African law enforcement agencies. It was later alleged during the sentencing of one of the perpetrators involved in the hijacking that Dewani had arranged for the killing of his wife. The motive for the killing is unknown, although unproven allegations have been made to the effect that it was

a forced marriage, which did not carry Dewani's approval and withdrawal from the marriage would have resulted in his being disowned by his family. Dewani was arrested in the UK and released on bail pending an extradition application. He denied involvement in the killing of his wife and alleged that on being extradited to SA his human rights would be infringed as he would be in danger of gang-related sexual violence in prison. The application by the South African government for Dewani's extradition, however, was successful.

In a globalised world the commission of cross-border crimes, such as human trafficking, terrorism, drug trafficking and environmental crimes are bound to increase, especially where a legal system does not provide sufficiently for extradition. Criminals will exploit deficiencies in a legal system to their own advantage. Countries without safeguards against such exploitation may become havens for fugitive criminals. This is one of the reasons why attention is increasingly being given to extraterritorial jurisdiction, to prevent criminals from escaping justice.

South Africa went through this process in the extradition of George Louca, the man who was accused of killing strip-club boss, Lolly Jackson. Louca fled to Cyprus. He was arrested there after the South African authorities appealed to their Cypriot counterparts and Louca appeared in a local Cypriot court.

A mutual legal assistance treaty is an agreement between two or more countries for the purpose of gathering and exchanging information in an effort to enforce public or criminal laws.

Conclusion

Physical and electronic crimes are increasingly being committed across borders. Criminal networks are taking advantage of opportunities resulting from dramatic changes in world politics, business, technology, communications and exploiting in international travel and effectively utilise these opportunities to avoid and hamper law enforcement investigations. Criminals are always looking to exploit deficiencies in the system for their advantage. The question remains whether SA has succeeded to establish the required framework as a fully-fledged member of the international community to make a positive contribution in the fields of mutual legal assistance and extradition.

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Determining the crime for concealment of birth



By
Louis
Radyn

As an assessor in the High Court for approximately ten years after my formal retirement in 2010, the experience of confrontation with legal issues has exposed me to prosecutions and judgments relating to the killing of foetuses and newly born children, which ostensibly do not always result in a just legal closure. One is increasingly alert to the reality of public belief and the *boni mores* condemning the seemingly insensitive judgments by South African courts when ruthless and callous killing of innocent children is at stake – even so when newly born babies are killed. The judiciary may not merely remain silent with an irrefutable attitude of ‘he, who alleges, must prove’ and so be it. The duty of the judiciary no doubt goes beyond the legal cliché of ‘taking an arm chair attitude’ when the community cries out for justice to be seen and done.

In April 2018 renewed protests by the media were perceived claiming that gigantic contemporary augmentation in these incidents. Some of the regions in South Africa need to be taken in hand without delay by law enforcement bodies and courts alike.

Magistrates have, since 1925, had a duty to guide litigants in a criminal court (*Rex v Thane* 1925 TPD 850). One of the most obtrusive reasons – in those years – was that most prosecutors in the magistrate’s courts were not legally qualified. Times have changed significantly. Today, judges are more inclined (understandably so) to uphold that litigants should be suitably qualified in law and experienced enough to deal with matters on the court rolls accurately. Regrettably, the hypothesis that litigants are efficiently skilled is not always trustworthy. The unfortunate truth is that university training in ethics pertaining to this very intricate category of offences has been abandoned with the introduction of the LLB degree in its current design.

Presiding officers and legal representatives should always be conscious of the legal consequences, when for example, an accused is charged with the offence of a contravention of s 113(1) of the General Law Amendment Act 46 of 1935 (the Act).

Concealment of birth is rather complex

The offence of concealing the birth of a newly born baby is often perpetrated instantaneously after birth. After careful appraisal of all the relevant circumstances surrounding a particular case the evidential material, which may initially appear to disclose a concealment of birth, may well culminate to constitute murder. Diverse dynamics potentially come into play when dealing with these matters, and they often impact on the judgment of the court.

These features will be discussed in this article. This article will structure diverse scenarios applicable to adjudication in matters, which may give rise to conviction on a variety of offences.

According to Andra le Roux-Kemp and Jacques Wilkinson legal status is only

granted to a person in South African jurisprudence on live birth, and a foetus is only deemed to be born alive if the birth was concluded and there was total severance between mother and child (Andra le Roux-Kemp and Jacques Wilkinson ‘A novel application of the hydrostatic test in determining live (non)-birth’ 2012 (25) *South African Journal of Criminal Justice* 271 at 272).

The crime

Section 113 of the Act reads as follows: ‘(1) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

(2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.

(3) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction.’



Picture source: Gallo Images/Getty

Elements of concealment of birth

The elements of the offence of contravening s 113(1) of the Act are –

- disposal;
- the dead body;
- a newly born child; and
- the intent to conceal the fact of birth.

These elements can be unpacked as follows:

• Disposal

The law requires that the disposal must have an element of permanency. Pittman JP found that placing the dead body of a stillborn in a box in a room where others had access was not ‘disposing’ of it for the purposes of s 113(1) as the evidence did not show that the accused intended the body to remain in the box for any length of time (*Rex v Dema* 1947 (1) SA 599 (E)).

This age-old requirement of ‘permanent disposal’ was recently confirmed in the Gauteng Division of the High Court in Pretoria in the matter of *S v Molefe* 2012 (2) SACR 574 (GNP). After the accused gave birth to a stillborn child she placed the body in a bucket and left it at her residence. When confronted by the police at a later stage she showed them the bucket containing the remains. Among other reasons and relying on the *dicta* of the *Dema* case, the review court set aside the conviction of attempted concealment of birth as the placing of the dead infant’s body in a bucket and keeping it at her residence did not qualify as disposal for purposes of contravening s 113(1).

• The dead body

Prosecutions under s 113(3) of the Act will not be successful in circumstances where the abandoned child was found and rescued. Prosecution is not sustainable in circumstances where the victim did not die, unless there are reasonable prospects of success on a charge of attempted concealment of birth, depending on the circumstances.

In *Rex v Oliphant* 1950 (1) SA 48 (O) at 51, De Beer JP stated the following:

‘The meaning of the section under which the accused was charged, however, to my mind quite clearly envisages the disposal of a dead body and this is an essential element of the crime, which should have been alleged. The words “whether the child died before, during or after birth” further stress the fact that it must have been dead at the time of concealment.’

Section 239(2) of the Criminal Procedure Act 51 of 1977 (the CPA) confirms as a requirement the death of the newly born child:

‘(2) At criminal proceedings at which an accused is charged with the conceal-

ment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth.’

While it is a prerequisite of the crime that a dead body be disposed of, s 113(2) of the Act relieves the prosecution of the burden to prove that the child was dead at the time of the disposal. This requirement must nevertheless be alleged in the charge (the *Oliphant* case). Where, however, there is proof that the child was alive at the time of disposal the accused cannot be convicted of the crime of concealment of birth as contemplated in s 113(1) of the Act (*S v Maleka* 1965 (2) SA 774 (T)).

It is questionable whether s 113(2) will survive a constitutional challenge as it relieves the state of proving one of the essential elements of the crime and infringes an accused’s right to a fair trial.

• A newly born child

For purposes of s 113(1) of the Act the disposal must be that of the body of the newly born child. The corollary is that where a mother buries her two-year-old child after the child has died she will not be contravening the provisions of this section.

• The intent to conceal the fact of birth

Proving that the accused disposed of the body of the dead newly born child is not sufficient to secure a conviction on a charge of contravening s 113(1) of the Act. The state is required to prove that in concealing the body the accused had the intention of concealing the fact of the birth. This requirement is proved by way of inference drawn from the proven facts.

Normally this offence will not be committed in circumstances where the accused births a stillborn baby in the presence of another person and then buries the body, as that person would know of the fact of birth, unless that person is in cahoots with the mother of the stillborn baby and they both dispose of the body with the intent to conceal the fact of birth. In such event they both contravene the provisions of s 113(1) of the Act.

In the event of that mother of the child tells people that she buried the body immediately after she has done so, she will not be guilty of the crime of concealment. Such behaviour would prove that she did not have the intention to conceal the fact of birth.

Every matter must be assessed on its own merits to determine whether or not the accused had the intention to conceal the fact of birth. Where the body of the stillborn is buried in circumstances where no one was aware that the mother was pregnant, and she only reports the birth a year later, it may well be possible

to prove that at the time she buried the body she had the intention of concealing the fact of birth.

Why not murder?

Murder is the unlawful and intentional killing of another living human being/person (*Rex v Ndhlovu* 1945 AD 369 at 373; *S v Mshumpa and Another* 2008 (1) SACR 126 (E) at 149; CR Snyman *Criminal Law* 5ed (Durban: LexisNexis 2008) at 309; Jonathan Burchell *Principles of Criminal Law* 3ed (Cape Town: Juta 2005 at 159).

Feticide (the killing of an unborn foetus) refers to the act that causes the death of a foetus (see CJ Davel and RA Jordaan *Law of Persons* 4ed (Cape Town: Juta 2006) at 12) and, therefore, cannot be murder because a ‘person’ or ‘human being’ for purposes of the definition of murder must have been born alive (see *Mshumpa (op cit)* at para 53).

In cases involving infanticide it is often complicated to prove that the child lived at the time when the perpetrator killed the child. In South African law, the appropriate manner in which to determine if a foetus was born alive is to determine whether the foetus breathed. To this end the legislator has enacted s 239(1) of the CPA:

‘At criminal proceedings at which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.’

The test

Breathing as a requirement of a live birth is not always easy to establish. The most common forensic tool used to determine whether or not a child had breathed is the hydrostatic test (E du Toit, FJ de Jager, A Paizes, A St Q Skeen and SE van der Merwe (general eds) *Commentary on the Criminal Procedure Act* (Cape Town: Juta 1987) at 24 to 114; and Le Roux-Kemp and Wilkinson (*op cit*) at 272). It involves placing pieces of the lungs of the deceased into water. If the tissue floats it is accepted that air was inhaled into the lungs showing the deceased breathed before death. The lung tissue of a stillborn child who has not breathed will sink in water (Le Roux-Kemp and Wilkinson (*op cit*) at 274).

Although this test has been criticised, it is still regarded as the most appropriate medico legal test to determine live birth. Ideally reliance should not be placed on this test alone. Additional verification should be placed before court to prove that the deceased breathed before death, for example other medico legal

tests, such as liver flotation, macroscopic and microscopic analysis or other circumstantial evidence, to corroborate that the child was alive and breathing before being killed should be done (Du Toit *et al* (*op cit*) at 24 to 114A). For a detailed discussion see Le Roux-Kemp and Wilkinson (*op cit*).

Murder, culpable homicide or concealment of birth?

If the state establishes that the newly born infant was breathing at the juncture when the accused abandoned or concealed him or her and later died as a result of the desertion there will generally be an excellent projection of accomplishment on a charge of murder. In this instance the state will have to provide evidence that the accused was acquainted with the fact that the child was living at the time when the toddler was deserted. Circumstantial evidence in this regard will solicit the court with the desired legal inference. The accused can undoubtedly raise the defence of being ignorant of the possibility that the infant was alive at the time of concealment or abandonment.

The following paradigm may serve as an illustration. Presume that immediately subsequent to the birth of her child its mother (knowingly) leaves the live infant in a concealed area like a forest, veld, bush or an outside pit toilet. Later on a passer-by finds the child alive; takes it to a hospital where the child eventually dies as a result of being neglected by the mother. The intention to kill manifested in the form of *dolus directus* since the mother knew that the child would die as result of the neglect. At the very least the intention to kill should be in the form of *dolus eventualis*. Should the state, however, fail to prove the required *mens rea*, an acquittal of murder should be eminent.

A charge of culpable homicide is a competent verdict to murder in terms of s 258 of the CPA and the accused can be convicted of this offence should the evidence prove that the death of the child was caused by the negligence of the accused.

Should the presented evidence fall short of proving either murder or culpable homicide, but proves a contravention of s 113(1), the accused may be convicted of the latter transgression as it is a competent verdict to murder (s 258(d) of the CPA) and on a charge of culpable homicide (s 259(c) of the CPA).

Attempted murder

In a similar vein, the accused should face a charge of attempted murder where the hospital succeeds in saving the child's life.

Additional requirements

Legislative requisites have, in the past, been developed and amplified by our courts to the degree that a conviction is subject to certain supplementary requirements. One such requirement is that the state has to prove that the foetus was older than 28 weeks at the time of the prohibited act (see the *Molefe* case; *S v Jasi* 1994 (1) SACR 568 (ZH); and *S v Madombwe* 1977 (3) SA 1008 (R)).

A further expansion is that it must be proved that the foetus had the potential of being born alive – it must have been a viable child (see the *Molefe* and *Jasi* cases and *S v Manngo* 1980 (3) SA 1041 (V)).

Other possible offences

In terms of s 14(1)(a) of the Births and Deaths Registration Act 51 of 1992 there is a profound obligation on an individual who was present at the demise of a person who died of natural causes to notify the Director-General of the Department of Home Affairs or their delegate of such death.

This Act will no doubt also apply to the death of a newly born child. One must be sensitive to the fact that the death of a person is referred to. Consequently, it will be necessary to prove that the baby was born alive.

It is a transgression to dispose of the body of a stillborn baby unless a notice of the death was given to the Home Affairs and a burial order was issued (s 20 of the Births and Deaths Registration Act).

It is required of a person present at a stillbirth to make a declaration that in regard to the incumbent Director-General if no medical practitioner was at hand at the time of birth or if a medical practitioner did not examine the stillborn after birth (s 18(2) of the Births and Deaths Registration Act).

Section 305(3) of the Children's Act 38 of 2005 also provides for the mother or father of the child to be found guilty of an offence in the event of a parent abusing or deliberately neglecting or abandoning such child.

Section 256 of the CPA provides for a conviction of an attempt of a specified offence while s 257 of the same legislation in a similar vein provides for conviction as accessory after the fact. These portions of legislation are accordingly worth being mulled over in circumstances where proof of the outright charge of concealment may be distrustful.

Prospects of future development of the law

In *S v Mentoer* (WCC) (unreported case no A300/2012, 27-2-2013) (Louw J and Nyman AJ) the accused was charged with murder. The assault on the preg-

nant mother resulted in the premature birth of the child and its death a few hours later. The court *a quo* acquitted the accused, holding that the foetus was not a 'person'. On appeal the court remarked *obiter* that the trial court erred as the murder was a consequential crime and the assault on the mother caused the premature birth, which resultantly caused the fatality.

It is apposite to acknowledge that although the court in the *Mshumpa* case (*op cit*) refused to extend the common law definition of murder to include the killing of an unborn child, it was not against the development of the law to criminalise feticide. Froneman J remarked as follows in the *Mshumpa* case (*op cit*) at para 64:

'I am not saying that there is no merit in making the killing of an unborn child a crime, either as part of the crime of murder or as a separate offence, only that in my view the legislature is, as the major engine for law reform (*Masiya*, para 33, referring to [*Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC)], better suited to effect that radical kind of reform than the courts'.

This notion by the judge must be supported as there is clearly a *lacuna* in our law to be addressed. The *boni mores* no doubt demands that an act of feticide be criminalised as has been the case in many countries across the world. I submit that South Africa is ready for such a development and that the legislator should be prompted to introduce appropriate legislation.

Conclusion

The purpose of forwarding a concealment of birth docket to the Director of Public Prosecution's (DPP's) office under s 113 of the Act is to obtain authority to prosecute as contemplated in s 113(3) of the Act. Typically, such matters are not sent for the DPP's decision on whether or not to prosecute. Only once all the requirements are met and it is clear that there are reasonable prospects of success on a charge of contravening s 113(1) of the Act must the matter be forwarded to the DPP. It must be fully investigated.

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FURTHER



One of the world's biggest Baobabs, a giant *Adansonia digitata*, lives on Sunland Farm near Modjadjiskloof, Limpopo. Boasting a stem of around 47 metres in circumference, the *Big Baobab* is famous for being the widest of its species and carbon dated to be well over 1 700 years old. The *Big Baobab* has been designated 'Champion Trees of South Africa' status by the Department of Agriculture, Forestry and Fisheries and declared as protected under Section 12 of the National Forests Act, 1998.





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Abbreviations

EC: Equality Court
 GJ: Gauteng Local Division, Johannesburg
 GP: Gauteng Division, Pretoria
 KZP: KwaZulu-Natal Division, Pietermaritzburg
 LC: Labour Court
 SCA: Supreme Court of Appeal
 TC: Tax Court
 WCC: Western Cape Division, Cape Town

Administrative law

Preliminary investigation is not reviewable: In *Gamede v Public Protector* 2019 (1) SA 491 (GP) the applicant, Gamede, was a Member of the Executive Council (MEC) for the Department of Agriculture, Rural Development, Land and Environmental Affairs for the Mpumalanga Province. The respondent, the Public Protector, received a complaint of maladministration, corruption and irregularities committed by the applicant in his department. As a result, the respondent initiated a preliminary investigation to verify the merits of the allegations and in the process notified the applicant accordingly, as well as advising him that if it were later to appear that he could be implicated, he would be notified and given the opportunity to respond. The applicant was impatient and already during the preliminary investigative stage, he requested certain information and documents.

THE LAW REPORTS

February 2019 (1) South African Law Reports (pp 327 – 655);
 January [2019] 1 All South African Law Reports (pp 1 – 289)

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

The respondent declined the request. For that reason, the applicant launched an application in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to review and set aside the respondent's decision to decline the request. The application was dismissed with costs.

De Vos J held that the duty to institute a preliminary investigation in order to objectively determine whether sufficient facts existed to enable the Public Protector to make a decision in connection with allegations falling within the scope of her mandate, could not be regarded as a decision that was reviewable in terms of PAJA. On the facts before the court the respondent had not yet made any decision regarding the facts before her. Accordingly, no administrative action had been taken. It was not in dispute that the applicant was entitled to certain information in order to protect his rights but that was at a later stage in the investigation process. It was not at all unreasonable for the respondent to choose to refuse to proffer that information during the investigative process. Therefore, the respondent's determination not to provide the applicant with certain documents at that stage of the investigation was not unreasonable.

Cession

Contractual rights of *delectus personae* are not ceded: In *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* [2019] 1 All SA 79 (SCA) the appellant, Propell Specialised Finance (Propell), advanced

money to clients of Buurman Stemela Lubbe Incorporated (BSL), a law firm, as bridging finance for property transactions. The money was deposited into the trust account of BSL against funds accruing to BSL's clients from the property transactions concerned. After completion of the transactions and payment of the funds into BSL's trust account Mr Buurman and/or Ms Van der Merwe, an employee of BSL, misappropriated the funds, resulting in BSL being unable to pay Propell. As a result, BSL notified the respondent Attorneys Insurance Indemnity Fund NPC of Propell's claims and sought indemnity from it. The respondent repudiated liability on the ground that Propell's money that was paid into BSL's trust account was entrusted to it as contemplated by s 26 of the Attorneys Act 53 of 1979 (the Attorneys

Act) and that the loss that Propell suffered was excluded in terms of clause 5.1.5 of the Policy, which provided, that the Policy did not cover any loss arising from theft by any principal, partner, director, candidate attorney, employee or 'in-house' consultant of the insured of any money or other property referred to in s 26 of the Attorneys Act. Instead of suing the respondent for repudiation of liability, BSL ceded its claim against the respondent to the appellant without the respondent's consent as required by the Policy. The appellant's claims against the respondent, based on the cession, were met with the special plea and could not be ceded as the insured, BSL, was a *delectus personae* and further that the Policy did not expressly or impliedly permit cession of the claims (*pactum de non cedendo*).

The WCC per Dlodlo J held

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Economic reality dictates that few, if any, are in a position to disregard the expense of litigation and attempts to maximise costs recovery on behalf of successful litigants or to limit the exposure of the less successful have served to highlight the degree of speciality required in this field. To assist attorneys in this regard, Cyril Muller Attorneys offer professional and efficient solutions to these aspects of litigation.

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that the rights were not ceded and dismissed the appellants' claims. An appeal to the SCA was dismissed with costs. Zondi JA (Lewis, Saldulker, Mathopo JJA and Mokgohloa AJA concurring) held that the High Court was correct in holding that the rights of indemnification under the Policy were not capable of being ceded on the grounds that first, the nature of the contractual relationship flowing from the Policy involved a *delectus personae* and secondly, the cession had the effect of burdening the respondent's position. The cession was, therefore, invalid and incapable of conferring *locus standi* on the appellant.

The specific group or class of people for whose benefit the insurance was established was specifically defined in the Policy. The 'insured' was defined as every individual practitioner who was practising as such in South Africa and was in possession of or would have been obliged to apply for a current Fidelity Fund Certificate. Viewed cumulatively, the above factors showed that the nature of the contractual rights under the Policy indicated the insured as a *delectus personae*. The contracts gave no right of indemnity to anyone but a legal practitioner. From the point of view of the respondent, the identity of the insured mattered.

Constitutional law

Cooperative governance – referral of dispute to state organs for resolution: In the case of *Cape Gate (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Others* [2019] 1 All SA 141 (GJ) the first respondent, Eskom, supplied bulk electricity to the second respondent, Emfuleni Municipality, for redistribution to private consumers within its geographic area of jurisdiction. The first applicant, Cape Gate, and others were such private consumers whose accounts with the second respondent were up to date. However, the second respondent did not pay Eskom for electricity supplied and over time the debt exceeded R 1 billion. As a debt control measure, Eskom gave

notice of its intention to disrupt electricity supply to the second respondent. Because of the nature of business conducted by the applicants, disruption of electricity supply could only mean one thing, namely shut down and loss of work for the workers. To prevent the threatened disruption the applicants approached the High Court for an interim interdict preventing Eskom from carrying out its threat. The interdict was to operate until the decision of Eskom to disrupt electricity supply was reviewed in legal proceedings. The applicants also asked for a court order authorising them to pay directly to Eskom for electricity consumed instead of paying to the second respondent, which did the monthly billing. Both the Gauteng Provincial Government (GPG) and the National Treasury intervened in the saga and indicated that they needed three months to come up with a recovery plan for the second respondent. However, because of a history of not honouring promises and not complying with a court order, Eskom insisted that it would interrupt electricity supply within one month.

The Full Court of the GJ per Keightley, Makume and Van der Linde JJA granted the interim interdict, which, was to operate until the dispute was resolved within six months, failing which, the matter could be set down for hearing of a review of Eskom's decision to interrupt the supply of electricity. The issue of resolving the R 1 billion, which was owed by the second respondent was referred to the affected organs of state to resolve within the given six months. In the meantime, the applicants were authorised to pay their electricity bills directly to Eskom, while the mark-up (commission) was to be paid to the second respondent. Save for specified aspects thereof, costs were reserved for finalisation of the matter.

The court held that the decision to interrupt the supply of electricity was an administrative action, which entitled the applicant to challenge it

under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Interruption of electricity supply was not rational as it was not going to help the second respondent pay its debt to Eskom, but would only destroy the applicants' businesses. Therefore, the interruption decision could not, reasonably and rationally speaking, given the second respondent's financial crisis, bring it the payment that Eskom was looking for. The interruption decision was accordingly reviewable under PAJA.

In the present case there were not only more parties involved, including the National Treasury but the GPG as well. The dispute was multifaceted and concerned how to resolve the indebtedness, given that the second respondent was not paying, could not pay and had what the Constitution in s 139 described as 'crisis in its financial affairs'. The GPG had embarked on the constitutionally and statutorily envisaged route of placing the second respondent under administration and that of procuring an appropriate recovery plan. Mechanisms and procedures had been provided for purposes of settling the dispute as found in the Constitution (s 139) and the Local Government: Municipal Finance Management Act 5 of 2003. That route would eventually open access by Eskom to National Treasury intervention.

Therefore, in the circumstances of the case the organs of state had not made every reasonable effort to settle the dispute by means of the prescribed mechanism and procedures. As a result the court had the power under s 41(1) of the Constitution to refer the dispute back to the organs of state involved.

Consumer credit agreements

Once-off credit provider also required to register: The facts in *Du Bruyn NO and Others v Karsten* 2019 (1) SA 403 (SCA) were that the appellants, Mr and Mrs Du Bruyn, were married in community of property. Mr Du Bruyn and the

respondent Mr Karsten conducted business together as shareholders in two companies and members of a close corporation. After a fall out Du Bruyn bought out Karsten in terms of three separate but identical agreements, the purchase price for the shares and member's interest in the close corporation being R 2 million, which was payable by way of deposit of R 500 000 and monthly instalments of R 30 000. The appellants undertook to register a covering bond over their immovable property. Because of the amount of credit granted and for the sake of registration of the bond the respondent was required by the National Credit Act 34 of 2005 (the NCA) to register as a credit provider, but was not so at the time of conclusion of the contract as he only registered much later. After breach of contract by the appellants who failed to honour payment of instalments, the respondent sought to enforce his rights. The appellants contended that due to the respondent's non-registration as a credit provider, the contracts were null and void.

The GP, per Mavundla J, held that the contracts were valid and granted judgment in favour of the respondent. The court expressly indicated that but for the Full Court decision of the same court in *Friend v Sendal* 2015 (1) SA 395 (GP), the decision would have been that the contracts were null and void as the respondent was not registered as a credit provider.

An appeal to the SCA was upheld and, as per agreement between the parties, no order was made as to costs. Nicholls AJA (Shongwe ADP, Makgoka, Schippers JJA and Mokgohloa AJA concurring) held that the amount of credit provided was the sole determining factor to ascertain whether a credit provider was obliged to register. A plain reading of s 40(1)(b) of the NCA made it clear that a person had to register as a credit provider if the total principal debt exceeded the prescribed threshold in terms of s 42(1). The section provided that the minister would, at the inter-

vals of not more than five years, determine an applicable threshold of not less than R 500 000 for the purpose of determining whether a credit provider was required to register in terms of s 40(1).

The requirement to register as a credit provider was applicable to all credit agreements once the prescribed threshold was reached, irrespective of whether the credit provider was involved in the credit industry and irrespective of whether the credit agreement was a once-off transaction. That this was an imperfect solution was readily accepted but it was for the legislature to remedy, rather than for the courts to attempt to accommodate deficient drafting by attributing a meaning to a s 40(1)(b) that was not justified by the wording of the statute.

- See case note Rebecca Walton 'Once-off credit agreements and registration as a credit provider in terms of the NCA' 2019 (March) *DR* 26.

Education

Best interest of child and right to basic education: The facts in *AB and Another v Pridwin Preparatory School and Others* 2019 (1) SA 327 (SCA), [2019] 1 All SA 1 (SCA) were that the appellants AB (the father) and CB (the mother) who were parents of two minor children, signed two parents' contracts with the first respondent Pridwin Preparatory School (the school) in terms of which the minors were admitted to the school. Clause 9.3 of the contracts, provided that the school had a right to cancel the contract at any time, for any reason, provided that the parent was given a full term's notice in writing of the school's decision to terminate the contract. After a number of incidents spanning over eight months in which AB, with CB being an accomplice, breached the contracts with the school by among others berating the school principal, the school head of sport and some staff members, the principal wrote a letter advising that the contracts had been terminated effective the end of the academic year. Although the principal could

have terminated the contracts earlier, for the sake of the minors, the termination was delayed to the end of the year to avoid disrupting the minors' schooling. The termination of contract did not include a hearing for the parents or the minors, the contracts making no provision to that effect. However, on a number of occasions when an incident occurred during a sporting or training event, the principal had been brought to the scene to have a talk with AB. To avoid further incidents in January 2016, an agreement was reached between the appellants and the principal in terms of which AB was to refrain from his disruptive tendencies and verbal abuse of both school staff and learners. As it turned out, the agreement was simply a waste of time as disruption and verbal abuse continued.

Aggrieved by termination of the contracts the appellants approached the GJ for an order declaring that the termination, which was not preceded by a hearing or representation, was unconstitutional, invalid and unlawful and accordingly had to be reviewed and set aside. To that end the appellants relied on ss 28(2) (paramountcy of a child's best interests) and 29(1)(a) (right to basic education) of the Constitution. They also relied on the right to fair administrative action as contained in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The High Court, per Hartford AJ, dismissed the application, hence the present appeal. The SCA dismissed the appeal with costs.

Cachalia JA (Shongwe ADP, Schippers JA and Mothele AJA concurring) held that the approach of the appellants in demanding a hearing before the contracts were terminated was to focus on the interests of their children to the exclusion of all others. It was not only the dignity of their children that needed protection but also the dignity of every other child and every other person at the school. That meant that every person's rights were worthy of equal consideration. That in-

cluded the right of the school to enter into and terminate contracts freely in accordance with their terms and the freedom to associate and dissociate with whomsoever it wished. That being the case, the argument that s 28(2) of the Constitution gave rise to an implied right to be heard before a contract was terminated had to be rejected. The right to be heard did not arise generally from s 28(2) and could not be deployed to limit a party's right to terminate a contract on notice. Furthermore, s 29(1)(a) of the Constitution could not be used to impose a duty on a private school, not provided for in the contract, to grant a hearing before it terminated the contract on notice.

There was no constitutional obligation on a private school to admit the appellants' children. The school had done nothing to prevent the appellants' children from obtaining basic education at a public school, there being three public schools in the area that would be obliged to take them. Accordingly, there had been no breach of the right to basic education in any way. The fact that s 29(3) of the Constitution, read with the South African Schools Act 84 of 1996, specifically permitted independent educational institutions to be established did not mean that such institutions performed a constitutional function to provide basic education as envisaged in s 29(1)(a) of the Constitution. In cancelling the contracts the school was not exercising a public power or performing a public function. It was exercising a contractual power that did not constitute administrative action for PAJA to apply.

In a dissenting judgment Mocumie JA held that clause 9.3 of the contracts was unconstitutional, contrary to public policy and unenforceable to the extent that it purported to allow the school to terminate the contracts without following a fair procedure and without hearing the views of the appellants' minor children. In her view a *curator ad litem* ought to have been appointed to represent the two minor children.

Equality Court

Jurisdiction of Equality Court: In *AS v Neotel (Pty) Ltd* 2019 (1) SA 622 (GJ) the applicant, AS, was an employee of the respondent Neotel. Her senior, one G, instructed her to come to his house to collect work-related material. It was at his house that G allegedly raped her, after which she reported her complaint to the police and the respondent. However, the respondent was more interested in protecting its reputation than investigating the complaint. To that end no proper investigation followed, while the work of the police was obstructed. That being the position the applicant lodged a complaint with the GJ sitting as an EC. In her complaint the applicant alleged that the conduct of the respondent made her a victim of gender-based discrimination, harassment and abuse of corporate power, which compromised her rights to equality and access to justice. As a result, she sought damages, an order directing the police to investigate and report back to court, as well as another order directing the Director of Public Prosecutions to investigate her complaint and make a decision regarding prosecution.

The respondent raised a special plea, contending that the EC did not have jurisdiction as the complaint was employment-related and accordingly belonged to the LC. The special plea was dismissed with costs.

Spilg J held that it was a *sine qua non* for the application of the Employment Equity Act 55 of 1998 (the EEA) that unfair discrimination should arise from an employment policy or practice. The EEA was directed at eliminating unfair discrimination in the workplace. On the other hand, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) was directed at facilitating equality within the broader social structures consonant with the values of the Constitution. For that reason, it would defeat a core objective of the Equality Act if one had regard

only to the grounds of complaint and not the remedial action which the EC was empowered to implement proactively and through structural orders that addressed the imbalances within the broader society, including its institutions.

As neither the applicant nor the respondent pleaded facts to indicate that the complaint of harassment arose from an employment policy or practice, the precondition for the application of the EEA (a preserve of the LC) to the exclusion of the Equality Act, fell away. The conduct complained of did not arise from, and was unrelated to, an employment policy or practice of a company in respect of its employee. As a result, the EEA did not apply and the LC lacked jurisdiction to adjudicate the complaint.

Income tax

Simulated transactions: During the tax years 2005 to 2007 s 103(1) of the Income Tax Act 58 of 1962 (the Act) provided that whenever the Commissioner for the South African Revenue Service (the commissioner) was satisfied that any transaction, operation or scheme had been entered into or carried out had the effect of avoiding or postponing liability for the payment of any tax, duty or levy imposed by the Act and, having regard to the circumstances under which it was entered into or carried out, it was by means or in a manner which would not normally be employed, and was entered into or carried out solely or mainly for the purposes of obtaining a tax benefit, the commissioner had to determine the liability for any tax, duty or levy imposed by the Act, and the amount thereof, as if the transaction, operation or scheme had not been entered into or carried out.

For present purposes the above provisions have to be read in conjunction with s 9D of the Act, which was introduced in 2001, and which extended the basis of taxation from source to residence. Section 9D(9) provides that in determining the nett income of a controlled foreign company

there shall not be taken into account any amount, which is attributable to any business establishment of that controlled foreign company in any country other than South Africa. The section continues to provide that the exemption provisions would not apply, and therefore the nett income would be subject to tax, if such nett income is derived from any person, in relation to that controlled foreign company, who is a resident of South Africa unless that controlled foreign company purchased the sold goods within the country of residence of that controlled company, from any person who is not a connected person in relation to the controlled foreign company.

The application of the above provisions (ss 103(1) and 9D(9)) was dealt with in *Sasol Oil Proprietary Limited v Commissioner for the South African Revenue Service* [2019] 1 All SA 106 (SCA) where the appellant Sasol Oil, a subsidiary of Sasol Ltd, was a South African company based in Durban. Sasol Oil imported crude oil from the Middle East to refine and market locally. When the Sasol Group of companies started to 'globalise', it among others incorporated Sasol Trading International (STI) in the Isle of Man and Sasol International Services UK (SISL) in London, the latter initially being known as Sasol Trading Services until the name change in 1998. STI and SISL were wholly owned subsidiaries of another Sasol Group company, namely Sasol Investments Holdings, which was incorporated in South Africa.

After restructuring of the Sasol Group and from 1997 procurement of crude oil from the Middle East was done by STI, instead of the appellant Sasol Oil, which shipped the oil to the latter. From 2001 there was a further change as instead of shipping the oil Sasol Oil, STI sold it to SISL in London, which in turn sold it to Sasol Oil. In 2004 a second wholly owned subsidiary of Sasol Oil, called Sasol Oil International (SOIL) was also established in the Isle of Man and did the same work as STI as it procured crude oil

from the Middle East and delivered it to SISL. The upshot of the above arrangement was that there were two companies and contracts in terms of which STI and SOIL procured and shipped crude oil to SISL for on-selling to Sasol Oil.

The obvious problem which the commissioner faced was the interposition of SISL. Before the interposition of SISL the position was that the nett income of STI was taxable in the hands of Sasol Oil as foreign income earned by a South African resident. With the interposition of SISL the position changed because the latter received the amount from the sale of goods (crude oil) as a result of purchasing from within the country of residence of that controlled foreign company (Isle of Man). The commissioner took the view that the interposition of SISL was a simulated transaction that had to be disregarded. In the alternative it was argued that the transactions had to be disregarded in terms of s 103(1) of the Act.

The TC, per Mali J, held that the impugned transactions were simulated and that the role of SISL was a sham. That being the case, the TC did not have to consider the implications of s 103(1) and accordingly upheld the commissioner's assessments, together with the imposition of penalties and the obligation to pay interest. All that was in respect of the tax years 2005 to 2007. An appeal against the TC's decision was upheld with costs by the SCA.

Lewis JA (Ponnan and Cachalia JJA concurring) held that the mere fact that the parties had followed professional advice in order to minimise the tax payable by them was not wrong nor did it point to deceit. The real question was whether they actually intended a sale by STI (then later also SOIL) to SISL and whether SISL intended to acquire ownership of the crude oil from STI/SOIL. The issue was, therefore, whether they dishonestly purported to do so solely for the purpose of avoiding the tax that would be payable by Sasol Oil.

Sasol Oil had discharged the onus of proving that the sup-

ply agreements between STI, SOIL and SISL and itself (Sasol Oil) were genuine transactions, which they implemented from July 2001 through the years of assessment being 2005, 2006 and 2007. The transactions had a legitimate purpose. There was nothing impermissible about following professional tax advice given and so reducing Sasol Oil's tax liability. The transactions were not false constructs created solely to avoid residence-based tax. There was good commercial reason for introducing SISL into the supply chain, while professional tax advice was not the trigger for the transactions. The fact that STI could have sold the crude oil directly to Sasol Oil did not mean that it was abnormal for STI to sell to SISL and then for the latter to sell to Sasol Oil.

In a dissenting judgment Mothele AJA (Makgoka JA concurring) held that the supply agreements in terms of which STI and SISL deferred the supply of crude oil to Sasol Oil were a simulation. Analysis of the evidence showed that in essence SISL traded by purchasing crude oil from STI and on-selling it only to Sasol Oil without making any profit. Therefore, Sasol Oil failed to demonstrate to the TC the commercial justification for interposing SISL in the supply chain. Failure to provide commercial justification for SISL revealed the absence of *bona fides* behind the transactions.

Judgments and orders

Absolution from the instance: The facts in *Liberty Group Ltd v K & D Telemarketing CC and Others* 2019 (1) SA 540 (GP) were that in 2010 the applicant, Liberty Group, instituted an action against the first defendant for repayment of certain commissions after certain policies had been cancelled or lapsed, an eventuality for which the applicant was entitled to repayment. The second and third defendants stood surety for the obligations of the first defendant. The trial took place in 2015 where the court granted absolution

from the instance against the applicant, then plaintiff in the matter. Nothing was done about the absolution order in the sense of an appeal or application to have it set aside. In 2016 the applicant applied to amend its pleading and for a trial date. The application was successfully opposed as an irregular step. In 2017 the applicant launched the present application for leave to reopen the old action against the defendants on the same papers and for condonation for its lateness in doing so. The defendants launched a counter-application for an interdict preventing the applicant from taking any further steps and/or any further legal proceedings of whatsoever nature under the old case number, as well as for the costs on attorney and client scale *de bonis propriis*.

Tuchten J dismissed both the main application and the counter-application with costs holding that the applicant, in the main application, had delayed in bringing the application. Moreover, there was no good reason for leading new evidence sought to be introduced since it was available at the time of the trial and it was simply left out.

On the issue of absolution from the instance the court held that an order for absolution did not give rise to a defence of *res judicata* or *lis finitis*. A plaintiff against whom absolution had been ordered could competently institute the same claim *de novo*. An order of absolution at the end of the defendant's case meant that the plaintiff failed to successfully prosecute the claim to final judgment as contemplated by s 15(2) of the Prescription Act 68 of 1969, which provided that the interruption of prescription lapsed, and the running of prescription would not be deemed to have been interrupted if the creditor did not prosecute the claim under the process in question to final judgment.

A plaintiff against whom an order of absolution had been granted always had a right to bring further proceedings to enforce the claim. He could do so by introducing proceedings afresh, for which he

did not need the leave of the court. Whichever route was followed, such a plaintiff had to proceed afresh (*de novo*). However, in the absence of an order setting aside absolution from the instant prescription would supervene.

An order allowing the plaintiff to proceed on the same papers was not equivalent to an order setting aside an order of absolution and, did not therefore, result in the plaintiff escaping the consequences of prescription. Whether the action was commenced afresh by issue and service of a new summons or whether it was renewed on the same papers, the consequences would be the same. The defendant would be entitled to raise all available defences including those which arose after absolution was ordered.

Mining

Environmental authorisation, land use authority, heritage compliance and waste management licence: In *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2019] 1 All SA 176 (KZP) three applicants, led by the first applicant Global Environmental Trust, a registered trust, which had the general object of pursuing and supporting environmental causes. Global Environmental Trust launched an application for an interdict restraining the first respondent Tendele Coal Mining (Tendele) from continuing with mining operations in an area adjacent to the Hluhluwe-Imfolozi Park in northern KwaZulu-Natal. To that end the applicants raised four grounds, namely that –

- the first respondent's mining operations were unlawful because it had no environmental authorisation issued in terms of the National Environmental Management Act 107 of 1998 (NEMA);
- the first respondent had no land use authority, approval or permission from any municipality having jurisdiction;
- no waste management licence was issued by the Minister of Environmental Affairs in terms of s 43 of the National Environmental Management: Waste Act 59 of 2008 (Waste Act); and

- no written approval was obtained in terms of s 35 of the KwaZulu-Natal Heritage Act 4 of 2008 (Heritage Act) to damage, alter, exhume or remove any traditional graves from their original position.

The application was dismissed with costs. Seegobin J held that whereas in terms of s 24 of NEMA an applicant who intended to commence an activity specified in a listing notice needed an environmental authorisation, prior to changes made with effect from December 2014, the position was that environmental impacts of mining were regulated exclusively through the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), which required the applicant to obtain an environmental management plan (EMP) prior to commencing mining and ensure that mining took place in accordance with such approved EMP. It was, therefore, evident that the position prior to December 2014 was that the first respondent's mining licence having been granted in 2005, the Minister of Minerals and Energy's decision to approve the first respondent's mining EMP and to grant the mining licence effectively constituted the environmental authorisation to conduct mining activity. As a result, in the absence of any evidence to the contrary from the applicants, it had to be assumed that all EMPs, including the first respondent's EMP, were approved because they met the requirements as prescribed by the MPRDA at the time. Moreover, in terms of transitional arrangements, an EMP or programme approved in terms of MPRDA was regarded as having been approved in terms of the law as amended.

In KwaZulu-Natal land use was regulated primarily by the KwaZulu-Natal Town Planning Ordinance 27 of 1949, which did not require municipal approval of land use. Any requirement of municipal consent only came into effect in October 2008, long after the granting of the first respondent's mining licence in 2006.

On the question of waste management licence, the

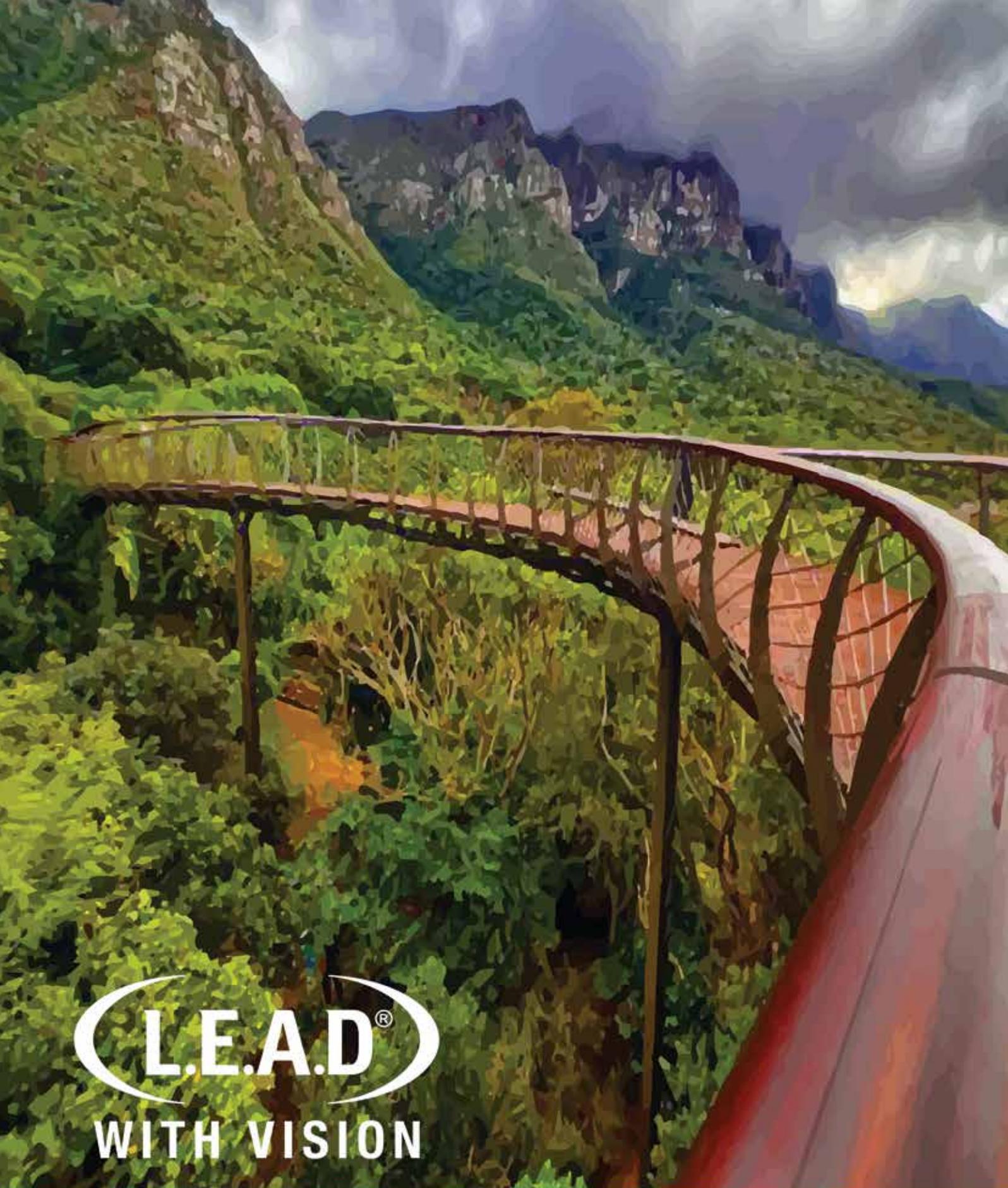
court held that a person who was conducting a listed waste management activity lawfully as in November 2013, which the first respondent did, was entitled to continue conducting such activity without waste management licence until such time as they were called on by the minister by notice in the *Gazette* to apply for such licence.

Regarding relocation of traditional graves without the consent of the Heritage Council as required by the KwaZulu-Natal Heritage Act 4 of 2008, the court held that whereas in the past the first respondent did relocate some graves without the consent of the Heritage Council, it had since undertaken that it would work with the Heritage Council to ensure that any future relocations would comply with both the letter and spirit of the law. The applicants had not put up any facts to justify any reasonable apprehension that the first respondent would continue to relocate or exhume traditional graves without the appropriate statutory safeguards.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained cases dealing with: Concurrent jurisdiction of magistrates' court, regional court and High Court, contingency deduction in calculation of future loss of income, credit guarantee distinguished from suretyship, deductibility of contractual damages for income tax purposes, delictual liability for omission, *dolus inventualis* and requirements for self-defence, eviction order, identity of owner of vehicle in RAF claims, invalidity of contingency fee agreement, investigative powers of the Competition Commission, prescribed minimum sentence for pre-meditated murder, proceedings before Refugee Appeal Board, rectification of construction guarantee and unconstitutionality of regulations governing provision of school infrastructure.





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WITH VISION



The Kirstenbosch Centenary Tree Canopy Walkway, also known as *The Boomslang*, takes visitors on a 130 metre-long walkway, snaking its way through the canopy of the National Botanical Garden's Arboretum. The walkway is crescent-shaped and takes advantage of the sloping ground, touching the forest floor in two places and raising visitors to 12 m above ground in the highest parts. Kirstenbosch National Botanical Garden was established in 1913 to promote, conserve and display the extraordinarily rich and diverse flora of southern Africa. It was also the first botanical garden in the world to be devoted to a country's indigenous flora.





By
Njabulo
Kubheka

The ranking of the business rescue practitioner's claim in liquidation proceedings

Diener NO v Minister of Justice and Correctional Services and Others 2019 (2) BCLR 214 (CC)

It is now trite in South African law that an interpretive procedure includes considering the words used in the legislation in light of all applicable and permissible framework, including the circumstances in which the legislation came into existence. In the *Diener* matter the Constitutional Court (CC) had to consider the wording of the Companies Act 71 of 2008 (Companies Act) and to rule as to whether the Companies Act creates a super preference claim for business rescue practitioners in failed business rescue proceedings.

Background

JD Bester Labour Brokers CC (JD Bester) is a property holding entity, which owned immovable property and had one major creditor FirstRand Bank Limited (FirstRand). JD Bester suffered a financial breakdown and as a result could not afford to meet its financial obligations. FirstRand obtained default judgment against JD Bester and proceeded to execute same.

Just before the sale in execution, the sole member of JD Bester passed a resolution placing JD Bester under business rescue. A business rescue practitioner (Mr Diener) was appointed as required by the Companies Act. After his appointment, Mr Diener found that JD Bester could not be rescued. He instructed Cawood Attorneys to bring an application in terms of s 141(2)(a) of the Companies Act to alter the business rescue proceedings into liquidation proceedings.

The joint liquidators could not agree on how the fees and expenses of Mr Diener and Cawood Attorneys should be distributed. Mr Diener then approached the High Court for an order giving preference for his fees and expenses, which amounted to a total sum of R 112 918,40.

High Court

The High Court held that s 135(4) of the Companies Act must be read with s 97 of the Insolvency Act 24 of 1936 (the Insolvency Act). On this reading, the court

found that remuneration of the business rescue practitioner and the expenses incurred during business rescue proceedings, to the extent that these have not been paid during business rescue proceedings and during liquidation, can be paid only after the costs set out in s 97 have been paid. The action was dismissed.

Supreme Court of Appeal

Mr Diener then approached the Supreme Court of Appeal (SCA) where he argued that the claim for remuneration by a business rescue practitioner was not a concurrent claim, but a special class of claim created by s 135 of the Companies Act. He argued that it enjoys a special and novel preference and that it grants the business rescue practitioner security over all assets, even above securities existing when the business rescue practitioner takes office. He submitted further that the position created by the Companies Act for the remuneration and expenses of the business rescue practitioner places the business rescue practitioner in a more favourable position than the best position that can be occupied by a secured creditor.

The SCA held that it is only s 135(4) of the Companies Act that is concerned with the consequences of a failed business rescue, retaining the preferences created in respect of post-commencement finance on liquidation, subject only to the costs of liquidation. It held that s 135(4), says nothing of the super preference contended for over secured assets. The SCA further held that s 143, is also not concerned with liquidation. It held that this section regulated the business rescue practitioner's right to remuneration during business rescue proceedings. It concerns the tariff in terms of which business rescue practitioners are remunerated, the additional contingency-based remuneration that the business rescue practitioner may negotiate, and the business rescue practitioner's claim for unpaid remuneration, which ranks in priority before the claims of all

other secured and unsecured creditors. The SCA found that ss 135(4) and 143(5), whether taken individually or in tandem, do not create the super preference contended for by Mr Diener. The appeal was, therefore, dismissed.

Constitutional Court

The matter was then taken to the CC and the court found that the legislature has clearly granted a preference for the claims of a business rescue practitioner over secured creditors in terms of s 143. To examine whether the preference granted by s 143 also extends to unsecured claims, the court had to look at the provisions of the Insolvency Act. The court found that s 97 of the Insolvency Act provides that costs of liquidation are paid out of any balance of the free residue, which shall be applied in defraying the costs of the sequestration of the estate. These costs do not rank in preference above secured creditors. The court further held that s 143 does not allow for the claims of business rescue practitioners to usurp the claims of all creditors, whether secured or not, in liquidation.

The CC further held that unlike s 89(1) of the Insolvency Act, s 135(4) of the Companies Act makes no reference to using secured assets to pay the practitioner. In contrast to ss 135(4), 89(1), in much clearer terms, creates a preference over secured assets for the costs of liquidation. The CC further held that the effect of super preference is that the claim for remuneration of the business rescue practitioner would rank ahead of the costs of liquidation. The business rescue practitioner would also enjoy preference over secured creditors even if a court, on challenge to a director's resolution to institute business rescue proceedings, set aside that resolution and were to grant an order placing the company in liquidation. The CC held that there is nothing in the Companies Act, or anywhere else, which would suggest that the legislature had intended the rights of secured creditors to be diluted where liquidation of

the company supersedes business rescue proceedings through the ranking in preference of the business rescue practitioner's remuneration and expenses, above the claims of secured creditors. The CC dismissed the appeal.

Conclusion

It is now settled principle in company law that the remuneration of the busi-

ness rescue practitioner will not take preference over secured claims in the event that the business rescue proceedings fail, and the company is placed under business rescue. The business rescue practitioner will be also required to prove their claim against the insolvent estate like all other creditors in terms of s 44 of the Insolvency Act. To hold security, the business rescue practitioners

will be required to secure their claims by way of a guarantee or surety with the shareholders of a financially distressed company.

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By
Unathi
Jukuda

An employer cannot use a big fish to catch a small fish

Rinsa (Pty) Ltd t/a Ultra City Middleburg v National Union of Metalworkers of South Africa and Others (LC) (unreported case no JR545/15, 5-12-2018) (Nkutha-Nkontwana J)

This article considers the recent Labour Court (LC) case of *Rinsa*, which provides valuable insight into how employers ought to exercise their discretion when entering into 'plea bargaining deals' with employees.

Plea bargaining and employment law

The concept of plea-bargaining agreements is not new in South African jurisprudence. In *North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape* 2000 (2) SA 78 (CC) decision at 670c, Uijs AJ defined a plea bargain as being 'the practice of relinquishing the right to go to trial in exchange for a reduction in charge and/or sentence.' In the employment law context, this approach may be used by either party, for example when an employer offers one (or more) employees within a group of suspected wrongdoers a plea bargain to enable it to acquire evidence of wrongdoing within the group, in exchange for a lighter disciplinary sanction or no sanction whatsoever. Historically, plea bargaining has been largely used in the criminal justice system and assists in, among others, securing evidence and saving time and resources.

The *Rinsa* decision

When engaging in plea bargaining certain obligations are imposed on employ-

ers. The *Rinsa* case offers a valuable recent example in this regard.

Facts

The case dealt with a review application brought before the LC. The facts of the case are as follows: Mr Msiza was employed by Rinsa as a petrol attendant. He was charged and dismissed for misconduct relating to his alleged involvement in a fraudulent transaction. Ms Mnguni, another petrol attendant and witness for the employer, testified against Mr Msiza and implicated him in the fraudulent transaction. On the day of the alleged misconduct, a taxi and a truck filled diesel from a single pump in one continuous transaction. This process was facilitated by Ms Mnguni. The taxi driver paid cash to Ms Mnguni for the diesel, but the whole transaction was levied against the truck driver's bank card, belonging to the truck owner. Ms Mnguni testified that she orchestrated the fraudulent transaction with Mr Msiza and shared the proceeds of the fraudulent transaction with him. Mr Msiza testified that he was not involved in the alleged fraudulent conduct and was merely assisting his colleague to pour fuel into the truck. Evidence in the form of video footage showed Mr Msiza assisting Ms Mnguni.

Applicable law

When making use of a plea bargain, the employer is required to observe certain principles. Although the employer has

a wide and almost unfettered discretion in selecting the witness it wishes to use as part of its case, such discretion has to be exercised in a *bona fide* manner. The key issue, as observed in the case of *Member of the Executive Council: Department of Health, Eastern Cape Province v Public Health and Social Development Sectoral Bargaining Council and Others* [2016] 6 BLLR 621 (LC), is that the employer's selection of the accomplice for plea bargaining should not be *mala fides*. The following examples were given in relation to when the decision to offer a plea deal might be unfairly exercised – 'the evidence the witness gave was not reasonably necessary to secure a guilty finding against the accused employees; including because such evidence was readily available from other sources; an imbalance in the relative degree of culpability of the witness and the accused employees, such that the proverbial "big fish" was used to secure a guilty finding against the "little fish"; that the decision to conclude a plea agreement was induced by an improper motive such as obvious favouritism or capriciousness; and/or unfair racial, gender or other discrimination in favour of the accomplice witness or against the remaining accused employees' (see para 38 to 42 of the *Department of Health* case).

The court's findings

The LC found that there was a glaring imbalance in the comparative degree of

blameworthiness between Ms Mnguni and Mr Msiza. Ms Mnguni was both the orchestrator and perpetrator of the misconduct while there was no hard or real evidence, which implicated Mr Msiza. The court viewed this case as nothing short of the proverbial 'big fish' being used to secure a guilty finding against the 'little fish'. The court's finding in this case affirms the decision in the *Department of Health* case, wherein the court held that an imbalance in the comparative degree of blameworthiness is one of the factors to be considered in determining whether the employer unfairly exercised its discretion. Accordingly, the LC held that the commissioner was correct in treating Ms Mnguni's evidence with caution.

The court concurred with the commissioner's assertion that Rinsa's case

hinged solely on Ms Mnguni's evidence as the video footage did not prove that Mr Msiza participated in the fraudulent transaction. Ultimately, the LC confirmed the commissioner's award, which was that the dismissal of Mr Msiza was substantively unfair.

Conclusion

This case underscores the principle that in the exercise of discretion by the employer in selecting who it wishes to use as part of its plea-bargaining deal, the discretion must be properly and fairly exercised, otherwise the decision may be regarded as unfair.

The case further confirmed that where there is an imbalance in the relative degree of culpability of the witness and the accused employees, such that the pro-

verbial 'big fish' is being used to secure a guilty finding against the 'little fish', it may be found that the employer's discretion was improperly exercised in awarding 'the big fish' a plea deal. As a result, such a witness' evidence may be disregarded or treated with caution. In situations, such as the present, this could have serious consequences for an employer's case and its ability to prove the fairness of an employee's (namely, the 'little fish's') dismissal.

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New legislation

Legislation published from
1 - 28 February 2019



Philip Stoop BCom LLM (UP) LL.D (Unisa) is an associate professor in the department of mercantile law at Unisa.

Bills

National Environmental Management Laws Amendment Bill B14C of 2017.
National Environmental Management Laws Amendment Bill B14D of 2017.
Carbon Tax Bill B46A of 2018.
Carbon Tax Bill B46B of 2018.
Local Government: Municipal Structures Amendment Bill B19A of 2018.
Local Government: Municipal Structures Amendment Bill B19B of 2018.
Financial Matters Amendment Bill B1 of 2019.
Local Government: Municipal Systems Amendment Bill B2 of 2019.
Customs and Excise Amendment Bill B3 of 2019.
Public Investment Corporation Amendment Bill B4 of 2019.
Division of Revenue Bill B5 of 2019.
Appropriation Bill B6 of 2019.
Public Audit Excess Fee Bill B7 of 2019.
National Health Amendment (Private Member) Bill B8 of 2019.

Promulgation of Acts

Competition Amendment Act 18 of 2018. Commencement: To be proclaimed. GN175 GG42231/14-2-2019 (also available in Afrikaans).

Selected list of delegated legislation

Agricultural Product Standards Act 119 of 1990

South African Meat Industry Company: Approved fees. GenN76 GG42230/15-2-2019.

Animal Diseases Act 35 of 1984

Control measures relating to foot and mouth disease in certain areas. GN67 GG42203/1-2-2019.

Animal Identification Act 6 of 2002

Amendment of regulations (fees payable). GN179 GG42240/22-2-2019.

Constitution of the Republic of South Africa, 1996

Calling and setting of a date for the election of the National Assembly: 8 May 2019. Proc8 GG42250/26-2-2019 (also available in Afrikaans).

Deeds Registries Act 47 of 1937

Amendment of regulations (fees). GN R283 GG42262/28-2-2019 (also available in Afrikaans).

Division of Revenue Act 1 of 2018

Allocations to provincial and local governments. GN240 GG42243/21-2-2019.

Electoral Act 73 of 1998

Reserved number of seats for each region

as determined by the Electoral Commission for the 2019 Election of the National Assembly. GenN114 GG42265/28-2-2019.

Election timetable for the election of the National Assembly and the election of the Provincial Legislatures. GenN113 GG42265/28-2-2019.

Electronic Communications Act 36 of 2005

End-user and subscriber service charter amendment regulations. GN R128 GG42225/12-2-2019 and GN R286 GG42266/28-2-2019.

Financial Markets Act 19 of 2012

Amendments to the A2X trading rules. BN6 GG42203/1-2-2019.

Amendments to the A2X listings requirements. BN7 GG42203/1-2-2019.

Amendments to the JSE listing requirements. BN17 GG42230/15-2-2019.

Independent Communications Authority of South Africa Act 13 of 2000

Amendment of the regulations on party election broadcasts, political advertisements, the equitable treatment of political parties by broadcasting licensees and related matters, 2014. GN245 GG42249/25-2-2019.

Magistrates' Courts Act 32 of 1944

Appointment of a place for the holding of a Court for Knysna Magisterial District. GN284 GG42264/28-2-2019.
Appointment of a place for the holding of a Court for Johannesburg Central Magisterial District. GN285 GG42264/28-2-2019.

Medical Schemes Act 131 of 1998

Adjustment to fees payable to brokers. GenN46 GG42203/1-2-2019.

National Environmental Management: Air Quality Act 39 of 2004

National greenhouse gas emission reporting regulations: Procedure to be followed by category A data providers for registration and reporting as a category A data provider. GN71 GG42203/1-2-2019.

Occupational Diseases in Mines and Works Act 78 of 1973

Increase of pension benefits. GN248 GG42253/26-2-2019 (also available in Afrikaans).

Performing Animals Protection Act 24 of 1935

Amendment of regulations: Application fees. GN130 GG42230/15-2-2019.

Public Holidays Act 36 of 1994

Declaration of 8 May 2019 as a public holiday. Proc9 GG42250/26-2-2019.

Promotion of National Unity and Reconciliation Act 34 of 1995

Publication of increased amounts in terms of reg 8(2)(a) of the Regulations Relating to Assistance to Victims in respect of Basic Education. GN R246 GG42251/26-2-2019 (also available in Afrikaans).

Road Traffic Management Corporation Act 20 of 1999

National Road Traffic Law Enforcement Code. GN174 GG42230/15-2-2019.

Traditional Leadership and Governance Framework Act 41 of 2003

Guidelines for determination of number of members of traditional councils. GN117 GG42217/8-2-2019.

Draft Bills

Draft National Minimum Wage Bill. GenN91 GG42240/22-2-2019.

Draft delegated legislation

Regulations relating to tariffs for the registration of fertilizers, farm feeds, agricultural remedies, stock remedies,

sterilizing plants and pest control operators, appeals and imports in terms of the Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 for comment. GN68 GG42203/1-2-2019.
Determination on occurrence reporting and recording categories in terms of the National Railway Safety Regulator Act 16 of 2002 for comment. GN118 GG42217/8-2-2019.

Determination of safety permit fees in terms of the National Railway Safety Regulator Act 16 of 2002 for comment. GN119 GG42217/8-2-2019.

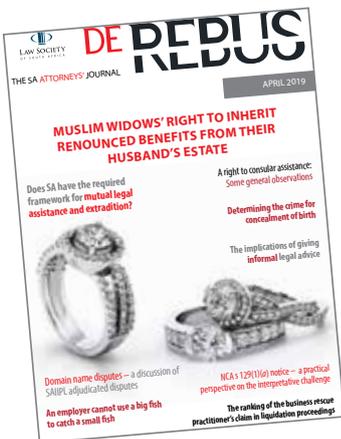
Draft amendment of the Civil Aviation Regulations, 2011 (sch 1 and 2) in terms of the Civil Aviation Act 13 of 2009. GN R129 GG42228/15-2-2019.

Proposed amendment of regulations relating to farm feeds in terms of the Fertilizer, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947. GenN70 GG42230/15-2-2019.

Draft amendments to the money laundering and terrorist financing control regulations in terms of the Financial Intelligence Centre Act 38 of 2001. GenN115 GG42267/28-2-2019.



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By
Marici
Corneli
Samuelson

Divorce and the injustice to children caused by parental alienation

Parental alienation is a set of processes and behaviours conducted and enacted by a parent to deliberately and knowingly damage or sever the relationship between a child and another parent with whom the child enjoyed a prior loving relationship' ('Parental alienation can be overcome' 2018 (Aug) *DR* 8).

Parental alienation syndrome is a controversial phenomenon associated with high-conflict divorce cases and since its proposal by Richard A Gardner in 1985, few researchers, academics and psychologists contested its existence in some form when encountering high-conflict divorce cases.

It brings us to the question of whether the South African legal system understands or underwrites parental alienation.

Looking at South African divorce statistics where seven out of ten children are from a divorce-household and in some of those households where parental alienation aspects are present, one needs to be alert to the consequences that may arise in the community and in the lives of these young people in the next 20 years. Knowing that the nature, duration and level of parental conflict in divorce can have a lasting impact on all family members.

When parents, involved in divorce proceedings, approach mediators, legal practitioners or mental health professionals, we should try to educate them and negotiate or resolve their parenting and contact difficulties with constructive assistance, bringing an awareness and knowledge into the problem of parental alienation, especially where parents choose not to communicate, but focus rather on their anger, fears, pain, and resentment.

It is important to note the difference between 'parental alienation' and 'parental estrangement'.

We have read the definition of 'parental alienation' in the paragraph above. Parental estrangement on the other hand results from one parent behaving badly towards their child/children, and the behaviour of the parent causes the child to refuse contact with that parent.

Situations frequently seen in parental alienation cases

- The belief held by the alienating parent that the child/children do not really need the other 'targeted' parent in their life.
- Where alienation is in play, one parent views the alienated parent's attempts to contact or visit the child/children as harassment.
- Gatekeeping in the form of not passing on information, telephone calls or text messages from the alienated parent to the child/children.
- Not sharing information about school, functions or medical information with the alienated parent.
- Frequently denigrating the alienated parent in front of the child/children.
- The child/children are emotionally and psychologically rewarded for siding with the alienated parent, this can be very subtle or prominent.
- The child/children are often rewarded emotionally for bringing back their own observations and information about the parenting flaws of the alienated parent after visits.

What are the consequences of parental alienation? Particularly active, intentional alienation

Children do not have adult logic, and it is often difficult to explain to them why they are scared, sad, or confused.

The message that a child/children may hear where parental alienation is active, according to writer and researcher Amy JL Baker; may sound like: '(1) I am the only parent who loves you and you need me to feel good about yourself; (2) the other parent is dangerous and unavailable; and (3) pursuing a relationship with that parent jeopardizes your relationship with me' (www.psychologytoday.com, accessed 28-2-2019).

Effect on children

In the article 'Understanding and evaluating alienation in high-conflict custody cases', Dr Philip Stahl states: 'When children are caught up in the midst of this conflict and become alienated, the

emotional response can be devastating to the child's development. The degree of damage to the child's psyche will vary depending on the intensity of the alienation and the age and vulnerability of the child. ... In addition to this, alienated children are at risk of developing disturbances in many of their relationships. They often become manipulative and feel overly powerful. They may be resistant to authority and act out at school. ... As they get older, there is a strong likelihood that they will develop a disturbance in their growing identity' (P Stahl 'Understanding and evaluating alienation in high-conflict custody cases' (2003) *Wisconsin Journal of Family Law* 20).

In the thesis titled: *Exploring the lived experiences of psychologists working with Parental Alienation Syndrome* (unpublished MA thesis, North-West University, 2014), Marilié Viljoen states: 'The long-term effects of [parental alienation syndrome] and other divorce-related syndromes on children could include distorted parental image and the distorted integration of parental roles which can lead to a negative impact on personality formation and functioning. Low self-esteem, self-hatred and feelings of betrayal arise in children as they develop a lack of ambivalence towards both parents, one of whom is only "good" and the other only "bad". According to Reay (2007) as many as 70% of children involved in caregiver conflict where [parental alienation syndrome] is involved are vulnerable to develop depression. Other possible long-term effects of [parental alienation syndrome] also include drugs and alcohol abuse, lack of trust in intimate relationships and a higher divorce rate later in life'.

In addition, we further see how parents and legal practitioners use the legal structures to remove a parent from a child's life by means of *ex parte* applications to change primary residence orders in defended court cases. The adversarial system becomes one of the 'winner-take-all', forcing parents to denigrate each other to prove that they are the better parent and worthy of being granted primary residence status.

A case dealing with parental alienation

tion was *T v D* (GP) (unreported case no 64290/14, 20-3-2015) (Mabuse J), where the court had to deal with an application for contempt of a court order, which concerned disputes about a contact the respondent was withholding from the applicant, after a final divorce.

In that matter, Mabuse J presided over the application and ruled at para 16: 'The respondent's aforementioned disobedience must, in the circumstances of this particular case, be regarded as wilful or intentional and should be treated as a contempt.'

The order for committal was for a period of 30 days suspended for five years, on condition that the respondent complied during the period of suspension with the order granted by the Kempton Park Regional Court on 30 September 2013.

The respondent was ordered to pay the costs of the application.

In committal proceedings, where a person is required by an order to do or abstain from doing an act, but refuses or neglects to do it within the time granted, the court may make an order for committal on application.

Parental alienation is frequently seen in high conflict divorce proceedings or separations where the residency of the children is in dispute and the financial impact of maintenance comes into play.

In another matter *R v R* (GJ) (unreported case no 2016/00404, 4-2-2016) where accusations of parental alienation and change of residence were dealt with, the judge commented in his judgment at para 34: 'I have already expressed my disapproval of the respondent's contemptuous conduct, lack of respect for the rule of law, and complete disregard for the applicant's rights and standing as a parent.'

Many questions and discussions were raised at the Parental Alienation Workshop held in June 2018 (see 'Parental alienation can be overcome' (*op cit*)).

- What are some of the corrective measures that the magistrate or judge will order when early alienation is noted?
- What route should be taken when inexperienced or uninformed professionals are involved in the case - alienating parents can represent themselves as the perfect parent and their relationships with their children are usually perfect.
- Decisions regarding children and residency should not be heard via *ex-parte* applications.
- Why do magistrates and judges seem reluctant with older children (under the influence/web of alienation) to order parent-child reunification.
- If there is a relatively easy process to sidestep early alienation, would the courts follow it?
- The inability of the legal system, for

various reasons, over-load and to take corrective measures.

- The legal system not being knowledgeable about how the system can be abused to 'get the children' and following thereon an inability to take corrective measures because a stalemate has been reached.
- One example includes an *ex-parte* application to remove the children from the former family home, while divorce proceedings are still pending and setting a new status to the residence of the child/children as soon as possible.

Ways to combat parental alienation

We need effective ways to combat parental alienation via a multi-faceted approach.

• Suggestion A

Professional recognition of parental alienation as a serious form of child

• Suggestion B

Suggestions by the South African Law Reform Commission to underwrite some fundamental reform of the family law system.

In 'Suggestions for a divorce process truly in the best interests of the children (1)' 2018 81.1 *THRHR* 48, Professor De Jong, writes that a new process must be conducive to conciliation and problem-solving and less confrontational. It specifically needs to address the heightened risk factors and the other problems inherent in the current court process and incorporate the 'voice of the child in a child-friendly manner'. In this regard, there have been calls for a simplified, briefer low-cost process for making decisions in difficult cases, and high-conflict family cases which cannot be resolved through pre-court processes.

• Suggestion C

More use of mediation and encouraging co-parenting, parallel parenting and parenting plans.

- Mediation takes high-conflict out of the adversarial arena and shifts the focus on problem-solving.
- Parents creating their own parenting plans are more committed to execute it.
- In the mediation process the voice of the child/children will be heard.
- Children will be informed of decisions affecting their lives.
- Children and parents will have the certainty of clear contact set out in a parenting plan.
- Conflict can be resolved by mediation and approaching the court will not be the first point of departure.
- Parents who parent their children at different times, but who have little or no

direct interaction are engaged in parallel parenting. This occurs when they engage in the same tasks, if they have little or no contact with one another.

- Where a lot of parenting plans focus on co-parenting, and the parents communicate and work with one another to raise their children in a cooperative fashion, high-conflict families sometimes do not succeed at this task, as each parent usually thinks their style is the only way to parent and is often very critical of the other.
- Very strict parenting plans with parental coordinators are used to assist in these instances.

• Suggestion D

Provision of effective treatment programmes and services by trained service providers, including reunification services and prevention programmes.

The provision of effective treatment services by trained service providers, including reunification services and prevention programmes, is vital to restoring the relationship between children and parent exposed to parental alienation.

• Suggestion E

Effective legal enforcement of parenting plans and court orders, and legal consequences for parents who withhold children from the other parent.

Legal sanctions must include meaningful consequences for failure to comply with parenting plans and court orders. There is a need to ensure compliance, as well as consequences for engaging in parental alienating behaviours.

Finally understanding that parental alienation in divorce can have a lasting impact on all family members, should compel judges and magistrates to be ever vigilant in preventing its growth and continuation.

Marici Corneli Samuelson *Bluris* (UP) is the Director at Family Assist and a Mediator at Mediationworx in Pretoria.

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The southern coast of South Africa is home to the Garden Route National Park and its jewel is the Tsitsikamma Section (proclaimed in 1964) – one of the world's most spectacular biodiversity protected areas. It comprises of indigenous rain forests that harbour 116 types of trees such as the giant Dutoitsbos yellowwood (some estimated to be between 500 and 600 years old) and fynbos (which covers around 30% of the park). Tsitsikamma is also the country's largest quene reserve and the inlet in Africa. One of the highlights is the 77 metre-long suspension bridge which spans the width of the Storme River Mouth. The bridge hangs just seven metres above the charming waters of the river as it enters the site. SANParks, established in terms of the National Environmental Management Protected Areas Act, 2003, has the primary mandate to oversee the conservation of this sensitive and valuable biodiversity, landscape and associated heritage asset.

Employment law update



Nadine Mather BA LLB (*cum laude*) (Rhodes) is an attorney at Bowmans in Johannesburg.

Employers permitted to take prima facie decision on need to retrench

In *South African Commercial Catering and Allied Workers Union and Others v JDG Trading (Pty) Ltd* [2019] 2 BLLR 117 (LAC), JDG Trading (JDG) concluded a collective agreement with the South African Commercial Catering and Allied Workers Union (SACCAWU), in which the agreement included 'job security' provisions regulating closures, relocations, and operational requirement decisions. In accordance with s 189A of the Labour Relations Act 66 of 1995 (the LRA) and the 'job security' provisions of the collective agreement, JDG issued SACCAWU with a s 189(3) notice informing SACCAWU that it intended consulting with it with a view to possibly retrench certain of SACCAWU's members. SACCAWU alleged that the s 189(3) notice did not demonstrate any genuine commitment by JDG to a consultation process and requested further information from JDG relating to the operational rationale for the proposed retrenchments.

JDG provided copious amounts of information to SACCAWU, including a copy of the resolution of the JDG's executive committee to initiate the consultation process. The resolution provided, among other things, that 'the furniture brands of the Group must further reduce store staff numbers.' Because JDG was bound by the resolution, SACCAWU argued that the consultation process was 'superficial' and the dismissal of its members for operational requirements was a *fait accompli*.

After a period of 30 days had lapsed from the date on which the s 189(3) notice had been issued, JDG referred a dispute to the Commission for Conciliation, Mediation and Arbitration in accordance with s 189A(8)(a) of the LRA. In turn,

SACCAWU launched an urgent application in the Labour Court (LC) in terms of s 189A(13) of the LRA seeking an order –

- declaring the consultation process to be unfair and a sham;
- declaring the resolution to be in contravention of JDG's duty to consult;
- interdicting JDG from retrenching its members; and
- compelling JDG to comply with a fair procedure by, *inter alia*, withdrawing the resolution.

SACCAWU submitted that the resolution was couched in peremptory terms and its meaning was clear, namely that JDG 'must' further reduce store staff numbers through its operational requirements. To the contrary, JDG submitted that the resolution was no more than a decision to proceed with the consultation process once retrenchments had been contemplated. The LC accepted that the resolution was cast in peremptory terms but held that it could be interpreted with reference to the events that transpired after its adoption. Once the resolution had been adopted, JDG embarked on a consultation process. It had not taken a final decision to retrench. The LC, therefore, dismissed the application.

On appeal, SACCAWU submitted that the LC erred in finding that the resolution could be interpreted having regard to the events that transpired after its adoption. It argued that it was entitled to be consulted prior to the taking of a decision to retrench, and a retrospective consultation process was improper. The issue on appeal was thus whether JDG had taken a final decision to retrench prior to issuing the s 189(3) notice. That in turn involved determining the meaning of the resolution.

The Labour Appeal Court (LAC) rejected SACCAWU's argument that surrounding circumstances should not be taken into account in interpreting the resolution. It was an established rule that the conduct of the parties before and after a contract is concluded may be used in interpreting the contracts meaning, and there was no reason why the same approach should not be taken when interpreting a unilateral statement such as a resolution. The retrenchment decision expressed in the resolution was, on the face of it, proper and valid. SACCAWU did not challenge the operational rationale of the decision to retrench and the evidence indicated that JDG was prepared to discharge its statutory consultation duties. Meetings with SACCAWU had been held over a period of three months

and JDG's attempts to comply with some of the SACCAWU's suggestions belied any suggestion that the consultations were held against the backdrop of a *fait accompli*.

The LAC held that employers in the position of JDG will invariably form a *prima facie* view on the need for retrenchments. Employers cannot be held to a standard of a genuine commercial rationale for retrenchment if it would be prejudiced in subsequent court proceedings precisely for making such an assessment of its commercial realities. Employers must be entitled to form a *prima facie* view on retrenchment, provided it demonstrates and keeps an open mind in the subsequent consultation process. It was clear from JDG's subsequent conduct that management did not regard the resolution as an instruction to retrench. JDG meaningfully engaged in a genuine consultation process which was still underway when the urgent application was launched. In the circumstances, the LC did not err in dismissing the application and accordingly, the LAC dismissed the appeal.



Moksha Naidoo BA (*Wits*) LLB (UKZN) is a practicing advocate holding chambers at the Johannesburg Bar (Sandton), as well as the KwaZulu-Natal Bar (Durban).

Severance pay and a new amendment to the BCEA

Question:

I am a teacher who was permanently employed during 2018. I only worked a year and was retrenched due to lack of learner registration this year, so I was not allocated a class for 2019.

I was teaching preschool learners at a primary school and was earning R 6 000 monthly. My employer paid me a retrenchment package of only R 1 000. Ac-

ording to my employer, the law states that for each year worked, one week must be paid to me and so it is R 1 000 a week in a year.

Is this true?

Answer:

I will assume you were either employed at a private school, alternatively if it was a public school, you were employed directly by the school's governing body and you were not employed by the state under the Employment of Educators Act 76 of 1998. My assumption is underpinned by the fact that it is highly unlikely that the state as employer would embark on retrenchment proceedings. The necessity to make this distinction with regard to who your employer, directly bears on the answer to your query.

It is correct that severance pay is calculated at one week's remuneration for each completed year of continuous service. This is in terms of s 41(2) of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

Therefore, receiving one week's pay as your severance package for one year of service, is correct. I do not, however, agree with the quantum you received. Calculating weekly pay in respect of employees receiving a monthly salary is done by dividing one's salary by 4,333.

In your case you earned R 6 000 per month, which means your weekly pay was R 1 384,72 (R 6 000/ 4,333). This in turn means you should have received R 1 384,72 as your severance package and not R 1 000.

Before addressing what legal recourse is open to an employee who does not agree with the amount of severance pay they received, it is important to note that there is nothing preventing an employee and employer from negotiating more favourable terms for calculating severance pay. Therefore, an employee and em-

ployer can agree that severance pay will be calculated at two weeks remuneration for every completed continuous year of service.

If there is a dispute about an employee's severance pay, then an employee can refer a severance pay dispute to either the Commission for Conciliation Mediation and Arbitration (CCMA) or to a bargaining council, which has jurisdiction.

Section 41(6) to (9) of the BCEA, gives the CCMA or bargaining council the authority to conciliate and arbitrate such disputes.

In addition to your severance pay, you should have also received payment for any outstanding leave, if any, that was accruing to you at the time of your dismissal. Having worked a year, you would have been entitled to 21 consecutive days leave, on full remuneration. This is in accordance with s 20(2)(a) of the BCEA.

If at the time of your retrenchment you had leave owing to you and this had not been paid out by the school, then in terms of s 74(3) of the BCEA, you could include your leave pay dispute, with the severance pay dispute and refer both matters to the CCMA.

Having addressed the question posed, it would be an opportune time to advise readers of the introduction of s 77A to the BCEA. In the past the only time the CCMA could hear and address a dispute regarding the non-payment of statutory money was if the employee had referred an unfair dismissal dispute or a severance pay dispute to the CCMA. When adjudicating the fairness of the dismissal or the severance pay dispute and provided certain other conditions were met (see s 74(2)(a) to (c) which has since been repealed effective 1 January 2019), the commissioner would hear any dispute regarding statutory money and if finding in favour of the employee included

in their arbitration award, a finding that the employer pay to the employee such outstanding money. This meant that in the absence of challenging a dismissal or one's entitlement to severance at the CCMA, an employee who wanted to claim overtime pay, for example, had to approach the Department of Labour for assistance.

Section 73A, as part of the 2018 amendments, now provides that any employee who earns less than the Ministerial threshold can refer a dispute to the CCMA 'concerning the failure to pay any amount owing to that employee or worker in terms of this Act, the National Minimum Wage Act, 2018, a contract of employment, a sectoral determination or a collective agreement.'

These disputes follow the normal dispute resolution path set out in the Labour Relations Act 66 of 1995; first conciliation followed by arbitration if a certificate of non-resolution has been issued.

Disclaimer: Please note that the advice offered in this article has been prepared not only for the intended benefit of the individual who has sent through the query, but to share Mr Naidoo's views with readers in general and legal practitioners, in particular. Mr Naidoo has not consulted with the person seeking advice nor has he any knowledge of any facts or circumstances other than that set out in the query. Mr Naidoo's views are based solely on his understanding of the law. Mr Naidoo cannot be held liable, professionally and/or personally, for any views and/or advice expressed in his response. □

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Abbreviation	Title	Publisher	Volume/issue
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<i>PER</i>	Potchefstroom Electronic Law Journal	North West University, Faculty of Law	(2019) 22
<i>SAJHR</i>	South African Journal on Human Rights	Taylor & Francis	(2018) 34.3
<i>SAPL</i>	Southern African Public Law	University of South Africa Press	(2018) 33.2
<i>TSAR</i>	Tydskrif vir Suid-Afrikaanse Reg	Juta	(2019) 1
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By Mabowa
Thomas Mokoena
Cape Town: Juta
(2018) 2nd edition
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247 pages (soft cover)

In this book, Professor Mokoena analyses the jurisprudence regarding the administration of bail and concludes that it has remained relatively, unchanged over the past few years.

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This edition, with its novel approach to a very old matter, should be read with interest by every legal practitioner and it will certainly stimulate and broaden their knowledge. The title of the reviewed book heralds a very welcome addition to our legal literature. There have been numerous previous works relating to bail, but this book, being a practical guide, deals fully with the law on the rather off-beat subject matter at universities these days. It will prove to be of inestimable value to all who are interested in this aspect of the law. The work has appeared at a most opportune moment, almost simultaneously to recent mind-boggling evidence provided at many Commissions of Inquiries when criminal charges and/or arrests will probably follow in due course.

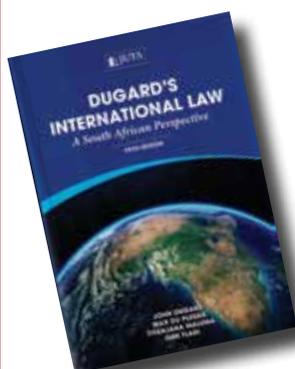
Lastly, the usefulness of this edition is greatly enhanced by the practical examples.

The only criticism I could find, was the numerous, often lengthy, extracts from the applicable legislation, however, useful they may be. I found same to be rather irksome and it tends to disturb the continuity of the discussion. Refreshing, however, are the extensive quotations from case law, which are employed to stress a point or principle, and which are explained in simple language.

Dr Llewelyn Gray Curlewis is a legal practitioner at Pieterse & Curlewis and a Senior Lecturer at the University of Pretoria. □



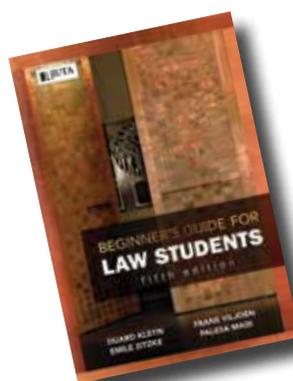
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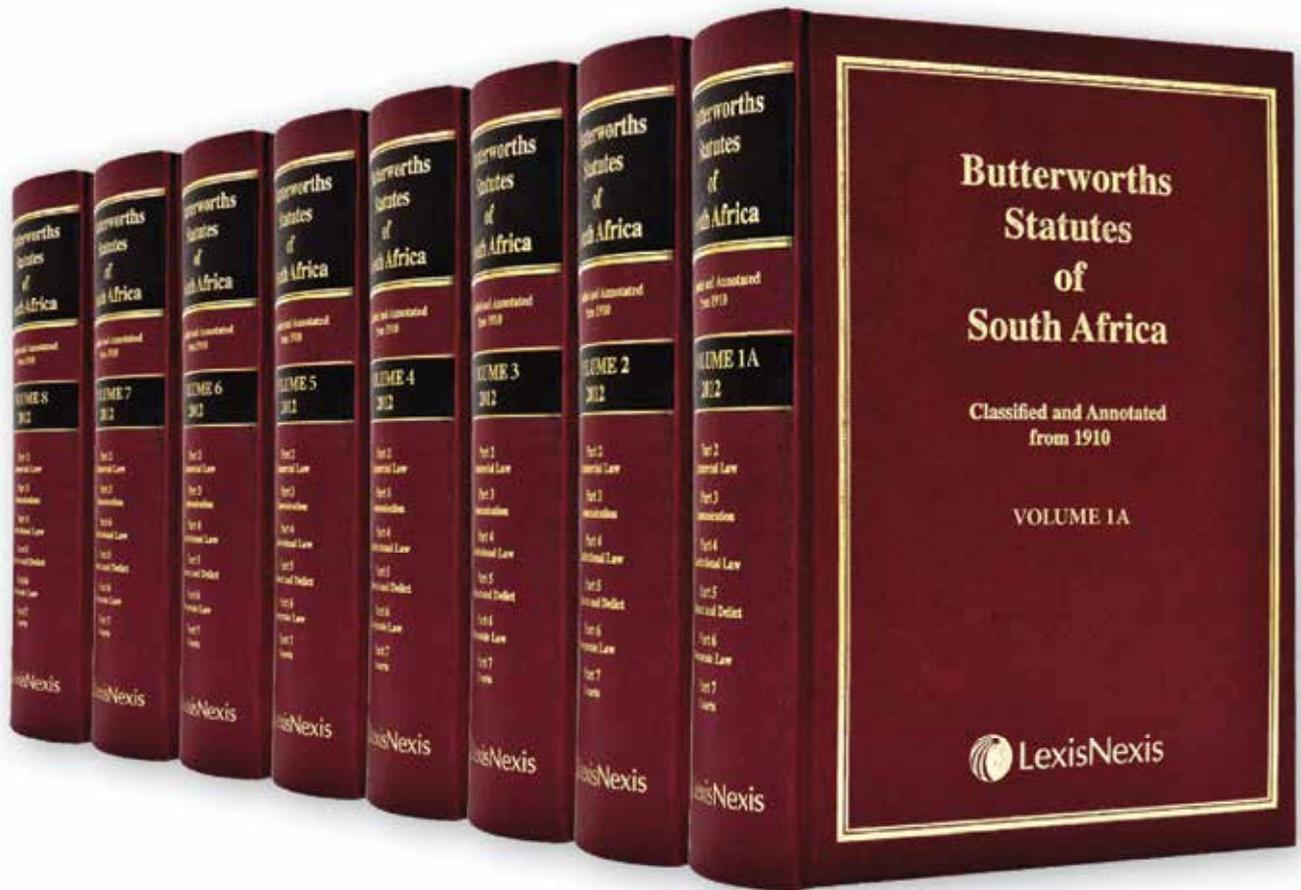
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