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DE REBUS

THE SA ATTORNEYS' JOURNAL

APRIL 2016

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LAW SOCIETY
OF SOUTH AFRICA

Your journal your views

In order for *De Rebus* to serve the broad church of our readership, legal practitioners are encouraged to send article submission in all areas of law. *De Rebus* prides itself as being the voice of the attorneys' profession, therefore, it needs to cater for all practitioners. We receive articles on different areas of law, however, there might be some areas of law that practitioners may feel that the journal does not cover.

De Rebus, the attorneys' official journal, is primarily an information and news source for attorneys, as well as other legal practitioners, on developments in and relating to the legal fraternity. In addition, it has an important educational role to provide practitioners with up-to-date information and practical guidance on aspects relating to practice management. The journal is also a platform for attorneys to engage with issues they consider relevant to their practices.

For our readers who do not know how articles in the journal are published, this is the process:

- Articles are submitted by individuals on topics of their choice. On some occasions the Editorial Committee may commission an author to write an article on a topic that is of interest to the profession. News articles are written by the news editor or any other member of the *De Rebus* team.
- Articles submitted are put before the Editorial Committee for approval.
- The *De Rebus* editorial team edits and fact checks articles that are approved by the Editorial Committee for publication.

In a recent mini survey conducted by *De Rebus*, respondents indicated that they would like to read content that is practical in nature. Therefore, we would like to revive our once popular 'step-by-step' column, which proved to be an important and valuable source of practical information. Practitioners are encouraged to send through articles that are practical and relevant to the profession.

Last year *De Rebus* relaunched its website and the journal is also available as an application (app) to download for Android and iOS users. Those who have downloaded the app on their devices will receive a notification when new content is uploaded. Practitioners can register on the website and bookmark articles for later reading. In the upcoming months, we will be asking readers to give information relating to the area of law they practice in. This information will be used by the website to intuitively showcase articles that a registered user would be interested in reading according to the area of law they practice in.

Readers should note that the March issue of *De Rebus Digital* was the last issue. From the April issue onwards, readers will be able to download the entire journal on our website, under the tab *De Rebus* PDF download on the homepage. Readers will receive an e-mail, which contains a summary of the articles covered in the journal and to notify them when the PDF is available on the *De Rebus* website.

Mapula Thebe – Editor

- To send articles or article topics and to receive notification when the website is updated, e-mail: derebus@derebus.org.za

Would you like to write for *De Rebus*?

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

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

- **Please note that the word limit is now 2000 words.**
- **Upcoming deadlines for article submissions: 18 April and 23 May 2016.**

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.

Seven pointers for a good court witness

I sat listening to evidence in the Tax Court this week, as I have done many times in the past 25 years. Why do legal practitioners not brief their witnesses on what to expect in court?

A legal practitioner should deal with the following to turn an ordinary witness into a good witness:

- Brief the witness on how to address the court.
- A witness should:

– Stand while giving evidence, even if the presiding officer offers you a seat. The evidence of a standing witness is more audible.

– Speak slowly and clearly. When the court takes notes, pause so that they may catch-up the writing.

– Turn to the Bench when answering questions. The lawyer asks the questions on behalf of the court, the Bench must hear and evaluate the evidence. Answering to the Bench also helps to not get into an argument with a lawyer under cross-examination.

– Be brief with answers, the lawyer will ask more questions if he or she wants the court to hear more.

– Ask for the question to be repeated, if the question is not understood.

– Do not speculate, the court is only interested in first-hand information, you should say if you do not know certain information.

Frans Krause, chartered accountant, Pretoria

Erratum

In the case note '*Subdivision – end of the road? Options to purchase subdivision of agricultural land*' (2015 (Dec) *DR* 46) the following error was brought to our attention:

'In 2003, however, in *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA), the SCA found that even conditions of that sort were *proscribed* by the Act.'

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

Then write to us.

De Rebus welcomes letters of 500 words or less.

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

Send your letter to: derebus@derebus.org.za

Court orders swopped babies to remain with families raising them

The Gauteng Division Pretoria (GP) in *Centre for Child Law v NN and NS* (GP) (unreported case no 32053/2014, 16-11-2015) (Ledwaba, Mabuse and Janse van Nieuwenhuizen J) has ordered that two children who were swopped at birth must remain with the families who have raised them.

At the beginning of the court process, one of the mothers in the application initially wanted her biological child back, while the other mother did not want to exchange the children. This left the High Court with the decision of whether the children should be returned to their biological parents.

In May 2014 the director of the Centre for Child Law at the University of Pretoria, Professor Ann Skelton, was appointed as the curator *ad litem* by the court to investigate and make recommendations on the outcome that would be in the best interests of the children.

In November 2015 the court ruled that the five-year-old boy and girl were to be considered having been adopted by the parents who had raised them thus far without them needing to undergo a formal adoption process. The court also ordered that the children continue to have contact with their biological parents.

According to the curator's report, both children were born on 2 August 2010. The children, M and Z are different genders. M is a girl and Z is a boy. The curator said that this is the first known case where children of different gender were swopped.

Background

The curator had her first meeting with both mothers on 6 June 2014. She said that at these meetings Ms NS told her that she had been admitted at Tambo Memorial Hospital on 2 August 2010. She had to have a caesarean section and was taken to theatre. 'She explained that she was awake during the delivery… . She thinks she remembers being shown a baby girl, but the baby was taken away by a nurse just after the birth because she (Ms NS) had to be given oxygen. Her baby was not in the same ward as her, but had been admitted into a separate ward.'

The next morning she had asked to see her baby and was told that the baby was in ward number four. Her baby, a girl, had a tag on her wrist, which had her surname, NS. She visited her baby several times in ward four, fed her and cared for her. They were both discharged and she took the baby home. Ms NS duly registered the child as M, reflecting herself as the mother and Mr DL as the father.

According to the curator, all went well until July 2013 when a matron from Tambo Memorial Hospital called Ms NS. She was asked whether the baby was still with her. When she answered in the affirmative, she was told that someone from the Department of Health wished to tell her something about the baby, and was asked to come to the hospital.

The following month she went to a meeting at the hospital. On arrival she was told that a woman had come forward and told them that she was given a child that was not hers. The hospital had checked with several other mothers who had given birth around the time of 2 August 2010, and now they wanted to check whether her child was hers. A DNA test was done.

About a week later, Ms NS was picked up at work and taken to the laboratory to be briefed about the results. She was then told that the baby was not hers.

According to the curator, Ms NS informed her that she was still doubtful about whether the children had actually been swopped. In particular she doubted the DNA tests that had been shown to her because, she said, they did not prove 100% that she was the mother of child Z. The report states that Ms NS remembered being shown a paper that said 85%. She had asked for a separate test and the father of her child had gone for that test, but she said that the results had not been made known to her.

Initial meeting with Ms NN

Later that afternoon the curator met with Ms NN and her lawyer, Henk Strydom of Strydom Attorneys, who was acting on a *pro bono* basis.

The curator states that at the time that Ms NN gave birth in 2010, she admitted herself to the Tambo Memorial Hospital as she suffers from diabetes. She was scheduled for a caesarean section. She was awake during the procedure, and was shown the baby immediately after the birth, it was a girl. The baby was then taken away.

'The following day, she asked where her baby was and was told that, if she feels strong enough, she can go see her child. … [A]fter three days, she felt strong enough and went to see the child. In the designated room, she found only one baby – a boy – with a tag with her surname attached to his wrist.

She then went back to the sister in charge to tell her that this baby was a boy, whereas she had been shown a baby girl after the birth. The sister concerned laughed at her and said she must be confused because she was ill. When she persisted that her child was a girl, it was suggested that she was trying to abandon the baby. She remained doubtful but eventually became persuaded that she must have originally been mistaken, and she was then discharged from the hospital. Ms NN duly registered the child, under the name Z,' the report states.

The report goes on to state that approximately three years later, on 3 July 2013, Ms NN went to the Maintenance Court to claim maintenance from the father of the child, as they had since separated. Paternity tests were required. She was then called in and told that they had bad news for her – the child was neither hers nor the fathers. She was very shocked.

The nurse at the hospital that conducted the DNA tests had advised her to go back to the hospital she gave birth at, to get clarity and find her biological child. The report states that Ms NN said that Tambo Memorial Hospital did not initially show interest in her story. Only after she showed them the results did they take the matter seriously.

According to the report, Ms NN has

struggled financially as she is unemployed and she has been unable to get maintenance from her former boyfriend because he is not the biological father of Z. He is though the biological father of her older son.

The curator states: 'Ms NN struck me as being far further down the road of acceptance of what had happened. Although she has experienced great heartache, she is a practical person who wants to move forward. She in fact expressed frustration with how slowly things are moving. At this initial interview, she told me that her preference was for her biological child, M, to be placed into her care. Although she would like to keep both children, she acknowledged that this was an unlikely outcome of the process.'

In June 2014, the Wits Law Clinic informed the curator that they would be Ms NS's attorneys.

The DNA test results

In her report, the curator goes on to say that she scrutinised the DNA results. In summary, the interpretation of the results is as follows:

- Ms NN is excluded from being the biological mother of the boy, Z.
- Ms NS is excluded from being the biological mother of the girl, M.
- Ms NN appears to be the biological mother of the girl, M. The probability that Ms NN is the biological mother of M is 99.99%.
- Ms NS appears to be the biological mother of the boy, Z. The probability that Ms NS is the biological mother of Z is 80.5%. This test was done on 21 August 2013. A further test done just a week later, on 29 August 2013, indicated that the probability that Ms NS is the biological mother is 99.99%.

What happened in August 2010

The curator then turned her attention to trying to find out what had happened at Tambo Memorial Hospital on the day M and Z were born that resulted in the babies being swopped. Following a written request, she was received by the Chief Executive Officer (CEO) of the hospital, Doctor Avis Naidoo, and two other representatives from the hospital.

The curator was told that Ms NN came to the hospital (Tambo Memorial) on 1 August 2013, and sat outside the CEO's office requesting to speak to the CEO. She then told the CEO she wanted her own baby, as the one she had was not hers. She showed them blood test results which confirmed her story. Her story also sounded credible to them in the way that she recounted details about what had happened.

According to the report, after receiving the news, the hospital then consulted all records of the day the children were born. There were 11 children born by caesarean section at the hospital that day, in five different operating theatres. At first, they did not know what they were looking for. From the records, they narrowed down possible swops to eight children, then to three, then two males and one female child.

From their records, they saw a pattern: The same midwife attended to both mothers although the caesarean sections were done in different theatres. They then considered what Ms NN told them, that she was told her child was a girl but was given a boy. Ms NS was the first to be tested, and was told the results.

'It appears that the files and/or name tags were accidentally swopped by the midwife. The hospital's procedure regarding the identification of babies and their mothers was explained. Every mother's admission file has two blank tags inside. One tag is meant for the baby and the other one for the mother. The tags would then be completed with the name and gender of the child only once the baby is born, in the theatre. … Both babies were admitted into the baby ward, independent of their mothers' admission. Z was admitted by virtue of his mother being diabetic, and the other due to her weight,' the report states.

The curator's report goes on to say that the hospital was also very busy on the day the mothers gave birth, with very few midwives present, resulting in one midwife attending to several patients. At that time, retired nurses had been called in due to lack of midwives. Further, the (building) structure of the hospital was not conducive, as the theatre and other related wards, were not on the same floor. Patients were transferred from different floors; this also meant that midwives also had to work on different theatres and floors.

According to the report, the Tambo Memorial hospital team acknowledged that it was regrettable that the complaints by Ms NN to the nurse in charge about her baby being the wrong gender, was not escalated to a higher level by that nurse. Had the error been discovered then, far less trauma would have occurred.

According to the report, the curator then asked about preventative measures that would be introduced to avoid a repetition of such occurrences. 'The team explained that from the theatre, the midwife accompanies the new mother to the ward where she will be kept together with the child. Further, they have made sure that one midwife would attend to only one mother at a time. The management of the files and the tags is subjected to stricter rules, and there is cross checking of these details before the mother and baby leave theatre,' the report states.

Follow-up meetings

According to the report, at follow-up meetings, Ms NN said that it would be sad to take M away from a father who loved her. She also said that she was worried about Z if the other family was unable to love him.

Ms NS and Mr DL both expressed a clear preference to continue caring for M, the child that they had been raising. They see her as their own child, are firmly bonded with her, and Mr DL also referred to traditional ceremonies and family acceptance as reasons why 'giving away' their child is unthinkable to him.

The report also states that there was a psychologist team put together to work with the children and the mothers. Every second Friday the children and mothers were brought together in contact sessions. Individual therapy was also provided. The team informed the curator that although the sessions were going 'quite well' in terms of the mothers and children getting to know one another, and it was apparent that the bonding of the children, with each of the mothers they were raised by, was very strong. It was acknowledged by the psychologist team that the original aim to place the children back with their biological mothers was unlikely to succeed.

Legal issues arising

The curator said that there were several legal issues that arise from the matter. These include a civil liability, parental responsibilities and rights, as well as adoption.

On the civil case, the curator stated that the parents had suffered a lot and continue to be under considerable stress. She adds that although financial assistance will not solve all the problems, it will ease their current difficulties in numerous ways.

Speaking on parental responsibilities and rights, the curator said: 'With regard to the natural mother of a child, the simple fact of her giving birth to a child is sufficient to provide her with full parental responsibilities and rights, which is conferred by operation of section 19 [of the Children's Act 38 of 2005 (the Act)].

Thus in this case, Ms NS acquired full parental responsibilities and rights

of Z as soon as he was born, and Ms NN acquired full parental responsibilities and rights with regard to M. They have never exercised these responsibilities and rights because each of them went home with the other's child. Although they have *de facto* exercised full parental responsibilities with regard to the child that resides with each of them, they do not have such rights and responsibilities *de jure*,' the report states.

The curator goes on to say that with regard to fathers, the automatic acquisition of rights is more complex. A married father automatically acquires full parental responsibilities and rights on the birth of the child, if he is married to the child's mother, or was married to her at any time between conception and birth, or after the child's birth.

Section 21 of the Act states that an unmarried biological father acquires full parental responsibilities and rights in respect of the child:

'(*a*) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(*b*) if he, regardless of whether he has lived or is living with the mother –

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.'

The curator notes that neither of the fathers of the children in the current case were married to the mother at the time of their biological child's birth and that neither was living with the mother in a permanent life partnership at the time of his biological child's birth.

'Mr DL accepted the child M as his – this is clear from the fact that she was registered under his surname and was also recognised as his child in customary law rituals that he initiated. He has been involved in her upbringing and he has contributed to her maintenance. However, as she is not his biological child (a requirement of s 21) none of these actions give him any rights under the law. He has not automatically acquired legal responsibilities or rights towards M because she [is] not his biological child, and he has not acquired any responsibilities or rights towards Z, who is his biological child, because he has not carried out any of the required acts under s 21 in relation to Z.

Mr LZ accepted the child Z as his, he has been involved in his upbringing, and may have contributed to the maintenance of the child in the early stages of the relationship though he has failed to do so for some time. However, as Z is not his biological child (a requirement of s 21) none of these actions give him any rights under the law. He has not automatically acquired legal rights or responsibilities towards Z because he is not his biological child, and he has not acquired any responsibilities or rights towards M who is his biological child, because he has not carried out any of the required acts under section 21 in relation to M,' the report states.

The curator said that an obvious solution to this matter was adoption but added that it was likely that M and Z do not qualify as 'adoptable children' because according to s 230(3) of the Act, a children's court may only make an adoption order if the concerned child is 'adoptable'. A child is adoptable if:

'(*a*) the child is an orphan and has no guardian or caregiver who is willing to adopt the child;

(*b*) the whereabouts of the child's parents or guardian cannot be established;

(*c*) the child has been abandoned;

(*d*) the child's parent or guardian has abused or deliberately neglected the child, or has allowed the child to be abused or deliberately neglected; or

(*e*) the child is in need of a permanent alternative placement.'

The curator recommended that the court should enable the children's 'psychological parents' – those who have raised them thus far – to adopt the children without having to go through the usual adoption processes.

Recommendations

The court agreed with the recommendations and ordered:

- Full parental responsibilities and rights in respect of M have been acquired by NS with retrospective and prospective effect through the operation of the principle of *de facto* adoption, and that all responsibilities and rights are to be applied as if she is the adoptive parent of the child.
- Full parental responsibilities and rights in respect of M have been acquired by DL with retrospective and prospective effect through the operation of the principle of *de facto* adoption, and that all responsibilities and rights are to be applied as if he is the adoptive parent of the child.
- The parental rights and responsibilities that NS has in respect of Z are terminated.
- No parental responsibilities and rights have been acquired by DL in respect of Z.
- NS is granted the right to have reasonable contact with Z.
- DL is granted the right to have reasonable contact with Z.
- Full parental responsibilities and rights in respect of Z have been acquired by NN with retrospective and prospective effect through the operation of the principle of *de facto* adoption, and that all responsibilities and rights are to be applied as if she is the adoptive parent of the child.
- Full parental responsibilities and rights in respect of Z have been acquired by LZ with retrospective and prospective effect through the operation of the principle of *de facto* adoption, and that all responsibilities and rights are to be applied as if he is the adoptive parent of the child.
- The parental rights and responsibilities that NN has in respect of M are terminated.
- No parental responsibilities and rights have been acquired by LZ in respect of M.
- NN is granted the right to have reasonable contact with M.
- LZ is granted the right to have reasonable contact with M.
- The exercise of contact of this order will be managed by a parenting coordinator.
- The therapeutic support and integration programme being provided by the Child and Adolescent Family Unit (CAFU) shall continue until the parties agree that the service is no longer required.

The order also states that a parenting coordinator will be appointed on agreement by the parties on a suitably qualified person within 30 days of the order and that the payment of fees of the parenting coordinator shall be met by the fourth respondent, the Gauteng MEC of Health.

The powers and duties of the parenting coordinator include to –

- evaluating the processes being carried out by the CAFU in order to decide when the children are ready for the introduction of a parenting plan;
- coordinating the development of a parenting plan by the parents; and
- resolving any possible conflicts that may arise through a facilitation process, and where such facilitation efforts fail, formulate directives to resolve the dispute, which will be binding on the parties until such time as a court directs otherwise or until the parties jointly agree otherwise.

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Editorial committee bids Danie Olivier farewell

The *De Rebus* Editorial Committee (EC) and staff bid farewell to Danie Olivier in February. Mr Olivier was part of the EC for 11 years, having served three of them as the committee's chairperson. Mr Olivier's last EC meeting was at the end of October 2015.

At the farewell lunch, Peter Horn, who is also a long standing member of the EC, said that Mr Olivier has made a huge contribution to the committee and that he was someone who always knew his meeting agenda from cover-to-cover. He said that Mr Olivier brought insightful comment and debate to the EC meetings and that it was evident that he did a great deal of research on articles on the agenda before the meetings.

Former* De Rebus *Editorial Committee member, Danie Olivier.

Mr Horn described Mr Olivier as someone who was up to date with cases and the law. He concluded by saying that Mr Olivier brought a new dimension to the journal and the committee and that he would be missed.

The current chairperson of the EC, Mohamed Randera, said that Mr Olivier had developed a legacy and that he had imparted considerable knowledge to all the EC members and *De Rebus* staff. He added that he would be missed.

Mr Olivier has been replaced by Giusi Harper of Houghton Harper Attorneys and Conveyances in Johannesburg.

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South African teen wins My Magna Carta competition

Mfundo Radebe from Umlazi in KwaZulu-Natal has won the overall senior category of the My Magna Carta, an international creative essay writing competition.

The competition was open for 11 to 18 year olds and its main aim was to celebrate the 800th anniversary of the sealing of the Magna Carta. Young people from across the world were invited to create their own Magna Carta for the 21st century.

According to the English-Speaking Union (ESU), which organised the My Magna Carta competition, entrants were tasked to present a new document that safeguards and promotes the rights, privileges and liberties of either their own country or the world, using the Magna Carta as their source document. As in the original document, entrants needed to give particular thought to the powers of presidents, prime ministers and monarchs that need to be limited. Entrants were encouraged to draw lessons from recent national and international events.

Entrants submitted their Magna Carta as a written piece. The top two entries from national finals were submitted to the ESU Central panel for judging. Continent winners were invited to a Magna Carta Celebration Gala in October 2015 at the ESU headquarters in London to present their entry to a live audience. The junior winner from the African continent was Kayseka Geerjanan from Mauritius. The final winner in the junior category was Jane Josefowicz from the United States.

Mr Radebe (18) is also a recipient of a full scholarship to Harvard where he will start studying in August.

De Rebus news editor, **Nomfundo Manyathi-Jele** had the opportunity to interview Mr Radebe about his achievement.

Nomfundo Manyathi-Jele (NMJ): What inspired you to enter the competition?
Mfundo Radebe (MR): I have always been passionate about South African democracy and politics. Therefore, when I found the My Magna Carta competition online I was so stoked and I just simply had to enter it. Even though there was an open invitation for the creation of modern rights, there was a large emphasis on the limitation of modern governments. It was my field of interest as I have done a lot of writing on South African politics, including, being very critical of the government. I do believe that they have forgotten the promises that they made to the South African people after the end of Apartheid. The My Magna Carta competition was a way for me to voice that. I had hoped that my voice would be

Mfundo Radebe won the overall senior category of the My Magna Carta competition, an international creative essay writing competition. **Photo credit – Media Link**

discovered on an international stage so that the world knows that the majority of South Africans are hungry for change at this point and that yes, there is hope in Africa.

NMJ: How did you find out about the competition?
MR: I actually discovered My Magna Carta while at the school's computer room doing some research for a debate. I do not have the most reliable internet connection at home, so I have to rely on doing all my research at school. I logged in and 'Googled' modern constitutional influences. I then remembered that last year was the anniversary of the Magna Carta, so I 'Googled' Magna Carta and the competition popped up. At this point in time I had only two and a half hours to write this essay because I had to go home soon so I quickly wrote something and submitted it. Then about two months later, when I was going home one day, I turned on my phone to find a voicemail from the educational programme officer at the ESU, William Stileman, telling me I was the senior winner from Africa. I simply could not believe it!

NMJ: What was your winning essay about?
MR: My essay was on limiting the powers of government.

NMJ: You must be really proud of yourself, how do you feel about winning?
MR: Winning the competition has actually confirmed my convictions of going into politics and returning the ideals of the law into the system. I still feel quite excited when I look back at the competition because it really showed that even though there were many people who entered from around the world, we all shared the same beliefs and concerns regarding the following of the law in governance.

NMJ: What prize did you win, was it the Harvard scholarship?
MR: The prize was very sentimental – they printed my Magna Carta onto traditional sheepskin parchment. The Harvard scholarship was a side thing, which I applied for by myself. I guess winning My Magna Carta did help though because it meant I could apply to Harvard as an international writing and speaking champion.

NMJ: How do you feel about going to Harvard? Are you excited?
MR: I am very excited about Harvard, but I am also a bit scared. I mean sure I have gotten in and that is great and all but I know that there is a long journey ahead of me and the fact that I leave my family and friends behind is quite daunting.

NMJ: What are you currently doing while you wait to leave in August?
MR: I am currently working at my ex-school Crawford College, La Lucia in Durban as a debating coach and administration assistant. I am also doing a bit of writing both in my personal capacity and as a columnist.

NMJ: What will you study there?
MR: I will study political science and economics. I decided against political science and African studies as I feel the former is a stronger combination.

NMJ: How long is the course?
MR: It is a four year degree course with the ability to write an honours thesis in the four years.

NMJ: I see that you are very interested in the law and politics. What sparked your interest in law?
MR: Law is a very interesting field. I feel that it is so dynamic because it has evolved over time with the evolution of mankind. I like the law because I feel that it allows us to truly interact with each other within the acceptable moral grounds we have all agreed are the norm. But it is the fact that those norms are constantly challenged that makes law so exciting.

• To read the winning essays go to www.esu.org/my-magna-carta/winners

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People and practices

Compiled by Shireen Mahomed

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

Fourie Stott Attorneys in Durban has appointed Allison Schoeman as an associate. She specialises in property.

Lester Hall Fletcher Inc in Durban has appointed Charl Claassen as a professional assistant. He specialises in commercial and matrimonial law.

Pieter Skein Attorneys in Bloemfontein has appointed Nelis Verwey as an associate he specialises in conveyancing, property and commercial matters.

From left: Vera Kruger; Nicholas Hayes; Henno Bothma (back) and Marita Swanepoel.

Abrahams & Gross Inc in Cape Town has promotions and new appointments.

Henno Bothma has been promoted to director.

Marita Swanepoel has been appointed as an associate in the trusts and estates department.

Nicholas Hayes has been appointed as an associate in the conveyancing and property law department.

Vera Kruger was promoted to an associate in the general litigation and family law department.

Raubenheimers Inc in George has appointed Johannes Jumat as a director.

Kish IP in Johannesburg has three new appointments.

Werner van der Merwe has been appointed as a director.

Fredo Stroh has been appointed as a director.

Mercia Fynn has been appointed as a director.

Shepstone and Wylie Attorneys in Durban has three new promotions.

Matthew Campbell has been promoted as an associate in the corporate and commercial law department.

Kara Barnard has been promoted as an associate in the employment and pension law department.

Siya Mkhize has been appointed as an associate in the environmental and clean energy department.

From left: Matthew Campbell, Kara Barnard and Siya Mkhize.

Drake Flemmer and Orsmond and Terence Mathie Attorney's has merged in March and will operate as as **Drake Flemmer and Orsmond** in East London. The merger combines the strengths and expertise of two local law firms. DFO was established in 1888.

From left: (Directors) Angus Pringle, Shaun Mathie, Bongani Qangule, Terence Mathie, Richard Jardine, Ingrid Gaertner, Tanya Coetzee and Sonja Nel.

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Sabinet

Facilitating access to information

By
Ann
Bertelsmann

What trouble are other lawyers getting into?

Do you know what your own colleagues and employees are doing?

There may well be some sense of *schadenfreude* – that is, if you yield to the temptation to take a form of pleasure in the troubles of others – when you read about practitioners' mishaps in the case studies that follow:

Misleading clients

In the article by John Hyde 'Partner struck off for "web of deception" about case progress' *The Law Society Gazette* (www.lawgazette.co.uk, accessed 22-2-2016), he discusses the sad tale of a solicitor having been struck off for misleading his client about the progress of a land dispute with a neighbour.

In mitigation, Adrian Harling, the managing partner of the law firm, argued that he had genuinely believed he was serving his client's best interests, having advised as far back as February 2008 that land dispute cases were difficult to win.

Closer to home, the Attorneys Insurance Indemnity Fund (AIIF) is regularly notified of claims where practitioners or support staff have attempted to mislead clients about the status of their matters – even going so far as to cut and paste court documents to create the impression that litigation has commenced or has been successful.

In one such case, several claims arose out of a partner in a two-person practice having misled a substantial number of clients over a period of time. For a fuller discussion, see the article by Ann Bertelsmann 'Let the Partner Beware! An important case study' *Risk Alert Bulletin* (www.aiif.co.za, accessed 22-2-2016).

Case notes

Misleading colleagues

The AIIF was notified by A Attorneys of a number of potential claims against them, arising out of the prescription and/or under-settlement of some of their clients' Road Accident Fund (RAF) claims.

These matters had all been allocated to S, a senior candidate attorney, who had been employed by the practice for several years, while he obtained his LLB degree and did his articles. S was allocated his own secretary and a portfolio of RAF and other personal injury matters.

Apparently during this time S reported to the directors on a regular basis. He built up a vast experience in running personal injury claims and had successfully concluded a large number of these matters.

A year or two later, one of the directors became aware that S had omitted to timeously lodge the RAF 4 serious injury report in one of his matters. S was instructed to consult with the senior director about the matter the following day. At this consultation, he was asked to have all his files ready for a discussion with the directors the following week. Thereafter, S failed to return to work and never furnished an explanation for his desertion. He did not return messages left for him and could not be contacted.

When S's other files were subsequently checked by the directors, it became apparent that many of them had not been dealt with competently and some claims had in fact become prescribed.

Ignorance of the law

- In another claim against a firm of attorneys arising out of the prescription of a client's RAF claim, the attorney had misunderstood the law. The client was injured in a motor vehicle accident in which the insured vehicle was unidentified – a so-called 'hit and run' claim. Such claims must be lodged within two years from the date of accident. The claim was lodged three months late and, therefore, became prescribed. The insured attorney explains that he was under the impression that a claimant in a hit-and-run case had two years and three months within which to lodge the claim. This was his (incorrect) understanding in terms of the amendments to the RAF legislation.
- In a conveyancing matter, B Attorneys had drafted a rental agreement between Ms X (the lessee) and Mr V (the lessor), which included an option to purchase the properties specified in the agreement from the lessor for R 3 million.

When the lessee attempted to exercise the option, the lessor refused on the basis that the agreement was in conflict with art 3 of the Subdivision of Agricultural Land Act 70 of 1970 (the Act).

B Attorneys then represented the lessee in an action against the lessor to force him to comply with the agreement.

The court found that the relevant clause was indeed in conflict with art 3 of the Act. A subsequent appeal was also unsuccessful. The lessee brought a professional indemnity claim against Attorney B, on the basis that he had drafted the agreement in contravention of the Act.

Lack of attention to detail and administrative errors

During March 2009, a couple consulted with C Attorneys regarding the drafting and registration of their prenuptial agreement. Their wedding was to take place on 21 March 2009. C Attorneys provided the couple with a letter to be given to the marriage officer as confirmation of the marriage regime to be entered on their marriage certificate. He drafted the contract, had it properly notarised on 19 March 2009 and lodged it with the deeds registries office on 23 March 2009.

However, the Registrar rejected the application because C Attorneys had reflected the incorrect identity number of one of the parties on the agreement. Although the error was subsequently rectified and the documents were re-lodged, they were once more rejected on the basis that more than three months had elapsed since the contract had been notarised and the provisions of the Deeds Registries Act 47 of 1937 were therefore not met.

To exacerbate the problem, as a result of a *bona fide* administrative error on C Attorneys' part, an application for condonation for the late registration of the agreement was never made. It was only when the couple sought to purchase an immovable property a few years later that they discovered that the agreement had never been registered in the deeds registries office.

An application for condonation was successfully brought and the agreement was finally registered in February 2014, by which stage the purchase of the immovable property had fallen through.

Poor trial advocacy

E Attorneys were sued by a client whose action against the state was unsuccessful. The transcript of the trial revealed that the professional assistant employed by E Attorneys had failed to place key evidence before the court to support the allegations in the particulars of claim.

Oversights

- During April 2006 F Attorneys received an instruction from S Bank to register a

first mortgage bond in their favour over a property. The mortgagor was Mr P.

The bank also instructed F Attorneys to have a limited surety signed by Mr P's daughter. Registration of the mortgage bond was duly effected in the Cape Town Deeds Office. Unfortunately the signed surety documents were not obtained. F Attorneys only realised that the surety had not been obtained, when the bank's compliance department contacted them in this regard.

Thereafter, F Attorneys were unable to persuade Mr P's daughter to sign the surety documents.

The bank demanded that F Attorneys provide them with an undertaking to cover any loss incurred as a result of their error. The mortgagor, Mr P was in arrear with his bond instalment.

• The sellers sold a property to the purchasers, subject to a water servitude for household consumption being registered in favour of their remaining property. F Attorneys drafted the papers to register the servitude but failed to register it. A paralegal had dealt with the file under the supervision of a director of F Attorneys.

Since the cases discussed are merely a small sample of things that have gone and do go wrong in practice, it might be prudent to ensure that mistakes made in your own practice do not also end up being material for future case studies – and the *schadenfreude* of others.

How would you go about ensuring that procedures, checks and balances are put in place in your practice to prevent such claims-prone situations? For some ideas read the article 'Effective supervision in your legal practice' 2015 (Dec) *DR* 26. You might also wish to consult the Risk Management section on the AIIF's website at www.aiif.co.za.

Ann Bertelsmann *BA (FA) HED (Unisa) LLB (Wits)* is the legal risk manager for the Attorneys Insurance Indemnity Fund in Centurion. ❑

By the financial forensic unit of the Attorneys Fidelity Fund

In contravention of legislation ... ?

Section 78(2A) of the Attorneys Act 53 of 1979 and s 86(4) of the Legal Practice Act 28 of 2014 (LPA) allow attorneys to invest client monies in a separate trust savings account or other interest-bearing account where there is an underlying transaction with an explicit mandate from the client to do so. For purposes of this article, we will refer to such investments as investments in terms of the Act.

Attorneys from time to time open investment accounts in terms of the Act for their clients where the underlying transaction takes longer to complete. These investments remain part of entrusted monies and are recorded in the general trust accounting records of the attorney's practice and enjoy protection by the Attorneys Fidelity Fund (the Fund).

With effect from 1 March 2016, the attorneys are regulated in terms of the Rules for the Attorneys Profession (GenN 2 *GG*39740/26-02-2016) (the rules). The rules permit attorneys to invest on behalf of individuals without there being an underlying transaction. Monies invested in terms of the rules have no underlying transactions and are not earmarked for any purpose except to invest, do not form part of the general trust monies and should not be accounted for as part of the general trust monies/balances, and do not enjoy the protection of the Fund. The question that arises is whether monies invested in terms of the Act are always correctly classified as such.

This article seeks to explore the various instances where attorneys may incorrectly invest client monies in terms of the Act, whereas the money should have been invested in terms of the rules and the implications thereof. The rules state as follows:

'Rule 36.1 A firm shall for the purpose of this rule be deemed to be carrying on the business of an investment practice if it invests funds on behalf of a client or clients and it controls or manages, whether directly or indirectly, such investments.

Rule 36.2 A client shall for the purposes of this rule include any person on whose behalf a firm invests funds or manages or controls investments, whether or not such person is otherwise a client of the firm concerned.

…

Rule 36.4 A firm carrying on an investment practice shall obtain an investment mandate from each client before or as soon as possible after investing funds for that client. The form of the investment mandate shall be substantially in the form of the Fifth Schedule to these rules, and shall contain a statement that the client acknowledges that moneys so invested do not enjoy the protection of the Fund.'

Readers are urged to read r 36 in full to get more information on Investment Practice Rules.

The Financial Services Board (FSB)

The FSB is a unique independent institution established by statute to oversee primarily the South African non-banking financial services industry in the public interest. The FSB supervises financial advisory and intermediary activities in the financial services sector through its Financial Advisory and Intermediary Services (FAIS) department in terms of the Financial Advisory and Intermediary Ser-

vices Act 37 of 2002 (the FAIS Act). The FAIS Act was designed to protect consumers of financial products and services. It applies to any provider of financial services and its representatives, as well as any person who gives financial advice or who provides an intermediary service.

Section 7(1) of the FAIS Act states that: '… a person may not act or offer to act as a –

(*a*) financial services provider, unless such person has been issued with a licence under section 8'.

Section 19(3) of the FAIS Act states that: 'The authorised financial services provider must maintain records in accordance with subsection (1)(*a*) in respect of money and assets held on behalf of clients, and must, in addition to and simultaneously with the financial statements referred to in subsection (2), submit to the registrar a report, by the auditor who performed the audit, which confirms, in the form and manner determined by the registrar by notice on the official web site for different categories of financial services providers –

(*a*) the amount of money and financial products at year end held by the provider on behalf of clients;

(*b*) that such money and financial products were throughout the financial year kept separate from those of the business of the authorised financial services provider, and report any instance of non-compliance identified in the course of the audit and the extent thereof; and

(*c*) any other information required by the registrar.'

Section 36 of the FAIS Act states that: 'Any person who –

(*a*) contravenes or fails to comply with a provision of section 7(1) or (3), 8(8), 8(10)(*a*), 13(1) or (2), 14(1), 17(4), 18, 19(2), 19(4) or 34(4) or (6);

(*b*) in any application in terms of this Act, deliberately makes a misleading, false or deceptive statement, or conceals any material fact,

…

is guilty of an offence and is on conviction liable to a fine not exceeding R 10 million or imprisonment for a period not exceeding 10 years, or both such fine and such imprisonment.'

Readers are urged to read in detail ss 8, 13, 14, 17, 18, 19 and 34 of the FAIS Act.

On 28 November 2012 the FSB issued 'Circular on Financial Services Provides who operate Cash Management System Accounts' (FAIS Circular 11/2012, 28-11-2012) (www.fsb.co.za, accessed 3-3-2016) dealing with Financial Services Provider's (FSP) who operate Cash Management System Accounts (CMS Accounts). The Circular was aimed at clarifying to the industry whether a s 19(3) audit report is required from FSPs who operate a CMS account or not. This came as a result of a growing number of FSPs rendering financial services on the CMS bank account currently offered predominantly by Investec Bank – Corporate Cash Management Account (CCM) and Nedbank – Corporate Saver System Account (CSS). Attorneys were identified to be among the types of businesses that banks currently offer the systems to.

Following the circular, the Fund's Board of Control obtained a legal opinion, which effectively advised that attorneys making use of these systems should be licensed as FSPs. Following the sought opinion, on 3 March 2015 the Law Society of South Africa (LSSA) wrote to the Senior Legal Adviser of the FSB requiring clarity on the Circular and expressing the views of the LSSA on the various investments that attorneys are involved with, being the investments in terms of the Act and the investments in terms of the rules. The views expressed by the LSSA were that the investments made in terms of the Act are incidental to the attorney's practice and that attorneys need not be FAIS compliant on these investments, whereas investments made in terms of the rules should require compliance with FAIS.

The Deputy Registrar of the FSB, in a response dated 23 July 2015, concurred with the LSSA that investments in terms of the Act would not fall within the ambit of the FAIS Act, while investments in terms of the rules would require compliance with the FAIS Act.

We will now consider various scenarios where an investment is considered an investment in terms of the rules and not an investment in terms of the Act and where attorneys are subjected to the FAIS Act:

- *Scenario 1*

A client (including the employees of the attorney firm and its directors or partners) approaches an attorney and asks that the attorney invests money on his or her behalf without there being any underlying transaction. The money is therefore not earmarked for any transaction except to invest.

This is a pure investment made in terms of the rules with interest accruing to the owner of the Funds. It is not covered by the Fund and does not form part of the general trust accounting of the firm. The attorney is required to be licensed as an FSP and to be FAIS compliant.

- *Scenario 2*

A client of a firm approached an attorney on a litigation matter, the litigation matter is, therefore, the underlying transaction. The client pays money into the trust account of the firm pending completion of the underlying transaction. This money is invested by the attorney in terms of the Act, while the litigation continues, gets reported as part of the general trust and enjoys protection by the Fund. The underlying transaction is then finalised and the attorney is released from the mandate. However, after the attorney has made all the required payments in terms of the underlying transaction and has taken fees for the services rendered, there is still money remaining, which is a client refund. The client opts for a non-refund and instructs the attorney to continue keeping the funds in the investment until the client instructs the attorney to refund him or her.

From the point where the underlying transaction is completed the invested funds have changed form and can no longer be

invested in terms of the Act but need to be withdrawn from the initial investment account and invested in terms of the rules. From this point onwards, the investment no longer enjoys the protection of the Fund, should no longer be reported as part of the general trust balances and the attorney should be FAIS compliant.

- *Scenario 3*

A client of a firm approached an attorney on a litigation matter, the litigation matter is, therefore, the underlying transaction. The client pays money into the trust account of the firm pending completion of the underlying transaction. This money is invested by the attorney in terms of the Act while the litigation continues, gets reported as part of the general trust and enjoys protection by the Fund. The underlying transaction is then finalised and the attorney is released from the mandate. However, after the attorney has made all the required payments in terms of the client mandate and has taken fees for the services rendered, there is money still remaining, which is due to be refunded to the client. The client opts for a non-refund and instructs the attorney to keep the money in an investment pending a future underlying transaction.

Where the attorney expects to provide a future legal service to the client, until such time as there is in fact an underlying transaction, the investment no longer enjoys the protection of the Fund, should no longer be reported as part of the general trust balances and the attorney should be FAIS compliant. On receipt of an explicit mandate for an underlying transaction by the attorney, the money can again be invested in terms of the Act.

From the above scenarios, it is important to note that money can change form over the period that it is in the hands of the attorney, and these are considered when a complaint or claim arises on invested funds. Attorneys should ensure that the form of the money is accurately determined for investment purposes at all times.

Levy on investments

Section 86(5)(*b*) of the LPA requires that interest accrued on money deposited in terms of s 86(4) must be paid over to the owner of the funds provided that 5% of the interest accrued on those funds must be paid over to the Fund and vests in the Fund. It therefore follows that, if invested money is incorrectly invested as an investment in terms of the Act, the Fund will incorrectly levy a 5% on the interest accrued, while the investment in itself enjoys no protection from the Fund.

Conclusion

It is clear from the foregoing paragraphs that proper and accurate distinction of investments should be made by attorneys to ensure compliance with relevant legislation and/or regulations. In summary, the following critical points should be ensured by attorneys who run investment practices as they must –

- be licenced to do so by the FSB;
- obtain a mandate from the client to invest his or her money;
- make an accurate classification of an investment at all times;
- explicitly disclose to the client that the investment is not protected by the Fund; and
- fully comply with the requirements of the FAIS Act.

Failure to comply with the requirements of the FAIS Act by attorney firms running investment practices may result in penalties, which include a monetary fine and/or imprisonment.

Remember, if you invest in terms of the Act without an existing underlying transaction, you are contravening legislation.

The financial forensic unit of the Attorneys Fidelity Fund in Centurion.

Western Cape Government

BETTER TOGETHER.

IMPORTANT NOTICE

INVITATION TO NOMINATE A LEGAL REPRESENTATIVE TO THE WESTERN CAPE MENTAL HEALTH CARE REVIEW BOARD

In terms of section 20(3)(a) of the Mental Health Care Act, 2002 (Act No.17 of 2002), the Provincial Minister of Health hereby calls for nominations from interested persons, community organisations or groups for this position on the Western Cape Mental Health Care Review Board. Nominees must be South African citizens.

- **Magistrate, attorney or advocate:** This nominee must be registered in accordance with the laws of the Republic of South Africa governing their appointment as a magistrate, attorney or advocate. This particular nominee must preferably have some knowledge of the Mental Health Care Act, 2002 and the accompanying Regulations as well as a strong background in administrative and constitutional law.

The Review Board has the following powers and functions:

(a) To consider appeals against decisions of the head of a health establishment;
(b) To make decisions with regard to assisted and involuntary mental health care, treatment and rehabilitation services;
(c) To consider periodic reviews and make decisions on assisted and involuntary mental health care Users
(d) To consider 72-hours assessment made by the head of the health establishment and make decisions to provide further involuntary care, treatment and rehabilitation services;
(e) To consider applications for transfer of mental health care Users to maximum security facilities; and
(f) To consider periodic reports on the mental health status of mentally ill prisoners.

Requirements:

1. The nominee must be resident in a community within the Province of the Western Cape.
2. Experience or interest in the Mental Health Care field, excellent verbal and writing skills and the ability to understand matters of a complex nature.
3. The nominee must be available to fulfil his/her duties during Monday to Friday office hours and attend meetings weekly. The Board member should be able to work a minimum of 15 hours per week.
4. The nominee must be an attorney, advocate or magistrate.
5. Preference will be given to a candidate who speaks isiXhosa fluently.

Persons, community organisations or groups making nominations and nominees must please take note of the following:

1. The Provincial Minister of Health is the authority that will appoint the Review Board member.
2. The Review Board's offices are located on the Lentegeur Hospital Estate in Mitchells Plain members will be required to travel to these offices as well as to hospitals and centres within the Province. Travel and subsistence compensation is covered.
3. The position of Review Board member is one which has a remuneration attached to it.
4. The appointments will be made with due regard to issues such as gender and equity.

Any person, community organization or group making a nomination must provide the following information to the departmental official whose details appear below:

1. The full name and address of the person, community organisation or group making the nomination;
2. The full name and address of the nominee;
3. A signed copy of the nominee's curriculum vitae;
4. An indication as to which category the nominee is being nominated for;
5. The person, community organisation or group must provide a written motivation why they consider the nominee to be a suitable member for the Review Board;
6. A declaration by the nominee of his/her willingness to be a member of the Board.

By
Mohammed
Moolla

Default judgment

Default judgment is a judgment entered against a party who has failed to defend a claim that has been brought by another party.

Where the defendant fails to defend an action, it is reasonable to suppose that the defendant is not disputing the claim or amount.

Judgment by default is covered under r 12 of the Magistrates' Courts Rules.

There are four instances where default judgment may be entered into:

- The defendant has not served and filed a notice of intention to defend.
- The defendant failed to serve and file a notice of intention to defend timeously (see below).
- The defendant failed to file a plea.
- The defendant entered a defective entry of notice of intention to defend.

The following are the most important requirements for any action:

- *Locus standi* – right to institute action.
- Cause of action – have proper claim.
- Jurisdiction – either s 28 where defendant resides or works or consented to in terms of s 29.

Procedure

- The plaintiff lodges a written request for default judgment if the defendant fails to file a notice of intention to defend within ten days.
- The request must be in duplicate.
- Original summons, sheriffs return of service and documents on which cause of action is based, (if applicable) must accompany the request.
- The correct case number must be reflected.
- The plaintiff may only claim the amount, not exceeding the amount claimed in summons, plus costs and interest as claimed in the summons.

If the defendant delivered a notice of intention to defend but failed to deliver a plea – the plaintiff may deliver a notice of Bar calling on the defendant to deliver a plea within five days hereof, failing which, the defendant will be barred from filing a plea and judgment may be entered into.

If judgment is entered into after the plaintiff has failed to file a plea the costs order made is for taxed costs.

The process

The magistrate endorses both the requests that judgment is granted.

In the event that the notice of intention to defend is defective, in that it –

- is not properly delivered;
- is not properly signed; or
- does not set out an address within 15 km radius, default judgment may not be entered unless the plaintiff has delivered a notice calling on the defendant to rectify that within five days (r 12(2)(a)).

Default judgment is not entered for summons served by registered post, unless there is an acknowledgement of receipt in terms of r 9(13)(a). Summons must be served on the defendant or agent and ten days must have lapsed. The summons may be served at the residence of the defendant or his place of business. Service is usually effected on a person over the age of 16 years or a person apparently in authority of the person at his place of work. As regards to service on companies, namely, close corporations or trusts, service may be effected at their registered offices.

Where the claim is for an unliquidated amount or for damages the plaintiff shall furnish the court with evidence either verbally or by affidavit, whereupon the court shall assess the amount recoverable. Examples of such matters are defamation and damages in collision matters. All claims for damages require an affidavit of an independent expert.

Where the claim is on a liquid document or agreement, the plaintiff must file the original of such document or an affidavit setting out reasons as to why the original is not filed.

Where there are several defendants, the plaintiff should request default judgment against the defendants jointly and severally, the one paying the other to be absolved.

Section 58 states requests for default judgments are consent judgments where summons was not issued.

Important recent case law

The case of *Sebola and Another v Standard Bank of South Africa Ltd and Another (Socio-Economic Rights Institute of South Africa and Others as* Amici Curiae*)* 2012 (8) BCLR 785 (CC) dealt with the extent to which a credit provider must bring the s 129 notice to the attention of the consumer. In fact it is not clear in respect of how a written notice must be brought to the attention of the consumer. Would an e-mail be sufficient? Would normal post be sufficient? What if the notice sent did not come to the attention of the consumer?

It was this ambiguity which formed the basis in the *Sebola* matter. They defaulted in their repayments to Standard Bank. Standard Bank sent them a notice by registered post. The notice was misdirected and instead of being sent to the intended post office in North Riding, it was sent to a post office in Halfway House.

The result was that they never received the notice. Judgment was obtained against them. The nett result was that the Sebolas were never able to exercise their consumer rights in referring the matter to, for instance, a debt counsellor.

The Constitutional Court was tasked with determining what delivery method a s 129 notice entails. The court was constrained that the National Credit Act 34 of 2005 (the NCA) does not define the concept of 'delivery' and the NCA demands neither proof of delivery, nor the question of: Did the notice come to the attention of the consumer? The credit provider must make averments that will satisfy the court on a balance of probabilities that the notice did reach the consumer.

As a result, it means that in future credit providers must be able to show that they have sent the letter by registered post, as well as obtained a track and trace print out from the post office to show that the letter was indeed delivered to the correct post office.

In another case, *Mhlokonya v Company Unique Finance (Pty) Ltd* (ECG) (unreported case no CA04/2012, 18-10-2012) (Goosen J), the Eastern Cape High Court confirmed that default judgment cannot be competently given where a defendant has given due and proper notice of his intention to defend the action (see also *Mthanthi v Pepler* 1993 (4) SA 368 (D) at 371 – 372).

There has also been proliferation of decisions in the recent past arising from the provisions of the NCA, especially insofar as home loans are concerned. It has given rise to different and divergent rules of practice or practice directions in various divisions of the High Court.

In the Constitutional Court case of *Gundwana v Steko Development CC and Others (National Consumer Forum as* Amicus Curiae*)* 2011 (8) BCLR 792 (CC) the court had to consider 'all relevant circumstances' before declaring a property executable, which was the primary residence of the judgment debtor/defendant.

A host of relevant circumstances which a court may be required to consider appear in the judgment of the Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stolz and Others* 2005 (1) BCLR 78 (CC) matter. In terms of Blignault J's judgment in *Nedbank Ltd v Jessa and Another* 2012 (6) SA 166 (WCC), the court held that the summons must, in addition, include an appropriate notification to the defendant that he or she is entitled to place information regarding relevant circumstances within the meaning of s 26(3) of the Constitution.

In the case of *Standard Bank of South Africa Ltd v Dawood* 2012 (6) SA 151 (WCC), the Western Cape High Court stated that: 'The size of the debt will be a relevant factor for the court to consider. It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor.' The court went on to further state the relevant factors referred to in the *Jaftha* matter, which includes: 'The availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home.' The court held that to grant an order declaring the defendants home executable for such a paltry amount would be disproportionate in the circumstances. The court, also stated that no reason was advanced as to why the plaintiff could not effectively utilise debt collecting mechanisms in terms of the Magistrate's Court Act 32 of 1944 and rules to obtain payment of the debt.

Checklist for granting default judgment

This is not a conclusive checklist, but should provide some assistance:

- Summons must be in the prescribed form (updated rules).
- Summons must be issued.
- Proper service must be effected and Sheriffs return attached (no electronic signatures unless compliant).
- Summons must be date stamped and signed by clerk of court.
- Summons must be signed by plaintiff or attorney.
- Case number.
- Any amendments to summons initialled prior service.
- If amended, is there compliance in terms r 55A of the Magistrates' Courts Rules.
- Name and physical address of attorney or plaintiff to appear and a 15 km distance radius.
- Does the summons disclose cause of action?
- Does the magistrate's district correspond with place of issue?
- Does name of place correspond with where court sits?
- Does the plaintiff have *locus standi*?
- Does the defendant have *locus standi* namely, a minor?
- Does the plaintiff have cause of action?
- Does the court have jurisdiction, place and amount?
- Has the *dies induciae* expired?
- Has the defendant filed a notice of intention to defend –
  – within the time limit?
  – before request for default judgment has been filed?
  – on the same day that request has been filed?
- If a written agreement is relied on, has the liquid document and original been filed?
- Does the request have correct parties and correct case number?
- Is the amount claimed for, costs and interest corroborated in the summons?
- Are the details of claim, costs and interests recorded on the file cover?
- Is the classification of claim recorded on cover?
- Does the file cover have the corresponding case number?
- NCA matters – is there compliance with ss 129 and 130 notices?
- Is credit provider registered with National Credit Regulator? Is the registration valid at time credit agreement was entered into?
- If not registered, does credit provider have less than 100 credit agreements at any given time? Are the credit agreements less than R 500 000 in value?
- Reckless credit – is there allegation in summons or an affidavit that an assessment to prevent reckless credit in terms

of s 81 conducted resulting in no reckless credit being granted? Section 83 of the NCA places an onus/obligation on the court in all matters relating to credit agreements for the court to consider whether there was reckless credit granted. The court has the power to suspend reckless credit agreements. In terms of s 83 of the NCA, the court may set aside or suspend the entire agreement or restructure the consumer's obligations under credit agreements. The court may put onus on the applicant to show no reckless credit was granted.

- Is the consumer over-indebted? The court may declare the consumer over indebted and relieve indebtedness in terms of s 79. Onus on consumer unless inferred or clearly indicated in pleadings.
- Is the credit agreement unlawful – s 89?
- Does the credit agreement have unlawful provisions – s 90?
- Is there compliance with maximum interest rates under specific categories?
- Are there any administrative or default charges? Is compliance with the tariffs?

The recent case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others (South African Human Rights Commission as* Amicus Curiae*)* [2015] 3 All SA 644 (WCC), the Cape Town High Court found that consents were not obtained voluntarily, nor on an informed basis. Consumers or debtors were required to consent to a jurisdiction of the magistrate's court, which did not have jurisdiction over them. Some judgments were obtained fraudulently. It was also found that the words 'judgment debtor has consented thereto in writing' in s 65J(2)(*b*)(i) and (ii) of the Magistrates' Court Act are constitutionally invalid to the extent that they allow for emoluments attachment orders (EAOs) to be issued by the clerk of the court without judicial oversight. The judgment debtor should have some right to dispute the validity or correctness of the balance owing and should have the power to set aside or amend an EAO on good cause. The issuing of the order also has contradictory ramifications as far as jurisdiction is concerned. The way of avoiding and preventing any misuse of s 45 is to request that a proper application be brought to court, wherein the magistrate will determine if the instalment claim is reasonable and affordable by the debtor.

Mohammed Moolla *BProc (UKZN)* is a magistrate in Cape Town.

Notarial Practice 2016 Syllabus

The examiners expect candidates to be able to draft various documents with reasonable competence, to satisfy themselves that the candidates have the necessary knowledge of the legal principles underlying the various documents and that they understand the underlying principles.

Candidates are to write a four hour paper. Candidates who attain 50% or more in the written paper, may be excused from an oral examination, but this decision is at the discretion of the examiners. Candidates who attain between 40% and 49% will be called back for an oral examination. Candidates who attain less than 40% will not be called for an oral examination and will fail the examination.

Candidates are allowed 15 minutes to peruse the paper before starting to answer the questions. No candidate may start writing in the answer book during this period. The examination starts at 9 am and ends at 1:15 pm.

The syllabus covers all aspects of the law with which notaries are required to deal in the course of their practice, particularly where notarial form is required for registration purposes and where work is reserved to notaries. Without affecting the generality of the foregoing, the following aspects require particular attention:

- The practice, functions, ethics, duties and obligations of notaries public and their admission, removal and suspension, as well as the notary public's duties in relation to notarial deeds.

- The preparation and registration of all types of notarial deeds, including among others –
  - deeds of servitude, both personal and praedial;
  - notarial bonds antenuptial and postnuptial contracts;
  - notarial deeds of cession of usufruct;
  - notarial deeds of waiver of preference of usufruct;
  - notarial leases;
  - trust deeds; and
  - deeds of donation. This is not an exhaustive list but is merely provided to serve as a guide to candidates.
- The law relating to bills of exchange with particular reference to dishonour, which encompasses the noting and presentation of bills of exchange, including the procedure required to note a bill and the subsequent preparation of the noting slip, deed of presentation and deed of protest.
- The rules relating to the authentication of documents.
- Guardianship and the marriage of minors.
- Matrimonial property law.
- The formalities to be complied with for the validity of all documents dealt with by notaries.
- The formalities to be complied with in regard to the execution and registration of registerable leases.
- The drafting of wills and trusts and the formalities to be complied with in regard

thereto and succession, both testate and intestate.
• All revenue laws as they affect the practice of a notary with particular reference to income tax, capital gains tax, donations tax, estate duty, transfer duty, stamp duty and value-added tax.
• Drafting of ships protests.

In order to cover the above syllabus candidates are advised to refer to the following:
• Lowe, Dale, de Kock, Froneman and Lang *The South African Notary*, (Juta: Cape Town 1995) (out of print).
• Randell and Van Niekerk: *The South African Attorney's Handbook* (LexisNexis: Durban 1968) (out of print).
• Van Blommestein *Professional Practice for Attorneys* (Juta: Cape Town 1965) (out of print).
• Lewis *Legal Ethics* (Juta: Cape Town 1982) (out of print).
• Van der Merwe *Notarial Practice* (LexisNexis: Durban 2001).
• Van Zyl *The Notarial practice of South Africa* (Juta: Cape Town 1909) (out of print).
• Securities Transfer Tax Act 25 of 2007.
• Bills of Exchange Act 34 of 1964 as amended.
• The regulations appertaining to notaries promulgated under GN 2961/1950-11-24 as amended by GN 362/1952-2-16 and which are to be found in Lowe *et al* ch 3 and Van der Merwe at 343.
• Deeds Registries Act 47 of 1937 as amended and the regulations promulgated thereunder.
• Sectional Titles Act 95 of 1986 as amended.
• Trust Property Control Act 57 of 1988.
• Attorneys Act 53 of 1979 as amended and the regulations promulgated thereunder.
• Long-term Insurance Act 52 of 1998 and the Insolvency Act 24 of 1936 as amended, insofar as they affect the cession of policies between husband and wife, donations and preference under notarial bonds.
• Children's Act 38 of 2005.
• Intestate Succession Act 81 of 1987, as amended and the Wills Act 7 of 1953 as amended, and particularly as amended by the Law of Succession Amendment Act 43 of 1992.
• Matrimonial Affairs Act 37 of 1953.
• Matrimonial Property Act 88 of 1984 as amended.
• Formalities in respect of Leases of Land Act 18 of 1969.
• General Law Amendment Act 50 of 1956 with reference to ss 2, 3, 4, 5 and 6 thereof.
• Transfer Duty Act 40 of 1949.
• Security by means of Movable Property Act 57 of 1993.
• Value Added Tax Act 89 of 1991.
• Subdivision of Agricultural Land Act 70 of 1970.
• Subdivision of Agricultural Land Repeal Act 64 of 1998.
• Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.
• GN773 *GG*16609/18-8-1995, which deals with the accession by the Republic to the Convention abolishing the requirements of legalisation for foreign public documents.
• Court decisions that relate to notarial deeds and the practice of notaries in general.
• Recognition of Customary Marriages Act 120 of 1998.
• Income Tax Act 58 of 1962, with particular reference to Part V (ss 54 – 64, both inclusive) dealing with Donations Tax and s 26A and the sch 8 dealing with Capital Gains Tax.
• Financial Intelligence Centre Act 38 of 2001.
• Prevention of Organised Crime Act 121 of 1998.
• National Credit Act 34 of 2005.
• Civil Union Act 17 of 2006.
• Consumer Protection Act 68 of 2008.
• Companies Act 71 of 2008.

It is further recommended that candidates consult appropriate publications, *inter alia* –
• Christie *Conveyancing Practice Guide* (LexisNexis: Durban 2008).
• West *Practitioner's Guide to Conveyancing and Notarial Practice* (Legal Education and Development: Pretoria 2016).

For any further information, contact Legal Education and Development at (012) 441 4600. ❑

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By Judge Patricia Goliath

Protecting victims of human trafficking – *is South Africa doing enough?*

Picture source: Gallo Images/iStock

'Money may be able to buy a lot of things, but it should never, ever be able to buy another human being' John F Kerry *Trafficking in persons report* July 2015 (www.state.gov, accessed 3-3-2016).

Human trafficking is a global phenomenon and one of the world's most shameful crimes. It is nothing more than modern slavery and affects each and every country, whether as a country of origin, transit or destination for victims. Human trafficking is considered to be the largest source of profits for organised crime after drugs and guns. According to the United States' (US) Department of State, approximately 600 000 – 800 000 people are annually trafficked across borders internationally. It is estimated that 80% of all trafficked persons are women and children. Sexual exploitation is by far the most commonly identified form of human trafficking.

The first universal instrument dealing exclusively with all aspects of human trafficking is the United Nations (UN) Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime 2000, (www.osce.org, accessed 3-3-2016) known as the Palermo Protocol. The Palermo Protocol was adopted on 15 November 2000, hence this year marks the 16th anniversary of the adoption of the protocol. The Palermo Protocol provides for a comprehensive response to human trafficking. Due to the transnational nature of the crime the protocol seeks to harmonise national laws on trafficking, thereby creating a uniform global consciousness and response to trafficking. As at June 2015 it has been ratified by 167 parties.

An overview of the Palermo Protocol shows that the main focus is on the '3P' paradigm of –

- protecting victims of trafficking;
- preventing the crime through the passage and implementation of national trafficking laws; and
- prosecution of the traffickers.

The protocol also focuses on international co-operation between states and governments globally are encouraged to ratify the protocol. Once ratified, a state party undertakes to ensure that its national legislation is compatible with the minimum standards as set out in the protocol. States are obliged to transpose key elements of the protocol into their domestic legislation to give effect to the '3P's'.

Article 3 of the protocol defines the crime of trafficking in human beings as follows:

'(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

The protocol further provides that:

'(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.'

The annual global US Department of State Trafficking in Persons report (TIP report (*op cit*)) was released in July 2015. The report is intended as a diplomatic tool for the US government when engaging countries on the issue of trafficking. The report monitors and ranks countries using a three-tier system according to their compliance level with the Palermo Protocol. The highest, tier one ranking, signifies governments of countries fully complying with the minimum standards of the protocol. The lower, tier two ranking, signifies governments of countries that do not comply fully, but are making significant efforts to reach compliance with the minimum standards, and for which there is:

- an increase in the number of victims;
- a failure to provide evidence of increasing efforts to combat human trafficking; and
- positive commitments have been made to take additional further steps.

A tier three ranking signifies governments that do not fully comply with the minimum standards of the Palermo Protocol and are not making significant efforts to do so.

The 2015 TIP report identified many Southern African Development Community (SADC) countries as source, transit and/or destination countries for trafficking. All the countries in the SADC region ratified the Palermo Protocol. Many are in the process of drafting legislation or developing measures to combat trafficking. Countries such as Mozambique, Zambia and Tanzania have all introduced comprehensive anti-trafficking legislation in 2008. The aforementioned countries and South Africa (SA) have a tier two ranking. Zimbabwe is the only SADC country with a tier three ranking.

South Africa has also been identified as a source, transit and destination country for men, woman and children trafficked for forced labour and sexual exploitation. The tradition of forced marriage through *ukuthwala* is also known to be abused for human trafficking purposes (see '*Ukuthwala*: Is it all culturally relative?' 2015 (Aug) *DR* 28). The report states that various international crime syndicates linked to sex trafficking operate in SA. Furthermore, forced labour involving local residents and illegal immigrants has been reported. In terms of international victims Thai women are the largest foreign group.

On 20 February 2004 SA ratified the Palermo Protocol. In compliance with its international obligations Parliament passed the Prevention and Combating of Trafficking in Persons Act 7 of 2013 (the Act), which was signed by the President in July 2013. On 9 August 2015 the Act came into operation. The Act addresses the scourge of trafficking in persons comprehensively. The Act adopts a broad definition of human trafficking, namely, that a person will be guilty of human trafficking if he or she delivers, recruits, transports, transfers, harbours, sells, exchanges, leases or receives another person within or across the borders of SA, through various means, including the use of force, deception and coercion, aimed at the person or an immediate family member for the purpose of exploitation. Furthermore, a person who adopts a child, facilitated or secured through legal or illegal means; or concludes a forced marriage with another person, for the purposes of exploitation of that child or person, is guilty of an offence under the Act in terms of s 4(2).

The Act creates offences such as debt bondage, possessing/destroying or tampering with travel documents, and using services of victims of trafficking. It also provides for the protection of victims, including foreigners, and gives South African courts extra-territorial jurisdiction in certain circumstances, for example, where the victim is a South African resident or where the suspect is present in SA. The Act adopts a victim-centred approach prioritising the welfare of victims during investigations and prosecutions. Protective measures include the prohibition of the prosecution of victims who had entered the country without valid documentation, the prohibition of summary deportation of foreign victims and proper repatriation processes in circumstances where protective systems are in place in their country of origin. The legislation criminalises various acts that constitute or relate to trafficking in persons and imposes harsh penalties for violations as follows:

- Trafficking in persons is punishable by a maximum of life imprisonment.
- Engaging in conduct that causes a person to enter into debt bondage is punishable by up to 15 years' imprisonment.
- Benefiting from services of a trafficking victim is punishable by up to 15 years' imprisonment.
- Facilitation of trafficking in persons is punishable by up to 10 years' imprisonment.

The Act also provides for severe fines and enables the state to confiscate the assets of traffickers. The legislation will assist in identifying victims and prosecuting suspects. Furthermore, it will ensure that victims of human trafficking are supported by a protective structure involving various role-players. Human trafficking is widely studied and attracts social and academic interest, yet there is no reliable data providing a comprehensive insight into the scale, character and impact of trafficking into or out of SA or the Southern African region. The LexisNexis Human Trafficking Awareness Index provides valuable insight into human trafficking as it presents itself across SA and the African continent (see 'Analysis of the Human Trafficking Awareness Index report' (2015 (June) *DR* 9)). The report refers to the kidnapping of 276 school girls in Northern Nigeria by Boko Haram in April 2014, which caused worldwide outrage. It is widely believed that the girls were trafficked and sold into sexual slavery or forced into marriage. Notably, Nigeria initially had a tier one ranking in 2011, which was downgraded to tier two in 2012 amid concerns about children being exploited and trafficked for sexual exploitation and sexual servitude.

The methods to facilitate trafficking in persons have evolved through the years but the usual features of the crime involve recruitment by force or deception, and movement or transportation of people against their will, for the purposes of exploitation. However, the crime remains underreported. Even if a country adopts comprehensive anti-trafficking legislation, this is not sufficient to combat trafficking. It is essential to address the root causes of trafficking in persons to truly combat this socially complex problem. This would entail –

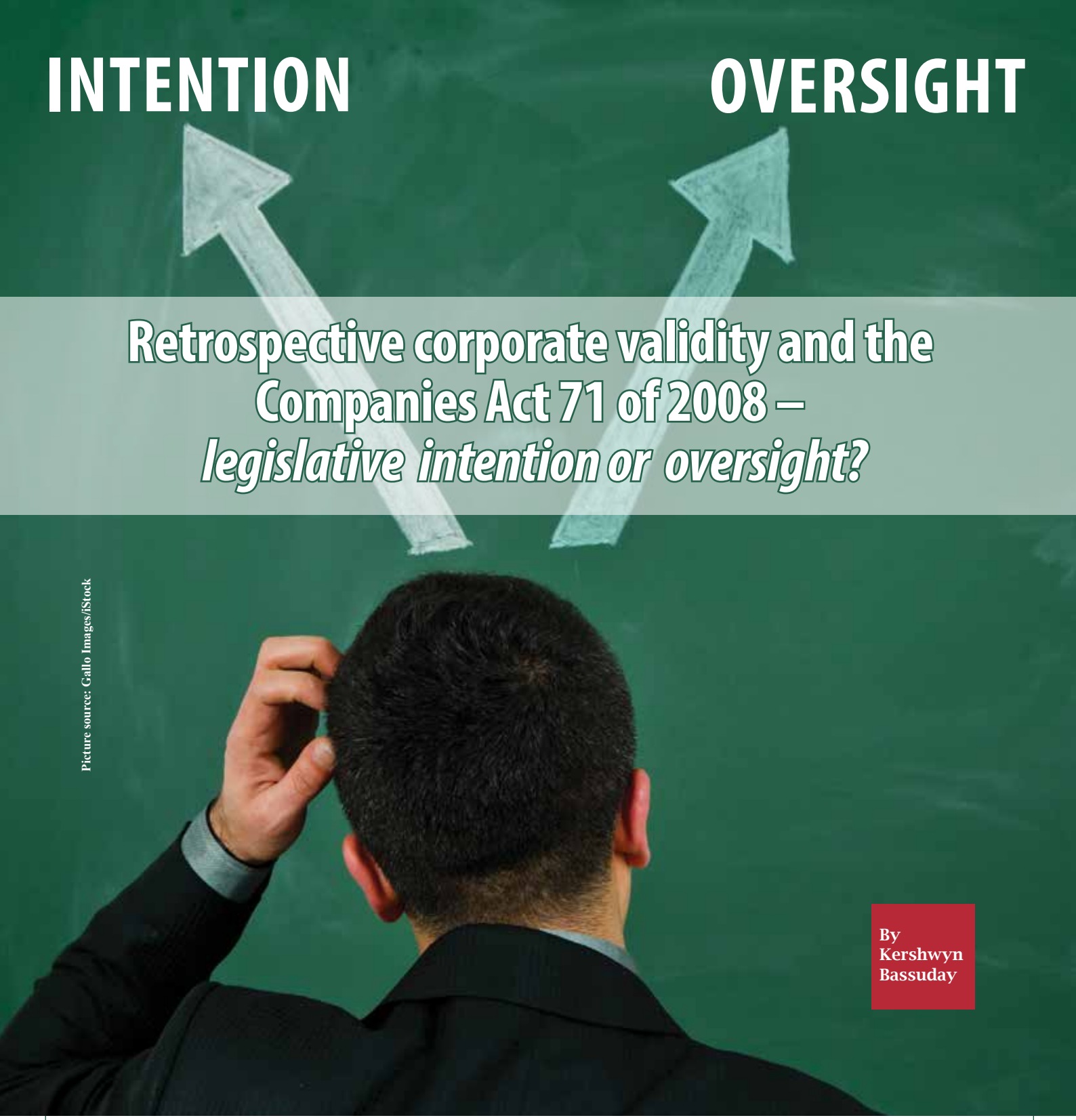
- an evaluation of socio-economic issues;
- border and immigration control;
- combatting violence against women and children; and
- ensuring proper implementation of legislation.

A multi-disciplinary approach is needed to really make an impact in combatting human trafficking. It requires a concerted global response from governments and civil society.

Conclusion

The South African government has taken pro-active and practical measures for optimum effectiveness of the Act. A multi-sectoral National Task Team consisting of the department of Justice and Constitutional Development, National Prosecuting Authority, South African Police Services, Home Affairs, Social Development and Civil Society were set up by the South African government in order to develop a comprehensive National Action Plan to combat human trafficking in the country. The primary focus of the Task Team is to develop a strategic framework, creating public awareness, implementing training programmes and strengthening the capacity for services and protective measures for victims of trafficking. The regulations under s 43(3) of the Act were promulgated on 23 October 2015. It provides for accredited social service institutions, which will assist in reporting, identifying and assessing victims of trafficking. Provision is made for places of safety for victims and protective measures for child victims. The regulations prescribe a set of guidelines to ensure minimum standards are complied with by accredited organisations rendering services to victims of trafficking. The implementation of the Act is a positive step for SA in combatting human trafficking in a holistic and coordinated manner. It is anticipated that SA will see more cases of human trafficking identified, reported and prosecuted. The enactment and implementation of this comprehensive legislation will facilitate an environment where structures are created to collect data on trafficking in persons, establish the extent of the problem, and evaluate whether measures to combat trafficking is effective. South Africa has, therefore, made significant efforts to deal with human trafficking in compliance with the minimum standards as prescribed in the Palermo Protocol.

Patricia Goliath *BA LLB (UWC) LLM (UCT)* is a judge at the Western Cape High Court.



Retrospective corporate validity and the Companies Act 71 of 2008 – *legislative intention or oversight?*

Picture source: Gallo Images/iStock

By Kershwyn Bassuday

With the enactment of the Companies Act 71 of 2008 (the Act), there was a call for the courts and other bodies, such as the Companies and Intellectual Property Commission (CIPC), to harmonise the changes and differences between the outgoing Companies Act, namely the Companies Act 61 of 1973 (the 1973 Act) and the Act. One such example, *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* 2015 (4) SA 34 (SCA). This appeal turned on the Supreme Court of Appeal's (SCA) interpretation of s 82(4) of the Act as juxtaposed with s 83(4) of the Act.

The High Court judgment – the factual matrix

The matter regarding the retrospective validation of corporate activity first came before Binns-Ward J in *Peninsula Eye Clinic (Pty) Ltd v Newlands Surgical Clinic and Others* [2014] 1 All SA 592 (WCC) (see also Law Reports 'company law' 2015 (Sept) *DR* 43). A company, the respondent, was deregistered due to the non-submission of its annual returns as required by the Act. During this period, the respondent was party to arbitration where the applicant was granted an arbitration award in its favour. The respondent contended that the arbitration award had no bearing or validity, as the company, at the time of the award, had been deregistered, had no legal status, and did not have the authority to enter into the arbitration. In this instance, the fundamental question the court in *Penin-*

sula had to answer – was whether on reinstatement of the company by the CIPC, it would make the arbitration award and the participation of the previously deregistered company in the arbitration proceedings retrospectively valid.

The court's reasoning

Was it now possible to validate corporate activity during the period of deregistration once the company was revived as previously governed by the 1973 Act? (See *Insamcor (Pty) Ltd v Dorbyl Light and General Engineering (Pty) Ltd* 2007 (4) SA 467 (SCA).) Plainly, and provided for by both incarnations of the Companies' Acts, a deregistered company is capable of resurrection. However, the legislative uncertainty around retrospective validation, meant that the court had to now decide between probable meanings, since the legislature had left it open for interpretation. Reflecting on *Absa Bank v Companies and Intellectual Property Commission and Others* 2013 (4) SA 194 (WCC), Binns-Ward J held, that the court made no determinative finding but did make some passing observations about s 82 of the Act, which 'might support a construction of the provision to the effect that reinstatement in terms of s 82(4) was retrospective in effect'.

In his judgment, Binns-Ward J took the court on an interpretative journey through past judgments, which had tackled this question. Binns-Ward J went on to state that in previous judgments emanating from this court, it was held that the omission of any equivalent in the Act of the express provisions found in the 1973 Act was a plain manifestation of the legislature's intention to exclude retrospective effect on the reinstatement of the company's registration (see *Bright Bay Property Service (Pty) Ltd v Moravian Church in South Africa* 2013 (3) SA 78 (WCC)). While such an omission from ss 82(4) and 83(4) of the Act of any express retrospectivity provisions is a good argument to show the legislature's intention to depart dramatically from such provisions, Binns-Ward J, however, did not consider the *Bright Bay* matter to be persuasive in this meaning. With this in mind, the court held that a purposive approach must be used in the interpretation of the provisions since the legislature's intention is not clear. Sections 5 and 7 of the Act provide that it is acceptable to construe the Act in a purposively manner that would be effective in addressing recognised needs and considerations, unless the language clearly excludes it.

Does this reinstatement of a company's registration bring with it retrospectivity insofar as the corporate personality and company property is concerned or does it also include any corporate activity carried out during the period it was deregistered? Unfortunately, the court held at para 31 that the jurisprudence available to answer this question did not hold much clarity or fully consider the issue of retrospectivity (see *Fintech (Pty) Ltd v Awake Solutions (Pty) Ltd and Others* 2013 (1) SA 570 (GSJ); *Amarel Africa Distributors (Pty) Ltd v Padayache* (GNP) (unreported case no 236/2011, 28-3-2013) (Legodi J); and *Nulandis (Pty) Ltd v Minister of Finance and Another* 2013 (5) SA 294 (KZP)).

Binns-Ward J went on to analyse the effect that the automatic validation of invalid act may have on third parties. The court, as it will be elaborated below, placed much provenance on the fact that third parties have received no notice of the reinstatement and could suffer prejudice. Practically, held the court, it makes sense in terms of time and legal costs for the automatic validation of invalid act to take place on application to the CIPC as per s 82(4) of the Act. But such an administrative measure does not take into account the need for some sort of judicial process, which is needed to take into account the justness and equity of such retrospective validation. Such a role or duty was meant for the court. The court, hesitant in deeming automatic validation appropriate, highlighted that third parties might have conducted themselves in a manner believing the company was registered, only to be prejudiced once the registration is reinstated and retrospectively validated. This consideration weighs against the ready acceptance of automatic retrospective validation.

Further, the constitutionally of s 73(6A) of the 1973 Act, which relates to automatic retrospective validation, can be questioned (see PM Meskin, B Galgut, JA Kunst, P Delport and Q Vorster *Henochsberg on the Companies Act 71 of 2008* vol 1 (Durban: LexisNexis 2011) at 144(3)). This would too, no doubt, apply to the current provisions in the Act. This observation highlighted the potential prejudicial effect automatic retrospective validation might have on unknowing third parties.

While the court recognised the possible prejudice to third parties by virtue of automatic validation by administrative action (see *Kadoma Trading 15 (Pty) Ltd v Noble Crest CC* 2013 (3) SA 338 (SCA) at paras 13 and 14), the court held that it did have the inherent power to supplement or vary any action of the CIPC and act in accordance with s 83(4) of the Act, and this could may well be an automatic validation.

The court held that an interested person may apply to the CIPC under the guise of s 82(4) of the Act, and once reinstatement has been given, then apply to a court to ask for validation of the corporate activities in terms of s 83(4) of the Act. As one might see this places an 'interested person' in the onerous and unenviable position of having to use two avenues to not be prejudiced. This cost and length envisioned here by the court itself – it can be opined – is on the face of it prejudicial to interested third parties. Strangely though, no notice is given to third parties before a company is deregistered.

The court's finding

The court, after consideration of all of these factors, that s 82(4) has the effect of administrative reinstatement of a company's registration and retrospectively re-establishes its corporate legal personality and gives title to its property, but does not validate automatically corporate activities during that period of deregistration. The court took a piecemeal approach and in the present case, the court decided that it was just and equitable to make an order declaring that the conduct of the arbitration proceedings were valid and effective. It did not, however, with reference to s 83(4) of the Act, think it would be appropriate in the circumstance to declare all the corporate activity valid especially without notice to third parties.

The reasoning of the SCA

On appeal, Newlands Surgical Clinic contented that the court *a quo* was correct in its finding that s 82(4) did not automatically operate retrospectively so as to make the arbitration proceedings valid – but rather that the court erred in finding that it was authorised in that it was authorised in terms of s 83(4) to afford the reinstatement under s 82(4) with such retrospective effect.

The SCA once again, as the court *a quo* did, conducted a thorough examination of the law and jurisprudence of the relevant provisions in the 1973 and indeed, the Act. The SCA evaluated the prejudices highlighted by the court *a quo*, which might exert itself on third parties. The court held that despite these concerns of prejudice the 1973 Act had consequences, which resulted in automatic retrospective validation – the consequences, the court held, could not be avoided.

Where the SCA diverted from the judgment of the court *a quo* was in its view regarding the legislature's intention and the idea of there being an omission. The court held, that on the face of it, it could agree that the omission of the deeming provision may be regarded as a pointer to a change of intent on the part of the legislature, but the SCA held that this was more than just an indication and was outweighed by counter-indications. The SCA stated that 'the indication of a different intent that usually follows from a change of wording in amending legislation, is diluted by the fact that the

new Act is not merely an amendment to the 1973 Act.' The court held that the 2008 Act is a complete reinvention of South African corporate law. The issue lies, really, on whether the intention of the legislature should be determined or whether the court should have tried to ascertain the meaning of the words of the provisions. 'Legislation intention', it has been held, in a previous judgment emanating from the SCA, is not the approach a court should take in its evaluation of a provision. The 'correct approach' per Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), at 603 – 605 can be summed up in a sentence: 'A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

The SCA relooked at the issue of prejudice to third parties as highlighted by the court *a quo*, in its determination of whether automatic validation should be justifiability limited. The court held that the more significant view point was the consideration that refusal to validate corporate activity of a company during its period of demises could be 'equally devastating to the interests of bona fide third parties who were unaware of a company's deregistration.' At para 26 the court held: 'Potential prejudice to third parties therefore affords no reason to interpret s 82(4) so as to exclude retrospective validation in principle.' The SCA cottoned on to the fact that should reinstatement of corporate activities be granted in a piecemeal fashion as envisioned by the court *a quo* – this would mean that the interested party must be burdened by a costly exercise of a court application. The court also highlighted the requirement that pursuant to the regulations, published as GenN 204 *GG*36225/15-3-2013, third parties are given the opportunity to prevent reinstatement by making representations.

Conclusion

The SCA's judgment on the practical effect of s 82(4) is, in my view, correct. However, despite being in agreement with Brand JA, I submit that the reasoning and logic used to show the legislature's intention or lack thereof, regarding s 82(4), seems to be somewhat shaky and unclear. The court, could have used a more common sense approach (as envisioned by Wallis JA in *Natal Joint Municipal Pension Fund*) in coming to the conclusion that the provisions allow for automatic corporate validation rather, than this idea that a complete change of wording in legislation shows no change of intention.

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By Sechaba Mohapi

A grandparents' duty to support

The grandparents' duty of support was recently considered by the Western Cape Division of the High Court in *N v B* (WCC) (unreported case no 6573/14, 19-6-2014) (Butler AJ). The case concerned a maintenance officer's directive that sought to hold a grandparent liable for maintenance in the absence of a prior maintenance order against the minor child's parent.

Common law duty to support

It is trite that parenthood automatically *ex lege*, gives rise to the parental duty to support children (DSP Cronje & J Heaton *South African Family Law* 2ed (Durban: LexisNexis 2004) at 291). It is a *sui generis* common law duty (L Van Zyl *Handbook of the South African Law of Maintenance* 2ed (Durban: LexisNexis 2005) at 4), which arises on the child's birth and in respect of which, both parents are obliged to support their children (Van Zyl (*op cit*); see also B Van Heerden, A Cockrell & R Keighthley (general editors) *Boberg's Law of Persons and the Family* 2ed (Kenwyn: Juta 1999) at 241) proportionately and according to their respective means (Van Zyl (*op cit*)). This common law duty has been duly incorporated in s 15(3)(*a*) of the Maintenance Act 99 of 1998 (the Act), which provides the following:

'(3)(*a*) Without derogating from the law relating to the support of children, the maintenance court shall, in determining the amount to be paid as maintenance in respect of a child, take into consideration –

(i) that the duty of supporting a child is an obligation which the parents have incurred jointly;

(ii) that the parents' respective shares of such obligation are apportioned between them according to their respective means; and

(iii) that the duty exists, irrespective of whether a child is born in or out of wedlock or is born of a first or subsequent marriage.'

In terms of the common law, the duty of support is based on notions of 'piety or affection', arising *ex ratione pietatis* (by reason of respect) or *ex aequitate caritateque sanguinis* (out of fairness and the affection of a blood relationship) (Van Zyl (*op cit*); see also *S v Badenhorst* 1997 (1) SACR 311 (W)) and *ex ratio naturalis* (for natural reasons)). The common law duty of support is furthermore based on the principle that family ties entail responsibilities (AH Van Wyk 'Familiereg' 1984 *Modern Business Law* 18).

As acknowledged in s 15(3)(*a*) of the Act, it is furthermore trite that a parent's duty to support arises, regardless of whether the child is born in or out of wedlock, and it subsists until the child becomes self-supporting, irrespective of the child's attainment of the age of majority (TA Ndaba 'Child maintenance after a parent's death' 2012 (March) *DR* 26 at 27). However, a major child is not entitled to support on as generous a scale as a minor child of the same parent (*B v B* 1997 (4) SA 1018 (SE) at 1021; *Gliksman v Talekinsky* 1955 (4) SA 468 (W)), and the onus will rest on the child to show their maintenance needs (*Sikatele and Others v Sikatele and Others* [1996] 2 All SA 95 (Tk)).

When a parent dies, this primary obligation to support the child will not cease or be extinguished, but will instead lie against the estate of the deceased parent (see *Carelse v Estate de Vries* (1906) SC 532; *Goldman NO v Executor Estate Goldman* 1937 WLD 64; *Ex Parte Insel and Another* 1952 (1) SA 71 (T); *Lloyd v Menzies, NO and Others* 1956 (2) SA 97 (N); and also LA Kernick *Administration of Estate and Drafting of Wills* 4ed (Cape Town: Juta 2006) at 22). Where a deceased parent's estate is insufficient to cover the child's support, or if there is no estate remaining to meet the maintenance needs of the child, the duty to support will be extended to the child's maternal and paternal grandparents jointly (Ndaba *op cit* at 27).

Grandparents' duty to support

The common law recognises a hierarchical duty of support. Voet (Percival Gane *The selective Voet being the Commentary on the Pandects Paris edition of 1829*, vol 4 (Durban: Butterworths & Co 1956) 363-364) sets a hierarchy of the duty of support requiring grandparents, and failing them, great-grandparents – in that

ascending order – before considering relatives in the collateral line such as siblings. In Voet (Gane *op cit*), it is put thus: 'Failing parents, grandparents jointly liable to maintain grandchildren – If father and mother are lacking or are needy, the burden of maintaining grandchildren and other further descendants has been laid by the Civil law on the paternal and maternal grandfather and the rest of the ascendants; with the reservation that much is left to the discretion of the judge. It follows from this that by the customs of today the giving of maintenance to needy grandchildren, just as it is deemed a common burden on father and mother, so also is the burden deemed to be common to grandfather and grandmother.'

In *Barnes v Union and South West Africa Insurance Co Ltd* 1977 (3) SA 502 (E) at 510, the court affirmed that there is an 'order of priority' and that if parents are not able to support their children, the duty to support falls on paternal and maternal grandparents. And in *Petersen v Maintenance officer, Simon's Town Maintenance Court and Others* 2004 (2) SA 56 (C), the court recognised that paternal grandparents have a duty of support towards a grandchild despite the child being born out of wedlock.

These authorities relating to the grandparents' duty to support are consistent with the Supreme Court of Appeal's (SCA) relatively recent framing of the grandparent's 'rights and responsibilities' under the Children's Act 38 of 2005 (Children's Act) in *FS v JJ and Another* 2011 (3) SA 126 (SCA). In that case – said to be the first reported grandparents' dispute since the enactment of the Children's Act (A Louw 'Children and Grandparents: An overrated attachment?' (2013) 24(3) *Stellenbosch Law Review* 618 at 634 – 635) – the SCA essentially found that a parent's rights and responsibilities 'outrank' those of grandparents and on that basis, it overruled a 'care order' that had been issued in the grandparent's favour. Consequently, Louw has levelled the following criticism against *FS v JJ* (at 634 – 35):

'Judging from the outcome of the dispute in *FS v JJ* it seems as though the courts still regard the *co-assignment*, of at least care and guardianship, as an intrusion upon the biological parent's exercise of those responsibilities and rights. This *approach contradicts the expectation of a new approach in terms of which it is deemed in the child's best interests to have as many persons as possible assuming a parenting role. The new approach would create what could rightfully be regarded as a "democracy of parenthood" instead of a dictatorship by parents.*

The *multiple parenting scheme* is far more likely to become viable where there are no longer parents who can dictate the role to be played by the non-parents – a scenario which is unfortunately becoming more and more common in South Africa as the devastation of the HIV/AIDS epidemic takes its toll' (my italics).

This criticism, seems fair in light of the changed legal landscape owing to provisions of s 28 of the Constitution, as well as the Children's Act, which further notes the following (at 620):

'While the lack of legal recognition of grandparents in the past could perhaps have been justified by the emphasis placed on the preservation of the nuclear family and the exercise of parental rights, the continuation of such disregard has become questionable in the light of a number of developments including, *inter alia*, –

(i) the entrenchment of a child's constitutional right to "family care" in section 28(1)(*b*) of the Constitution of the Republic of South Africa, 1996 ("the Constitution");

(ii) the growing recognition of non-parents and the multiple parenting scheme which the new Children's Act ostensibly seems to promote; and

(iii) the generally held belief that a child's attachment to a grandparent is of such importance that to disregard its benefits would be detrimental to the child's best interests and therefore constitute an infringement of a (grand) child's rights in terms of section 28(2) of the Constitution.'

Apart from the child becoming self-supporting as already mentioned, the duty to support is only terminated –

- in principle upon the child's own death (Ndaba *op cit* at 27);
- where the child marries, in event of which the duty to support will then rest primarily on their spouse and only if the spouse cannot support can one's parents be called on to support (*Ex parte Jacobs* 1982 (2) SA 276 (O) at 279). However, parents would have a right to recover their maintenance against the spouse (*Gammon v McClure* 1925 CPD 137); and
- Voet (Gane *op cit*) states that this duty will also cease when the child is 'guilty of a cause of ingratitude towards him from whom he desires maintenance such that he could even be justly disinherited on account of it'. It is uncertain whether this assertion will be sustained by our courts.

Regulation 3 of the Act

It is evident from the above discussion relating to the duty to support that there is no presumption concerning the maintenance needs of the claimant, nor is there one relating the defendant's means to support. This justifies the legislative scheme of the Act and regulations, which of necessity enable and empower the maintenance officer to issue reg 3(1) directives to enable him or her to investigate or inquire into aspects of the –

(a) maintenance *needs* of the claimant on the one hand; and on the other

(b) the maintenance *obligations* and *means* of the defendant.

Regulation 3(1) provides the following:

'A maintenance officer *may*, in investigating a complaint and with due consideration to expediting the investigation of that complaint, *direct the complainant and the person against whom a maintenance order may be or was made to* –

(a) appear on a specific time and date before him or her; and

(b) produce to him or her on the date of appearance information relating to the complaint and documentary proof of the information, if applicable' (my italics).

The regulation thus clearly confers a discretion on the maintenance officer, which enables him or her to investigate a maintenance complaint. Thus, 'information relating to the complaint' necessarily includes evidence refuting maintenance liability. In the context of the hierarchy of the duty of support, such evidence (comparably akin to the surety's benefits of excussion) would for instance include a grandparent's proof absolving them from paying maintenance on the basis that a maintenance order may first be sought against a parent or that the parent has means to support.

Regulation 3(1) and the powers it gives to a maintenance officer to exercise a discretion in calling grandparents to determine their maintenance liability is necessary as there are different duties to support categories recognised by the law and the maintenance officer must be afforded the procedural means to investigate what will yet be placed before a Maintenance Court, where defendants will still be able to oppose the claim before the court makes a determination on their maintenance liability. Thus, when the maintenance officer issued the directive against a grandparent in *N v B*, the grandparent could have made legal representations to the maintenance officer that a claim against the parent, be first pursued, before invoking the grandparent's duty to support (*De Klerk v Groepies NO and Others* (GSJ) (unreported case no 31156/2012, 28-8-2012) (Kgomo J)). For it is intrinsic in the maintenance officer's discretion and powers under the regulation that he or she duly considers any such representations in the proper exercise of such discretion and powers.

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THE LAW REPORTS

February 2016 (1) South African Law Reports (pp 325 – 641); [2016] 1 All South African Law Reports January no 1 (pp 1 – 312); [2015] 3 All South African Law Reports July no 1 (pp 1 – 114) and no 2 (pp 115 – 257); [2015] 3 All South African Law Reports August no 1 (pp 255 – 386) and no 2 (pp 387 – 521); 2015 (12) Butterworths Constitutional Law Reports – December (pp 1407 – 1513); 2016 (1) Butterworths Constitutional Law Reports – January (pp 1 – 155)

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

Abbreviations:

CC: Constitutional Court
GJ: Gauteng Local Division, Johannesburg
SCA: Supreme Court of Appeal
WCC: Western Cape Division, Cape Town

Capital gains tax

Determination of the base cost of a pre-valuation date asset: Capital gains tax, which was introduced on 1 October 2001 through the insertion of s 26A and addition of sch 8 (the schedule) to the Income Tax Act 58 of 1962 (the Act), is payable where a capital gain accrues on the disposal of assets in the taxpayer's possession on or acquired after 1 October 2001. The tax payable is determined by a calculation of the difference between the proceeds of the sale and the 'base cost' of the asset disposed of. In *Commissioner for the South African Revenue Service v Stepney Investments (Pty) Ltd* [2016] 1 All SA 1 (SCA) the respondent taxpayer, Stepney, made a disposal of its assets, namely shares in the ELR company. For the tax years, 2002 and 2003, the appellant, Commissioner for South African Revenue Service (Sars), took the view that the respondent had made capital gain and accordingly made additional assessments for capital gains tax in the amounts of R 2 million and R 2,2 million respectively. The respondent contended that instead of capital gain it had sustained a loss and, should therefore, not have been assessed for tax as its aggregate base cost of the shares exceeded the amount of the disposal proceeds. The shares disposed of were a pre-valuation date asset as defined in para 1 of sch 8 since they were acquired before the introduction of capital gains tax. To arrive at a valuation of the 'base cost' the respondent used the discount cash flow (DCF) valuation method, which entailed valuing the business of an entity on its future forecast free cash flow, discounted to present value through the application of a discount factor. The appellant, on the other hand, used the net asset value (NAV) valuation method as a result of which it was determined that the 'base cost' was nil.

Before the Tax Court, Cape Town, it was implicitly conceded that usage of the NAV method of valuation was inappropriate. Accordingly, Yekiso J, sitting as President of the Tax Court, set aside the additional assessment raised by the appellant, hence the appeal to the SCA, which appeal was upheld with costs. The additional assessments in respect of the 2002 and 2003 tax years were set aside and the matter remitted to the appellant for further investigation and assessment.

Majiedt JA (Mbha, Navsa, Shongwe JJA and Van der Merwe AJA concurring) held that while usage of the DCF valuation method was correct, it had not been correctly applied in the instant case. The court indicated a number of shortcomings relating to the manner in which the method was applied, as including among others the fact that:

- The revenue forecast was based on information provided in 2001 and did not include the management accounts of 2004, which would have had a material effect on the figures arrived at as the 2001

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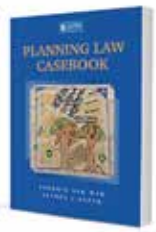

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figures were unreasonably high.

- Instead of utilising the valuation date of 1 October 2001 as set out in sch 8, the respondent used a wrong date of 31 March 2002.
- Incorrect tax calculations, being understatement of tax amount and, which led to overstatement of valuation of assets, were used without verification for reasonableness.
- The valuation understated projected capital expenditure by not including substantial amounts for ongoing capital expenditure for the maintenance of buildings, furniture and fittings.
- The projected revenue flows were based on a flow in perpetuity even though the business at issue, a casino hotel, had licence to operate for 15 years.
- The appellant used a flat discount rate for all the five casinos it had, including the new one at Richards Bay/Empangeni in KwaZulu-Natal, notwithstanding that it was new and characterised by much uncertainty due to litigation, which was underway and untested clientele base.

The court held that it was clear that the valuation of the 'base cost' was flawed in a number of ways. A court was entitled to reject a valuation if it was not satisfied with the investigations underpinning it.

Constitutional law

Courts not constitutionally mandated to remove Speaker of National Assembly from office save when requirements of legality call them to do so: Rule 102A of the National Assembly (NA) rules provides, among others, that a member of the NA may propose that a motion of no confidence in the Cabinet or the President be placed on the Order Paper, and that the Speaker of the NA must accord such motion of no confidence 'due priority', and before scheduling it, the Speaker is required to consult with the Leader of Government Business and the Chief Whip of the Majority Party. The rule also specifies the requirements that a motion of no confidence should satisfy, as well as the procedure to be followed.

In *Tlouamma and Others v Speaker of the National Assembly and Others* 2016 (1) SA 534 (WCC), [2016] 1 All SA 235 (WCC) leaders of three minority political parties, namely Agang, Congress of the People and United Democratic Movement approached the WCC for a number of remedies and declarations against the first respondent, Speaker of the NA, and others. Although the applicants were leaders of three minority parties, it was in fact just one party, namely Agang, which was active in the litigation and events leading thereto. Very briefly, the applicants sought an order declaring r 102A unconstitutional, an order removing the Speaker of the NA from office and another directing that a motion of no confidence in the President of the Republic should be scheduled for debate, after which, voting would take place by secret ballot. An order was also sought that the Speaker should recuse herself from presiding at the debate.

The above occurred after a request by Agang to have a motion of no confidence vote in the President in the NA, was not scheduled to take place before the end of the NA session for the 2014 calendar year. Such a request was made on 3 November 2014, whereas the last business day of the NA was 27 November 2014. In short, the request was made on short notice and due to the full schedule of the NA it could not be accommodated. Nevertheless, the Speaker made arrangements for the debate and vote to take place early in the first session of the NA in the following, namely at the beginning of March in 2015.

Goliath J (Henney and Mantame JJ concurring) dismissed the application, ordering each party to pay own costs. The court held that in requiring in broad terms that the Speaker of the NA had to accord a motion of no confidence 'due priority' and ensure that it was scheduled within a reasonable time, given the programme of the NA, r 102A was compliant with the Constitution. To prescribe a specific period within which to schedule a debate of no confidence would be duly prescriptive to the Speaker and the NA in a manner, which was in conflict with the principle of separation of powers. The requirement in terms of r 102A that the Speaker should consult with both the Chief Whip of the Majority Party and the Leader of Government Business (all three being members of the ruling party) before scheduling the vote of motion of no confidence did not mean that such was within the gift of the majority party. Since a successful vote of no confidence in the President would entail resignation of the President and Cabinet, such a requirement of consultation was reasonable and rational. The consultation process did not grant the Speaker, the Chief Whip or the Leader of Government Business discretion to deny the scheduling of the motion.

The NA rules dealt extensively with voting, but did not provide for voting by secret ballot. Furthermore, the Constitution did not expressly or implicitly make provision for voting by secret ballot in respect of a motion of no confidence in the President. It was not within the authority of the court to introduce the element of a secret ballot in instances other than those prescribed by the Constitution. Furthermore, the court was not mandated to prescribe to the NA as to how to conduct its voting procedure.

Given that the Constitution expressly stated that the NA was competent authority to remove the Speaker and did nowhere else confer such power on any other person or institution, including the courts, it would be impermissible for any other person or institution to assume that function. Removal of the Speaker on grounds other than those legal bases that would disqualify her to be a member of the NA was a political act. Judicial independence would be adversely affected, should the courts become involved in such a political act, save for those limited instances where legality called on them to do so.

Contracts – specific performance

Specific performance will not be ordered if compliance with the order would be impossible: In *Hanna v Basson and Others* [2016] 1 All SA 201 (GJ) the first defendant, Basson, was the sole member of a close corporation, the third defendant, which owned immovable property. The plaintiff, Hanna, the first defendant and a third party, and the second defendant, entered into an agreement in terms of which, the first de-

fendant was to develop the property by building three similar residences and an employee's cottage, which he did. The agreement also provided that the first defendant would sell a third of a member's interest each in the corporation to the plaintiff and the second defendant. There was also a right of pre-emption in the contract. When the relationship between the plaintiff and the first defendant soured, the latter repudiated the contract by claiming that it was invalid and unenforceable. The plaintiff sought enforcement of the contract and its specific performance, namely transfer to him of a third of the member's interest in the corporation. While proceedings for specific performance were underway the first defendant sold the member's interest to other parties, namely, his brothers, thus making it impossible to sell and transfer same to the plaintiff. As a result the plaintiff amended his claim to seek payment *in lieu* of performance which he described as 'damages as surrogate of performance'. The amended claim was granted with costs.

Cilliers AJ held that in accordance with the maxim *lex non cogit ad impossibilia* specific performance would never be ordered if compliance with the order would be impossible. However, payment of damages *in lieu* of specific performance was competent. The agreed right of pre-emption placed an obligation on the first defendant to offer his one third membership interest to the plaintiff at the original contract price before it was open for him to sell it in the open market. The existence of the right of pre-emption did not have a sufficient exclusive relation to the true market value (price) of one-third of the membership interest in the corporation to permit of equating the agreed price on exercise of the right. Therefore, the plaintiff would, had the contract been performed *in forma specifica*, have received a membership interest of which the market value would have been equal to one-third of the objective market value of the total interest in the corporation. Accordingly, the market value of one-third of the membership interest in the corporation was equal to the objective market value thereof as agreed to by the parties. The plaintiff was therefore entitled to payment of a sum of money *in lieu* of performance *in forma specifica* in an amount that constituted the difference between the objective market value of one-third of the membership interest in the corporation, less the original price, after deducting payments already made by him.

Fundamental rights (medical treatment)

Right not to be refused emergency medical treatment: In *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) at the age of 17 years and while playing the game of rugby the applicant, Oppelt, sustained spinal cord injuries. The incident happened at 2:15 pm, after which he was taken to a local hospital, Wesfleur in Atlantis, a small coastal town some 50 km from Cape Town. Wesfleur Hospital did not have the facilities to treat him and as a result he had to be transferred to Cape Town. A helicopter was not available to transfer him and after some delay an ambulance took him to Groote Schuur Hospital in Cape Town, where he arrived at 5:40pm. Although the hospital had the facilities to treat him, it was decided to transfer him to a specialised unit dealing with spinal cord injuries, the Conradie Hospital, which was also in Cape Town but some 7 km from Groote Schuur Hospital. That transfer took place at 12:25 am, after which he arrived at Conradie Hospital at 1:23 am and was taken for a procedure at 3:50 am, being some twelve and half hours after sustaining the injuries. By that time it was too late since as a result of lack of blood supply and oxygen it carried, the applicant suffered permanent paralysis from the neck downwards. The WCC held that the Provincial Department of Health was liable for damage caused by the injuries sustained by the applicant as it failed to provide the required emergency medical treatment. That decision was reversed on appeal to the SCA.

In a further appeal, the CC granted the applicant leave to appeal against the decision of the SCA and upheld the appeal with costs. Reading the majority judgment Molemela AJ (Cameron J and Jappie AJ dissenting in the minority judgment) held that failure by the respondent department's employees to provide the applicant with reasonable medical attention within four hours, as suggested by a medical expert, denied him a 64% chance of probably making a full or substantial recovery from harm of permanent quadriplegia. The omission of the employees of the respondent to provide the applicant with the appropriate closed reduction treatment within four hours of his injuries was causally linked to his permanent and complete paralysis.

The law required hospitals to provide urgent and appropriate emergency medical treatment to a person in the position of the applicant. Legal convictions of the community demanded that hospitals and healthcare practitioners should provide proficient healthcare services to members of the public. Those convictions also demanded that persons and institutions who failed to do so had to incur liability. There was no doubt that the applicant's injuries constituted a medical emergency and all concerned employees of the respondent knew it. No reasonable explanation had been advanced for the inordinate delays in performing a simple, brief and inexpensive close reduction procedure that was both available and absolutely necessary. The respondent constructively refused to provide the necessary emergency treatment and breached its legal duty to provide the applicant with medical treatment promptly or within the required four hours, thus acting unlawfully.

Lease

Subtenant is not allowed to raise sub-lessor's lack of title as a defence to eviction: In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) the respondent, Engen, entered into a lease agreement, the head lease, with the owner of property and developed it into a filling station with the necessary equipment, signage and trademarks. Thereafter the respondent entered into a sublease with the applicant, Mighty Solutions, to operate the filling station using the respondent's equipment, signage and trademarks. The sublease was for a period of three years, after which it continued on a monthly basis. The respondent having given the required notice of termination of the sublease, the applicant refused to vacate and continued running its business free of charge without paying rental. Eventually the respondent instituted proceedings for eviction of the appellant, which raised the defence that as by then the head lease had also lapsed the respondent was not allowed to evict it. The GJ, per Matthee AJ, held that in terms of the common law the lessor was allowed to evict the lessee even if the lessor had no title to the property. The SCA dismissed the application for leave to appeal to it. A further leave to appeal was dismissed with costs by the CC.

Reading the unanimous decision of the CC, Van der Westhuizen J held that it was an established common-law rule that when being sued for eviction at the termination of a lease, a lessee could not raise as a defence the issue that the lessor had no right to occupy the property. The rule followed naturally from the principle that a valid lease did not rest on the lessor having any title. The sublessee was in the same position as the lessee. In the instant case there was no reason to develop the common law as the rule did not offend the spirit, purport and objects of the Constitution or the values of constitutional democracy.

Medical aid schemes

Duty of medical aid scheme to pay medical costs incurred at a private hospital: Regulation 8(1) of the regulations promulgated in terms of s 67 of the Medical Schemes Act 131 of 1998 (the Act) provides, among others, that any benefit option that is offered by a medical scheme must 'pay in full', without co-payment or the use of deductibles, the diagnosis, treatment and care costs of the prescribed minimum benefit (PMB) conditions. Treatment of open fracture/dislocation of bones or joints is one such prescribed minimum benefit. In *Council for Medical Aid Schemes and Another v Genesis Medical Scheme and Others* 2016 (1) SA 429 (SCA), [2016] 1 All SA 15 (SCA) the daughter of Ms Joubert, the third respondent, suffered compound fracture of tibia and fibula and was treated at a private hospital. The first respondent, Genesis Medical Scheme (Genesis), refused to pay the medical costs, contending that in terms of its rules, which constituted a contract between it and its members, including the third respondent, it was obliged to pay only if treatment took place at a public or state hospital and not a private hospital. The Registrar of Medical Schemes, the Appeal Committee for the Council for Medical Schemes and the Council's Appeal board disagreed with Genesis, holding that it had to pay. That decision was set aside by the WCC, which held that Genesis was not obliged to pay for medical treatment received. An appeal against that decision was upheld with costs by the SCA.

Leach JA (Petse, Willis, Mbha and Zondi JJA concurring) held that while the rules of any medical scheme amounted to a contract between it and its members that bound both sides, there was no reason to accept that any obligation imposed by the statute upon a medical scheme to pay certain amounts became unenforceable when its rules, which did not contain any such provision, were registered. Section 29(1)(*o*) of the Act and reg 8, which read together, required a medical scheme to 'pay in full' the costs of treatment of PMB conditions as a scope and level as might be prescribed were clearly designed to ensure that members would not be obliged to bear the cost of providing such treatment. They made no mention of a medical scheme being obliged to do so only in the event of the treatment being obtained from the public sector.

The Minister of Health, in specifying the table of PMBs and the allowable treatment for such conditions, clearly intended to ensure that members of medical schemes would enjoy cover in relation to those specific medical conditions and encourage them to seek treatment in either private or public hospitals. That objective would be defeated by a medical scheme only providing cover for treatment of PMBs if obtained from the public sector, thereby effectively shifting the cost of treating PMBs from medical schemes to the state. Yet that was precisely what Genesis was attempting to do. The relationship between a medical scheme on the one hand and its members on the other, was not governed solely by that scheme's rules but also by the obligations imposed by the statute on medical schemes. The latter obligations could not be evaded by a medical scheme purporting to contract with its members by prescribing rules having a contrary effect. Briefly, the law obliged medical schemes to pay the costs of treating PMB conditions in full and that was what Genesis had to do.

Patents

Raising defence of invalidity of patent for lack of novelty without claiming for revocation of such patent: In *Strix Ltd v Nu-World Industries (Pty) Ltd* 2016 (1) SA 387 (SCA) the appellant, Strix, was a registered holder of a patent in respect of a 'liquid heating vessel', namely, a kettle, which had two thermally sensitive switches, spaced apart at the base of the kettle, which provided additional safety measure against overheating. Until then kettles only had one thermally sensitive switch and, therefore, lacked the additional safety of a second thermal switch, which was spaced apart and could cut electricity supply to avoid overheating if the kettle was tilted and as a result had a part of the base which was not covered with liquid. A kettle with one thermal switch did not have that additional safety. Alleging that a kettle manufactured and sold by the respondent Nu-World was in breach of its patent rights, the appellant approached the Court of the Commissioner of Patents for a number of remedies including interdict, delivery up of infringing kettles and damages. Preller J dismissed the claim, holding that the appellant's kettles lacked novelty as the second thermal switch they had formed part of the state of art. An appeal against that order was upheld with costs by the SCA.

Navsa JA (Saldulker, Swain, Dambuza JJA and Van der Merwe AJA concurring) held that even though in its plea the respondent only raised the defence of invalidity of the patent without seeking its revocation, as it could have done, a defence based on the invalidity of a patent on the statutorily recognised ground of lack of novelty was competent without a claim for revocation. In the instant case the patent was novel in that the effect of the second control (thermal switch) was that the control at the part that overheated because it was dry would activate and cut off the electricity supply, something which other kettles could not do. Simply put, the additional safety feature in the form of two thermally sensitive controls spaced apart and in good thermal contact with the base of the kettle to deal with the problem that could present itself when the kettle was tilted did not occur in the prior art and accordingly constituted a novel safety feature.

Pension funds

Initial surplus may be used to reduce future deficit: Section 15H of the Pensions Fund Act 24 of 1956 (the Act), that was introduced in 2001, provides among others, that if a pension fund has credit balances in the member surplus account or employer surplus account and the fund is found to have a deficit following an actuarial valuation, such credit balances shall be reduced in the same proportion by the amount of the deficit. The section does not allow the credit balance to be reduced by more than the amount to which the account is in credit. The section should be read together with s 15D, which provides that any credit balance in the member surplus account may only be used to improve the benefits for existing or former members, to reduce current contributions due from members and meet expenses, which would otherwise reduce proportion of the members' contribution that are invested for retirement.

In *British American Tobacco Pension Fund v Howie NO and Others* 2016 (1) SA 398 (GP); [2015] 3 All SA 55 (GP) the applicant Fund had a member surplus account credit balance for the year 2002 but a deficit for the year 2005. The issue was whether that initial credit balance for the year 2002 could be used to reduce a future deficit which occurred in 2005. The Fund allowed it to be done but that decision was rejected by the fourth respondent, the Registrar of Pension Funds. The first to third respondents, being members of the panel of the Financial Services Board Appeal Board (the Appeal Board), upheld the decision of the registrar. The applicant sought a court order reviewing and setting aside the decision of the Appeal Board. The order was granted with costs.

Potterill J held that the Appeal Board had no legal basis to find that the actuarial surplus credited to the member surplus account was not susceptible to s 15H. If the legislature had intended to shield the actuarial surplus from the provisions of s 15H, it would have been so expressed. Without such express provision the legislature had no such intention. The legislature would have been aware that

the first credit balances in the surplus account would be vulnerable to the provisions of s 15H. The language of the section was clear and unambiguous. If a fund had a credit balance in the member surplus account and the fund was found to have a deficit, then that credit balance had to be reduced in the same proportion by the amount of the deficit, provided that no credit balance could be reduced by more than the amount to which the account was in credit. If the deficit was more than the credit in the member and employer surplus accounts, then the total of the credit balances was to be applied to the deficits. Considering the language of the section in the light of the ordinary rules of grammar and syntax, there was nothing in its wording remotely suggesting that it only had future application, that is, that only future credit balances, to the exclusion of initial balance, would be used to reduce the deficit. Accordingly, the Appeal Board was not correct in finding that s 15H had future application only.

Revenue (preservation order – *curator bonis*)

Preservation order and appointment of *curator bonis*: Section 163(4)(*d*) of the Tax Administration Act 28 of 2011 (the Act) provides, among others, that 'the court to which an application for a preservation order is made may … upon application … appoint a *curator bonis* in whom the seized assets vest'. Section 163(7)(*b*) adds that a court 'granting a preservation order, may make any ancillary orders regarding how the assets must be dealt with, including … if not already appointed … appointing a *curator bonis* in whom the assets vest'. In *Commissioner, South African Revenue Service v Van der Merwe* 2016 (1) SA 599 (SCA); [2015] 3 All SA 387 (SCA) the applicant for condonation for late filing of appeal was one Ms Van der Merwe. That was after the South African Revenue Service (Sars) had obtained a preservation order against her. In granting the provisional order the WCC, per Rogers J, did not appoint a *curator bonis*. Again no *curator bonis* was appointed when the provisional order was made final by Savage AJ. The preservation order was triggered by the applicant's receipt of US $ 15,3 million and two expensive cars worth R 2,5 million at a time when she was earning some R 20 000 per year in her modelling career. Against her father, the second respondent, Sars had obtained judgment in the amount of some R 66 million in taxes, additional taxes, penalties and interest as a result of tax fraud and claiming false Value Added Tax refunds.

On appeal to the SCA, the condonation application by Ms Van der Merwe was dismissed with costs. The appeal by Sars, for appointment of *curator bonis* was upheld with costs. The *curator bonis* was appointed to take control of the assets of the first respondent and the second respondent, her father Mr Van der Merwe.

Ponnan JA (Wallis, Mbha JJA, Fourie and Mayat AJJA concurring) held that the second respondent was closely and intimately involved in managing the applicant's funds. Indeed there was no single financial transaction involving the funds, ostensibly the property of the applicant, that had not been directed by the second respondent. The apparent situation was that he did whatever he pleased with the funds, while she acquiesced in his decisions. His evident involvement of family members and his obviously close relationship with the applicant, coupled with the extraordinary wealth which she suddenly acquired within two months, required investigation. It was imperative that a *curator bonis* should investigate how and on what basis those funds were effectively placed at the disposal of the second respondent and whether and how he disposed of the funds. It followed, therefore, that the application for appointment of a *curator bonis* should have succeeded before the High Court.

Trusts (variation)

Variation of testamentary trust by trustees and beneficiaries: In *Hanekom v Voight NO and Others* 2016 (1) SA 416 (WCC) in the year 1980 the grandfather, one Dr Marais, created a testamentary trust in terms of which his four granddaughters were appointed beneficiaries. The trustee of the trust was his son, the granddaughters' father. In 2001, and after his death, the trustee and beneficiaries concluded a memorandum of agreement in terms of which they amended the trust. The terms of the amendment were that together with their father all four beneficiaries became trustees and that decisions were taken by a majority of them. Furthermore, the category of beneficiaries was broadened. Thereafter, one of the beneficiaries, the appellant Hanekom, approached the WCC for an order declaring the 2001 amendment invalid. Cloete J held that the Master of the High Court carried out an administrative action by making a decision that the 2001 amendment was valid and, as a result of the appellant not bringing an application for the review and setting aside of the Master's administrative action, the 2001 amendment stood as a valid trust deed. The full Bench dismissed, with costs, an appeal against the High Court order. Such costs were to be paid by the appellant in her personal capacity, that is, not out of trust funds.

Dlodlo J (Bozalek J and Riley AJ concurring) held that the general rule regarding amendments to a trust deed was that the trustees and beneficiaries could amend a trust deed. The court also added *obiter* that where minor or unborn beneficiaries were concerned, ordinarily a court order was required for a valid amendment of the trust deed. In order for the Master to authorise a person as a trustee there should be a specific underlying trust deed, and where there was a choice between two or more trust deeds the Master had as a necessary pre-condition to authorisation to know the trust deed in terms of which, the appointment of that person as trustee occurred. Authorisation without an implicit acknowledgement of the trust deed of which the underlying appointment occurred would be legally untenable and could not be what the legislature intended in terms of s 6(1) of the Trust Property Control Act 57 of 1988.

Unlawful occupation of land

Right of occupation of land trumps that of owner of land: In *Hendricks v Hendricks and Others* 2016 (1) SA 511 (SCA) the appellant, Mrs Hendricks, was the owner of residential property, which she sold to her son, the second respondent. The parties registered a lifelong right of habitation in favour of the appellant on the property's title deed. When the second respondent married the first respondent in community of property the two became joint owners of the property. Relations between the parties having soured, the appellant temporarily left the property. As the parties could not live together because of animosity. The appellant, wishing to exercise her right of habitation, applied for eviction of the respondents from the property. That was essentially eviction of the second respondent and those who depended on her as the first respondent had already left the property. The magistrates' court, and thereafter, the WCC per Zondi and Samela JJ, held that the appellant's right of habitation could not trump the second respondent's right of ownership.

An appeal to the SCA was upheld with costs. The matter was remitted to the magistrates' court for determination of a just and equitable order as required by s 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act). Majiedt JA (Mhlantla, Leach, Tshiqi and Saldulker JJA concurring) held that the courts had long recognised *habitatio* as a personal servitude, which was a limited real right. The holder

of that limited real right was a person in charge of the property in respect of which the *habitatio* operated and could obtain an eviction order against the owner who occupied the property without his consent. A limited real right detracted from the owner's dominium. Therefore, in the instant case the owner of the property, the first respondent, could not exercise full dominium over it inasmuch as she could not occupy the property unless the appellant, as the holder of the right of occupation, had consented thereto. Absent such consent, the first respondent's occupation of the property would be unlawful. The first respondent was, therefore, an 'unlawful occupier' within the meaning of s 1 of the PIE Act. The first respondent's bare dominium as owner of the property would in law yield to the appellant's right of habitation.

Other cases

Apart from the cases and material dealt with or referred to above the material under review also contained: Dealing with cartel activity and corporate leniency policy, case manager under divorce settlement not authorised to suspend parenting responsibilities, declaration of toll roads, default judgment against taxpayer, effect of business rescue on liquidation proceedings, establishment of city improvement district, government procurement process, investigation into irregularities in executive mayor's office, one percent negligence rule in Road Accident Fund claims and capping of claims; recognition of dental assistants as professionals, supplementing written agreement by oral agreement and e-mails and use of intermediary while the complainant gives evidence. ❑

On the lighter side: A fast game of chess?

Jhatam and Others v Jhatam
1958 (4) SA 36 (N)

Holmes J: 'These judicial dicta fell upon alert ears, and sparked off a series of moves and countermoves which resembled a fast game of chess. Indeed, one feels that if the debtor's business acumen had matched his litigious astuteness, he would not now be insolvent.' ❑

CASE NOTE – ADMINISTRATIVE LAW

The review of municipal awarded tenders:

Regulation 50 of the municipal supply chain management regulations and s 7(2) of the Promotion of Administrative Justice Act

By Yashin Bridgemohan

DDP Valuers (Pty) Ltd v Madibeng Local Municipality (SCA) (unreported case no 233/2015, 1-10-2015) (Mhlantla JA (Mpati P, Lewis, Bosielo and Swain JJA concurring))

Regulation 50 of the municipal supply chain management regulations GN 868 *GG*27636/30-5-2005 (the regulations), which deals with disputes, objections, complaints and queries, provides as follows:

'(1) The supply chain management policy of a municipality or municipal entity must provide for the appointment by the accounting officer of an independent and impartial person not directly involved in the supply chain management processes of the municipality or municipal entity –

(a) to assist in the resolution of disputes between the municipality or municipal entity and other persons regarding –

(i) any decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system; or

(ii) any matter arising from a contract awarded in the course of its supply chain management system; or

(b) to deal with objections, complaints or queries regarding any such decisions or actions or any matters arising from such contract.

(2) A parent municipality and a municipal entity under its sole or shared control may for purposes of subregulation (1) appoint the same person.

(3) The accounting officer, or another official designated by the accounting officer, is responsible for assisting the appointed person to perform his or her functions effectively.

(4) The person appointed must –

(a) strive to resolve promptly all disputes, objections, complaints or queries received; and

(b) submit monthly reports to the accounting officer on all disputes, objections, complaints or queries received, attended to or resolved.

(5) A dispute, objection, complaint or query may be referred to the relevant provincial treasury if –

(a) the dispute, objection, complaint or query is not resolved within 60 days; or

(b) no response is received from the municipality or municipal entity within 60 days.

(6) If the provincial treasury does not or cannot resolve the matter, the dispute, objection, complaint or query may be referred to the National Treasury for resolution.

(7) This regulation must not be read as affecting a person's rights to approach a court at any time.'

Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (the Act) provides:

'(2)(*a*) Subject to paragraph (*c*), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in

any other law has first been exhausted.

(*b*) Subject to paragraph (*c*), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (*a*) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(*c*) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

Facts

During the month of May 2013 the first respondent sent out an invitation to bidders for the tender to compile the new and supplementary evaluation roll for the term of 2014 to 2018. The appellant who was the valuer for the term preceding September 2013 had applied and was shortlisted. The appellant was, however, unsuccessful and the second respondent was awarded the tender.

In accordance with reg 49 of the regulations the appellant addressed a letter to the first respondent requesting information relating to the second respondent and the bid evaluation process used. The appellant further requested the first respondent, in accordance with reg 50, appoint a qualified and able individual to assist in the dispute resolution process.

The first respondent replied via e-mail and advised the appellant that it would be unethical to engage in communication as the appellant had instituted action for unpaid invoices. The appellant replied and indicated that legal action would be taken if the information required was not provided.

On receiving no response, the appellant made application to the Gauteng High Court for the review and the setting aside of the tender awarded to the second respondent.

The respondents in opposing the application raised a point *in limine*, being that the appellant had not exhausted all its internal remedies in terms of s 7(2)(*a*) of the Act. The internal remedy in question being reg 50. This point *in limine* was upheld by Makogba J and the application was dismissed. The appellant then made application for leave to appeal in the Supreme Court of Appeal (SCA).

Issue before the SCA

The main issue before the SCA was whether the dispute resolution process provided for in reg 50 amounted to an internal remedy as provided for in s 7(2)(*a*) of the Act.

SCA's judgment

Mhlantla JA focused on the definition of an 'internal remedy' in administrative law as defined in *Reed and Others v Master of the High Court of SA and Others* [2005] 2 All SA 429 (E) at para 25 as follows:

'The composite term "internal remedy" … is used to connote an administrative appeal – an appeal, usually on the merits, to an official or tribunal within the same administrative hierarchy as the initial decision-maker – or, less common, an internal review. Often the appellate body will be more senior than the initial decision-maker, either administratively or politically, or possess greater expertise. Inevitably, the appellate body is given the power to confirm, substitute or vary the decision of the initial decision-maker on the merits. In South Africa there is no system of administrative appeals. Instead internal appeal tribunals are created by statute on an *ad hoc* basis.'

The court noted that generally the duty to make use of internal remedies first is not absolute or automatic. According to the court this was evident from s 7(2)(*c*) of the Act, which permits courts to exempt applicants in exceptional circumstances from exhausting internal remedies if the interests of justice permit same.

It was further noted that a failure to exhaust internal remedies can be condoned where the remedy in question is 'illusory or inadequate, or because it is tainted by the alleged illegality.'

In addition to the above, the court noted that in terms of our common law there are two important factors:

'(a) whether the domestic remedies are capable of providing effective redress; and

(b) whether the alleged unlawfulness undermines the internal remedies themselves.'

Mhlantla JA held that as reg 50 did not make provision for an internal remedy, there was no obligation on the appellant to make use of it or make application for an exemption in terms of s 7(2)(*c*) of the Act and, as such, the court *a quo* erred 'when it concluded that even though a purported internal remedy would not be effective and its pursuit would be futile, it was still incumbent upon the appellant to approach the court for exemption from the obligation to exhaust internal remedies.' Mhlantla JA further held that the court *a quo* erred in upholding the point *in limine*.

Mhlantla JA had also noted s 62 of the Local Government Municipal Systems Act 32 of 2000 (the Systems Act), which allows an individual to appeal by giving written notice and reasons for the appeal to the municipal manager, who then submits the appeal to the appeal authority. The appeal authority is empowered to confirm, vary or revoke the decision, provided that such variation would not adversely affect the rights that have already accrued to the successful bidder.

However, in this case as the first respondent had already been awarded the tender and signed an agreement with the second respondent, which resulted in the rights accruing to the second respondent, the court found the appellant did not have to resort to the s 62 procedure of the Systems Act in order to comply with s 7(2) of the Act. The only avenue available to the appellant as unsuccessful bidder was to apply for the judicial review of the tender award and the conclusion of the contract. Hence Mhlantla JA held the appellant's appeal has to succeed.

The court accordingly upheld the appeal and ordered that the matter be referred back to the court *a quo* for consideration on its merits.

Conclusion

This judgment of the SCA is important because in light of it reg 50 of the regulations does not fall under s 7(2) of the Act. Unsuccessful bidders for a municipal tender may apply to court for the judicial review of the awarded tender, without exhausting the reg 50 process or making an application for exemption in terms of s 7(2)(*c*) of the Act for failure to exhaust the reg 50 process. This is, however, provided that the tender has been awarded and an agreement has been signed between the municipality and successful bidder. Where a tender has not been awarded and no agreement has been entered into the internal remedy provided for in s 62 of the Systems Act must be followed before making an application to court for judicial review otherwise failure to comply with s 7(2) of the Act can be raised by the respondents as a point *in limine*.

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By Nomfundo Manyathi-Jele

'Unlawfully' obtained Facebook communication admissible in court

Harvey v Niland and Others (ECG) (unreported case no 5021/2015, 3-12-2015) (Plasket J)

Our right to privacy on social media in the workplace has been put in the spotlight by the recent judgment of *Harvey v Niland and Others* (ECG) (unreported case no 5021/2015, 3-12-2015) (Plasket J), where the Eastern Cape Division, Grahamstown, ruled that evidence obtained by hacking into Bruce Niland's Facebook account, was admissible in court. The Facebook communication was presented to court.

Background

In this case, the applicant, Gregory Harvey, and the first respondent, Mr Niland, were the only members of a close corporation, Huntershill Safaris CC (Huntershill), which offers professional hunting services to its clients. Mr Niland was employed by Huntershill as a professional hunter and safari guide until mid-2015. Around that time, Mr Harvey and Mr Niland parted ways on bad terms and Mr Niland took up employment with Thaba Thala Safaris (Thaba Thala), while remaining a member of Huntershill. Thaba Thala also provides safaris and professional hunting services.

Mr Harvey suspected Mr Niland of breaching his fiduciary duties to Huntershill by attempting to solicit and divert their existing clients to Thaba Thala. Because Mr Niland remained a member of Huntershill, he was still in a fiduciary relationship with the close corporation, meaning that he was in breach of his fiduciary duties through his activities with Thaba Thala. Mr Harvey brought an urgent application to interdict Mr Niland from these activities which allegedly caused financial and reputational damage to Huntershill.

An employee then informed Mr Harvey that she knew the password for Mr Niland's Facebook profile. He instructed her to use the password and access it, which she did and Mr Niland's Facebook communications were copied and printed.

In his answering affidavit, Mr Niland stated that he never gave his password to anyone and deduced from this that Mr Harvey hacked his Facebook communications unlawfully and contrary to the provisions of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act).

Facebook communication

I will now highlight some of the communication that Mr Harvey found on Mr Niland's Facebook profile, which he used in court.

According to the judgment, on 14 July 2015 Mr Niland placed a message on his Facebook wall to the effect that he had decided to leave Huntershill and was 'going on to bigger thinking'. On 15 July 2015, he stated that he would be 'hunting with a company not far from here'. In a communication with Candice Syndercombe, who was not a client but, it would appear, a friend of Niland's, he told her, with reference to his move to Thaba Thala that he had been asked 'to make a big hunting place' and that he was 'going to try'. It is apparent that she was in the United Kingdom. In one communication, he asked her to sell hunts there for him.

On 15 July 2015 Mr Niland informed one William Nelson, described by Mr Harvey as an important client and hunting agent, that Thaba Thala Safaris 'is my new home', that Nelson is 'welcome to join me, but please keep quiet', that he will start there in 15 days and that it had not been hunted for three years.

Mr Niland went on to ask Mr Nelson whether he had booked at Huntershill to which Mr Nelson answered in the affirmative – 'because I cannot change the expectations everyone going with me have' – and then added: 'Let me get through this hunt, and we'll move forward'. Mr Nelson also sent a message to Mr Niland in which he asked him to tell 'me before I send everyone's deposits' whether there was a problem with Huntershill.

According to the judgment, in his exchanges with Wayne Pourciau, a 'valued existing client of Huntershill who has hunted at Huntershill three times previously, and had already committed to return to hunt at Huntershill', Mr Niland, with obvious reference to Thaba Thala, stated that it 'will be huge areas to hunt' to which Mr Pourciau asked for information as to where Thaba Thala is and 'what we can shoot'. When Mr Pourciau offered to 'get the word out around here', Mr Niland told him that he still needed two more weeks as he was 'sorting the prices and packages out'.

The admissibility of the Facebook communication as evidence

With regards to the admissibility of the Facebook communication, in his judgment Plasket J said that at common law, '"all relevant evidence which was not rendered inadmissible by an exclusionary rule was admissible in a civil court irrespective of how it was obtained". That rule is not absolute: It is subject to a discretion to exclude unlawfully obtained evidence.'

He further states that s 14(*d*) of the Constitution provides that everyone enjoys a fundamental right to privacy which includes the right not to have 'the privacy of their communications infringed'. In order to give this right teeth, s 86(1) of the ECT Act provides that, 'a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence'.

In his judgment, Plasket J states that it has been argued that the evidence should be struck out because the accessing of Mr Niland's Facebook communications was an infringement of his fundamental right to privacy and constituted a criminal offence as well. In other words, it is evidence that was unlawfully obtained.

Case law

Plasket J then looked at examples of numerous case law. He said that it was argued that the legislation applicable to this case, the ECT Act, is a 'game-changer'. 'I am not persuaded that it is. It creates, like the legislation in issue in the cases dealt with above, an offence – of accessing data without authority or permission – and it is silent on whether evidence obtained in contravention of s 86(1) is inadmissible. I am of the view that, far from being a "game-changer", the ECT Act, by its silence on the issue, allows for the admission of unlawfully obtained evidence subject to its exclusion in the discretion of the court,' he said.

'How then does a court decide whether to exclude unlawfully obtained evidence or to admit it,' Plasket J questioned.

Plasket J said in *Fedics Group (Pty) Ltd & Another v Matus & Others; Fedics Group (Pty) Ltd & Another v Murphy & Others* 1998 (2) SA 617 (C), the judge considered whether the same considerations apply to unlawfully obtained evidence in the criminal and civil contexts. 'He made the point that, while in criminal proceedings, an accused has a right against self-incrimination and to silence, is not obliged to disclose his or her defence or to assist the State to prove its case, and is under no obligation to provide the State with any documents that may strengthen its

case, the position is quite different in civil proceedings: a party in civil proceedings "is not only obliged to disclose his case, he is also obliged to discover all documents which may damage his own case or which may directly or indirectly enable his adversary to advance his case",' the court stated.

Plasket J goes on to say: 'He spelt out the implications of this for the way in which the discretion to allow or disallow unlawfully obtained evidence is to be exercised when he stated:

"Without trying to formulate principles of general validity or rules of general application, the implications of these differences between criminal and civil proceedings in the present context are, in my view, twofold. On the one hand, the litigant who seeks to introduce evidence which was obtained through a deliberate violation of constitutional rights will have to explain why he could not achieve justice by following the ordinary procedure, including the Anton Piller procedure, available to him. On the other hand, the Court will, in the exercise of its discretion, have regard to the type of evidence which was in fact obtained. Is it the type of evidence which could never be lawfully obtained and/or introduced without the opponent's co-operation, such as privileged communications, or the recording of a tapped telephone conversation, or is it the type of evidence involved in this case, namely documents and information which the litigant would or should eventually have obtained through lawful means? In the latter case, the Court should, I think, be more inclined to exercise its discretion in favour of the litigant who seeks to introduce the evidence than it would be in the case of the former. It goes without saying that the Court will, in any event, have regard to all the other circumstances of the particular case".'

Plasket J stated that in the exercise of the discretion to exclude unlawfully obtained evidence, all relevant factors must be considered. These include the extent to which, and the manner in which, one party's right to privacy (or other right) has been infringed, the nature and content of the evidence concerned, whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means and the idea that 'while the pursuit of truth and the exposure of all that tends to veil it is cardinal in working true justice, the courts cannot countenance and the Constitution does not permit unrestrained reliance on the philosophy that the end justifies the means'.

'I accept for purposes of this matter that, in accessing Niland's Facebook communications, Harvey acted unlawfully. I accept too that this act, apart from probably constituting criminal conduct also constituted a violation of Niland's right to privacy. That right must, however, be viewed in its proper context,' Plasket J states in his judgment.

In *Gaertner & Others v Minister of Finance & Others* 2014 (1) BCLR 38 (CC) it was held that: 'Privacy, like other rights, is not absolute. As a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks. This diminished personal space does not mean that once people are involved in social interactions or business, they no longer have a right to privacy. What it means is that the right is attenuated, not obliterated. And the attenuation is more or less, depending on how far and into what one has strayed from the inner sanctum of the home.'

Plasket J goes on to say that: '[T]he hacking of Niland's Facebook communications would have produced both information that was relevant to the business of Huntershill and Niland's fiduciary duties to it, and information that was irrelevant to those issues and entirely private. The relevant material that was accessed, however, established that Niland had been conducting himself in a duplicitous manner contrary to the fiduciary duties he owed to Huntershill. That duplicity was compounded by the fact that he had denied that he was acting in this way and had also undertaken not to do so. In these circumstances, his claim to privacy rings rather hollow.'

Plasket J examined whether Mr Harvey had other lawful means of obtaining the evidence available to him. 'On the face of it, he could have instituted an action against [Mr] Niland for damages arising from the breach of his fiduciary duties. He would have been entitled to discovery of annexure "G" in due course. If he was concerned that the evidence may disappear, he may have been able to launch an application for an Anton Piller order in order to preserve it pending the institution of the action. A third possibility would have been to launch an application such as the present without annexure "G",' he said.

Plasket J said that in his view, the other courses of action would not have availed Mr Harvey and are, from a practical perspective, more apparent than real. He continued to say that without the Facebook communication, Mr Harvey had no case and so could neither institute an action or launch an application. 'An application for an Anton Piller order would have floundered too. It would have been seen as nothing but a fishing expedition and the suspicions that he had would not have constituted the *prima facie* case he would have had to make out in order to meet the first requirement for this relief,' he said.

Plasket J said that right-thinking members of the society would believe that Mr Niland's conduct, particularly in the light of his denials and the undertakings that he gave, should be exposed and that he should not be allowed to hide behind his expectation of privacy: 'It has only been invoked, it seems to me, because he had something to hide,' he said adding that in these circumstances, the Facebook evidence is admissible and the application to strike it out must fail.

The order

The court ordered that for as long as Mr Niland remains a member of Huntershill, he is interdicted from –

- breaching his fiduciary duties to the second respondent as contemplated by s 42 of the Close Corporation Act 69 of 1984;
- competing with the business interests of the second respondent, whether directly or indirectly;
- marketing or promoting the professional hunting and safari activities or services of Thaba Thala Safaris or any other rival or competing professional hunting or safari outfitter;
- disparaging the second respondent or any member or employee of the second respondent;
- disparaging the business activities or professional hunting and safari activities or business of the second respondent;
- utilising in any manner whatsoever, and either directly or indirectly, the personal client base data of any clients of the second respondent, or any person who has hunted with or at the second respondent since 2010;
- canvassing, soliciting or diverting, or attempting so to do, any existing client of the second respondent or any person who has hunted at or with the second respondent since 2010;
- any conduct, which will have the effect of damaging the goodwill or client or business relationships of the second respondent;
- copying, transmitting or transcribing, or rendering in usable form, any existing client data relating to existing clients of the second respondent, or any person who has hunted at or with the second respondent since 2010; and
- making available to any other party or entity, whether in digital form or otherwise, any client data or contact information relating to existing clients of the second respondent, or any person who has hunted at or with the second respondent since 2010.

Mr Niland was also directed to pay the costs of the application, including the costs of two counsel.

Nomfundo Manyathi-Jele *NDip Journ (DUT) BTech Journ (TUT)* is the news editor at *De Rebus*.

New Legislation

Legislation published from 1 – 26 February 2016

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

Bills introduced

Appropriation Bill B3 of 2016.
Division of Revenue Bill B2 of 2016.
Expropriation Bill B4B of 2015.
Revenue Laws Amendment Bill B4 of 2016.

Commencement of Acts

National Environmental Management: Integrated Coastal Management Act 24 of 2008, ss 65 – 66, 95 – 96 and 98. *Commencement:* 5 February 2016. Proc5 *GG*39657/5-2-2016.
Special Economic Zones Act 16 of 2014. *Commencement:* 9 February 2016. Proc R6 *GG*39667/9-2-2016.

Selected list of delegated legislation

Animal Diseases Act 35 of 1984
Tariffs payable for import permits and export certificates for animals and animal products. GN R2 *GG*39678/12-2-2016.
Animal Identification Act 6 of 2002
Tariffs for services, goods or supplies. GN3 *GG*39718/19-2-2016.

Attorneys Act 53 of 1979
Rules for the attorneys' profession. GenN2 GG39740/26-2-2016.

Basic Conditions of Employment Act 75 of 1997
Amendment of sectoral determination 12 from 1 March 2016: Forestry worker sector. GN138 *GG*39648/3-2-2016.
Amendment of sectoral determination 13 from 1 March 2016: Farm worker sector. GN137 *GG*39648/3-2-2016.
Sectoral determination 9: Wholesale and retail sector. GN162 *GG*39671/9-2-2016 and GN189 *GG*39714/18-2-2016.
Broad-based Black Economic Empowerment Act 53 of 2003
Repeal of certain sector codes. GN184 *GG*39703/17-2-2016.
Civil Aviation Act 13 of 2009
Thirteenth amendment of the Civil Aviation Regulations, 2016 (user fees). GN R173 *GG*39687/12-2-2016.
Electronic Communications Act 36 of 2005
Commencement of the dual illumination period on 1 February 2016 in terms of the Digital Migration Regulations, 2012. GN87 *GG*39642/1-2-2016.
Employment of Educators Act 76 of 1998
Consolidation of the terms and conditions of employment of educators. GN170 *GG*39684/12-2-2016.
Estate Agency Affairs Board 112 of 1976
Amendment of the Estate Agency Affairs Board Regulations. GN R2 *GG*39719/19-2-2016.
Regulations relating to the issuing of fidelity fund and registration certificates. GN R2 *GG*39743/26-2-2016.
Financial Markets Act 19 of 2012
Amendments to the JSE listing requirements. BN15 *GG*39711/19-2-2016.
Genetically Modified Organisms Act 15 of 1997
Amendment of regulations (fees payable). GN3 *GG*39679/12-2-2016.
Tariffs for genetically modified organisms status certificates. GN5 *GG*39679/12-2-2016.
Health Professions Act 56 of 1974
Amendment of the rules relating to the registration by medical practitioners and dentists of additional qualifications. BN4 *GG*39736/26-2-2016.
Annual fees. BN3 *GG*39736/26-2-2016.
Income Tax Act 58 of 1962
Agreement between the governments of South African and the State of Qatar for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. GN164 *GG*39674/11-2-2016.
Fixing of the rate per kilometre in respect of motor vehicles for the purposes of s 8(1)(*b*)(ii) and (iii). GN192 *GG*39724/24-2-2016.
Determination of daily amount in respect of meals and incidental costs for purposes of s 8(1). GN191 *GG*39724/24-2-2016.
Long-term Insurance Act 52 of 1998
Penalty for failure to furnish Registrar with information. BN4 *GG*39718/19-2-2016.
Medicines and Related Substances Act 101 of 1965
Amendment of regulations relating to a transparent pricing system for medicines and scheduled substances: Dispensing fees for pharmacists. GN153 *GG*39658/5-2-2016.
Mine Health and Safety Act 29 of 1996
Guideline for a mandatory code of practice for the management of medical incapacity due to ill-health and injury. GN R149 *GG*39656/5-2-2016.
Guideline for a mandatory code of practice on the right to refuse dangerous work and leave dangerous working places. GN R148 *GG*39656/5-2-2016.
Guideline for a mandatory code of practice on minimum standards of fitness to perform work on a mine. GN R147 *GG*39656/5-2-2016.
Guideline for a mandatory code of practice for an occupational health programme (occupational hygiene and medical surveillance) on thermal stress. GN R146 *GG*39656/5-2-2016.
National Credit Act 34 of 2005 and Consumer Protection Act 68 of 2008
Amendment of the regulations for matters relating to the functions of the Tribunal and rules for the conduct of matters before the National Consumer Tribunal. GN157 *GG*39663/4-2-2016.
National Environmental Management: Protected Areas Act 57 of 2003
Amendment of sch 2 (national parks). GenN2 *GG*39728/25-2-2016.
National Road Traffic Act 93 of 1996
Amendment of the National Road Traffic Regulations. GN188 *GG*39710/19-2-2016.
Nursing Act 33 of 2005
Fees payable to the South African Nursing Council. BN13 *GG*39708/18-2-2016.
Plant Improvement Act 53 of 1976
Amendment of regulations relating to establishment, varieties, plants and propagating material (fees payable). GN2 *GG*39718/19-2-2016.
Plant Breeders' Rights Act 15 of 1976
Amendment of regulations relating to plant breeders' rights (fees payable). GN4 *GG*39679/12-4-2016.
Promotion of National Unity and Reconciliation Act 34 of 1995

Increased amounts in terms of regulations relating to the assistance to victims in respect of basic education. GN R2 *GG*39742/26-2-2016.
Increased amounts in terms of the regulations relating to assistance to victims in respect of higher education and training. GN R3 *GG*39742/26-2-2016.

Rules Board for Courts of Law Act 107 of 1985
Amendment of the rules (r 12, 15, 21B, 22 and Annexure 2) regulating the conduct of proceedings of the Magistrates' Courts of South Africa. GN R2 *GG*39715/19-2-2016.
Amendment of the rules (r 6 and form 2 of sch 1) regulating the conduct of proceedings of the several provincial and local divisions of the High Court of South Africa. GN R3 *GG*39715/19-2-2016.

Short-term Insurance Act 53 of 1998
Penalty for failure to furnish Registrar with information. BN3 *GG*39718/19-2-2016.

Small Claims Court 61 of 1984
Establishment of a small claims court for the area of Steynsburg. GN154 *GG*39660/5-2-2016.
Establishment of a small claims court for the area of Fochville. GN155 *GG*39660/5-2-2016.
Establishment of a small claims court for the areas of Parys and Vredefort. GN156 *GG*39660/5-2-2016.
Establishment of small claims courts for the Limpopo and Mpumalanga Provinces. GN175 *GG*39691/12-2-2016.

Special Economic Zones Act 16 of 2014
Regulations made in terms of s 41 of the Act. Proc R6 *GG*39667/9-2-2016.
Tax Administration Act 28 of 2011
Reportable and excluded arrangements. GN140 *GG*39650/3-2-2016.
Regulations for purposes for s 70(4) listing the organs of state or institutions to which a senior South African Revenue Service official may lawfully disclose specified information. GN R160 *GG*39668/9-2-2016.

Draft legislation

Determination of a threshold for credit provider registration in terms of the National Credit Act 34 of 2005 for comment. GN158 *GG*39663/4-2-2016.
Proposed amendments to the code of conduct for professional registered auditors in terms of the Auditing Profession Act 26 of 2005. BN11 *GG*39657/5-2-2016 and BN2 *GG*39718/19-2-2016.
Proposed regulations for the protection of geographical indications and designations of origin used on agricultural products intended for sale in South Africa in terms of the Agricultural Product Standards Act 119 of 1990. GN R3 *GG*39678/12-2-2016.
Increase in monthly pensions in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 for comment. GN167 *GG*393683/12-2-2016.
Increase of the maximum amount of earnings on which the assessment of an employer shall be calculated in terms of the compensation for Occupational Injuries and Diseases Act 130 of 1993 for comment. GN169 *GG*39683/12-2-2016.
Proposed amendment of the Civil Aviation Regulations, 2011 in terms of the Civil Aviation Act 13 of 2009. GN R176 *GG*39692/12-8-2016.
Amendments to the regulations relating to the application and payment of social assistance and the requirements or conditions in respect of eligibility for social assistance in terms of the Social Assistance Act 13 of 2004 for comment. GN R181 *GG*39698/15-2-2016.
Draft Broad-based Black Economic Empowerment Regulations, 2016 in terms of the Broad-based Black Economic Empowerment Act 53 of 2003. GN185 *GG*39704/17-2-2016.
Draft Aquaculture Bill. GenN78 *GG*39713/19-2-2016.
Draft amendments to the regulations relating to child justice in terms of the Child Justice Act 75 of 2008. GenN81 *GG*39751/26-2-2016.
Policy on the use of official languages by the Office of the Chief Justice in terms of Use of Official Languages Act 12 of 2012 for comment. GN194 *GG*39749/26-2-2016. ❑

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• See 'Finding free legal information on the internet' 2015 (Aug) *DR* 21.

Employment law update

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Unequal pay claims – unfounded pay disparity claim

In *South African Municipal Workers Union and Another v Nelson Mandela Bay Municipality* [2016] 2 BLLR 202 (LC), a female employee employed as one of five assistant directors in the Municipality's Human Settlements Directorate alleged that she was unfairly discriminated against on the basis of sex or gender as her salary was lower than her male counterparts who performed similar work to her. In this regard, two of the male assistant directors were appointed at the same time and on the same grade as the complainant and yet were paid a higher salary than her. She also alleged that it constituted unfair discrimination for one of the other assistant directors to be employed on a higher grade than her. The Municipality sought absolution from the instance in this matter.

The Labour Court (LC) found that it was common cause that the complainant earned less than her comparators. The issue to be determined by the LC was thus whether this difference in pay amounted to unfair discrimination. In order to succeed in a claim for unfair discrimination the complainant was required to show that this differentiation was related to her gender.

In response to the complainant's allegations of unfair discrimination, the Municipality's justification for the pay discrepancy was that two of the assistant directors were previously engaged as project managers of the Municipality whereas the complainant was an external candidate. After their appointment to the position of assistant director they had complained in writing that their salary was less than what they had previously earned as project managers and as a result their salaries were adjusted accordingly. Thus, the Municipality alleged that the difference in salary was not because the two employees were males, but rather because of their background at the Municipality. As regards the assistant director who was employed on a higher grade than the other four assistant directors, the Municipality argued that his grade was not higher because he was a male. Instead, this discrepancy arose because the Municipality had incorrectly graded the employee and a process was underway to correct this error.

Phatshoane AJ found that the complainant had not been able to demonstrate that there was any employment policy or practice at the Municipality that favoured males over females. The complainant further conceded that she would have still complained about her pay disparity even if her comparators had been female. This demonstrated that the issue was not about gender. The LC accordingly found that the complainant failed to show that there was a *causal nexus* between her gender and the difference in her salary. Absolution from the instance was granted.

Automatic termination provisions in employment contracts (*vis-à-vis* Labour Relations Act)

In *Pecton Outsourcing Solutions CC v Pillemer and Others* [2016] 2 BLLR 186 (LC), a temporary employment service, Pecton Outsourcing Solutions CC (the TES), gave notice of termination of employment to all its employees on its client terminating a service agreement with the TES. In simply notifying the employees of the termination of their employment, the TES relied on a provision in the fixed term employment contracts, which provided for automatic termination of employment if the service contract with the client was terminated. The employees then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The commissioner found that the employees had been unfairly dismissed as an employer cannot contract out of the provisions of the Labour Relations Act 66 of 1995 (the LRA). The commissioner acknowledged that there was a fair reason for the dismissal but ordered compensation as no process was followed.

The TES then instituted review proceedings in the LC alleging that the commissioner had wrongly found that the employment contracts could only be terminated by dismissal. The TES argued that the commissioner had failed to appreciate that fixed term contracts may terminate in ways other than dismissal, for example, expiry on an agreed end date. The LC was required to consider whether relying on automatic termination provisions in employees' contracts of employments on the cancellation of a service agreement by a client constituted a dismissal and if so, whether the CCMA had jurisdiction to determine such a dispute.

The LC held that a fixed term contract can either provide for expiry on a given date or on the completion of a specified task and in such circumstances this would not amount to circumventing the provisions of the LRA. In this regard, Whitcher J did not agree with the TES that the commissioner had failed to appreciate that fixed term contracts may terminate in these circumstances. On the other hand, while the LC acknowledged that a fixed term contract may provide for termination on the occurrence of a particular event, such as where a client cancels its service contract, it cautioned that this was open to abuse and may undermine employees' rights. Thus, such a clause would be invalid if it was used to contract out of the provisions of the LRA. The LC found that in determining whether there has been an attempt to contract out of the LRA, one should consider the content of the reason for the termination over the form of the contract governing it. According to Whitcher J, if the reason for the termination is one that typically constitutes a reason for a dismissal then it may be a situation where there is an attempt to contract out of the LRA.

It was held that, in this case, by relying on the automatic termination provisions, the TES was circumventing the provisions of s 189 of the LRA. This is because the reason for the termination in these circumstances was financial – the TES was unable to afford to employ the employees when it lost its only client. The automatic termination provisions in the employment contract deprived

the employees of their rights associated with a dismissal for operational requirements, including the right to severance pay. Thus, it was held that the commissioner was correct in finding that the automatic termination provisions were invalid as they had the effect of contracting out of the provisions of the LRA. It was accordingly held that there had been a dismissal and the commissioner had jurisdiction to determine the dispute. However, as soon as the commissioner concluded that this was a dismissal for operational requirements, she should have referred it to the LC as she lacked the power to determine such a dispute. The LC accordingly set aside the award and granted the employees leave to refer the dispute to the LC.

Moksha Naidoo *BA (Wits) LLB (UKZN)* is an advocate at the Johannesburg Bar.

Executing an order pending leave to appeal

Dintwe v Ditsobotla Local Municipality and Another (LC) (unreprorted case no J65/16, 1-2-2016) (Tlhotlhalemaje J).

In December 2015 the applicant employee approached the Labour Court (LC) on an urgent basis to declare his suspension unlawful and that he be reinstated with immediate effect. On 23 December the LC, per Nkutha-Nkontwana AJ, having found the employee's suspension unlawful ordered the first respondent employer to reinstate the employee as from 11 January 2016.

On 11 January the employer advised the employee that it was unable to 'facilitate his return' and on 18 January the employer brought an application for leave to appeal against the aforestated order. The following day the employee was issued with a notice to attend a disciplinary hearing scheduled for 1 February.

On 22 January the employee again brought an urgent application to the LC wherein he sought Nkutha-Nkontwana's AJ order be executed and that the operation of the order not be suspended pending the application for leave to appeal or any other subsequent appeal application thereafter.

The court per Tlhotlhalemaje J, noted that while an application for leave to appeal does stay the order appealed against, r 49(11) of the High Court Rules provides:

'Where an appeal has been noted or an application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, *unless the court which gave such order, on the application of a party, otherwise directs*' (my italics).

Despite the LC not having a similar provision, r 11(3) of the Labour Court Rules nevertheless allowed the court to adopt any procedure it deemed appropriate when addressing a situation not contemplated in its rules.

Therefore, r 49(11) of the High Court Rules, read with r 11(3) of the Labour Court Rules, permits the LC to hear an application as envisaged in r 49(11).

In exercising its judicial discretion, the court referred to the decision in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A), which listed the relevant considerations a court should have regard to in an application of this nature. Quoting from South Cape Corporation (*supra*) these factors are:

'(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;

(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g. to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

In considering the issue of 'irreparable harm' the court took cognisance of the fact that Nkutha-Nkontwana AJ found the employee's suspension unlawful as a result of the employer failing to afford the employee an opportunity to be heard before taking the decision to suspend him and/or failing to give the employee full details for why it took the decision to suspend him.

The court further highlighted the fact that the employer, in the initial urgent application, did not materially defend the above allegations and thus, according to Tlhotlhalemaje J, the employee's suspension remained unlawful. The fact that the employee's disciplinary hearing was to commence on 1 February did not detract from the unlawfulness of his suspension.

Having balanced the impact a continued suspension would have on the employee's dignity, reputation and self-esteem as argued by the employee, against the alleged harm the employer would be subject to should the employee return to work, the court concluded that it was the employee who would suffer irreparable harm if his unlawful suspension were to continue pending leave to appeal.

In addressing the consideration 'balance of convenience', the court noted that the employee's return to work could not impact the employer's investigations into the employee's alleged misconduct as such investigations had already been concluded. In addition to this and returning to the findings of Nkutha-Nkontwana AJ, the court held:

'It is therefore my view that to not order the execution of the order in circumstances where there are clear legal and procedural issues to dispense with pending the application for leave to appeal would clearly not be in the interests of either the Applicant or the Municipality. Whilst the leave to appeal is pending, and in the absence of any indication that the Municipality has attempted to correct the flaws in its intended disciplinary process against the Applicant, and in particular his suspension, it would imply that the Applicant would remain suspended with pay until the leave to appeal is finally dispensed with. This can definitely not be an ideal situation for both parties, let alone members of the public the Municipality is meant to serve. To this end then, and for reasons other than those advanced by the Applicant, the balance of convenience favours that the order be executed.'

Turning to the issue of 'prospects of success' Tlhotlhalemaje J found that in addition to the argument that the employer only sought to appeal against the cost order granted by Nkutha-Nkontwana AJ and not the merits per se, there were other considerations that supported a finding that that the employer had remote prospects of success if leave to appeal were granted.

Following the above the court granted the employee leave to execute the order delivered by Nkutha-Nkontwana AJ pending the application for leave to appeal. Taking into account the considerations of law and fairness, the court declined to make an order as to costs.

Dismissal for failure to submit for medical treatment

By Moffat Ndou

In a recent decision of the Labour Court in *EWN v Pharmaco Distribution (Pty) Ltd* (LC) (unreported case no JS654/10, 22-9-2015) (LaGrange J), the court had the opportunity to decide whether the employer can dismiss an employee for failure to submit to medical treatment and therefore that the employee failed to comply with the provisions of the employment contract.

The facts

The applicant was employed as a pharmaceutical sales representative on 1 July 2008 under a fixed-term contract. In mid-July 2009 she was employed on an indefinite basis under a written contract of employment. A term of that contract provided, *inter alia*, that whenever the company deems necessary, the applicant will undergo a specialist medical examination at the expense of the company, by a medical practitioner nominated and appointed by the company. The term of the contract included psychological evaluations.

In December 2008 the applicant's performance appraisal stated that her performance was 'exceptional and consistently demonstrates excellent standards in all job requirements'. During January to October 2009, the applicant queried the calculation of commission as determined by the employer and delays in paying her commission due; and later lodged a formal grievance. Consequently she was given a notice to attend a disciplinary inquiry. The inquiry concerned six charges, all of which arose from her interactions, with various staff members in her efforts to resolve her complaints about her commission payments. She was found guilty of some of the charges, which related to the alleged incidents. The applicant was issued with a final written warning based on the inquiry findings, against which she appealed. She was later suspended with the instruction that she must present herself for medical examination to determine whether or not she was fit to deal with her tasks. She was further warned in the letter that failure to attend the examination would constitute a serious offence.

The applicant was later dismissed for a 'particularly serious and/or repeated wilful refusal to carry out lawful instructions or perform duties'. The instruction she failed to perform was to present herself to a psychiatrist, for medical examination. The applicant, who suffered from a bipolar disorder, which she maintained was under control, claimed that the instruction was unlawful and was an act of unfair discrimination based on disability amounting to an act of harassment. The respondent company contended that the instruction was both reasonable and lawful in terms of the applicant's contract of employment, and was necessary to determine if she was 'fit to work'. The respondent claimed the applicant was required to undergo such assessment 'on account of her inappropriate, aggressive and irrational behaviour towards fellow workers and management on, *inter alia*, 20 October and 23 October 2009'.

The Labour Court was required to determine the following issues –

- whether the provisions in the applicant's contract of employment requiring her to undergo medical testing were enforceable or void;
- whether her dismissal for failing to submit to a medical examination on the employer's instruction was automatically unfair in terms of s 187(1)(*f*) of the Labour Relations Act 66 of 1995; and
- in the event her dismissal was not automatically unfair, whether it was substantively or procedurally unfair.

Whether the instruction was ever permissible

Section 7 of the Employment Equity Act 55 of 1998 prohibits the medical testing of employees, unless legislation permits or requires the testing or it is justifiable. The court observed that no exception to the prohibition against medical testing is made on the basis that an employee consented to the medical testing. Section 7(1)(*a*) (which allows for medical testing of employees if legislation permits) clearly had no application in the case. Consequently, the respondent could only require the applicant to undergo a test if the requirements of s 7(1)(*b*) were met. In terms of s 7(1)(*b*) medical testing is only permitted if it is justifiable in the light of –

- medical facts;
- employment conditions;
- social policy;
- the fair distribution of employee benefits; or
- the inherent requirements of a job.

First the court noted that the medical facts were that: The applicant suffered a bipolar disorder and that she was undergoing regular therapy and being medicated for her condition and there was also the opinion of her psychologist, that her condition did not affect her ability to function effectively in her work environment.

The court rejected the respondent's argument that the employment conditions justified the medical examination in that it could not risk employing someone in the position if there was a question mark about their ability to remain mentally stable to cope with the demands of the job. The court pointed to the fact that the evidence did not support the view that conditions of work in the job were inherently stressful, still less that any expressions of anger or frustration would render the person unable to perform their duties. The evidence showed that the applicant's outburst was triggered by a dispute over an important aspect of her remuneration and had nothing to do with performance. The court also dismissed the argument that it is an inherent requirement of the job of a pharmaceutical sales representative to be medically certified fit for work, because the evidence did not support the argument.

Consequently the court found that, in the absence of being able to establish that the referral to medical examination was justifiable under one of the exceptions to the prohibition in s 7 of the Employment Equity Act, the term of the contract was unlawful and unenforceable.

Whether the instruction amounted to discrimination

The court noted that it had established that the instruction, which the employee was dismissed for disobeying was an unlawful one. But in itself that is not sufficient to establish that her dismissal was on account of a prohibited reason. The court observed that the employee's performance had been rated as 'exceptional'; she had no history of absenteeism; the company had not considered it necessary to subject any employees to pre-employment medical or psychological examinations; when the employee had an outburst none of the staff had felt threatened by her. The court con-

cluded that the ostensible rationale advanced for the examination, namely to determine if she was fit to do her work, was hard to believe. It seemed more probable on the evidence that the predominant reason the employee was required to undergo the testing was because senior management became aware of her bipolar status. Had she not suffered from that condition she would consequently not have been placed in a situation where she faced dismissal for not acceding to an examination based solely on her condition. Consequently, the court was satisfied that the dismissal in the circumstances was based on her refusal as a person with a bipolar condition to undergo a medical examination, which she would not have been required to undergo, but for her condition. The stigmatising effect of being singled out on the basis of an illness that she was managing, notwithstanding the absence of any objective basis for doubting her ability to perform, is obvious. The act of requiring her to submit for examination in the circumstances was also an act of unfair discrimination in terms of s 6 of the Employment Equity Act.

Turning to whether the respondent unfairly discriminated against the employee and was her dismissal automatically unfair, the court observed that the applicant would have not been required to undergo testing on account of the conduct for which she was disciplined alone. The knowledge that she was bipolar was, therefore, decisive. The court accordingly found that the clause of the employment contract, which gave the employer the power to subject the employee to medical examination, was invalid; amounted to unfair discrimination; and the dismissal was automatically unfair.

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By Meryl Federl

Recent articles and research

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Abbreviation	Title	Publisher	Volume/issue
AHRLJ	African Human Rights Law Journal	University of Pretoria, Centre for Human rights	(2015) 15.2
EL	Employment Law	LexisNexis	(2015) December
ILJ	Industrial Law Journal	Juta	(2016) 37 January
JJS	Journal for Juridical Science	University of Free State, Law Faculty	(2015) 40.1 (2015) 40.2
	LitNet Akademies (Regte)		(2015) 12 .3
PLD	Property Law Digest	LexisNexis	(2015) December
TSAR	Tydskrif vir die Suid-Afrikaanse Reg	Juta	(2016) 1

Child law

Matthias, CR and Zaal, FN 'Suspension of parental responsibilities and rights of an unmarried father' (2016) 1 *TSAR* 194.
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Civil procedure

Theophilopoulos, C 'Constitutional transformation and fundamental reform of civil procedure' (2016) 1 *TSAR* 68.

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Hauman, M and Snyman-Van Deventer, E 'The series limited liability company: Innovative, flexible ... and complicated' (2015) 40.2 *JJS* 24.
Henning, JJ 'Identifying the structure envisioned for closely held incorporated business entities under the new statutory dispensation' (2015) 40.1 *JJS* 19.

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Vettori, S 'Mandatory mediation: An obstacle to access to justice?' (2015) 15.2 *AHRLJ* 355.

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Otto, JM 'Bedinge en kontrakte ter beperking van die handelsvryheid. Drie dekades sedert *Magna Alloys v Ellis* 1984 (4) SA 874 (A)' (2016) 1 *TSAR* 133.

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Windridge, O 'A watershed moment for African human rights: *Mtikila & Others v Tanzania* at the African Court on Human and Peoples' Rights' (2015) 15.2 *AHRLJ* 299.

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Van der Linde, A 'Family life and religion in the upbringing of children' (2016) 1 *TSAR* 144.

HIV law

Eba, PM 'HIV-specific legislation in sub-Saharan Africa: A comprehensive human rights analysis' (2015) 15.2 *AHRLJ* 224.

Human rights

Okafor, OC and Ugochukwu, B 'Raising legal giants: The agency of the poor in the human rights jurisprudence of the Nigerian Appellate Courts, 1990 – 2011' (2015) 15.2 *AHRLJ* 397.
Killander, M 'Human rights developments in the African Union during 2014: Recent developments' (2015) 15.2 *AHRLJ* 537.

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Kitharidis, S 'Rape as a weapon of war: Combating sexual violence and impunity in the Democratic Republic of the Congo, and the way forward' (2015) 15.2 *AHRLJ* 449.
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Benjamin, P 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act' (2016) 37 Jan *ILJ 28.*
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Kriek, CA and Van der Walt, AJ 'Alternative strategies to protect the existing view from a property' (2016) 1 *TSAR* 20.
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By
Brenda
Wardle

Oscar Pistorius and s 276(1)(*i*) placement on correctional supervision

In *S v Pistorius* (GP) (unreported case no CC113/2013,12-9-2014) (Maspia J), Masipa J sentenced Oscar Pistorius to a five year imprisonment term pursuant to the provisions of s 276(1)(*i*) of the Criminal Procedure Act 51 of 1977 (the CPA). This section, provides for an offender to be placed on correctional supervision, in the discretion of the Correctional Supervision and Parole Review Board (previously the Commissioner), on expiry of one sixth of the sentence.

The legislative prescripts, which kick in once an offender is admitted to the correctional centre, are those contained in the Correctional Services Act 111 of 1998 (CSA), as amended. The most important provisions are those contained in s 38 and these deal with the assessment of an offender as soon as possible after admission to the correctional centre. The assessment is based, among others, on the sentence which was imposed by the court.

Section 42 of the CSA flows from these provisions and regulates the case management committee. Of importance to this discussion is the sentence plan, which must be prepared by the case management committee. In this section there is specific reference to preliminary arrangements with community corrections on possible placement dates, conditions of placement, etcetera, but, one of the most important functions of this case management committee, is the making of a recommendation to the Correctional Supervision and Parole Board for possible placement.

Shortly prior to the placement of Pistorius on correctional supervision there was an intervention by the Minister of Justice and Correctional Services, in which the minister sought the review of the approved date of placement of Pistorius. The minister was of the opinion that the provisions of s 276(1)(*i*) of the CPA read with the relevant provisions of the CSA, had been misinterpreted and that the approved date of release was premature.

However, it was clear, as it continues to be, that the interpretation of the relevant sections, which came under the minister's attack, were attacked erroneously. The case management committee and Correctional Supervision and Parole Board are enjoined by the CSA to consider possible placement long before the actual consideration – as in this case – the one sixth milestone is reached. This is the practice for all other releases and placements.

The Correctional Supervision and Parole Review Board considers placement in terms of s 75 of the CSA. Mr Manelisi Wolela, spokesperson for the Department of Correctional Services, reiterated at the time of the original approval, that a date for the placement of Pistorius had been approved and that the parents of the victim, in terms of the Victim's Charter, had been invited to make representations to the Correctional Supervision and Parole Board. He also confirmed in an earlier statement that all processes had been followed and that finally, the stage was set for the placement of Pistorius on correctional supervision.

I disagreed with this stance as the Victim's Charter in as far as s 299A of the CPA is concerned, is not applicable to the *Pistorius* matter. Be that as it may, the Correctional Supervision and Parole Board, were at liberty to take into consideration any factor they considered relevant, including input from the parents of the victim, albeit it could never be argued that such inputs were sought pursuant to s 299A of the CPA or even the Victim's Charter.

The reasoning by the minister was, in my opinion, anomalous, if regard is had to ss 38 and 42 of the CSA, as well as the established practice at correctional services. The decision by the minister to refer the matter to the Correctional Supervision and Parole Review Board in terms of s 75(8) of the CSA, led to the suspension of the date of placement and thereafter this matter continued in a rapid, downward trajectory.

It became clear that Pistorius's rights to just administrative action, including his right to have his legitimate expectations protected, his right to human dignity and freedom of the person, were violated. Besides, Pistorius was definitely not the first high profile offender or offender for that matter, to be sentenced in terms of this section but for the first time, the public saw someone sentenced in terms of this section being dealt with in a grossly unfair manner.

The first date announced for the sitting of the Correctional Supervision and Parole Review Board led to much anticipation that Pistorius might be released. However, that was not to be. Section 77 of the CSA deals with the powers of the Correctional Supervision and Parole Review Board and this section is clear that the review board can either confirm the decision of the Correctional Supervision and Parole Board or it can substitute that decision with its own. There is no provision in the CSA for the remittance of the matter back to the Correctional Supervision and Parole Board, as happened in this case.

In my opinion, therefore, the Correctional Supervision and Parole Review Board acted *ultra vires* of the provisions of the Act by remitting the matter back with a further condition for psychological intervention. Nothing, to my knowledge was even said about the correct interpretation of the Act or whether or not the decision had been taken prematurely, as the minister had argued on referral. It is trite that the review board is under a duty to consider or review the decision within the confines of the terms of reference or grounds on which it was referred. Contrary to media reports there was only Judge Lucy Mailula as chairperson so the reports that a 'panel of judges' had cancelled Pistorius's placement on correctional supervision, were in fact, untrue.

Besides, s 75(8) states clearly that a decision of the Correctional Supervision and Parole Board is final and binding. That being said, it thus means that the parole board, once a decision has been made, becomes *functus officio*, meaning therefore, that it may not revisit an earlier decision made. The only instance where a matter can be remitted back to the Correctional Supervision and Parole Board, would be where a court is approached in terms of the Promotion of Administrative Justice Act 3 of 2000 and where such court, directs that the matter be remitted back to the board for a decision afresh.

There were widespread fears that other offenders who had been sentenced in terms of the same section would face the same delay in their releases but this was not to be. I had hoped that the review board would clarify when consideration ought to take place but not even that happened. So we have all to stick to the previous, and in my view correct, interpretation of the provisions of s 276(1)(*i*).

Something not previously considered the *nemo iudex in sua causa* (no one can

be a judge in his own cause) rule. The Correctional Supervision and Parole Boards are appointed by the minister. The National Council is appointed by the minister. The Correctional Supervision and Parole Board is selected from among members of the National Council, and thus appointed by the minister. A decision of the Correctional Supervision and Parole Review Board is final except that the minister may refer any decision to the Correctional Supervision and Parole Review Board. This essentially means that the minister has full powers to interfere in the process at leisure and if a cautionary approach is not adopted this has the potential of leading to abuse of the process for ulterior purposes or even ulterior motives, affecting as it were, both the legislated independence of the Correctional Supervision and Parole Boards and by necessary implication the independence of the Correctional Supervision and Parole Review Board.

Pistorius was eventually released a day before the anniversary of the imposition of his sentence and prior to a rumoured application for judicial review by his legal representatives. We should, as South Africans, guard against violating the rights, especially of the most vulnerable members of society.

Brenda Wardle *LLM (Unisa).*

Optional features in a patent claim

By Yogani Naicker

In patent law, the claims of the patent define the scope of protection afforded to a patentee, and for this reason the claims must 'define with clarity and precision the scope of the invention claimed as a monopoly' (*Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A)). Certain words give particular problems when used in patent claims and one of these is the word 'preferably' and similar words and phrases. A matter involving use of these terms recently came before the Board of Appeal (the board) of the European Patent Office (EPO), T 1882/12 (www.epo.org), which may change the approach when interpreting features introduced by these terms in a patent claim.

Before proceeding to the facts of the case it may be useful to give a bit of background. In Europe, excess claim fee charges are applicable if a patent application includes more than 15 claims; such excess claim fee charges have resulted in the practice of combining multiple integers into a single claim simply to avoid this additional cost.

The patent applicant in this case followed the same approach to avoid the additional cost. Claim 2 of the application, which was used as an example by the board, reads:

'2. A mouth and tooth care and purification agent according to claim 1, characterized in that it contains 12 to 60 wt.-%, *preferably* 15 to 50 wt.-%, more *preferably* 17 to 40 wt.-% and *particularly* 20 to 35 wt.-% of sorbitol and/or glycerol and/or 1,2 propylene glycol' (my italics).'

The question that arose is whether claim 2 contravened the requirements of clarity and conciseness in terms of art 84 of the European Patent Convention by the use of the terms 'preferably' and 'particularly'. The Examining Division found that claim 2 did contravene art 84 and rejected the claims. Reference was made to the Guidelines for Examination in the EPO (documents.epo.org) for optional features, which reads:

'4.9 Optional features

Expressions like "preferably", "for example", "such as" or "more particularly" should be looked at carefully to ensure that they do not introduce ambiguity. Expressions of this kind have no limiting effect on the scope of a claim; that is to say, the feature following any such expression is to be regarded as entirely optional.'

The applicant appealed the decision of the Examining Division and the matter was heard before the board. The board stated that even though the guidelines provide that the feature following the expression is regarded as optional, the expression must still be examined carefully in order to determine whether any confusion may be created. If the expression creates confusion, this means that there is ambiguity of the subject matter for which protection is sought, resulting in a lack of clarity. Further the board rejected the Examining Division's arguments that the claims were not concise and contained superfluous, non-limiting features.

The board reasoned that if claim 2 was carefully examined, the broadest range of 12 to 60 wt. % was defined. The preferred embodiments were confined within this broadest range. Further as these confined ranges remained within the parameters of the broadest range, this consequently created a relationship between the broadest range and the preferred embodiments. The board, as a result of this finding, concluded that the preferred embodiments did not create a lack of clarity. The board stated that the optional expressions will not in all circumstances lead to a lack of clarity, but careful examination on a case by case basis must be performed.

The question then arises as to the relevance of this decision in South African law. In South Africa there are no excess claim fee charges, and therefore there is no need to use 'preferably' for this particular purpose. However, in South African law claims must be clear, and any patent, that contains a claim that is unclear is liable for revocation in terms of s 61(1)(*f*) of the Patents Act 57 of 1978.

There has only been one case on this issue in South Africa, viz *Ian Fraser-Johnson v GI Marketing* CC 1993 BP 461 (CP).

Again the objection was a lack of clarity of claim 2, which read:

'An arrangement as claimed in claim 1 wherein a cover is *preferably* provided to permit the airflow to and from the valve but still to prevent the ingress of leaves or dirt which could have a detrimental effect upon the working of the valve' (my italics).

The judge stated that:

'Claim 2 of the 1987 patent was attacked on the ground that it is ambiguous. The scapegoat is the word "preferably". There is merit in this contention. As the claim stands it is not clear whether the claim has a cover as an integer or whether it has not. If it has not, claim 2 does not differ from claim 1 and is mere surplusage. If it has a cover, why is this requirement watered down by the use of the word "preferably"?

I hold that claim 2 of the 1987 patent is ambiguous.'

In other words the court questioned the reason for introducing an integer in a claim by the term 'preferably' if it did not add value to the invention. If this integer was important to the invention, it should simply be claimed with certainty so that third parties would clearly understand the key features or integers of the invention. Although the structure of this claim differed from that of the claim in issue in the European case, we can conclude that in South Africa, the use of the term 'preferably' may lead to a lack of clarity. However, our courts may be influenced in the future by this recent European judgment, and come to a different view.

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